CONTROL AND/OR MISCONDUCT: 
CLARIFYING THE TEST FOR PIERCING 
THE CORPORATE VEIL IN ALASKA*

I. INTRODUCTION

"Piercing the corporate veil" refers to instances in which a court disregards the fundamental principle of limited liability of a corporate entity and instead imposes liability on its shareholders beyond the amount they contributed to the corporation in exchange for shares. Veil-piercing doctrines generally exist under state law. Moreover, they tend to exist within a state's common law; veil-piercing is conspicuously absent from most states' corporation statutes.1 This lack of statutory guidance makes these doctrines rather amorphous. Justice Cardozo once described the law and language surrounding the various doctrines as "enveloped in the mists of metaphor."2 Other commentators have also noted such ambiguity3 and criticized these doctrines.4 One researcher, conducting a survey of the piercing law in the United States, commented that "the boundaries of [the

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3. See Robert C. Clark, The Duties of the Corporate Debtor to Its Creditors, 90 HARV. L. REV. 505, 541 (1977) (stating that "cases attempting to pierce the corporate veil are unified more by the remedy sought -- subjecting to corporate liabilities the personal assets directly held by shareholders -- than by repeated and consistent application of the same criteria for granting the remedy."); Thompson, supra note 1, at 1036-37, and the sources cited therein.

4. See Frank H. Easterbrook & Daniel R. Fischel, Limited Liability and the Corporation, 52 U. CHI. L. REV. 89 (1985) (concluding that "'[p]iercing' seems to happen freakishly. Like lightning, it is rare, severe, and unprincipled. There is a consensus that the whole area of limited liability, and conversely of piercing the corporate veil, is among the most confusing in corporate law."); reprinted in 27 CORPORATE PRACTICE COMMENTATOR 313, 314 (1985).
doctrine] ... are usually stated in broad terms that offer little guidance to judges or litigants in subsequent cases.

The veil-piercing doctrine in Alaska is no exception to this general uncertainty. Commentators on the Alaska piercing law have been unable to present a clear or definitive explanation of the Alaska doctrine. The Alaska Supreme Court, which has been responsible for the development of the veil-piercing doctrine within the state, has contributed to this uncertainty by oscillating between two competing veil-piercing tests: a "disjunctive" test and a "conjunctive" test. Both tests involve an inquiry into two "prongs" of analysis: (1) control of the corporation and (2) misconduct by the corporation or its shareholders. The tests differ, however, in the weight and force given to each of these prongs.

This note will demonstrate that the two prongs necessarily overlap and that both the disjunctive and conjunctive tests examine control and

5. Thompson, supra note 1, at 1036.


7. Although there are federal (Ninth Circuit) cases that address piercing the veil in Alaska, they are not generally included in this doctrinal examination as they make no reference to, nor are they consistently referred to, in the cases decided by the Alaska Supreme Court. See Bergen v. F/V St. Patrick, 816 F.2d 1345 (9th Cir. 1987), cert. denied, 493 U.S. 871 (1989); Kilkenny v. Arco Marine, Inc., 800 F.2d 853 (9th Cir. 1986), cert. denied, 480 U.S. 934 (1987); Huss v. Purinton, 229 F.2d 104 (9th Cir. 1955), cert. denied, 350 U.S. 997 (1956). But see infra note 148.

8. Ironically, all of the Alaska Supreme Court cases that have addressed the piercing issue have been unanimously decided. That no justice has dissented despite the court's frequent vacillation is suggestive that, notwithstanding the unsettled nature of the doctrine, the court would have reached the same decisions under either the conjunctive or the disjunctive test described herein. See infra notes 9, 12 and accompanying text.

9. Although the court has never used the terms "conjunctive" or "disjunctive," this author has adopted such terms because they illustrate the effect of the tests imposed by the court.

10. For purposes of nomenclature in this note, the "control" prong will be evaluated as an inquiry to determine whether such control is excessive or rises to the level at which the corporate form becomes a mere "instrumentality." The Alaska Supreme Court has also referred to the "control" or "instrumentality" prong as the "quantitative" prong. The "misconduct" prong examines whether there is serious wrongdoing that "defeat[s] public convenience, justifie[s] wrong, commit[s] fraud or defend[s] crime." United States v. Milwaukee Refrigerator Transit Co., 142 F. 247, 255 (C.C.E.D. Wis. 1905).

11. A brief example will illustrate the meaning of each prong. In Eagle Air, Inc. v. Corroon & Black/Dawson & Co., 648 P.2d 1000 (Alaska 1982), a case in which the Alaska Supreme Court pierced the veil, the control prong was satisfied when a parent corporation had purchased all of the stock of a second corporation and had equipped that newly acquired subsidiary with helicopters leased from another of its subsidiaries. The court also found misconduct, separate from the control element, because the assets of the acquired subsidiary had been stripped by the parent corporation. Id. at 1002, 1004.
misconduct. The Alaska Supreme Court will consider the piercing issue in terms of misconduct only where there is some control or connection to the corporate form, albeit not necessarily amounting to the level of instrumentality. Similarly, the court will pierce the veil under the instrumentality prong only where there is a suggestion of "misuse," which may or may not be tantamount to traditional misconduct. Instrumentality and misconduct are thus threshold levels relating to the prongs of both tests employed in Alaska.

As stated above, the difference between the two tests lies in the weight given to both elements, rather than any substantive disagreement over the nature of the elements. The first test presented by the Alaska Supreme Court was a disjunctive test, in which a showing of either excessive control or other corporate misconduct sufficed for the court to pierce the veil. The second test was a conjunctive test, in which both control and misconduct had to be proven to warrant the court's disregard of the corporate entity.\(^2\) In the Alaska Supreme Court's construction of the conjunctive test, the second prong examines whether there has been some serious misconduct rising above the level of corporate misuse implicit in any finding of instrumentality under the control inquiry.\(^3\)

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12. The conjunctive test has also been advanced by the court in terms of "priority" and "combination." Despite the different terminology, both are functionally conjunctive tests. In reality, the tests may appear as a single test (disjunctive) or a dual test (conjunctive). In all of the Alaska cases in which the court has had to make a choice between the tests, the issue has been reduced to the following: given that there is control with which the disjunctive test permits piercing the veil, does the court require an additional showing of misconduct as part of a conjunctive test? In other words, the disjunctive test has imposed liability following a showing of excessive control only, while the conjunctive test has proceeded to the misconduct question only after control has been established. This result is probably due to the fact that veil-piercing is inappropriate absent some connection of the allegedly improper action to the corporate form. Disregarding the veil of corporate protection is not the standard remedy for the fraud plaintiff unless the defendant has misused the corporate mechanism. Thus, the misconduct prong looks at whether the corporate form has been used to defeat public convenience, justify wrong, commit fraud or defend crime. The particular facts of the cases may lead the reader to conceptualize a vacillation between a one-step test requiring only a showing of control, and a two-step test requiring control plus misconduct. Nevertheless, the author prefers to retain the conjunctive/disjunctive dichotomy as that model is suggested by the cases and would include the possible, albeit currently nonexistent, scenario in which a court employing a disjunctive test would consider piercing the veil where there was serious misconduct that was connected to the corporate form but did not necessarily satisfy the control prong.

13. Such additional misconduct has generally been in the nature of common law fraud. However, the court has indicated that actual fraud is not required to satisfy the misconduct prong under the conjunctive test. *Eagle Air*, 648 P.2d at 1000. \(\text{See infra text accompanying notes 129-41 for a clarification of this distinction.}\) Professor Fessler, surveying Alaska corporate law, has argued that "the plaintiff's success [is] dependent upon demonstrating some significant transgression by the defendant in the use of the corporate creature." Fessler, *supra* note 1, at 54. Professor Fessler suggests that misconduct that defeats the public convenience, justifies wrong, commits fraud or defends crime is sufficient to constitute the "big wrong" necessary to pierce the veil. *Id.* at 54 n.138.
Many other states have experienced similar conflict in their veil-piercing laws. However, the conflict has been particularly pronounced in Alaska, as the supreme court has shifted between the two doctrines seven times between 1973 and 1987. This indecisiveness has compounded the uncertainty common to veil-piercing jurisprudence. Such irresolution may in fact impede business planning and also lead to unnecessary appeals.

Although the decisions are inconsistent and the emerging doctrine unsettled, the decisions of the court can be harmonized to clarify the current state of Alaska’s veil-piercing jurisprudence. This note will demonstrate that the proper test for piercing the corporate veil in Alaska is the disjunctive test, requiring a showing of either excessive control rising to the level of instrumentality or misconduct in connection with the corporate form. This construction of the doctrine is supported on three grounds. First, the sources from which the Alaska doctrine was initially derived and the way in which it has evolved indicate that the court intentionally adopted a disjunctive test. Second, in all of the cases in which the court has been faced with an outcome-determinative choice between the tests, it has adopted the disjunctive test. Third, the way in which the court examines the control prong inherently contemplates some

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14. States have had varying degrees of success in clearly presenting their respective doctrines regarding the conjunctive/disjunctive dichotomy. In most states, as in Alaska, the issue arises when a court considers whether a showing of mere control will warrant disregard of the corporate entity. See generally, PRESSER, supra note 6, §§ 2.00-.52, at 2-1 to 2-540 (including a survey of state-by-state piercing law that details most states’ struggles with this issue).


16. Substantial control of a corporation by a parent or an individual shareholder might subject the controlling party to liability notwithstanding the protection of the corporate veil.

17. See, e.g., Klondike Indus. v. Gibson, 741 P.2d 1161 (Alaska 1987); Eagle Air, Inc. v. Corroon & Black/Dawson & Co., 648 P.2d 1000 (Alaska 1982). In both of these cases, the defendant-corporations whose veils had been pierced based their appeals on contentions that the conjunctive test, rather than the disjunctive test, should have been used, thus requiring a higher showing by the plaintiff since both prongs of the test had to be satisfied.
degree of incidental misuse, thereby eliminating the need for an additional showing of misconduct.

This note focuses on the substantive veil-piercing decisions of the Alaska Supreme Court. Certain cases addressing the veil-piercing issue have been excluded as they either did not reach the merits of the question of piercing or involved unorthodox situations which are inapplicable to the general piercing doctrine. Although the cases analyzed arise both in the parent/subsidiary and individual shareholder/corporation contexts, the situation under which the veil-piercing issue arises is not a dispositive issue. Similarly, the fact that the piercing issue relates to a procedural matter or sounds in tort or contract has no bearing on the ultimate judicial decision of whether to disregard the corporate entity. The court has never stated that differing contexts mandate different substantive treatment, and it has applied the same two tests, albeit inconsistently, without regard to such circumstances. Thus, the specific facts of the cases detailed herein are only relevant to the inquiry insofar as they illustrate the breadth of the situations in which the court will consider the piercing issue and insofar as


19. See Croxton v. Crowley Maritime Corp., 817 P.2d 460 (Alaska 1991); State Dep't of Revenue v. Alaska Pulp America, Inc., 674 P.2d 268 (Alaska 1983). Both of these cases involved reverse-piercing or self-piercing, in which a corporation seeks to pierce its own veil to treat otherwise separate entities as a single entity in order to minimize tax or similar liability. The Alaska Supreme Court has manifested a reluctance to apply traditional piercing doctrine in such cases, stating that "we have never suggested that either of these theories [conjunctive or disjunctive] is available to the corporation to pierce its own corporate form." Id. at 465 n.9.

However, this distinction may tend to explain one shift by the court. See infra notes 112-16 and accompanying text.

they affect the manner in which the court applies the chosen test, whether conjunctive or disjunctive.\textsuperscript{22}

In sum, this examination will focus on the form of the tests used rather than the substantive evidence which supports or opposes piercing under the test ultimately chosen. Part II will detail the development of the doctrine and the evolution of its two conflicting tests. Part III will explain why the argument in favor of the disjunctive test is more compelling.

II. DEVELOPMENT OF THE DOCTRINE

A. The Disjunctive Test

The Supreme Court of Alaska first addressed the piercing issue in \textit{Jackson v. General Electric Co.},\textsuperscript{23} a case involving a tort claim of defamation against a finance company and its parent corporation, an electronics manufacturer. The plaintiff had defaulted on payments for goods purchased from the parent corporation by means of credit provided by the subsidiary and had subsequently received a defamatory collection letter from the subsidiary. Unable to join the subsidiary as a defendant in the action, the plaintiff sought judgment against the parent.

Justice Fitzgerald, writing for the court, noted one of the "well-recognized exceptions" to the general principle of limited liability for corporations. He stated that:

\begin{quote}
[A] parent corporation may be held liable for its subsidiary's conduct when the parent uses a separate corporate form to defeat public convenience, justify wrong, commit fraud, or defend crime. The parent corporation may also be liable for the wrongful conduct of its subsidiary when the subsidiary is the mere instrumentality of the parent.\textsuperscript{24}
\end{quote}

Thus, the veil-piercing doctrine was first presented as a disjunctive test involving alternate inquiries into misconduct and control. In \textit{Jackson}, the plaintiff sought to prove excessive control by showing that the subsidiary

\textsuperscript{22} For example, the instrumentality prong entails an inquiry into either six or eleven elements of control, depending upon the factual context. \textit{See infra} text accompanying notes 26 & 62. The frequency with which these facts are determinative in resolving the piercing issue is secondary to the issue of \textit{which test} is employed. Such empirical analysis is therefore beyond the scope of this examination. One empirical conclusion that can be drawn is that the court will usually defer to the trial court's interpretation of the facts, as evidenced by the fact that in only three of the cases detailed herein was the trial court reversed, and the reversals were predicated on the lower court's misapplication or nonapplication of the piercing doctrine.

\textsuperscript{23} 514 P.2d 1170 (Alaska 1973).

\textsuperscript{24} \textit{Id.} at 1172-73 (emphasis added) (footnotes omitted).
was the "mere instrumentality" of the parent.\textsuperscript{25} In evaluating the instrumentality question, the court looked at the eleven factors presented by Professor Powell in his treatise on corporate law:

(a) The parent corporation owns all or most of the capital stock of the subsidiary.

(b) The parent and subsidiary corporations have common directors or officers.

(c) The parent corporation finances the subsidiary.

(d) The parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation.

(e) The subsidiary has grossly inadequate capital.

(f) The parent corporation pays the salaries and other expenses or losses of the subsidiary.

(g) The subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation.

(h) In the papers of the parent corporation or the statements of its officers, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation's own.

(i) The parent corporation uses the property of the subsidiary as its own.

(j) The directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take their orders from the parent corporation in the latter's interest.

(k) The formal legal requirements of the subsidiary are not observed.\textsuperscript{26}

Though several cases have described the \textit{Jackson} inquiry as quantitative,\textsuperscript{27} the test as presented by the court was in fact qualitative,\textsuperscript{28} with the controlling principle and underlying policy being that "[a] parent corporation which does not permit its subsidiary to exercise an individual status may not expect that the subsidiary's independence will be recognized elsewhere."\textsuperscript{29} Since the \textit{Jackson} court did not find the subsidiary to be a "mere instrumentality,"\textsuperscript{30} and since it was not presented with the issue

\textsuperscript{25} \textit{Id.} at 1173.

\textsuperscript{26} \textit{Id.} (quoting \textsc{Frederick J. Powell}, \textsc{Parent and Subsidiary Corporations} §§ 5-6, at 9 (1931)).


\textsuperscript{28} The court stated that "[i]t is not necessary . . . that all eleven of these factors be found in order to conclude that the subsidiary is the mere instrument of its parent." \textit{Jackson}, 514 P.2d at 1173.

\textsuperscript{29} \textit{Id.}

\textsuperscript{30} The trial court's findings, affirmed by the supreme court, included the following: the subsidiary's credit services rendered in connection with consumer financing for the products of the parent constituted only one part of the subsidiary's operations; the advisory
of misconduct, it affirmed the judgment of dismissal by the trial court and declined to pierce the veil.  

B. The Conjunctive Test  

The next decision that addressed the veil-piercing issue came four years after Jackson. In Elliott v. Brown, the plaintiffs, who had previously won a criminal case against their supervisor for assault, attempted to use the supervisor's guilty plea as an admission of liability in the subsequent intentional tort case. Seeking a deeper pocket, the plaintiffs sought judgment against the corporation rather than the supervisor, based on the fact that the supervisor was a fifty percent shareholder in the corporation. Because workers' compensation provided a defense to claims of vicarious liability, the plaintiffs sought to pierce the veil and recover from the corporation for the supervisor's torts. In evaluating the claim, the court held that "[t]he corporate veil may not be pierced merely because [the shareholder] . . . controls the activities of the corporation. Rather, the veil may be pierced only if the corporate form is used "to defeat public convenience, justify wrong, commit fraud, or defend crime." The court cited the misconduct prong of Jackson's disjunctive test. Nevertheless, by indicating that the misconduct inquiry was always necessary, the court imposed a conjunctive test: "This doctrine requires considerably more than mere control; it exists to prevent a party from obtaining an advantage through deceptive or manipulative conduct." Absent evidence of such misconduct, the court curtailed its examination of control and affirmed that portion of the trial court's opinion refusing to disregard the corporate entity.

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services rendered by the parent were paid for by the subsidiary; the subsidiary was not disadvantaged in any way by the parent corporation; the creditors of the subsidiary were not threatened; there was no use of the subsidiary's property by the parent; and the parent did not pay the salaries of the employees of the subsidiary. Nevertheless, control amounting to instrumentality was suggested by the following: the corporations filed consolidated income tax returns; there were common officers and directors; and the earnings of the subsidiary were included in the financial reports of the parent. Id. at 1172, 1174. The court indicated that based upon these facts, if the trial court had found that the subsidiary was a mere instrumentality, a decision to pierce the veil under a disjunctive test could have been affirmed. Id. at 1174.

31. Id. at 1173-74.  
33. Id. at 1326 (quoting Jackson, 514 P.2d at 1172-73).  
34. Id.  
35. Id.
C. Competing Tests

In the decade following the Elliott decision, the court made several shifts in articulating the proper test to be used in deciding whether to pierce the veil. Throughout this period, neither the circumstance (parent/subsidiary or individual shareholder/corporation) nor the cause of action was decisive in the court's determination. Furthermore, while the court occasionally used the language of "priority" and of a "combined" test, a dichotomy between the conjunctive and disjunctive tests essentially remained.

Although Elliott addressed the piercing issue within the context of the individual shareholder/corporation situation rather than the parent/subsidiary context addressed in Jackson, the court soon after applied the conjunctive test to the latter relationship as well. In Bendix Corp. v. Adams, the plaintiffs asserted a breach of contract claim against a subsidiary and its parent on an instrumentality theory, citing the control prong of Jackson. The court, however, disregarded the control inquiry because, under the conjunctive test that it used, the absence of "deceptive or manipulative conduct" precluded any decision to pierce the veil. The court used language indicating a prioritization of the two prongs: "[M]ore important than the quantitative [instrumentality] approach ... is the fact that there was no suggestion that [the subsidiary] ... was created 'to defeat public convenience, justify wrong, commit fraud, or defend crime.'" The court recognized the possibility that the subsidiary was to a certain degree an instrumentality of the parent but dismissed the plaintiff's allegations of excessive control, noting that the subsidiary's mere existence did not denote misconduct. This analysis proved dispositive of the piercing issue. In essence, the court imposed a conjunctive test. The court

37. Id. at 32.
38. Id.
39. Id. (quoting Jackson, 514 P.2d at 1172-73).
40. Id.
41. The conceivable options of interpreting the priority language are (a) that the priority, in effect, imposes a conjunctive test, as detailed in the text accompanying this footnote or (b) that priority only means that, in the disjunctive test, the misconduct prong should be the initial focus of the court's examination but should not be dispositive of the piercing question since excessive control may still be demonstrated.

The court's analysis in Bendix indicates that the former, or conjunctive, construction is probably being used. In Bendix, the court mistakenly combined the plaintiff's instrumentality and agency claims. Id. at 32 n.14. Since the plaintiff had failed to prove any agency, the trial court implied that there was no instrumentality. The court's inquiry into agency did not resemble the traditional control inquiry, however. That the trial court did not consider control in the manner established by precedent indicates that the absence of misconduct was indeed dispositive. Id. at 32-33.
cited the principle and policy behind the conjunctive test presented in Elliott, noting that control by itself was insufficient to pierce the veil, because some degree of control is a normal expectation in the parent/subsidiary relationship.

In the same year that Bendix was decided, however, the court returned to the disjunctive test. This departure from Bendix occurred in Volkswagenwerk, A.G. v. Klippan, GmbH, which involved a breach of contract claim brought by a parent automobile manufacturer and its subsidiary importer against a manufacturer that supplied component seatbelts for plaintiffs’ automobiles. The defendant asserted as a defense a forum selection clause in its contract with the subsidiary and sought to pierce the veil to bind the parent to the contract. The court explicitly adopted the disjunctive test of Jackson as determinative of “the limited circumstances which do warrant ‘piercing the corporate veil.’” Furthermore, Chief Justice Rabinowitz, writing for the court, reiterated Professor Powell’s eleven factors for examining the control issue. Because the evidence did not warrant a finding of mere instrumentality, the court affirmed the trial court’s judgment and again declined to pierce the veil. Ironically, the court cited Elliott and Bendix but made no reference to the fact that those cases employed a different test.

The court made a tentative return to the conjunctive test in General Construction Co. v. Tyonek Timber, Inc. General Construction involved a disputed contract between the defendant and a construction company. The defendant subsequently contracted with a subsidiary of the

Nevertheless, the fact that the court addressed both control and misconduct might indicate that the priority analysis is merely an ordering principle of the disjunctive test. The issue of which alternative is the proper construction of the priority inquiry is unimportant, however, since it is clear that the court has struggled with the issue and has construed such priority as effectively imposing a conjunctive test. See Eagle Air, Inc. v. Corroon & Black/Dawson & Co., 648 P.2d 1000 (Alaska 1982).

42. See supra text accompanying note 34.

43. “It is to be expected that a subsidiary will be controlled by its parent, otherwise it would have little reason for creating it.” Bendix, 610 P.2d at 37 (quoting 6 ZOLMAN CAVITCH, BUSINESS ORGANIZATIONS § 120.05[2][b] (1979)).


45. Volkswagenwerk, 611 P.2d at 505.

46. Id. at 506 n.12. See supra text accompanying note 26.

47. The court was presented with evidence showing that the parent and subsidiary corporations had separate contracts and records, that they owned property in their own names, and “in short carry[d] on business as . . . separate entit[ies].” Volkswagenwerk, 611 P.2d at 506.

48. Id.

49. Id.

construction company for completion of the job. The defendant refused to pay the subsidiary, and the subsidiary sued the defendant for breach of the second contract. The trial court found substantial performance by the subsidiary and rendered judgment accordingly. The defendant appealed, seeking to pierce the veil of the subsidiary and bind the subsidiary to the original contract between the defendant and the parent corporation.\(^5\)

The court appeared to impose a conjunctive test, emphasizing that the *Jackson* factors relating to instrumentality were of "secondary importance" to the misconduct inquiry.\(^5^2\) Because there was no showing of misconduct and an "insufficient showing of interrelatedness,"\(^5^3\) the court affirmed the judgment of the trial court and refused to pierce the veil.\(^5^4\) However, the force of the argument for a conjunctive test was limited by the court's detailed explanation of the disjunctive test and its thorough examination of both control and misconduct.\(^5^5\) Again, it was unclear exactly what was meant by the priority the court gave to the misconduct inquiry.\(^5^6\) The opinion in *General Construction* clearly demonstrated that the court was either confused about or unaware of the dichotomy that existed in the prior piercing cases.

The court again applied the disjunctive test in *Uchitel Co. v. Telephone Co.*\(^5^7\) Although *Uchitel* reflected a forceful return to the disjunctive test,\(^5^8\) the decision was not free from inconsistency. *Uchitel* involved a

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51. Id. at 982.
52. Id. at 983 (citing Bendix Corp. v. Adams, 610 P.2d 24 (Alaska 1980)).
53. Id. The trial court was presented with evidence showing that the parent corporation owned 50 percent of the stock of the subsidiary, there were common officers and directors, and the parent provided some financing to the subsidiary. As evidence against instrumentality, there was no showing that the parent had caused the incorporation of the subsidiary. Also, the subsidiary was not undercapitalized and the parent did not pay the salaries, use the property or commingle records with the subsidiary. Id. at 983-84.
54. Id. at 983, 985.
55. The court stated that "no contention is made that [the parent] ... used [the subsidiary] ... to defeat public policy or perpetrate a wrong or fraud or crime. Moreover, under the quantitative approach suggested in *Jackson*, there is an insufficient showing of interrelatedness." Id. at 983. The court continued by examining the facts of the case in light of the factors presented by Professor Powell. Id. at 983-84. See supra text accompanying note 26.
56. If the court had indeed adopted a strict conjunctive test, both the court's instrumentality inquiry and the examination of the instrumentality doctrine as presented in *Jackson* would have been unnecessary once the court had found that there was no misconduct. On the other hand, the court may have interpreted the priority as guiding, but not determinative of, the piercing issue. If the court had meant that there was a disjunctive test which merely placed emphasis on the abuse prong as detailed in the first option presented supra note 41, then the court's reliance on *Bendix* would be misplaced.
57. 646 P.2d 229 (Alaska 1982).
58. Professor Fessler argues that "[i]n *Uchitel*, after spending nearly a decade pondering an ill-defined area of the law, the court found terminology and criteria with which it was comfortable. It preferred the 'quantitative approach' of the disjunctive test initially announced in *Jackson* in evaluating veil-piercing claims. Fessler, supra note 1, at 57."
contract dispute between a corporation and a telephone company. The plaintiff telephone company sought to hold the sole shareholder of the corporation personally liable for the corporation's breach of contract. Although the court adopted a disjunctive test, it recognized its previous holdings in Elliott and Bendix which indicated the propriety of a conjunctive test. The Uchitel court's holding reaffirmed its willingness to pierce the corporate veil under the control prong where "the subsidiary is the mere instrumentality of the parent . . . [and] 'the two corporations are so closely intertwined that they do not merit treatment as separate entities.'"\textsuperscript{6} Ironically, the court cited General Construction in support of the disjunctive test and a court's ability to pierce the veil on a showing of only excessive control.\textsuperscript{61} That this inconsistency was not noted by the court either in Uchitel or in later decisions indicates the court's non-recognition of either the conjunctive/disjunctive dichotomy or the ambiguity of the priority language as utilized by the court.

In Uchitel, the court adapted and condensed Professor Powell's eleven factors of instrumentality in the parent/subsidiary context to six factors in the individual shareholder/corporation context:

(a) whether the shareholder sought to be charged owns all or most of the stock of the corporation;
(b) whether the shareholder has subscribed to all of the capital stock of the corporation or otherwise caused its incorporation;
(c) whether the corporation has grossly inadequate capital;
(d) whether the shareholder uses the property of the corporation as his own;
(e) whether the directors or executives of the corporation act independently in the interest of the corporation or simply take their orders from the shareholder in the latter's interest;
(f) whether the formal legal requirements of the corporation are observed.\textsuperscript{62}

The court directly adopted Professor Powell's original language, eliminating those portions of the inquiry that were particular to the parent/subsidiary relationship.\textsuperscript{63} Since the court found no evidence of misconduct or instrumentality\textsuperscript{64} under the adapted criteria, it declined to

\textsuperscript{59} Uchitel, 646 P.2d at 234 n.12.
\textsuperscript{60} Id. at 234 (quoting Jackson v. General Electric Co., 514 P.2d 1170, 1173 (Alaska 1973)).
\textsuperscript{61} Id.
\textsuperscript{62} Id. at 235.
\textsuperscript{63} See supra text accompanying note 26.
\textsuperscript{64} Other than the defendant being the sole shareholder of the company, the court found none of the six factors in the adapted instrumentality inquiry. Uchitel, 646 P.2d at 234-35.
pierce the veil, and reversed and vacated the trial court’s judgment which
held the shareholder personally liable for the breach by the corporation.65

The first case in which the Alaska Supreme Court actually pierced the
veil was Eagle Air, Inc. v. Corroon & Black/Dawson & Co.66 In Eagle
Air, the court again shifted from the seemingly settled disjunctive test to a
hesitant adoption of the conjunctive test. Eagle Air involved a claim of
breach of contract arising in both the individual shareholder/corporation
context and the parent/subsidiary context. The plaintiff insured a company
that was purchased by a corporation of which the defendant owned 998 of
1000 shares. The plaintiff sought to collect premium payments in arrears,
but the insured company, at that point a subsidiary of defendant’s
corporation, had been stripped of its assets by the parent corporation and
its controlling shareholder. The plaintiff thus sought to pierce the veil of
the insured subsidiary and hold the parent and the shareholder liable for the
amount in default. The trial court found that control amounting to
instrumentality existed under both the Jackson and Uchitel inquiries.67

On appeal, however, the defendant asserted that a finding of mere
control was insufficient to pierce the veil and urged the court to adopt a
conjunctive test under which an “additional element of fraud or
wrongdoing must be shown before liability can attach.”68 The court
apparently agreed with the defendant’s approach, finding support in
General Construction and Bendix, again “relegat[ing] the ‘quantitative’
[instrumentality] approach to secondary importance.”69 The court
nevertheless affirmed the trial court’s decision to pierce the veil based on
defendant’s misconduct in stripping the subsidiary of its assets.70 Once
again, the effect of prioritizing the misconduct inquiry over the control
inquiry was ambiguous. It was also unclear whether the court was truly
adopting a conjunctive test or whether it was merely pointing out that the
defendant’s contention on appeal was not outcome-determinative.

Following Eagle Air, the court returned to the disjunctive test in
McKibben v. Mohawk Oil Co.71 This case ushered in the longest period

65. Id. at 235.
67. Id. at 1003-04. In addition to the stock ownership, the trial court found that the
defendant was the president and director of the defendant corporation, that the defendant
corporation leased helicopters to the acquired subsidiary through another of its subsidiaries,
and that the defendant was president, manager and director of the acquired subsidiary. Id.
at 1002. These findings, and the ultimate conclusion that control existed, were not
challenged by the defendants on appeal. Id. at 1004.
68. Id. at 1004 (footnote omitted).
69. Id.
70. Id. at 1005.
of consistency in Alaska’s veil-piercing doctrine. *McKibben* involved a joint venture between the assignee of a mining lease and a wholly-owned subsidiary of the defendant corporation. The plaintiff-lessee sought to collect unpaid royalties from the subsidiary, which was liable as a co-venturer under the lease. In affirming summary judgment for the lessor, the court pierced the veil of the parent corporation.\(^7\) The *McKibben* court clearly adopted the disjunctive test:

Two theories may be used to justify disregarding the corporate status of a subsidiary. First, a parent corporation may be held liable for the wrongful conduct of its subsidiary when the parent uses a separate corporate form “to defeat public convenience, justify wrong, commit fraud, or defend crime.”\(^7\) Second, a parent corporation may be held liable on the alternative theory that the subsidiary is the mere instrumentality of the parent.\(^7\)

The opinion, written by Chief Justice Burke, restated the eleven factors included in the instrumentality inquiry and evaluated the plaintiff’s claim based upon those factors.\(^7\) The court found that the record contained evidence that “sufficiently established . . . mere instrumentality”\(^7\) and, notwithstanding the absence of any additional misconduct, affirmed the trial court’s judgment to pierce the veil.\(^7\)

In *Kennecorp Mortgage & Equities v. First National Bank*,\(^7\) a bank sought to pierce the veil in the procedural context of obtaining personal jurisdiction over a foreign parent corporation whose subsidiary had defaulted on loan payments. In analyzing the piercing issue, the court reiterated the eleven-point instrumentality inquiry from *Jackson*.\(^7\) Finding that the plaintiff had “not listed facts which would meet the tests of corporate alter ego,”\(^8\) the court declined to pierce the veil, setting aside

\(^7\) Id. at 1231.

\(^7\) Id. at 1229 (quoting *Jackson v. General Electric Co.*, 514 P.2d 1170, 1172-73 (Alaska 1973)).

\(^7\) Id. (emphasis added) (citing *Elliott v. Brown*, 569 P.2d 1323, 1326 (Alaska 1977); *Uchtel Co. v. Telephone Co.*, 646 P.2d 229, 234 (Alaska 1982)) (other citations omitted).

\(^7\) Id. at 1230.

\(^6\) The trial court found that the parent caused the incorporation of the subsidiary and had financed and owned all the capital of the subsidiary, that the officers and directors were the same in both corporations, that the subsidiary was undercapitalized and had no employees or assets other than those acquired from the parent corporation, that there was extensive commingling of offices and records, and that the parent corporation used the assets of the subsidiary. *Id.*

\(^7\) Id. at 1230-31.

\(^7\) 685 P.2d 1232 (Alaska 1984).

\(^7\) Id. at 1240-41 n.9.

\(^8\) Id. The court found that the parent corporation owned all the capital stock of the subsidiary and that there was a common officer, but failed to find any other evidence pointing to instrumentality. That the court used the term “alter ego” instead of “instrumentality” or “control” is not an issue. See *infra* notes 112-16 and accompanying
the trial court's default judgment against the parent corporation. No allegation of misconduct was made nor was the issue addressed by the court. Thus, the court appeared to consider the piercing issue on instrumentality grounds only, essentially applying the disjunctive test under which a showing of excessive control would have been sufficient to pierce the veil.

In Husky Oil N.P.R. Operations v. Sea Airmotive, Inc., a case involving a contract dispute, the court addressed the piercing issue in a similar manner. The plaintiff sought to pierce the veil of a sibling corporation of the contracting entity. Referring only to the instrumentality doctrine, the court extended Jackson to the sibling corporation context and concluded that the sibling corporation was the mere instrumentality of the contracting entity. On this basis, the court pierced the veil, reversing the trial court's denial of summary judgment on that issue. As in Kennecorp, no reference was made to any misconduct prong, thereby indicating the propriety of the disjunctive test.

Though the court appeared to have settled on the propriety of the disjunctive test, it abandoned its five years of consistency in Klondike Industries v. Gibson. In Klondike Industries, the plaintiff sought to hold the defendant personally liable for breach of contract by a corporation which was wholly owned by the defendant. The court referred only to Eagle Air, interpreting that decision to hold that "a shareholder could be held personally liable for a corporate obligation if he controlled the corporation (as determined by six control factors [from Uchitel]) and used the corporate form 'to defeat public convenience, justify wrong, commit fraud or defend crime.'" Conceding control, the shareholder defended against only the misconduct allegations. Since the court found prejudicial action that implicitly satisfied the misconduct prong, it affirmed the trial court's judgment to pierce the veil and hold the shareholder

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81. Kennecorp, 685 P.2d at 1240-42.
82. 724 P.2d 531 (Alaska 1986).
83. The trial court noted that the plaintiff's audit of the defendant revealed that the president of the parent owned 96 percent of the subsidiary's stock, the subsidiary had no equipment or personnel related to its proffered business purpose (fuel distribution), and the subsidiary had no income. Id. at 533.
84. Id. at 534.
85. 741 P.2d 1161 (Alaska 1987).
86. Id. at 1171 (emphasis added) (referring to the control factors put forth in Uchitel Co. v. Telephone Co., 646 P.2d 229 (Alaska 1982)).
87. Id. At trial, the court had found that the defendant had formed a corporation with himself as the sole shareholder and had used the funds of the corporation for his own purposes. Id. at 1162.
personally liable. As in Eagle Air, it is unclear whether the court was forcefully advancing the conjunctive test as the correct test or whether the court was merely pointing out that the defendant's actions did, in fact, prejudice the plaintiffs so as to constitute misconduct. Once again, reference to any of the original precedents or to the ensuing dichotomy between the tests is conspicuously absent from the opinion.

The veil-piercing doctrine in Alaska remains unsettled, as evidenced by the court's most recent consideration of the piercing issue. In Murat v. F/V Shelikof Strait, the instrumentality and misconduct inquiries appeared in the familiar language of priority. The court suggested, however, that the tests were actually combined. The court found that the instrumentality test was the proper tool to inquire into the "primary" issue of misconduct. In Murat, the defendant close corporation had suffered a default judgment in an action for breach of contract. The plaintiff sought to hold the shareholders personally liable for the amount in default and obtained summary judgment piercing the veil. On appeal, the court used the instrumentality inquiry to examine the misconduct issue:

[T]he primary consideration in determining whether to "pierce the corporate veil" is whether the corporate form has been abused by the person sought to be charged; that is, whether the corporate entity was used "to defeat public convenience, justify wrong, commit fraud or defend crime." In determining whether there has been an abuse of the corporate form sufficient to justify a disregard of the protective "veil" in the shareholder-corporation context, this court has approved a "quantitative approach," under which the [Uchitel] . . . factors are to be considered by the court. Finding the existence of a genuine issue of fact in the piercing inquiry, the court remanded the case.

The combined inquiry presented in Murat essentially operates as a conjunctive test. In the end, a successful plaintiff will have shown both instrumentality and wrongdoing amounting to the traditional misconduct

88. Id. at 1171-72.
90. Id. at 76.
91. Id. at 72.
92. Id. at 76 (citations omitted).
93. Id. at 76-79. Although the court did not conclusively address the control issue, it indicated that causing incorporation was not particularly indicative of instrumentality and that, while undercapitalization was more probative, it alone was insufficient to pierce the veil. Id. at 77-78.
94. Ironically, however, the Murat court cites McKibben and the disjunctive test with approval, stating that "summary judgment on [the] 'mere instrumentality' issue [is] appropriate where virtually every factor was indicated on the undisputed evidence." Id. at 79 n.20.
under the second prong of the conjunctive test -- that which defeats the public convenience, justifies wrong, commits fraud or defends crime.

III. PROPERITY OF THE DISJUNCTIVE TEST

The sources and evolution of Alaska's veil-piercing doctrine, combined with the choices made by the court when faced with an outcome-determinative decision indicate that the disjunctive test is the proper approach in considering whether to pierce the corporate veil in Alaska. This conclusion is strengthened by the necessary and inherent overlap of the control and misconduct prongs of the disjunctive test.

A. Sources of the Doctrine

The manner in which the Alaska Supreme Court utilized precedent in deciding *Jackson v. General Electric Co.* indicates that the court intended to adopt a disjunctive test in determining whether to pierce the veil of limited liability for corporations. Furthermore, the sources from which the control prong and the misconduct prong were derived indicate that satisfaction of either prong is sufficient to pierce the veil.

The original language of the misconduct prong derives from the rule "that a corporation will be looked upon as a legal entity . . .; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons." Since the rule makes no reference to a required inquiry into a threshold level of control, the rule appears to provide that misconduct in conjunction with the legal entity is alone sufficient to warrant piercing the veil. Consequently, in *Jackson*, the Alaska


97. For example, such misconduct might involve the "use[] [of] a separate corporate form to defeat public convenience, justify wrong, commit fraud or defend crime." *Jackson*, 514 P.2d at 1172-73. Fraud, crime or other wrong that is not connected to the corporate form has never been deemed a proper circumstance for disregarding the corporate entity.

98. *Milwaukee Refrigerator* is not dispositive of the conjunctive/disjunctive issue. While the case plainly turns on the question of misconduct, the significance of control is unclear. At the time *Milwaukee Refrigerator* was decided, the United States Supreme Court had not yet presented a coherent instrumentality doctrine. Following its consideration of the misconduct issue, the circuit court pointed out that "it clearly appears that the [parent] shipper practically controls the [subsidiary] transit company . . . [and that] the transit company is a mere separate name for the brewing company, being in fact the same
Supreme Court adopted the misconduct rule as one of two prongs of a
disjunctive test, either of which could stand alone to warrant piercing the
veil.

The source of the control prong further suggests that a disjunctive test
is proper. The classic idea of "instrumentality" did not involve a direct
inquiry into wrongdoing. The first use of such language by the United
States Supreme Court appears in United States v. Reading Co.:99

[W]here such ownership of stock is resorted to, not for the purpose of
participating in the affairs of the corporation in which it is held in a
manner normal and usual with stockholders, but for the purpose of making
it a mere agent, or instrumentality of another company... the courts will
look through the forms to the realities of the relation between the
companies as if the corporate agency did not exist and will deal with them
as the justice of the case may require.100

Thus, the concept of instrumentality emerged as an independent method for
piercing the veil, not requiring a formal showing of additional misconduct.

The Jackson court appeared to adopt Professor Powell’s analysis of
instrumentality as its own.101 However, an examination of Powell’s work
clearly demonstrates its inconsistency with the approach adopted in Alaska.
Powell’s test is itself a conjunctive test under which a party wishing to
disregard the corporate entity must satisfy a three-part test: “(1) Control
(per the] Instrumentality Rule)... (2) [d]efendant’s fraud or wrong with
respect to the complainant... [and] (3) [u]njust loss or injury to the
complainant.”102 The first element of control is evaluated under the
eleven-point inquiry adopted by the Jackson court.103 Under Powell’s
analysis, the second element of misconduct is also necessary to pierce the
veil: “[P]roof must show not only an excessive control over the subsidiary
but the actual exercise of that control in such a manner as to defraud or
wrong the complainant.”104 The third element would naturally be present
in any tort or contract claim.

It therefore appears that the Jackson court consciously declined to
adopt the conjunctive elements of the Powell test. Rather, the court opted

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99. 253 U.S. 26 (1920). The Jackson court did not refer to this case. It appears herein
as historical background for the principle.
100. Id. at 62-63 (emphasis added).
102. POWELL, supra note 26, § 3, at 4-6.
103. See supra text accompanying note 26.
104. POWELL, supra note 26, § 12, at 40.
to use Powell's eleven factors to guide only the control prong of its own disjunctive inquiry. Additional support for this proposition can be found in the court's reference to *Steven v. Roscoe Turner Aeronautical Corp.*[^105] which employed a conjunctive test to pierce the veil.[^105] The *Jackson* decision indicates that the court was aware that the conjunctive test originally presented by Professor Powell and adopted by the Seventh Circuit in *Steven* had been "quoted approvingly by the courts,"[^107] yet it declined to adopt the conjunctive strictures of the tests as they existed in the original sources.

Professor Presser agrees that the court consciously adapted and adopted the disjunctive test:

Powell had used the "mere instrumentality" factor as only one of three that had to be present before he thought the veil ought to be pierced. . . . By allowing the veil to be pierced when only one of Powell's three factors was present, . . . the Alaska court seems to have greatly liberalized Powell's approach.[^108]

Indeed, such a liberal piercing law has positive policy implications that may have influenced the court to plant "the seeds of . . . plaintiff victories."[^109] For example, proving unfair or inequitable conduct can be costly and difficult.[^110] A liberal doctrine would serve to alleviate this problem. It would also help curb the general problem of excessive control, where such control "impair[s] the interests of other parties by carrying this unity of interest too far."[^111]

It is noteworthy that none of the decisions employing a conjunctive test ever referred to the fact that Powell's original standard was itself conjunctive. If the court had meant to assert such a test, it could have

[^105]: 324 F.2d 157 (7th Cir. 1963). *See supra* note 96.

[^106]: *Steven*, 324 F.2d 157. The Seventh Circuit held that:

In order to establish that a subsidiary is the mere instrumentality of its parent, three elements must be proved: control by the parent to such a degree that the subsidiary has become its mere instrumentality; fraud or wrong by the parent through its subsidiary, e.g., torts, violation of a statute or stripping the subsidiary of its assets; and unjust loss or injury to the claimant, such as insolvency of the subsidiary.

*Id.* at 160 (emphasis added) (citing, *inter alia*, *POWELL*, *supra* note 26, § 3, at 4-6). Thus, the *Steven* court gave Powell's analysis the construction that the Alaska Supreme Court would have given it had the court desired to establish a conjunctive test.

[^107]: *Jackson*, 514 P.2d at 1173 n.9.

[^108]: PRESSER, *supra* note 6, § 2.02, at 2-7 to 2-8 (footnotes omitted). Professor Presser was referring to the court's opinion in *McKibben v. Mohawk Oil Co.*, 667 P.2d 1223, 1230 (Alaska 1983), where the court presented Professor Powell's eleven-point inquiry but cited only *Jackson*. Nevertheless, Professor Presser's observation with respect to the return to the disjunctive test in *McKibben* is applicable to all of Alaska's veil-piercing decisions.

[^109]: Fessler, *supra* note 1, at 57.

[^110]: Clark, *supra* note 3, at 543.

referred to Powell’s original conjunctive standard, literally interpreted, as compelling support for the change in the Alaska piercing test. Yet the court has not done so, and its departure from the initial test put forth in *Jackson* raises questions as to its rationale.

One reason for the court’s apparent confusion could be the context in which *Elliott* arose. *Elliott* involved an individual shareholder/corporation situation rather than the parent/subsidiary situation present in *Jackson*. While there is no discernible pattern in the ensuing application of the tests with regard to the context in which the cases arise, the *Elliott* court, perhaps as a result of the different factual context, used the term “alter ego” instead of “mere instrumentality.” One earlier federal case in Alaska had also used “alter ego” as the proper inquiry in the individual shareholder/corporation context. While Professor Powell did not believe there was a practical difference between the concepts of alter ego and instrumentality, the language of “alter ego” may have originally referred to a conjunctive standard. That *Elliott* was never distinguished in later cases based upon the language or the context suggests that the Alaska Supreme Court may not have recognized the conjunctive/disjunctive dichotomy, and may simply have unintentionally abandoned its holding in *Jackson*.

The adoption of the disjunctive test was supported by the independent corporate misconduct and instrumentality doctrines as they existed prior to Alaska’s first impression. Furthermore, the fact that the court did not refer to the dichotomy between the tests presented in *Jackson* and *Elliott* indicates that it was unaware of the substantive change it was making in the veil-piercing doctrine when it made the *Elliott* departure.

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115. *POWELL, supra note 26, § 3, at 4 (classifying “mere instrumentality” and “alter ego” as equivalent terms, both connoting “control of the subsidiary by the parent corporation”).*
116. *BLUMBERG, supra note 6, § 6.03, at 118.*

*“[P]iercing the veil” is proper when (1) such unity of ownership and interest exist that the two affiliated corporations have ceased to be separate and the subsidiary has been relegated to the status of “alter ego” of the parent; and (2) where recognition of them as separate entities would sanction fraud or lead to an inequitable result. Id. (emphasis added). Nevertheless, the Ninth Circuit’s interpretation of the term “alter ego” on an appeal from the District Court of the District of Alaska in *Hoss*, 229 F.2d at 108, indicates that this is probably not the case. The interpretation given to the term in *Hoss* would support the adoption of a disjunctive standard insofar as the Ninth Circuit employed an instrumentality-type inquiry to determine whether the corporation was a “mere conduit” for the activities of its shareholders, without any additional inquiry into misconduct. *Hoss*, 229 F.2d at 108.*
B. Evolution of the Doctrine

The court's decision in *Bendix Corp. v. Adams*\(^\text{117}\) indicated the nebulous nature of the piercing doctrine in the wake of the *Elliott* decision. While Justice Boochever advanced a conjunctive test in *Bendix*, the test was not put forth in the straightforward language of *Elliott*,\(^\text{118}\) but rather in the elusive language of priority that may or may not, in fact, be tantamount to a conjunctive test.\(^\text{119}\) The remainder of the Alaska cases adopting the conjunctive test manifest the same hesitation found in the *Bendix* decision insofar as they refer to prioritization of the misconduct and control prongs but do not strictly require a conjunctive test, as the court did in *Elliott*.\(^\text{120}\)

On the other hand, the decisions reaffirming the disjunctive test have been more firm in their assertions. The disjunctive test was consciously adapted to the individual shareholder/corporation context in *Uchitel Co. v. Telephone Co.*\(^\text{121}\) Furthermore, the disjunctive test enjoyed the longest period of consistent acceptance, as demonstrated by the court's decisions in *McKibben v. Mohawk Oil Co.*,\(^\text{122}\) *Kennecorp Mortgage & Equities v. First National Bank*,\(^\text{123}\) and *Husky Oil N.P.R. Operations v. Sea Airmotive, Inc.*\(^\text{124}\)

Thus, the evolution of the piercing doctrine indicates that once the initial tests were formulated, the court shifted strongly toward the disjunctive test. In contrast, the court made only tentative pronouncements of the conjunctive test insofar as those decisions referred to priority. Even in these cases, the court acknowledged that there had been alternative tests, which constituted a disjunctive standard, in some prior holdings.

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118. *See Elliott*, 569 P.2d at 1326 (stating that "[t]his doctrine requires considerably more than mere control"). While the court cites this passage in *Bendix*, 610 P.2d at 32, it does not embrace the language of *Elliott* in its holding.
119. *See supra* note 41. In the language employed by the *Bendix* court ("more important than the quantitative approach [(instrumentality)] . . . is the fact that there is no suggestion [of misconduct] anywhere in the record"), it is unclear whether the absence of misconduct completely precludes any finding to pierce the veil, as it would under a conjunctive test. *Bendix*, 610 P.2d at 32.
121. 646 P.2d 229 (Alaska 1982).
C. Making Meaningful Choices

Further evidence that the disjunctive test is the proper test derives from the fact that in each instance where the court was presented with an outcome-determinative situation in which the resolution of the veil-piercing issue would be different depending upon the test used, it selected the disjunctive standard. In the majority of cases, the court found neither excessive control nor misconduct. A court applying either the conjunctive or the disjunctive test would have declined to pierce the veil in those instances. Likewise, in those cases where both misconduct and control amounting to instrumentality were found, the court would have pierced the veil under either test. However, in each instance where only instrumentality was present and misconduct was either absent or not at issue, the court adopted the disjunctive test, thereby allowing the court to pierce the veil. This supports Professor Presser's theory that the Alaska Supreme Court desires a liberal piercing policy.

D. Instrumentality Includes Misconduct

Justice Boochever, writing for the court in *Bendix Corp. v. Adams*, recognized the potential overbreadth of a liberal (disjunctive) test that required only a showing of instrumentality; control is a normal expectation.
in the parent/subsidiary relationship and an important aspect of the corporate form. 130 Similarly, some control is necessarily attendant to the individual shareholder/corporation relationship in a close corporation. Professor Presser has criticized Alaska's liberalization as "inconsistent with traditional piercing the veil learning ... [and] economically inefficient," 131 noting that such liberalization may ... seriously undercut the policy of encouraging use of the corporate form, by providing a means for piercing the veil when contract creditors might have been fully knowledgeable about the "mere instrumentality" nature of a subsidiary, and still chosen to contract with the subsidiary on that basis. 132

Indeed, many of the Powell factors may be present in the normal corporate existence, potentially imposing liability upon entities or persons who were merely shareholders of corporations evidencing a few of the Powell factors. Essentially, such liberalization could threaten the fundamental corporate principle of limited liability, thereby eliminating a major incentive to incorporate.

The application of the disjunctive test is unlikely to cause such consequences, however, since a showing of instrumentality necessarily involves a degree of corporate misconduct. The disjunctive test, as applied by the Alaska Supreme Court, includes an inquiry into corporate wrongdoing through either the formal misconduct prong or through the control inquiry. Although the eleven-point inquiry of the control prong does not directly address corporate misconduct, it does serve to uncover corporate misconduct. 133 The Powell inquiry assists the court in characterizing the actions of the corporation and in deciding whether corporate control is for proper purposes. Professor Clark has noted the propriety of requiring some indicator of misuse where the court pierces the veil based solely upon a finding of excessive control:

[T]he court may find that random instances of self-dealing and mismanagement, in the context of the shareholder's failure to keep corporate books and observe corporate formalities, his or its mingling of corporate and personal (or parent company) assets, and various other utterances and acts which suggest too weak a faith in the reality of the corporate fiction, is sufficient to make the shareholder unlimitedly liable. All of the latter kinds of "indicia" of [instrumentality] ... are, upon analysis, singularly lacking in direct relevance to the question of the existence, and the amount, of harm caused the outside creditor by the

130. See id. at 32 (quoting 6 CAVITCH, supra note 43, § 120.05[2][b]).
131. PRESSER, supra note 6, § 2.02, at 2-8 n.10.
132. Id.
133. Professor Powell himself notes that some elements of the eleven-point inquiry indicate misconduct. POWELL, supra note 26, § 6(h)-(k), at 17-19, § 13(e), at 75.
misbehavior of the controlling shareholder. Yet these indicia do at least suggest that fraudulent transfers may have taken place . . . and when sufficiently suffused with intimations and evidence of some actual self-dealing, may create the appearance of a justification for going beyond the limits imposed by doctrine.134

As a result, the “innocent instrumentality” shareholder is not unduly threatened. The disjunctive test applied by the Alaska Supreme Court resembles its conjunctive test in that some wrongdoing must be shown to pierce the veil. However, the tests differ in the degree of wrongdoing required. The conjunctive test requires a strong showing of misconduct that defeats public convenience, justifies wrong, commits fraud, or defends crime. On the other hand, the disjunctive test requires only that the decision to pierce the veil under the instrumentality prong be supported by some suggestion of fraud-like misuse of the corporate form, i.e., that the control itself was suspicious or improper. Thus, the misconduct aspect of the instrumentality prong entails a much less stringent requirement.135 Of course, if the more serious misconduct satisfying the conjunctive test were present, the court employing the disjunctive test could still pierce the veil.

Consideration of the results of the court’s eleven-factor analyses in cases where the court pierced the veil demonstrates that the instrumentality examination tends to uncover inherent misconduct. In McKibben v. Mohawk Oil Co.,136 the subsidiary that existed as a co-venturer was clearly a shell corporation created for the purpose of limiting liability with regard to the speculative mining venture.137 In such a transaction, the contracting parties have expectations as to corporate control and liability and make business decisions in reliance on those expectations.138 Based on the facts of McKibben, the court was probably concerned that the plaintiff understood that the parent corporation would be liable for its

134. Clark, supra note 3, at 553 (footnotes omitted).
135. This is consistent with Professor Fessler’s analysis of the piercing cases. While Professor Fessler does not address the dichotomy of the conjunctive and disjunctive tests, he does point out that in the classical inquiry into misconduct, the “big wrong” was “being deflated” to the point where “the ‘big’ had gone out of the ‘wrong.’” Fessler, supra note 1, at 58-59. Professor Fessler’s article and this note both maintain that the court has advanced a liberal test under which an inquiry into control or instrumentality is the preferred standard. Nonetheless, the court has been reluctant to pierce absent some showing, however minor, of corporate misuse or misconduct.
137. Nine of the eleven Powell factors existed. The subsidiary was created, entirely owned, financed and directed by the parent. Furthermore, the corporation had no employees and was severely undercapitalized. Finally, there was commingling of assets and property, indicating a relationship with the corporation that might have prompted a third party to believe that the parent bore some responsibility for the actions and obligations of the subsidiary. Id. at 1230.
138. Clark, supra note 3, at 543-44.
subsidiary, which was inadequately capitalized given the transaction. In *Husky Oil N.P.R. Operations v. Sea Airmotive, Inc.*, a sibling shell was similarly created by a party to a fuel contract, allowing that party to make a profit on fuel transfers effected through the sibling while representing such transfers as being "at cost" as required by the contract. In both of these cases, the Powell inquiry was sufficient to uncover the fraud-like misconduct of the corporate entities.

In contrast, the Powell inquiries that led to decisions declining to pierce the veil did not uncover the type of deception or indicia of misuse noted above. These decisions generally involved normal relations between previously existing corporations or shareholders acting in typical situations. In those cases, the level of control naturally found in parent/subsidiary and close corporation contexts did exist, but there was no suggestion of misuse connected to such control.

Many states considering the instant issue have adopted a conjunctive test but have required a broader "injustice" prong, rather than a misconduct prong, to supplement the control inquiry. Such states naturally include corporate misconduct as one possible form of injustice. The functional application of Alaska's disjunctive test, with its inherent consideration of instrumentality plus an additional lesser requirement of misuse or "suspicious instrumentality," would qualify as an exemplar of a standard utilizing a control inquiry with an injustice prong. Thus, while there is extraterritorial support for both the strict conjunctive and disjunctive tests, there is also support for Alaska's hybrid formulation.

### IV. Conclusion: A Disjunctive Test for the Future

Notwithstanding the relative doctrinal confusion found in Alaska's veil-piercing cases, the decisions of the Alaska Supreme Court nonetheless warrant the observation that "in spite of conflicting and misleading dicta the judicial hunch usually comes through to a correct decision." In

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140. *Id.* at 533-34. Ninety-six percent of the stock of the sibling shell was owned by the president of the party to the contract. Moreover, the shell had no income, employees or equipment. *Id.*
141. For example, California requires "unity of interest and ownership" and an "inequitable result" to pierce the veil. *PRESSER*, supra note 6, § 2.05, at 2-30 & n.44 (quoting Automotriz Del Golf, de Cal. S.A. v. Resnick, 306 P.2d 1 (Cal. 1957)). Likewise, Arizona requires "alter ego" and a showing that "observance of the corporate form would sanction a fraud or promote injustice." *Id.*, *supra* note 6, § 2.03, at 2-10 (citing Employers Liability Assurance Corp. v. Lunt, 313 P.2d 393 (Cal. 1957)).
In essence, the court has disregarded the corporate entity in cases where corporate forms have been misused either to constitute a mere instrumentality or to effect more serious forms of misconduct. The court has had difficulty in advancing a clear standard in cases in which there has been a showing of instrumentality plus additional misconduct. In such instances, its confusion and failure to clarify the proper test have led it to phrase such decisions as implying dual requirements of instrumentality and additional wrongdoing. Thus, the court has incorrectly suggested the propriety of a conjunctive test, thereby clouding the veil-piercing doctrine in Alaska.

The court’s most recent veil-piercing decision in Murat v. F/V Shelikof Strait is a positive step toward clarifying the propriety of the disjunctive test. That decision, however, requires further development. The Murat decision correctly conceptualized that there is some overlap between instrumentality and misconduct. The Powell inquiry (and its Uchitel adaptation to the individual shareholder/corporation context) can in fact illuminate the misconduct prong. Nevertheless, the strictures suggested in Murat are not completely desirable. The Powell control inquiry should not be the formal method of examining misconduct. First, the history of the court’s decisions indicate the propriety of the disjunctive test, while the Murat formulation of the standard effectively operates as a conjunctive test. Additionally, the Murat test might prove to be underinclusive. One could imagine a situation in which there was corporate misconduct but not of the type that would be revealed under a Powell control inquiry. Such a situation would not result in piercing the veil under Murat. Without the formal limitation of the Powell inquiry, however, the court would be able to pierce the veil under the disjunctive test.

It is important to preserve the separate inquiry into corporate action which might tend to “defeat public convenience, justify wrong, commit fraud or defend crime,” but might not necessarily amount to instrumentality in the traditional (Powell) sense. The court has shown a reluctance to pierce the veil without a showing of either “misconduct” under the conjunctive test or the suggestion of misuse under the control prong of the disjunctive test. This indicates that a construction of the Alaska test as a

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144. See supra footnotes 89-93 and accompanying text.
conjunctive "control plus injustice" test, similar to that formulated in other states, would also be misplaced. That test encompasses a much broader spectrum of corporate behavior than does the "control plus suggestion of improper purpose or misuse" approach suggested by this author. The injustice test as applied by other states would cover such improper purposes, but they might exceed the degree of liberalization desired by the Alaska Supreme Court.

The historical wisdom of the court and the logic of Murat suggest a practicable approach that will best be served by a final adoption and clarification of the disjunctive test. An Alaska court should pierce the corporate veil where it finds either (1) excessive control amounting to instrumentality (under the established quantitative inquiries) that also suggests misuse or an improper purpose or (2) evidence of such corporate misconduct that tends to defeat public convenience, justify wrong, commit fraud or defend crime, but is not necessarily connected to excessive control. Such a pronouncement by the court will preserve the integrity of limited corporate liability and ensure that the principles and policies behind incorporation in Alaska will not be disturbed. A consistent and predictable veil-piercing doctrine will protect both investors and corporations by clarifying the expectations that the court has for persons or entities utilizing the corporate form.

Philip Reed Strauss

146. See supra note 141 and accompanying text.

147. Under the proposed formulation of the doctrine, it appears that each of the court's decisions detailed in this note reached the same result with respect to piercing the veil as the optimistic Professor Latty would have predicted. See supra note 142 and accompanying text.

148. Subsequent to the submission of this note, United States District Court Judge James K. Singleton ruled that the "mere instrumentality" test alone was sufficient to justify a grant of summary judgment piercing the veil under Alaska law, thereby indicating the propriety of the disjunctive test. See City of Fairbanks v. Amoco, No. F-87-054 (D. Alaska April 2, 1992).