## ***STUDII***

# UNIVERSALLY SPEAKING: A TRANS-JURISDICTIONAL ABUSE OF RIGHT APPROACH TO PIERCING THE CORPORATE VEIL

**Aron SAMU***

***Abstract:*** *The advantages offered by our current study are threefold. Not only will we show a new, unitary, all-encompassing theoretical foundation for piercing the corporate veil in any facet the issue may arise, but by modifying the starting point of each case analysis, will also allow for a more reasonable (given the topic at hand) subjective-oriented inquiry as opposed to the objective item-by-item one currently in place. Last but not least, we will demonstrate that by using this approach, qualifying the problem before the court as an issue of law rather than one of fact is the correct solution to pursue.*

***Keywords:*** abuse of right, piercing the corporate veil, trans-jurisdictional theory, issue of fact, issue of law

**Motto:** "*Equity: simply a matter of the length of the judge's ears.*"
(Elbert Hubbard)

**Outline**

1. Introduction
2. The current theoretical setting of the Abuse of Right doctrine
3. The Abuse of Right theory in the specific context of the Louisiana mixed system of law in general, and how it relates to Piercing the Corporate Veil in particular
4. The implications and practical consequences of its application in the particular Piercing the Corporate Veil setting
5. Conclusion(s)

Table of Cases

Bibliography

## 1. Introduction

Which way other than that of Universally Speaking is proper for one to express ideas and draw conclusions in today's world, characterized by globalization and interconnectedness? The extremely complex network of links that is established between the various nations could not be more obvious – or necessary, for that matter – than in the case of their legal systems. That they are intertwined is the result of the sum of forces shaping our existence, be they historical, social, political, economic or military. Even the proprietary legal 'currents' that their flow inevitably creates constantly strives for coming together and creating a multitude of intersection points.

However vast the area of cross-jurisdictional analysis and comparison of law left to be uncovered is, our present study, due to the limitations of time and space to which we all are bound, will offer a detailed focus on a very narrow segment in the grand scheme of things. We will stop and glance thoroughly and effectively upon the conceptual theory of *abuse of right* as an alternative approach to *piercing the corporate veil*, on a simply trans-jurisdictional direction coming from France and having as its terminus the Louisiana legal system component of the United States of America.

But as any "… journey of a thousand miles begins with a single step."[1], we see only fit that we award it the importance it deserves. Thus the need to briefly explain our choice of the doctrine of abuse of right arises.

Suggestively coined *abus de droit* in its country of origin, it represents a jurisprudential creation first and foremost connected to its dictionary meaning, and further taking on an ample own legal existence and constant evolution. As such, the choice of terms can and in fact must be broken down in order to allow for the revealing of its wanted meaning.

*Abus* derives from the Latin abusare[2]-abusus, in the sense of particularity to our current analysis of misuse[3]. According to some general definitions, it is linked to such words and expressions as "an overdoing", "going too far", "misuse", "overexertion", "taking advantage of", "impropriety", "overpossesive", "excessive", "wrongly"[4]. Advancing more in depth, it has been connected to "fraudulent dealing", "breach", "rely too heavily", "overindulge", "exploit", "impose", "unfair conduct", "misguidedly"[5]. A local valuable explanatory source adds some flavor to the meaning, by associating it with "to indulge freely in", "mistreat", "parasitic", "sponging (of a person)"[6]. As far as the lay ambit of the term, as one can easily see, the end result it conveys is that of crossing a boundary.

But in order to recognize the outer limits, we must be able to abstractly confine the item that they circle. And in our case, it is *un droit*, a right. We do not consider necessary to explain the meaning of the term extensively, as it is fundamental general knowledge of any person that is at least passively interested in or out of necessity forced to acknowledge the existence of the legal sciences. It suffices to consider a right as a legal entitlement to a certain conduct, thus a possibility conferred upon one through the power of law, in whatever form it might be conjured.

Moving on to the more specific legal meaning of the expression *abus de droit*, as it stands – united, the very basic definitions allotted by dictionaries and vocabulary explanation sources hold it to represent, ranging from most general to most specific, a behavior exceeding that which is normally permitted in a particular situation[7], use of a right by its holder in a way that shifts it from the end purpose for which it was recognized[8], in a procedural application of the essence of the notion an improper use of a legitimately issued process to obtain a result that is either unlawful or beyond the process's scope[9], and theory established by the tribunals deeming it a fault consisting of one's use of his right not primarily in a good faith self-interest but in a personal gain-oriented manner at the expense of mainly causing harm to another, or disregarding its social and legal reason of being[10]. As such, the full complexity of this jurisprudential creation is prefigured.

From all of the above associations, descriptions and definitions, it is easy to notice that this construction deals with the situation in which, even though a perfectly valid legal right to a certain conduct exists and is conferred upon the person in question, nevertheless through his action it becomes tainted, either due to the purpose of the exercise in the harming of another, or simply because the purpose to the attainment of which the holder chooses to act is different than that for the benefit of which the law recognized the prerogative in the first place. As such, a business person might be tempted to stray from simply enjoying the general limited liability conferred upon him to conduct business, by seeking to avail himself of it even when clearly acting beyond what would draw liability simply for routine, ordinarily-anticipated debts, thus in a territory of mainly potential causation of injury to others (as the greater expense to be paid as the price for his "legally-cunning recklessness" in respect to them in pursuing profit at absolutely *any* cost). Following, a parallel can be drawn with the common law doctrine which allows for the disregarding of a corporate entity, that of *piercing the corporate veil*. The recognition and development of such doctrine by Louisiana courts can be found expressed in cases such as Abraham v. Lake Forest, Inc.[11], LeBlanc v. Opt, Inc.[12], Giuffria v. Red River Barge Lines, Inc.[13], Sparks v. Progressive American Insurance Co.[14] or Glazer v. Commission on Ethics for Public Employees[15], to name a few[16]. The theme of our current discussion thus begins to take on shape.

The effects of our present study will not cease with or be in any way limited by the completing of the analysis in connection with the common law doctrine of piercing the corporate veil. Its ultimate purpose is to demonstrate that the abuse of right construction can not only be expressed in English as such from its French equivalent, but that its very essence and meaning can become attached to constructions representing a broad equivalent. In other words, we take on the challenge to show that the doctrine is not confined to linguistic translation, but is in fact susceptible of a complete legal one. As such, the work will ultimately have a general, conceptual applicability, a tendency towards the universality of its practicality. The sole limits of the trans-jurisdictional travel capabilities of abuse of right will be set by the prerequisite requirement that the jurisdictions undergoing comparison will be of compatible legal framework and construction. They must have an equivalence of provisions such as the State of Louisiana shares with France due to their Napoleon Civil Code common heritage.

Over the course of the following parts, we will focus on expanding the readers' understanding of these seemingly difficult to grasp concepts by first explaining the current theoretical setting of the *abuse of right* doctrine. Then, we will continue by placing the theory in the particular context of the Louisiana mixed jurisdiction, and starting to connect it to the common law- developed corporate doctrine of *piercing the veil*. Following an expanding of the highlighting of links by means of presenting both theoretical implications and practical consequences of such intertwinedness, we will finally end the journey fruitfully.

## 2. The current theoretical setting of the Abuse of Right doctrine

As it is of the utmost importance to note, we will begin this current part of our research by acknowledging the observation of an esteemed legal scholar, by which he begins building the defense of his Doctor of Juridical Science thesis: "Il y a une théorie de l'abus de droit"[17]. Even more than a century ago, one could take on the task of analyzing the topic and finding enough support to conclude such an endeavor in over 200 pages.

The abundant jurisprudential base for the recognition and establishment of the theory started coming into existence around the middle of the nineteenth century, with three successive instances of particular application: that of the Colmar Court of Appeals, followed by the Saint-Galmier and Clément-Bayard resolutions[18]. However, the highest French Court of Cassation most efficiently drew in 1964 that in exercising a property right, inherently limited as mandated by a serious and legitimate purpose,

the owner is not bestowed with the ability to be malicious, in a way not justified by any utility and which ultimately results in prejudice to another[19]. We must acknowledge that, even though the reliance of business persons on the legally-conferred benefit of limited liability rarely amounts to actual malice, and is somewhat justified by the maximizing-pursuit of profit, nevertheless such conduct can, in the current setting, amount to at least sanctionable negligence, if not even present elements suggesting intentionality, while the pursuit of profit cannot be absolutely-excused and protected, regardless of the greater social cost of unlimited injury-creating potential towards others.

It might seem that the last one and a half centuries of the theory's existence were built upon going against the very second article of the extremely principial Declaration of the Rights of Man and of the Citizen, according to which property is a basic, "natural and imprescriptible" right of man[20]. But one would actually be committing a fallacy in pursuing this reasoning, as an inspection of the following fourth and fifth articles of the same Document, according to which the law bounds one to not harming another, the law having the right to limit an absolute right such as that to property solely if society would be injured in absence of the restriction[21]. It actually appears that such a jurisprudential construction would inevitably result due to the need to apply (and, as a consequence, elaborate upon) the before-mentioned fundamental principles.

Accordingly, it started to take on shape even though it appears to essentially encompass a theoretical conflict[22]. How can one be guilty (and sanctioned because) of fault in the exercise of his right as recognized and conferred upon him by power of law? Particularly as a solution to overcoming this dilemma, it has been considered that to resort to an attribution of the character of fault in this setting would be inappropriate, because it presupposes an obligation to the contrary of the slip. This is why it was proposed that the construction be deemed *abuse*, and not violation, of right[23]. There is a view to the contrary, which places malicious intent as constitutive of the basis of the jurisprudential theory. However, we believe this to be the result of the erroneous standpoint from which that analysis is made, as it looks at just half of the problem, disregarding the instances in which even though such evil motives lack, an abuse of right is still to be found simply because the right holder found a new use of his legally-conferred prerogative, one which is not in line with the *ratio essendi* recognized by the law.[24] Thus, the anti-malice principle does not explain veil-piercing. As such, the concept was first founded nonetheless in the field of delictual civil liability. Moreover, on two specific Civil Code[25] provisions: those of articles 1382 and 1383[26]. They state that "Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it." and "Everyone is liable for the damage he causes not

only by his intentional act, but also by his negligent conduct or by his imprudence.", respectively[27]. Finally, it is important to note that even though the area of delictual responsibility gave birth to the theory, by means of analogy it was extended by the courts to a complete encompassing of any specific situation in which rights are exercised, including contractual obligations[28].

As for a summary of the theory behind the concept, for the purpose of our current study, we feel an analysis of the abuse of the property right will more than suffice, and will actually be the most comprehensive and representative towards a more specific inquiry, that of abuse of right in the context of corporations (' ownership and consequences deriving thereof). However, as the constraints of vastness of the field undergoing scrutiny, of the specific issue we herein address, coupled with those of time and space, do not allow us to here fully or even comprehensively expose the issue, pointing the reader towards extremely comprehensive general settings already in existence remains our only choice[29].

## 3. The Abuse of Right theory in the specific context of the Louisiana mixed system of law in general, and how it relates to Piercing the Corporate Veil in particular

As we concluded our more general analysis of the concept of abuse of right, it is now time to move on to placing the overview in the context of the uniquely-mixed United States of America jurisdiction of Louisiana. First, we will show that even in a common law setting, the doctrine undergoing scrutiny can function[30]. Then, by showcasing a few special features that Louisiana is quite alone-standing in having, our transplant of the legal institution will be deemed successful. The only shard of mystery left as to our choice of topic for this study will then be dispelled by linking the abuse of right theory to that of Piercing the Corporate Veil.

It has been correctly noted, even in a more international law-focused setting, that the principle of abuse of rights denotes a violation of the core universally-recognized value of good faith[31]. As a consequence of such, any fictitious or lacking honesty/loyalty exercise of a right will not be tolerated on conducts of an international scale, as having the ultimate purpose of evading either a rule of law or a contractual obligation (consequences undeserving of protection)[32]. At the same time, it has been emphasized that "… "[e]very right is the legal protection of a *legitimate* interest," … "an alleged exercise of a right not in furtherance of such interest, but with the malicious purpose of injuring others can no longer claim the protection of the law …"" and better, demonstrating independence from the concept of malice, that ""… abuse of rights

refers to .. exercising a right either in a way which impedes the enjoyment by other…s of their own rights or *for and end different from that for which the right was created*, to the injury of another …""[33].

One undertaking the study of this topic should however be cautioned not to proceed with the absolute confidence resulting from a complete lack of challenge as to the premises set herein. As reputed Professor Gutteridge introduces, in a widely-cited[34] comparative study in the area of abuse of rights, "The theory … has been rejected by our law … in the present-day decisions of the Anglo-American Courts."[35] He then goes on to note that the Common Law has an "absolutist view of rights", and that it "has not hesitated to place the seal of its approval upon a theory of the extent of individual rights which can only be described as the consecration of the spirit of unrestricted egoism."[36] However, this can be construed more as a reference to civil liberties than to contract or tort rights and duties. Common law clearly impedes freedom through the imposition of tort duties and less obviously through application of the "good faith" and "fair-dealing" concepts in the area of contracts. Moreover, should Prof. Gutteridge's references be extended to encompass property rights, a criticism to his conclusion can still be found in that American common law at the very least recognizes nuisance doctrine.

The reader should still remain somewhat at ease, however, because in the concluding part of the analysis, several acknowledgements are made. First of all, that the doctrine is widely invoked in the arena of international litigation[37]. Second, even taking into account the lack of reconcilability with the "axiomatic character of … Common Law", an issue still remains as to permit further and future development and consequent settlement. The Anglo-American absolutist view of rights "is one which stands condemned on moral grounds, and its application, in all its rigor, can only be justified if it is established beyond doubt that any departure from the principle of absolute rights would involve consequences which are equivalent to or more serious than the evil which it is desired to counteract." The author then repeats that "the problem is one of practical importance, but this should not cause us to … refrain from any further investigation of the question."[38] Finally[39], we witness an apparent ultimate indecision as to a specific position to be taken in respect to the topic, as Professor Gutteridge recognizes that it is desirable to ultimately deter proprietary rights to be exercised from a wholly improper motive. He would wish it done by means of enactment of legal amendments to the law of nuisance (viewed as a "useful supplement" to the law of nuisance in that it would meet the difficulty of borderline cases)[40]. A partial lack of imagination on his part follows, in that apart from a couple of a few specific situations in which the need for such protection is viewed as desirable, "the risk of any further extension would seem to outweigh any advantages which might be gained"[41].

The compatibility of the theory with the general legal framework exhibited by the Common Law setting has otherwise been defended[42], for example by means of a challenge to "the notion that abuse of rights is a peculiar "invention" of civil law jurists that was absent in the common law."[43] As such, we can affirm the existence of the "story of abuse of rights in the United States", and at the same time discover the potential that comparative law has as an instrument for legal reform as to the redressing of distributive inequalities. It has also been argued in a well-supported manner that, ultimately, abuse of rights hardly challenges "the individualistic premises of modern private law, leaving largely intact the language of free will, individual autonomy, and absolute property". Abuse of rights is finally considered to be an in effect effective corrective allowing for enjoyment of rights and mitigation of the most blatant disproportionalities arising in legally-governed interactions[44].

As showcased by the preceding arguments, it is safe to say that there is a great degree of compatibility between the theory of abuse of rights, rooted originally in a civil law setting, and the common law system. Even more so then, a higher amount of congruity should be present in the particular case we discuss further on.

Now let us move on completely to the issue of the measure of compatibility of the legal concept of abuse of right with the structure of the Louisiana jurisdiction, and to showing it's especially great. This is due to the highly similar legal provisions relevant in the matter, particularly a couple of crucial Civil Code articles. Their identity in respect to each other is a vestige of the common root of them, traceable back to the Napoleonic Civil Code of 1804.

First off, we must mention a specific particularity that Louisiana showcases, in the area of most interest to our present endeavor, that of analyzing abuse of right in the context of property law[45] (again, as it will later be seen, this will lead to an understanding and ability to explain the phenomena which take place when the person behind the corporation acts in respect to his property). Even though at a previous time[46], the Louisiana Civil Code provided that "Perfect ownership gives the right to use, to enjoy and to dispose of one's property *in the most unlimited manner*, provided it is not used in any way prohibited by laws or ordinances …"[47], things have slightly changed since in language, but fortunately to making our point, not also in substance. Today, the corresponding article provides of "Ownership …" that "Ownership is the right that confers on a person direct, immediate, and *exclusive authority* over a thing. The owner of a thing *may use, enjoy, and dispose of it within the limits and under the conditions established by law*."[48] Even though the highest degree of freedom was substituted with apparently mere exclusivity, the main limitation that both legal texts pose is found in their mentioning of the

possibility as to legal limitations to be placed upon ownership. A subsequent provision is in fact an active expression of this passive option towards existence: "Although a proprietor may do with his estate whatever he pleases, still he cannot make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him."[49] This article basically represents a uniquely-Louisianan codified application of the abuse of right doctrine in its offering of a solution for a particular case[50]. But what is most important about this legal norm is that it best showcases the absolute duality of the exercise of property rights, in that the owner may use his estate in whatever manner he wishes, but he is concurrently completely barred from harming others through such conduct[51].

Moving on to a second and more general point as to the specifically high adaptability of the construction in the ambient of the Louisiana jurisdiction, we stumble upon the identity of the latters' provisions relevant in the matter to that of the previously-articles 1382 and 1383 of the French Civil Code[52]. They are those of articles 2315 A. and 2316, Louisiana Civil Code. As they amount to "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." and "Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill.", respectively, it is easily discernable that a parallel as to the foundation on which abuse of right can be built upon is drawable.

The question whether Louisiana Law reserves a place for the theory of abuse of rights or not has been previously intentionally left unanswered due to constraints resulting from a lack of clear conviction, by Judge Mayrand, during a paper summing up a 1974 seminar of Louisiana Appellate Judges held under the auspices of the Institute of Civil Law Studies of the Louisiana State University[53]. At the present time, and especially in respect to piercing the corporate veil (as we will further show), we reinforce the author's part opinion part wishful thinking with well-founded optimistic belief that indeed "... it will not be inappropriate to make the following observation. Already the Louisiana Civil Code expressly condemns particular abuses of rights. If and when the Louisiana courts find it useful in the interest of justice to recognize the theory of the abuse of rights, they will find in their own Code all the corresponding articles which were used in Quebec and in France to provide a legal basis for this theory."[54]

But why did we choose an abuse of right theory analysis in the context of the piercing the corporate veil doctrine? In line with our previous statement, because we believe that in this area in particular, the Louisiana courts have implicitly recognized and are constantly working with the former in their analysis and drafting of decisions in the ambit of the latter, even though they might not be fully aware of this.

We must first take a brief look at the ambit and characteristics of the piercing the corporate veil construction, in order to be able to further efficiently and effectively link it to our corresponding theory of choice for the purpose of this current study. It is constantly being considered, by both judges in their decisions, as well as by legal scholars in their works that many piercing the corporate veil cases are "long on rhetoric and contradictory general principles but short on reasoning"[55]. As an author states, "This is jurisprudence by metaphor or epithet. It does not contribute to legal understandings because it is an intellectual construct, divorced from business realities. … Courts state that the corporate entity is to be disregarded because the corporation is, for example, a mere 'alter ego.' But they do not inform us why this is so, except in very broad terms that provide little general guidance. As a result, we are faced with hundreds of decisions that are irreconcilable and not entirely comprehensible. Few areas of the law have been so sharply criticized by commentators."[56]. This is probably one of the main shortcomings in the area that our paper seeks to eliminate, by providing a sound and solid basis for future constructions of argument.

Most piercing the corporate veil cases present the issue whether a shareholder should be held personally liable for a corporate obligation, or not[57]. In deciding real life disputes, courts use terms such as "… "alter ego", "instrumentality", "sham", "subterfuge" or "tool", to select a few …", in order to decide upon the previously-stated problem[58]. Even though "the rationales in the various piercing the corporate veil cases are not articulated so as to give iron-clad guidance to future potential litigants", courts do not "often … pierce the corporate veil in situations when it is inappropriate to do so. Despite the vagueness of the language in many veil piercing opinions, there are … few cases in which the corporate veil is actually pierced. Courts appear to be rather reluctant to disregard the corporate form."[59] And they ultimately so should be, as corporate existence is a right conferred by law upon individuals in order to allow for their expressing of entrepreneurship, under the protection of limited liability[60]. In order to exemplify, returning to state law, we remind the reader that as far as purpose is concerned, the Louisiana Civil Code allows for the creation of juridical persons distinct from their owners, for the purpose of engaging in business and pursuing benefit deriving therefrom[61], while as far as limited liability is, the expression of such is contained by Louisiana R.S. 12:93(B), in that "A shareholder of a corporation … shall not be liable personally for any debt or liability of the corporation."[62]. As such, the following statement stands to resonate that much more powerful: "Care should be taken on all occasions to avoid making 'the entire theory of the corporate entity useless.'"[63].

Because limited liability as to the owner's activity is a prime reason behind the law conferring existence to the corporation in the first place, it is only indirectly that the question of whether such shareholder should bear personal responsibility in

any given case arises. And in consequence, when decision to deem the responsibility personal, rather than corporate, "… the courts typically use metaphorical, pejorative terms such as alter ego or instrumentality to suggest that the corporation involved was really not operated as the truly separate sort of business entity contemplated by the corporate statute."[64].

Piercing the corporate veil is ultimately an equitable doctrine, one that legally favors substance over form. As the Black Letter Law currently stands, deriving from Louisiana court decisions, the main test (used in conjunction with some or all of the "factors/totality of circumstances/exceptional remedy" rules)[65] is the two-part one based on Kingsman Enterprises, Inc. v. Bakerfield Elect. Co.[66] and later adopted by the Louisiana Supreme Court in Riggins v. Dixie Shoring Co., Inc.[67]. In a logical formula-type rendition, it stands as follows:

**Corporate veil may be pierced IF ("alter ego plus fraud") OR ("indistinguishability")[68] are found.**

More extensively, courts will consider in their analysis whether the corporation is actually an alter ego of the shareholder and has been used as such in a manner amounting to some sort of fraud, or even in the absence of fraud, whether the shareholder did not cater to maintaining the corporation separate from his own persona (through the means of conducting business)[69]. But this is not enough, as this two-fold determination should be pursued in tandem with an appraisal of the Riggins v. Dixie Shoring Co., Inc. five factors (or six[70]; however the fifth is simply a special emphasis of a particular aspect of the second):

1. **the commingling of corporate and shareholder funds**
2. **the failure to observe statutory formalities in connection with the transaction of corporate affairs**
3. **under-capitalization**
4. **failure to provide separate bank accounts and bookkeeping records** and
5. **failure to hold regular shareholder and directors' meetings[71].**

And even following this second set of criteria, the judge's task does not come to an end. Not only is this list of factors left unfinished to begin with[72], but according to the Louisiana supreme court decision on veil-piercing in Riggins v. Dixie Shoring Co., Inc.[73], it is required that the courts consider "the totality of circumstances" presented in the particular case[74].

All previous aspects are essentially a manifestation of courts searching for an abuse of right having taken place. Starting with findings of alter ego plus fraud, and continuing with indistinguishability, coupled with the several specific factors the judge has to

take into account, they are all facets of businesspersons abusing their right to sever themselves from the liability standpoint in respect to the entities through which they conduct their endeavors[75]. In every case, the court will have to determine if the juridical entity endowed with limited liability is but a front for the owner / shareholder in the given case, and that the latter tries to cross the limit to which he is allowed to avail himself of the legal shield awarded to him by law. As the current state of things in the relevant matter stands, even though no one author or judge recognize that they recognize abuse of rights, everything they analyze and the way in which they do it stand as particular applications of abuse of right theory.

Why abuse of right in the context of piercing the corporate veil? The reason is two-fold. On one hand, from a theoretical standpoint, as a fundamental approach to the problem, we consider it to be most compatible and better representative of the current state of matters in legal practice. Piercing the corporate veil is done solely if the courts find an abuse of right, even though they do not do so in an express manner but rather by implication. On the other, it allows for the specific resolve of a great controversy showcased by vast case law and apparently still remaining unsettled due to a lack of a strong foundation for the arguments of the Louisiana Supreme Court, more specifically that of whether the analysis of the courts in these cases is done upon an issue of fact or rather one of law. This last point has great implications as far as the standard of judicial review is concerned.

## 4. The implications and practical consequences of its application in the particular Piercing the Corporate Veil setting

We strongly view the main implications of taking an abuse of right perspective on corporate veil piercing as threefold. One is purely theoretical, one is mixed in nature, and the other one is clearly practical.

First off, why should the Louisiana courts continue their struggling pursuit[76] upon understanding and slowly developing their progress, when there is already strong statutory basis that allows for the application of an abuse of right angle towards solving the various legal conflicts that arise in the matter? Should they decide to pause, awaiting discovery stands the theory of abuse of rights.

It constitutes a much more solid theoretical foundation, even if we only look at its seniority[77], given the fact that it long precedes developments towards piercing the corporate veil. By unifying the various alternative and complementary tests that we saw the courts choose to resort to in dealing with the causes before them[78], it

offers a homogenous general standard encompassing all. The alter ego plus fraud, or even in the absence of fraud indistinguishability analyses, coupled with those of various specific events, and ultimately one upon the entirety of the cases' circumstances, would be left aside. Louisiana courts would treat each case according to the underlying specificities and equities, and decide whether a wrongful use of the benefit of being allowed to conduct business in shielded corporate form has been made by the owner (shareholder), in that a malicious/ fraudulent result ensued, and that no sufficient repair can be awarded by solely the juridical person's means, mandating piercing the corporate veil towards accessing the auxiliary resources[79] available.

Second off, our view shifts the task of the court from a more objective criteria-dependent analysis to a more subjective one, much more suitable to adaptation as required by the totality of circumstances present. Because the same conduct of two business "owners" can and should be distinguished as far as its legal implications are concerned simply just because no two are alike. This aspect is possibly included in the fraud analysis of the current state of matters, but it is hard to apply in the context of indistinguishability and looking at the specific factors to which courts almost always primarily turn to. Even though the totality of factors / circumstances can be said to possibly encompass the prerogative of Louisiana courts to find one's conduct not sufficient to allow for veil-piercing while another's same act as mandating the opposite, we believe our more general and subjective-oriented analysis "frees" the mind of the judge from the burdensome "corset" of objective specificity, revealing to him the importance of understanding the intricacy of each case's totality of circumstances as determinative towards one outcome or another. Because of this, we deem this advantage of our theory as a mixed one which, besides changing the theoretical primary approach towards considering whether piercing the corporate veil is warranted, also touches upon the practical consequences of said consideration's outcome.

Finally, although probably the most important practical consequence of adopting our study is that it clarifies a very ardently-fought dispute as to whether the court is dealing with a question of fact or with one of law. This turmoil is very well enunciated by Prof. Morris, in that "… a rule … declares that such decisions are "primarily questions of fact, best decided by the trial court …" and sometimes … such questions of fact are subject to reversal only in the case of manifest error ..."[80], while at the same time "… there are exceptions …"[81]. But these exceptions are not ordinary, and have gone so far as to be decided by Louisiana's highest court, the Louisiana Supreme Court, in which case[82] as the trial court decided to pierce the veil, because the appellate court believed that reversal was merited, the newly-set standard of review was set, and it "… seems far closer to simple error."[83].

An abuse of right approach to veil-piercing brings a fundamentally different perception as to the root of the main problem in these cases, by shifting the process of solving it from a more objective almost check-point-type inquiry to a more subjective determination of whether one has disregarded the boundaries attached to his legally-conferred right to conduct business in incorporated form, and has as such caused harm to another, irreparable by resorting to the resources of the clearly liable juridical entity, or not. The right has to be analyzed, its boundaries set, and an abuse of right be found, in order to allow for the piercing of the corporate veil to the owner / shareholder. This perspective thus clearly supports the Riggins v. Dixie Shoring Co., Inc.[84] view that the court is dealt a question of law rather than one of fact, making the standard of review simple error, and not manifest error.

## 5. Conclusion(s)

The corporations' benefit of limited liability conceptually always protects the owners from personal liability. One question that validly arises is what conditions, other than the issuance of a corporate charter, should be satisfied before limited liability is to be recognized by law? Should there be requirements of allocating adequate capital to the enterprise, should certain standards be imposed as to the quality (both substantial and formal) of the financial records of the business, or are other measures more appropriate, supplementary or *in lieu* of?. Finally, if we were to delve deeper into the problem, past these objective criteria and on to the subjective ones like the possibility of regulating the very specific way in which business could be done in a less harmful way in respect to others, the result would be an emergence of the need and draconian task of basically designing a "How to conduct business properly?" sort of manual / guidelines, practically extremely improbable to ever be satisfactorily completed.

If the policy is oriented towards making it more difficult for businesspersons to have access to the protection of limited liability, then a huge problem that is created stands as to where should the line be drawn? Between facilitating the commencing of a business and engaging in entrepreneurial activities and the correlative social necessity of greater protection being awarded to bystanders as a "legal shield" set to counter the potential of them being harmed, one cannot go right or wrong, as the result is relative. Increasing safeguards would translate into discouraging commercial activity (by automatically creating barriers to entry), whereas less protection would lead to incentivizing careless conduct on the part of business owners, who, in strive for profit, would reduce precaution as to harming third-persons (as they would ultimately not bear personal liability for their actions).

But one cannot but recognize a different, more practical route to solving the before-mentioned dilemma. This is why, in our opinion, until (if ever would be the case for it to happen) a completely satisfactory balance in this sense might be struck, for the time being, we consider the case by case analysis done by courts, by taking into account the totality of factors and subsequently deciding whether the corporate veil should be pierced or not as a good compromise to say the least. And moreover, in line with our current study's line of thought, we view an abuse of right approach to the issue as at the very least deserving of further consideration by courts, especially those of the Louisiana jurisdiction.

Over the course of this study, we showed that the theory of abuse of right has a side to it that allows for trans-jurisdictional approaches, and analyzed the specific case of the French-Louisiana connection. Concluding that due to the fundamental elements needed for the recognition, application and further development of the theory being present in the Civil Code provisions of both sovereigns, it is somewhat not so hard to imagine one could find similarities elsewhere as well. And this especially because the systems undergoing comparisons are of different categories, the former a civil law jurisdiction while the latter a mixed one.

Making our approach go against the common law doctrine of piercing the corporate veil has allowed us to explore a particular aspect of the civil law theory's application in the Louisiana system of law. We considered the existing case law and found that the judge-made foundation is heterogeneous, composed of alternative analyses and considerations to be made upon a large amount of factors. An abuse of right starting point would unify the task of the judge and reduce it to a process of determining whether one has abused his right of conducting business under the limited liability protection-umbrella or not, this having direct consequence towards the solving of the issue of *personal+corporate* rather than just *corporate* liability in any given case.

Continuing down the path started, we shift the task of the judge from one of primarily conforming to pre-determined standards and only secondarily taking into account the totality of facts to one of placing a greater emphasis and attention on whether the conduct of any one businessman is abusive or not in the particular case (regardless of objective criteria-linked findings which may not in the end reveal all). This approach, dual in nature (pertaining to theory as well as endowed with practical consequences) would better suit case by case analyses that showcase such a great element of particularity and exceptionality. Because one must remember that abusive conduct is not illegal conduct *per se*, but just by way of judicial finding to be so, and piercing the corporate veil, thus disregarding the very right to limitation of liability is to remain as an exceptional sanction of abuse and remedy towards the victim.

Finally, and most importantly from a practical standpoint, we can confidently state that the main consequence of an abuse of right approach to the problem of piercing the corporate veil is that it makes the decision rest upon an issue of law rather than one of fact, thus more soundly supporting the theory and reasoning of the Louisiana Supreme Court in the Riggins v. Dixie Shoring Co., Inc.[85] case, which sets to shed light in a dark, controversial area. By doing this, in turn, it hopefully succeeds to clarify and settle.

---

[*] LL.M. (Master of Laws). This study represents our Disertation Thesis. Crafted under the careful guidance of the reputed Glenn G. Morris (J. Dawson Gasquet Professor of Law) and Dr. Olivier Moréteau (Russell B. Long Eminent Scholars Academic Chair Professor of Law), it was previously submitted in partial fulfillment of the requirements for the degree conferred upon us by the Louisiana State University Paul M. Hebert Law Center in Baton Rouge, Louisiana, USA; foresttroll2002@yahoo.com.

[1] As postulated very long ago by the extremely wise Chinese philosopher and founding father of Taoism Lao Tzu. As the first step in furthering knowledge on the topic, see BBC, *Moving Words. Lao Tzu*, http://www.bbc.co.uk/worldservice/learningenglish/movingwords/shortlist/laotzu.shtml (last visited Feb. 10, 2011).

[2] See ROBERT HENDRICKSON, THE FACTS ON FILE ENCYCLOPEDIA OF WORD AND PHRASE ORIGINS 5 (Infobase Publishing, 4th ed. 2008).

[3] See JAMES MORWOOD, THE POCKET OXFORD LATIN DICTIONARY 2 (Oxford University Press 1995) (U.K.).

[4] See DAPHNE DAY, COLLINS ROBERT CONCISE FRENCH DICTIONARY 3-4 (Harper Collins Publishers, Dictionnaires Le Robert 2002) (& Fr.).

[5] See MARIE-HÉLÈNE CORRÉARD, OXFORD HACHETTE FRENCH DICTIONARY 5 (Oxford University Press 2007) (U.K. &).

[6] See ALBERT VALDMAN, DICTIONARY OF LOUISIANA FRENCH: AS SPOKEN IN CAJUN, CREOLE AND AMERICAN INDIAN COMMUNITIES 6 (University Press of Mississippi 2010).

[7] MINISTERE DE LA JUSTICE, PETIT DICTIONNAIRE DE LA JUSTICE 7 (Éditions Gallimard 1984) (Fr.). In other words, "a departure from legal or reasonable use" – see BRYAN A. GARNER, BLACK'S LAW DICTIONARY 4 (Thomson West, 3rd pocket ed. 2006).

[8] RAYMOND GUILLIEN, TERMES JURIDIQUES 3 (Dalloz, 10e éd. 1995) (Fr.).

[9] Court process, that is. See GARNER, *supra* note 7, at 5.

[10] GERARD CORNU, VOCABULAIRE JURIDIQUE 6-8 (Quadrige/Les Presses Universitaires de France, 3e éd. 2002) (Fr.).

[11] 377 So.2d 465 (La. App. 4 Cir. 1979).

[12] 421 So.2d 984 (La. App. 3 Cir. 1982).

[13] 452 So.2d 793 (La. App. 4 Cir. 1984).

[14] 517 So.2d 1036 (La. App. 3 Cir. 1987).

[15] 431 So.2d 752 (La.1983).

[16] Representative decisions, as collected and rendered in this particular (compact) order by Prof. Morris in GLENN G. MORRIS, BUSINESS ASSOCIATIONS I SUPPLEMENT 224-249 (Louisiana State University Law Center 2005).

[17] The English language translation of this phrase is: There is a theory of abuse of right. See ERNEST PORCHEROT, DE L'ABUS DE DROIT 5 (Librairie L. Venot 1901) (Fr.).

[18] For more details on these cases and court decisions, see JEAN-LOUIS BERGEL, MARC BRUSCHI & SYLVIE CIMAMONTI, TRAITÉ DE DROIT CIVIL. LES BIENS 113 (Librairie Générale de Droit et de Jurisprudence 2000) (Fr.), and the sources cited therein.

[19] *Id.*, at 113-114.

[20] The full text of the article states: "The aim of every political association is the preservation of the natural and imprescriptible rights of man. These rights are Liberty, Property, Safety and Resistance to Oppression.". See ENCYCLOPEDIA BRITANNICA, *Declaration of the Rights of Man and of the Citizen*, http://www.britannica.com/bps/additionalcontent/8/116846/Declaration-of-the-Rights-of-Man-and-of-the-Citizen (last visited February 16, 2011).

[21] The articles read as follows in full: "*Article 4*--Liberty consists in being able to do anything that does not harm others: thus, the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights. These bounds may be determined only by Law.

*Article 5*--The Law has the right to forbid only those actions that are injurious to society. Nothing that is not forbidden by Law may be hindered, and no one may be compelled to do what the Law does not ordain.". See *Id.*.

[22] The juridical literature has characterized this state of things as an apparent paradox. See GERARD CORNU, DROIT CIVIL. INTRODUCTION. LES PERSONNES. LES BIENS 57 (Éditions Montchrestien, 8e éd. 1997) (Fr.).

[23] See GUILLAUME WICKER, LES FICTIONS JURIDIQUES. CONTRIBUTION A L'ANALYSE DE L'ACTE JURIDIQUE 114 (Librairie Générale de Droit et de Jurisprudence 1997) (Fr.), and the source cited therein. However, it could be argued that the tension between an unlimited right and a limitation on the right remains. Whether one calls it an exception or not, the scope of the right is still restrained, in both cases.

[24] For more details, see CORNU, *supra* note 22, at 57-58.

[25] Civil Code, for the purpose of the current section of our analysis, refers to the French Civil Code, the Napoleonic Code of 1804, as modified and completed to date.

[26] See PHILIPPE LE TOURNEAU, DROIT DE LA RESPONSABILITE ET DES CONTRATS 1240-1241 (Éditions Dalloz, 6e éd. 2006) (Fr.).

[27] These legal norms are part of Chapter II (entitled "Of Intentional and Unintentional Wrongs [Of Torts]") from Title IV ("Of Undertakings Formed Without an Agreement") in Book III ("Of the Various Ways in which Ownership is Acquired"). As the English language is our weapon of choice for the crafting of this study, we used the official translation of the Civil Code by Professor Rouhette (and Research Assistant Berton), as represented by the Légifrance public service of disseminating law by means of the internet (placed under the editorial responsibility of the Government's Secretariat General). For the text, see GEORGES ROUHETTE, LÉGIFRANCE CIVIL CODE ENGLISH TRANSLATION (Secrétariat général du Gouvernement 2004) (Fr.), http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm (last visited February 18, 2011).

[28] See Le Tourneau, *supra* note 26, at 1241.

[29] See, in this sense, Porcherot, *supra* note 17, at 21-37 and Le Tourneau, *supra* note 28, at 1240-1296.

[30] As this is not the focal point of our current study, we will limit ourselves at highlighting the demonstrations of our predecessors in this sense, and will be more concerned as to enhancing their conclusions in respect to the Louisiana jurisdiction, in the area of Piercing the Corporate Veil.

[31] See Robert D. Sloane, *Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality*, 50 HARV. INT'L. L.J. 19 (2009), and the previous work cited therein. Even though the works are not specifically-topic related to our current endeavor, they offer great principial insights into the universality of abuse of right.

[32] *Id.*.

[33] See *Id.*, at 19-20.

[34] For example, see note 102, *Id.*, or Anna di Robilant, *Abuse of Rights: The Continental Drug and the Common Law*, 61 HASTINGS L.J. 688 (2010).

[35] See H. C. Gutteridge, *Abuse of Rights*, 5 C.L.J. 22 (1933) (U.K.).

[36] For a more detailed explanation and tracing of the case law sources of said conclusion, see text and notes 1 and 2, *Id.*.

[37] *Id.*, at 43.

[38] *Id.*.

[39] See, as for the source of discussion for the entirety remainder of this current paragraph, *Id.*, at 44-45.

[40] As we will further show, in the case of the Louisiana jurisdiction, such legal support already exists, in the form of specific Civil Code articles. Thus, Professor Gutteridge's paper ends up indirectly and ultimately supporting our position.

[41] We use the phrase lack of imagination as to most fitly characterize his overlooking of the need and beneficial implications of applying the theory in the ambit of Piercing the Corporate Veil.

[42] For the purpose of this paragraph, unless otherwise noted, see Anna di Robilant, *supra* note 34, at 746-747.

[43] *Id.*, at 689.

[44] *Id.*, at 747-748.

[45] For more details on the topic, see Albert Mayrand, *Abuse of Rights in France and Quebec*, 34 LA. L. REV. 994-1002 (1974).

[46] 1974, to be more precise.

[47] Then article 491 of the Louisiana Civil Code. See *Id.*, at 995.

[48] (Emphasis added.) Louisiana Civil Code, article 477.

[49] *Id.*, article 667 "Limitations on use of property" *apud* Albert Mayrand, *supra* note 45, at 995.

[50] *Id.*.

[51] See Louisiana Civil Code, article 667.

[52] See *supra*, at 11.

[53] See Albert Mayrand, *supra* note 49, at 993.

[54] See *Id.*, at 1015, emphasis on notes 93 and 94. He also mentions Louisiana Civil Code art. 1983 (then art. 1901 (3)) pertaining to agreements having to be performed in *good faith* (emphasis added) as an extremely relevant legal provision in the matter.

[55] See Robert W. HAMILTON, JONATHAN R. MACEY & DOUGLAS K. MOLL, CASES AND MATERIALS ON CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES 213-214 (West Publishing Co., 11th ed. 2010), and the various resources cited and referenced therein.

[56] Philip L. Blumberg, *The Law of Corporate Groups: Procedural Law* 8 (1983).

[57] Because the corporate veil can be pierced for other reasons as well, for example anti-circumvention or jurisdictional purposes.

[58] See HAMILTON, MACEY & MOLL, *supra* note 55, at 213. The actual figures suggest veil-piercing taking place in the range of forty to fifty per cent of reported cases. But commentators suggest that these figures simply reflect the fact that it is the close cases that go to trial. If the outcome would be clearer, the cases would assumedly be settled.

[59] *Id.*, at 214.

[60] See GLENN G. MORRIS & WENDELL H. HOLMES, LOUISIANA CIVIL LAW TREATISE VOLUME 7. BUSINESS ORANIZATIONS 278 (West Group 1999).

[61] See Louisiana Civil Code art. 24, in conjunction with the detailed overview of the matter at hand presented in *Id.*, at 270-273 and GLENN G. MORRIS, WENDELL H. HOLMES, LOUISIANA CIVIL LAW TREATISE VOLUME 8. BUSINESS ORGANIZATIONS 52-62 (West Group 1999).

[62] See STATE OF LOUISIANA, CORPORATION LAWS 41-42 (Claitor's Publishing Division 2009).

[63] See Koch v. First Union Corporation, 2002 WL 372939 (Pa.Com.Pl.2002).

[64] See *Id.*, at 53-54, and the substantial supportive case law cited therein (note 6).

[65] *Id.*, at 58 and the references cited therein.

[66] 339 So.2d 1280 (La.App. 1st Cir. 1976).

[67] 590 So.2d 1164 (La.1991).

[68] 339 So.2d 1280, 1282 (La.App. 1st Cir. 1976) *apud* MORRIS & HOLMES, *supra* full citation in note 61, at 58.

[69] *Id.*.

[70] See *infra*, note 71 and accompanying text.

[71] See 590 So.2d 1164, 1168 (La.1991). For the additional factor, 6. **ownership of all shares by a single shareholder**, see 377 So. 2d 465, 468 (La.App. 4 Cir. 1979).

[72] See 590 So.2d 1164, 1168 (La.1991) and 377 So. 2d 465, 468 (La.App. 4 Cir. 1979).

[73] 590 So.2d 1164 (La.1991).

[74] See *Id. apud* MORRIS & HOLMES, *supra* note 68, at 56-57.

[75] Even though not in completely direct connection with the piercing the corporate veil doctrine currently undergoing analysis, it is important to note that a more extensive 18 factor list is being used in determining whether the corporate veil can be pierced to draw the liability of other "parent" or "sister" corporations. They are relevant to our discussion, as they more specifically show instances of abuse of right. Not exhaustive, and as listed in a "single business enterprise" doctrine case, the relevant items are: actions in the interest of the corporation, financing the corporation, payment of salaries and other expenses or losses of the corporation, receiving no business other than that given to the corporation, using the property of the corporation as own, common employees, services rendered by personal employees to the corporation, common offices, centralized accounting, undocumented transfers of funds, and unclear allocation of profits and losses. For an overview of the topic, as well as the express factors, see Green v. Champion Insurance Co., 577 So.2d 249 (La. App. 1 Cir. 1991).

[76] See *supra*, at 20-21.

[77] Abuse of right theory appeared in 19th century French law. For more details, see the detailed account of PASCAL ANCEL & CLAUDE DIDRY, L'ABUS DE DROIT: UNE NOTION SANS HISTOIRE? L'APPARITION DE LA NOTION D'ABUS DE DROIT EN DROIT FRANÇAIS AU DEBUT DU XXE SIECLE 53-58 (Publications de l'Université Saint-Étienne 2001) (Fr.).

[78] See *supra*, at 23-24.

[79] Auxiliary resources in a legal sense, in that as the owner's / shareholder's, they belong to a secondary entity in respect to the main resources at hand, those of the direct malicious being, the corporation. We make this distinction to distinguish from the economic sense, in which cases involving abuse of right conduct in the corporate area usually involve less resources being attached to the legal entity shield and much more to those wielding it. For a good example of the discrepancies at hand, see Green v. Champion Insurance Co., 577 So.2d 249 (La. App. 1 Cir. 1991).

[80] For a very detailed and well-reasoned setting of the problem, seriously backed-up by numerous case law instances, see MORRIS & HOLMES, *supra* note 74, at 57, and the sources cited therein (notes 16, 17 and 19).

[81] *Id.* (just see note 18 instead).

[82] Riggins v. Dixie Shoring Co., Inc., 590 So.2d 1164 (La.1991).

[83] See Morris & Holmes, *supra* note 80, at 57-58 (just see note 20 instead – "... (appellate court "erred" when it affirmed trial court's veil-piercing under a "primarily a question of fact" standard) ...").

[84] 590 So.2d 1164 (La.1991).

[85] 590 So.2d 1164 (La.1991).