

Taking the *Entergy* Out of Louisiana’s Single Business Enterprise Theory

I. INTRODUCTION

Over fifteen years ago in *Green v. Champion Insurance Co.*,¹ the Louisiana’s First Circuit Court of Appeal introduced a controversial form of piercing the corporate veil called “single business enterprise” or “SBE” theory. Traditionally, veil-piercing has been used sparingly in Louisiana and only in cases where either fraud or misuse of the corporate form has taken place. In *Green*, the first circuit employed an un-weighted eighteen factor test that focused primarily on control rather than fraud or misuse of the corporate form to find that a group of affiliated businesses was a single business enterprise. Recently, the second circuit in *Town of Haynesville, Inc. v. Entergy Corp.*² overturned a trial court decision that used *Green*’s SBE theory in a contract dispute to impute the actions of one electric utility subsidiary onto another. This decision is important for two reasons. First, the second circuit should be praised for refusing to drastically expand veil-piercing jurisprudence through broad application of SBE theory and rejecting its use in the contract interpretation arena. Second, language in the court’s opinion could and should be applied more broadly to reject any application of SBE theory where there is no showing of fraud or misuse of the corporate form.

SBE theory, as established by the first circuit in *Green*, ignores traditional veil-piercing jurisprudence and allows Louisiana courts to disregard corporate separateness based solely on a finding that one company is controlled by another. Application of this theory would allow courts to disregard the corporate entity every time it found a type of relationship exemplified by the classic parent-subsidiary arrangement.³ Furthermore, the eighteen factor test offered by the first circuit for applying SBE theory is not only methodologically unworkable, but also represents an extremely poor policy choice for this state. Lastly, broad application of SBE theory to legitimate multiple-entity business structures could seriously weaken the firmly established practice in Louisiana of

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1. 577 So. 2d 249 (La. App. 1st Cir. 1991).

2. (*Haynesville II*) 956 So. 2d 192 (La. App. 2d Cir.), writ denied, 964 So. 2d 334 (La. 2007).

3. GLENN G. MORRIS, SINGLE BUSINESS ENTERPRISE BACKGROUND MEMORANDUM—REPORT OF THE LOUISIANA STATE LAW INSTITUTE TO THE LOUISIANA STATE LEGISLATURE IN RESPONSE TO HOUSE CONCURRENT RESOLUTION NO. 138 OF THE 2001 REGULAR SESSION 1 (Nov. 29, 2004).

respecting the separate legal identity of businesses and the legislative grant of limited liability to corporations and limited liability companies. This in turn could have detrimental effects on Louisiana's ability to encourage business development in this state.

In an important opinion, the second circuit in *Haynesville*⁴ recognized these dangers and overturned a trial court decision that applied SBE theory in a contract interpretation setting. More specifically, the second circuit refused to allow the plaintiff to use SBE theory to effectively re-write the contract and impute the actions of one affiliated subsidiary to another in order to trigger a most-favored-nation-clause.⁵ Though the court clearly rejected the use of SBE theory in the arena of contract interpretation, it is arguable that language in the decision went even further and calls into question any use of SBE theory where there is no showing of fraud or misuse of the corporate form. Therefore, the *Haynesville* decision may represent the beginning of the rejection of SBE theory and its reliance on control alone to disregard corporate form by Louisiana courts. If this is the case, then the second circuit should be praised for interjecting some much needed restraint into SBE jurisprudence.

Part II of this Case Note briefly explores the origins of SBE theory and the eighteen factor test established by the first circuit in *Green v. Champion Insurance Co.*,⁶ and then discusses the many criticisms of SBE offered by various commentators. Part III examines the facts and procedural history of the second circuit case *Town of Haynesville v. Entergy Corp.*⁷ and then argues that the court is not only rejecting the expansion of SBE theory, but calling into question any application of SBE that relies solely on the factor of control to disregard corporate form.

II. THE ORIGINS OF SBE THEORY IN LOUISIANA AND ITS DETRIMENTAL EFFECTS ON BUSINESS POLICY

In *Green v. Champion Insurance Co.*⁸ the first circuit introduced SBE theory, a radical new form of veil-piercing that allows Louisiana courts to disregard certain aspects of corporate identity

4. *Haynesville II*, 956 So. 2d 192.

5. See generally *id.* (referring to the "most-favored-nation-clause," which is defined by *Black's Law Dictionary* as "1. A clause in an agreement between two nations providing that each will treat the other as well as it treats any other nation that is given preferential treatment. 2. By extension, such a clause in any contract, esp. an oil-and-gas contract." BLACK'S LAW DICTIONARY 1035 (8th ed. 2004)).

6. 577 So. 2d 249.

7. 956 So. 2d 192.

8. 577 So. 2d 249.

that have traditionally been afforded to affiliated business groups. In its most simple form, traditional veil-piercing is used to disregard the corporate form and impose liability for corporate or LLC obligations vertically onto the assets of an entity's shareholders, be they human or juridical.⁹ The effect of SBE theory, on the other hand, is to pierce the veil of all businesses in an affiliated group—"upstream, downstream, and sideways"¹⁰—effectively removing all corporate distinctions, and to treat the group as one unified entity subject to the debts of any one of the separate affiliates.¹¹

SBE theory and the eighteen factor test established in *Green* represent a considerable expansion of traditional veil-piercing jurisprudence because it does not require a finding of fraud or misuse of the corporate form to extinguish a business entity's limited liability protection. Despite the Louisiana courts' treatment of traditional veil-piercing as a radical remedy¹² available only under exceptional and limited circumstances,¹³ the first circuit in *Green* established a rule that would eliminate limited liability between the majority of parent and subsidiary companies based solely on the fact that one company controls the other.¹⁴ This radical new approach to veil-piercing is both a deeply flawed legal framework and a poor policy choice for this state. First, in practical application, the un-weighted eighteen factor test is highly unworkable and allows for widely disparate results. Second, SBE theory poses a significant risk to a core tenet of Louisiana business law: respecting the legal separateness and limited liability protection afforded by the corporate form.

A. *Green v. Champion Insurance Co. and the Origins of SBE*

In *Green*, the Commissioner of Insurance brought suit against an insolvent insurance company, its parent corporation, and other affiliated entities in its business group. The Commissioner, relying on considerable evidence of fraud and the absence of adherence to

9. See generally GLENN G. MORRIS & WENDELL H. HOLMES, BUSINESS ORGANIZATIONS § 32, in 8 LOUISIANA CIVIL LAW TREATISE 50 (1999).

10. MORRIS, *supra* note 3, at 7.

11. *Id.*

12. *Id.* at 2. (citing *Amoco Prod. Co. v. Texaco, Inc.*, 838 So. 2d 821, 833 (La. App. 3d Cir.), *writ denied*, 845 So. 2d 1096 (2003)).

13. *Id.* (citing *Riggins v. Dixie Shoring Co., Inc.*, 590 So. 2d 1164 (La. 1911); *F.G. Bruschweiler (Antiques) Ltd. v. GBA Great Britain Antiques, LLC*, 860 So. 2d 644 (La. App. 5th Cir. 2003); *Shoemaker v. Giacalone*, 793 So. 2d 230 (La. App. 2d Cir.), *writ denied*, 804 So. 2d 632 (2001)).

14. *Id.* at 3.

even basic corporate formalities amongst the business group,¹⁵ alleged that the affiliated entities had been operated as a “single business enterprise.” The first circuit agreed with the commissioner and applied an un-weighted eighteen factor test to determine that Champion was an SBE. The first circuit then directed the entire group’s assets to be pooled and used to satisfy outstanding policy holder claims of Champion.

B. Criticism of Single Business Enterprise Theory and the Eighteen Factor Test

SBE theory and the eighteen factor test have received considerable criticism as both a flawed legal framework and a poor policy choice for this state.

1. SBE: A Flawed Legal Framework

In establishing SBE theory, the first circuit reasoned that:

the legal fiction of a distinct corporate entity may be disregarded when a corporation is so organized and controlled as to make it merely an instrumentality or

15. Champion Insurance was a subsidiary of Boardwalk International, Inc., which owned a number of other closely held corporations. John M. Eicher, Jr. owned 84% of the stock of Boardwalk, Eicher and members of his immediate family were the controlling shareholders of all of the nine corporate entities that made up the Boardwalk group, and they all acted as overlapping directors and officers of the various corporations. Most of the entities were operated out of the same office, and all of the entities shared the same accountant. Lastly, Champion Insurance had no employees of record. *Green v. Champion Ins. Co.*, 577 So. 2d 249, 251–53 (La. App. 1st Cir. 1991).

The Court also found:

[t]here was a tremendous amount of intercompany debt due to the lack of adequate capitalization . . . Substantial intercompany debt was created to enable other corporations or individuals to use the assets of one corporation to make purchases or invest in one of the other corporations. Cash would leave one corporation and flow through a series of other corporations or individuals within a short period of time thereby creating assets or capital on the books of those involved. These funds would ultimately be returned to the initial corporation in the lending cycle. Corporate formalities were not observed with respect to annual shareholder meetings, formal board meetings, and corporate authorization for major transactions . . . Activities between members of the group were not properly reflected on the books of these corporations. Documentation of many of these transfers was inadequate . . . Costs for the construction of a shareholder’s home were buried in Champion books as part of the cost of constructing Champion’s office building.

Id. at 257–59.

adjunct of another corporation. If one corporation is wholly under the control of another, the fact that it is a separate entity does not relieve the latter from liability.¹⁶

The first circuit stated that courts should look to the substance of the corporate structure rather than its form and enumerated eighteen factors to use when determining if a business group is in fact an SBE.¹⁷

Even ignoring the inherent impracticality of consistently applying *any* un-weighted eighteen factor test, the *Green* test has received substantial criticism as a flawed legal framework. The two main criticisms of the test are that a large number of the factors are readily found in almost any parent-subsiary or closely affiliated business relationship¹⁸ and that a number of the listed factors appear to contradict one another.¹⁹

a. Factors Present in Nearly All Parent-Subsidiary Structures

If courts follow the test laid out by the first circuit, then most affiliated business entities would be “guilty” of a large number of the factors. The first factor, ownership of stock sufficient to give “working control” over an entity, favors piercing anytime a single

16. *Id.* at 257 (citing *Lucey Mfg. Corp. v. Oil City Iron Works*, 131 So. 57 (La. App. 2d Cir. 1930)).

17. These 18 factors include: (1) corporations with identity or substantial identity of ownership, that is, ownership of sufficient stock to give actual working control; (2) common directors or officers; (3) unified administrative control of corporations whose business functions are similar or supplementary; (4) directors and officers of one corporation act independently in the interest of that corporation; (5) corporation financing another corporation; (6) inadequate capitalization (“thin incorporation”); (7) corporation causing the incorporation of another affiliated corporation; (8) corporation paying the salaries and other expenses or losses of another corporation; (9) receiving no business other than that given to it by its affiliated corporations; (10) corporation using the property of another corporation as its own; (11) noncompliance with corporate formalities; (12) common employees; (13) services rendered by the employees of one corporation on behalf of another corporation; (14) common offices; (15) centralized accounting; (16) undocumented transfers of funds between corporations; (17) unclear allocation of profits and losses between corporations; and (18) excessive fragmentation of a single enterprise into separate corporations. Lastly, the court explained that the list is merely illustrative and is not an exhaustive list of all relevant factors. *Id.* at 257–58.

18. Kyle M. Bacon, Comment, *The Single Business Enterprise Theory of Louisiana’s First Circuit: An Erroneous Application of Traditional Veil-Piercing*, 63 LA. L. REV. 75, 86 (2002).

19. Daniel Q. Posin, *Turning Green: Louisiana’s Piercing-the-Corporate-Veil Jurisprudence and Its Economic Effects*, 79 TUL. L. REV. 311, 359 n.312, 362 (2004).

shareholder holds more than 51% of outstanding stock, a situation found between most parent corporations and wholly owned subsidiaries.²⁰ This is also true of the fifth and seventh factors; most parent corporations cause the incorporation of the subsidiary²¹ and likewise finance them.²² Additionally, many multiple entity businesses, in an effort to either take advantage of economic efficiencies or to ensure adequate control, have common employees (Factor 12), officers, and directors (Factor 2); share offices (Factor 14); and have some form of centralized accounting (Factor 15).²³ These practices have legitimate economic benefits and do not alone suggest any misuse of the corporate form.

b. Inconsistent Factors

A number of the factors also seem to contradict one another. For instance, the first circuit correctly identifies inadequate capitalization or “thin incorporation” as a valid factor in a veil-piercing analysis. Inexplicably, the court then goes on to penalize a parent corporation for: “[one] corporation financing another,” “[one] corporation paying the salaries and other expenses or losses of another corporation,” and “services rendered by the employees of one corporation on behalf of another corporation.”²⁴ All of these practices are perfectly legitimate examples of a parent corporation making capital contributions to a subsidiary.²⁵ Furthermore, these contributions also directly contradict a claim of undercapitalization.²⁶

2. SBE: A Poor Policy Choice for Louisiana

Broad application of SBE theory by Louisiana courts could lead to the erosion of the protection of limited liability and be

20. *Id.* at 359 n.307. Perhaps even less than 51% if the remaining stock ownership is highly fragmented.

21. This is the case unless the subsidiary is bought by the parent. But this fact clearly should not offer any more guarantee of limited liability than the formation of a subsidiary. *Id.* at 360 n.313.

22. *Id.* at 360 n.314.

23. *Id.* at 361 n.321.

24. *Id.* at 359–61.

25. Although the paid in capital requirement was eliminated in Louisiana in 1969, it is still obviously contemplated that a parent corporation will contribute capital contributions in the manner of cash and services to a wholly owned subsidiary. GLENN G. MORRIS & WENDELL H. HOLMES, BUSINESS ORGANIZATIONS § 8.26, in 7 LOUISIANA CIVIL LAW TREATISE 309 (2d ed. 2001) (citing 1928 La. Acts No. 250, §§ 3, 8; 1950 La. Acts No. 202, §1).

26. See Posin, *supra* note 19, at 359–61 nn.307–24.

damaging to business interests and economic development in this state. By failing to require a showing of fraud or misuse of the corporate form, SBE theory: (1) largely ignores the cautious body of jurisprudence surrounding traditional veil-piercing and undermines a core tenet of Louisiana business law; (2) ignores the myriad of legitimate reasons for a multiple-entity corporate form; (3) increases the cost of doing business; (4) discourages the investment of capital; (5) fails to consider the adverse and unintended effects on creditors; and (6) creates havoc with contractual relations.

a. SBE Theory Ignores Traditional Veil-Piercing Jurisprudence

SBE theory, as established by the first circuit, is a striking departure from traditional veil-piercing jurisprudence in that it lacks any mention of fraud or misuse of the corporate structure.²⁷ The Louisiana Supreme Court in *Riggins v. Dixie Shoring Co.* directly addressed a court's right to revoke a business entity's grant of limited liability and found that one of the primary components of piercing is to "prevent the use of the corporate form [to] defraud . . . creditors."²⁸ Where "the plaintiffs do not allege shareholder fraud, they bear a heavy burden of proving that the shareholders disregarded the corporate entity to such an extent that it ceased to become distinguishable from themselves."²⁹ In *Glazer v. Commission on Ethics for Public Employees*, the Court summarized its viewpoint:

If any general rule can be laid down in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; 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.³⁰

27. Not only does SBE theory ignore this body of jurisprudence, it arguably does so unnecessarily. Traditional veil-piercing, with a few minor alterations, seems perfectly capable of handling cases where courts applied SBE theory. See generally Bacon, *supra* note 18.

28. 590 So. 2d 1164, 1169 (La. 1992).

29. *Id.* at 1168 (citing *Chaney v. Godfrey*, 535 So. 2d 918, 921 (La. App. 2d Cir. 1988); *Am. Bank of Welch v. Smith Aviation, Inc.* 433 So. 2d 750, 755 (La. App. 3d Cir. 1983)).

30. 431 So. 2d 752, 758 (La. 1983) (quoting *United States v. Milwaukee Refriger. Transit Co.*, 142 F. 247, 255 (E.D. Wis. 1905)).

By removing fraud or misuse of the corporate form from the analysis, SBE theory is then left to be triggered by the mere factor of control.³¹ This too, directly conflicts with traditional veil-piercing analysis. As LSU Law Center's Vice Chancellor Morris stated in a Report of the Louisiana State Law Institute, "[p]roof of control alone, no matter how complete, is not enough to impose veil piercing liability under traditional law."³² Furthermore, the U.S. Supreme Court has recognized this principle and stated unequivocally:

Thus it is hornbook law that "the exercise of the 'control' which stock ownership gives to the stockholders . . . will not create liability beyond the assets of the subsidiary. That 'control' includes the election of directors, the making of by-laws . . . and the doing of all other acts incident to the legal status of stockholders. Nor will a duplication of some or all of the directors or executive officers be fatal."³³

Under Louisiana's traditional veil-piercing jurisprudence, control is necessary but not sufficient to impose liability.³⁴ The two main tests established by the jurisprudence require showing that either a corporation was the mere alter ego of its controlling shareholder *and* had engaged in some type of fraud, or that corporate formalities were so ignored as to make the shareholder and the corporation indistinguishable.³⁵ Clearly, the eighteen factor

31. In *Miller v. Entergy Services, Inc.*, the fourth circuit, relying on *Green*, stated:

If one corporation is wholly controlled by another, the fact that it is a separate entity does not relieve the latter from liability. In that situation, the former corporation is considered to be the alter ego or business conduit of the latter. Courts can pierce the veil of a corporation in order to reach the 'alter egos' of the corporate defendant.

913 So. 2d 143, 148 (La. App. 4th Cir. 2005) (citing *Green v. Champion Ins. Co.*, 577 So. 2d 249, 257 (La. App. 1st Cir.), *writ denied*, 580 So. 2d 668 (La. 1991)).

32. MORRIS, *supra* note 3, at 3.

33. *United States v. Bestfoods*, 524 U.S. 51, 61–62 (1998) (citation omitted).

34. MORRIS, *supra* note 3, at 3 n.14.

35. *Id.* (citing *Riggins v. Dixie Shoring Co., Inc.*, 590 So. 2d 1164, 1168 (La. 1991); *Amoco Prod. Co. v. Texaco, Inc.*, 838 So. 2d 821, 833 (La. App. 3d Cir.), *writ denied*, 845 So. 2d 1096 (La. 2003)). Recent cases say that, in the absence of fraud, the plaintiff bears a "heavy burden" of proving indistinguishability. *See, e.g.*, *F.G. Bruschweiler (Antiques) Ltd. v. GBA Great Britain Antiques, LLC*, 860 So. 2d 644, 651 (La. App. 5th Cir. 2003). The courts also consider the following five factors either independently or, more commonly, as part of the alter ego or indistinguishability analysis: (1) commingling of corporate and personal funds; (2) observance of statutory formalities in the incorporation and operation of the company; (3)

test, which makes no mention of fraud or misuse of the corporate form, is in direct conflict with this parallel jurisprudence.

The rationale for relaxing the standard for courts to revoke the protection of limited liability in SBE cases is based perhaps on the misguided notion that since only capital contributions (the assets of the affiliated businesses) are being imperiled, then the restraint shown in traditional veil piercing cases (where the ultimate human shareholders' assets are liquidated) is unneeded.³⁶ This is in direct contravention of the Louisiana Supreme Court's stated policy of respecting the limited liability of parent corporations on equal terms as that of a human shareholder.³⁷

The law has long been clear that a corporation is a legal entity distinct from its shareholders and the shareholders of a corporation . . . shall not be personally liable for any debt or liability of the corporation. The same principle applies where one corporation wholly owns another.³⁸

Thus, some courts are subjecting wholly-owned affiliates to a theory they have soundly rejected between wholly-owned corporations and a human shareholder.³⁹

This cavalier attitude towards the revocation of the protection of limited liability, where capital assets are given less protection than those of a human shareholder, is unsound.⁴⁰ Major public corporations are responsible for the vast majority of investment capital that the grant of limited liability is supposed to encourage and have just as much reason as an individual human shareholder to avoid risking all of their capital on a new venture.⁴¹

Furthermore, granting greater protection to capital assets does not necessarily protect the human shareholder from significant harm.⁴² First, sole shareholders of small businesses will often leave the majority of the profits in the various businesses themselves.⁴³ Second, many of those businesses are commonly held in multiple

undercapitalization; (4) whether a separate bank account and financial records have been maintained; and (5) whether regular director and shareholder meetings have been held. *Id.* (citations omitted).

36. MORRIS, *supra* note 3, at 7–8.

37. *See* Bujol v. Entergy Servs., Inc., 922 So. 2d 1113 (La. 2004).

38. *Id.* at 1127–28 (citations omitted).

39. MORRIS, *supra* note 3, at 5.

40. *See id.* at 5–6.

41. *Id.* at 6.

42. *Id.*

43. *Id.*

corporations or LLCs to minimize risk.⁴⁴ Thus, the entrepreneur who creates a new business entity before re-investing capital to open a second gas station or restaurant will be severely impacted if those capital assets are pooled and liquidated under SBE theory.

b. SBE Theory Ignores the Myriad of Legitimate Reasons for a Multiple-Entity Corporate Structure

The privilege of limited liability is granted to corporations by the legislature in order to encourage development and capital investment.⁴⁵ The multiple entity business group allows businesses to organize and separate their operations by location, function, or degree of risk to minimize exposure or to insulate a particular pool of assets from a risky new line of business.⁴⁶ SBE theory, with its emphasis on control, ignores these legitimate business goals and punishes businesses for taking advantage of the very benefits the legislature intended to confer upon them. Thus, as SBE theory places the protection of limited liability in jeopardy, it disregards the legislature's intent and threatens to "turn Louisiana's traditional limited liability regime on its head."⁴⁷

c. SBE Theory Discourages the Investment of Capital and Increases the Cost of Doing Business

If the SBE doctrine set forth in *Green* allows Louisiana courts to disregard the multiple-entity business structures that are accepted throughout the rest of the United States,⁴⁸ corporations may think twice before investing in Louisiana business opportunities.⁴⁹ In *Bujol v. Entergy Services, Inc.*, the Louisiana Supreme Court explicitly recognized the roll of limited liability in the investment of capital, noting that "[t]he fundamental purpose of the corporate form is to promote capital by enabling investors to make capital contributions to corporations while insulating separate corporate and personal asset[s] from the risks inherent in

44. *Id.*

45. Bacon, *supra* note 18, at 104 (citation omitted).

46. *Id.* at 104–05 (citation omitted).

47. MORRIS, *supra* note 3, at 4.

48. *Id.* at 4 (citing *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (citation omitted) ("It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the debts of its subsidiaries.")).

49. *Id.* at 6.

business.”⁵⁰ Separating a riskier line of business in a separate corporation is a common and accepted business practice. A multiple entity structure allows for the protection of the core business’s assets while insulating it from the higher insurance premiums and financing costs that occur in ventures with a higher degree of liability or risk.⁵¹ If the protection of limited liability cannot be maintained by establishing a separate entity, then businesses will be forced to either forego undertaking new ventures or will have to unnecessarily suffer increases in the cost of doing business.⁵² Both of these alternatives could negatively impact business development in this state.

d. SBE Theory Can Produce Adverse and Unintended Effects for Creditors

The effect of SBE theory is to pierce the veil of all businesses in an affiliated group—“upstream, downstream, and sideways”⁵³—effectively removing all corporate distinctions and to treat the group as one unified entity subject to the debts of any one of the separate affiliates.⁵⁴ In cases where the blended SBE company is able to pay a piercing judgment and remain solvent, the effect of SBE on other creditors is nil.⁵⁵ While the controlling shareholder of the blended company will see the equity of the combined companies reduced by the amount of the judgment, the creditors of the individual companies will not be harmed as the value of their claims will remain unchanged.⁵⁶ But, where the piercing judgment exceeds the equity of the blended group, the interests of unsecured creditors of the individual businesses will be directly affected.⁵⁷ Thus, creditors of the weaker pierced entity are allowed to recover their debts at the expense of unsecured creditors of the stronger entities in the group.⁵⁸ Where the legislature has provided for such

50. 922 So. 2d 1113, 1128 (La. 2004) (citations omitted).

51. MORRIS & HOLMES, *supra* note 9, § 32.15, at 98–99.

52. See MORRIS, *supra* note 3, at 7 n.19 (“Even if an entrepreneur is willing to live with this increased risk of liability, his lenders and insurers may not be—at least not at the same interest rates or insurance premiums. If they cannot loan money or insure risks in separate companies separately, they will have to charge rates for the risks they incur as if they were lending or insuring the entire SBE-blended group of companies.”).

53. *Id.* at 7.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

an outcome,⁵⁹ this result may be justified, but where no explicit expression of public policy is present, courts should be particularly careful about the effects SBE theory can have on unrelated creditors.

e. SBE Theory Poses a Serious Threat to Contractual Relationships

As with traditional veil-piercing, the dissolution of corporate separateness and revocation of the protection of limited liability is particularly contentious in the contractual setting. It is black letter contract law that when two parties enter into an agreement, they are bound by the terms of that agreement. The application of SBE theory alters this bedrock principle in two distinct ways. First, SBE theory may allow a party suing for contractual damages to enforce a judgment against the assets of an affiliated entity even without a contractual guarantee by that entity. Second, in arguably the most controversial application of SBE theory to date, a plaintiff may seek to use SBE to change the agreed upon contractual obligations themselves. It is this attempted radical application of SBE theory that was at issue in the second circuit case *Town of Haynesville v. Entergy Corp.* and is the subject of this Case Note.

The general rule in traditional veil-piercing cases is that:

Where a creditor has agreed to look only to the assets of the corporation for his payment, that agreement will be enforced unless, in some rough sense, the creditor should not be expected to understand the nature of his agreement, or the corporate shareholder has either committed fraud or violated the implied contractual obligation of good faith.⁶⁰

The removal of the requirement of fraud or misuse of the corporate form allows plaintiffs to use SBE theory to obtain an un-bargained for benefit equivalent to a windfall. Particularly in cases between sophisticated parties who were represented by counsel, one party should not be able to use SBE theory to judicially rewrite a contract to include an un-bargained for guarantee by a parent or affiliated corporation. Unlike the innocent tort victim who is unable to bargain for a guarantee,⁶¹ parties who willingly enter into a contract should face a higher hurdle when attempting

59. See MORRIS & HOLMES, *supra* note 9, § 32.15, at 99. Bankruptcy law also provides for the rare but similar outcome through the doctrine of substantive consolidation. *Id.*

60. *Id.* § 32.06, at 71.

61. Even in a tort situation, courts have been unwilling to pierce the corporate veil without extraordinary circumstances. See generally MORRIS & HOLMES, *supra* note 9, §32, at 50–101.

to pierce the corporate veil. Justice Dennis's concurring opinion in the denial of rehearing in *Riggins v. Dixie Shoring Co.* made clear that:

Where the action underlying the request to pierce the corporate veil is based on contract, courts have usually applied more stringent standards to piercing the corporate veil Accordingly, absent very compelling equitable considerations, courts should not rewrite contracts or disturb the allocation of risk the parties have themselves established.⁶²

Finally, the use of SBE theory to retroactively alter agreed upon terms in a contract is a notion that most business lawyers would find repugnant. Businesses commonly use the multiple entity form to legitimately separate obligations and pools of assets.⁶³ Application of SBE theory in these cases would allow one party to impute the performance and obligations of a contract with another party to all of the entities affiliated with that party. This is the equivalent of negotiating as part of a purchase price a specific percentage of the profits of a business and then later demanding that the buyer include in the calculation profits from all other businesses the buyer controls. This is basically using SBE not to satisfy a debt, but to change the value or nature of the debt itself. As outlandish as this may seem, the imputation of the obligations of one business onto its affiliate are the underlying facts of the second circuit decision in *Town of Haynesville v. Entergy Corp.*

III. TOWN OF HAYNESVILLE V. ENTERGY CORPORATION

The second circuit in *Haynesville* overturned a trial court decision that had greatly expanded the application of SBE theory into the realm of contract interpretation. This case is particularly interesting for SBE jurisprudence, as it involves an extremely expansive application of SBE theory against a defendant that is highly regulated by both state and federal authorities. Arising out of a franchise fee dispute between a municipality and a utility company, the case presented the issue of whether the town was entitled to a higher fee, as per the terms of a most favored nation clause, due to the actions of a separate subsidiary of the defendant's affiliated group. More specifically, did Entergy Louisiana have to pay the Town of Haynesville the same higher

62. 592 So. 2d 1282, 1285 (La. 1992) (citation omitted).

63. MORRIS & HOLMES, *supra* note 9, § 32.05, at 69.

rates that Entergy Gulf South, a separate incorporated company, paid to some towns in Texas?

Although the town did not allege fraud or misuse of the corporate form, the trial court found in favor of the municipality and declared that defendant Entergy Corporation was a single business enterprise. While the second circuit originally denied Entergy's motion for summary judgment on the SBE issue, it correctly overturned the trial court on appeal and refused to extend SBE theory into dangerous new territory.

This section will begin by examining the factual and procedural history of *Haynesville*, including the second circuit's denial of Entergy's motion for summary judgment. It will then analyze the second circuit's opinion on appeal and discuss the extent of the opinion's ramifications on the use of SBE theory by Louisiana courts.

A. Facts and Procedural History

Although the underlying facts of the case appear relatively clear, the procedural history is a bit more complicated. In January of 1985, Louisiana Power and Light Company (LP&L), later known as Entergy Louisiana (ELI),⁶⁴ entered into a twenty-five year franchise agreement with the Town of Haynesville.⁶⁵ In exchange for the exclusive right to provide the Town electric service, LP&L agreed to pay a 2% franchise fee of its gross income derived from the franchise.⁶⁶ The parties additionally entered into a side letter agreement which contained a most favored nation clause.⁶⁷ The clause provided:

As part and portion of the consideration for the franchise renewal contract granted by the Town of Haynesville to Louisiana Power and Light Company (the "Company") . . . the Company does hereby further agree, that in the event the Company contracts with any other town or municipality in the renewal of its franchise contracts to pay as a franchise fee more than two (2%) percent of the gross receipts of the Company from the sale of electric service . . . the Company will increase the franchise fee more than two (2%) percent of gross receipts of the Company from the sale of electric

64. For simplicity's sake, the author will use the current name Entergy Louisiana (ELI).

65. *Town of Haynesville, Inc. v. Entergy Corp. (Haynesville II)*, 956 So. 2d 192, 194 (La. App. 2d Cir.), *writ denied*, 964 So. 2d 334 (La. 2007).

66. *Id.*

67. *Id.* at 195.

service . . . [and] the Company will increase the franchise fee paid to the Town of Haynesville.⁶⁸

In 1949, Middle South Utilities, Inc. (MSU) was formed as a public utility holding company under the Public Utility Holding Company Act of 1935 (PUHCA).⁶⁹ In its role as holding company, MSU owned 100% of the stock in four subsidiaries: Arkansas Power and Light Company, Mississippi Power and Light Company, Louisiana Power and Light Company, and New Orleans

68. *Id.* at 194.

69. *Id.* The PUHCA was passed in 1935 as a direct response to the overly complex and confusing structure of public utility holding companies. AMY ABEL, CRS REPORT—ELECTRICITY RESTRUCTURING BACKGROUND: PUBLIC UTILITY HOLDING COMPANY ACT OF 1935 (PUHCA) (1999), <http://ncseonline.org/NLE/CRSreports/energy/eng-47.cfm>. Prior to this legislation, pyramiding of vast numbers of operating utilities led to large portions of the national private electric system being held by a small number of holding companies. *Id.* This monopolization led to nefarious lending schemes between affiliated businesses, excessive consumer utility rates, and instability in the overall market. *Id.* By 1932, some of these pyramids were separated by as many as ten layers and three of the largest controlled 45% of the electricity generated in the United States. *Id.* In the seven year period surrounding the stock market crash, fifty three holding companies with combined securities of \$1.7 billion went into bankruptcy or receivership. *Id.* Furthermore, this convoluted system produced large complex national companies that became virtually impossible for state and local governments to effectively regulate. *Id.*

The PUHCA was enacted to benefit both consumers and investors by eliminating unfair practices and other abuses by electricity and gas holding companies through federal control and regulation of interstate public utility holding companies by the SEC and FERC. *Id.* See also Heather Curlee, *Examining EPACT 2005: A Prospective Look at the Changing Regulatory Approach of the FERC*, 63 WASH. & LEE L. REV. 1649, 1651–53 (2006). Establishing a parallel system of regulations, the 1935 Public Utility Act contained two titles, which created corresponding tracks of regulation. PUHCA was the first one which covered the Securities and Exchange Commission (SEC). The second title was the Federal Power Act (FPA) and the Federal Power Commission (now the Federal Energy Regulatory Commission—FERC). *Id.* at 1650. The SEC was tasked with improving investor protection through greater regulation of the complex public holding company structure. *Id.* The FERC was to protect the ratepayers through regulation of wholesale interstate energy sales. *Id.* Holding companies subject to the PUHCA were then required to register with the SEC and could be no more than twice removed from their controlled utilities. *Id.* When the PUHCA was repealed by the Energy Policy Act of 2005, the FERC became the sole regulatory body over the electric industry and was given control of much of the SEC's previous oversight duties. *Id.* at 1651 (citing Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594). The Energy Policy Act also allows state and local regulators, to the extent necessary to discharge their duties, access to books and records of the holding companies. *Id.* Thus, even though PUHCA has been repealed, the electric utility industry is still subject to comprehensive state and federal regulation designed to prevent fraud and misuse of the corporate form. *Id.*

Public Service, Inc.⁷⁰ In 1989, MSU changed its name to Entergy Corporation with the subsidiaries subsequently adopting the Entergy name plus their respective geographic and jurisdictional identifiers over the next seven years.⁷¹ In 1992, Entergy Corporation announced its intention to acquire Gulf States Utilities, Inc., a public utility company operating in southwest Louisiana and southeast Texas, which became Entergy Gulf South (EGS).⁷²

In June of 2000, the town of Haynesville brought suit against ELI and Entergy Corporation, alleging that ELI was in breach of the most favored nation clause due to 1) ELI's payment of a 3% franchise fee to the city of West Monroe and 2) EGS' payment of a 5% franchise fee to municipalities in Texas under a single business enterprise theory.⁷³ In 2001, the trial court granted Haynesville's motion for summary judgment on the 3% ELI claim and denied Entergy Corporation's motion seeking a judgment that ELI was not liable under the 5% SBE claim.⁷⁴ Entergy appealed.⁷⁵

In 2003, the second circuit affirmed both the trial court's grant of summary judgment in favor of Haynesville on the 3% claim⁷⁶ and its denial of Entergy Corporation's motion that Haynesville was not entitled to recover the 5% claim under SBE theory.⁷⁷ In denying Entergy's motion, the second circuit relied on the following evidence: although EGS was not acquired by Entergy Corporation until some eight years after the contract was signed, Entergy Corporation owned 100% of the stock of ELI and EGS,⁷⁸ and the two entities shared common offices and directors.⁷⁸ Furthermore, the two entities shared the same service company, Entergy Services, which made payments on behalf of the two subsidiaries to various municipalities.⁷⁹ Finally, the court took notice of a newspaper advertisement that ran in 1996, some eleven years after the contract was signed, noting the new name of LP&L and stating that Entergy had unified "five separate power companies into one cohesive whole."⁸⁰

70. *Haynesville II*, 956 So. 2d at 194.

71. *Id.* at 194–95.

72. *Id.*

73. *Town of Haynesville, Inc. v. Entergy Corp. (Haynesville I)*, 840 So. 2d 597, 598–600 (La. App. 2d Cir.), *writ denied*, 845 So. 2d 1090 (La. 2003).

74. *Id.* at 600–02.

75. *Id.* at 602.

76. *Haynesville II*, 956 So. 2d at 195. As the 3% claim was not at issue in the later 2007 appeal, it will not be addressed by this Case Note. *Id.*

77. *Haynesville I*, 840 So. 2d at 607.

78. *Id.* at 606.

79. *Id.*

80. *Id.*

The court followed its review of the evidence by briefly discussing SBE theory as introduced by the first circuit in *Green* and then listed the eighteen factor test.⁸¹ Nowhere in its discussion did it mention fraud or misuse of the corporate form as prerequisites for disregarding the corporate form. The court specifically found that:

Neither Haynesville nor the defendants presented authority for liability under the “single business theory” under the facts of this case. Nor did ELI/Entergy establish that it was legally entitled to summary judgment denying Haynesville relief under the “single business entity” hypothesis. We agree with the trial court’s conclusion that there are genuine issues of material fact as to whether Entergy operated as a “single business entity.” The trial court properly denied ELI/Entergy’s request for summary judgment on this issue.⁸²

Thus, the only plausible reason for the court to have found that Entergy had not established that it was legally entitled to judgment was to base the SBE inquiry solely on a finding of control.

In 2005, the trial court ruled on the merits of Haynesville’s SBE claim and found that the most favored nation agreement was ambiguous and that Entergy Corporation was a single business enterprise.⁸³ After Entergy’s subsequent motion for a new trial was denied, a second appeal ensued.⁸⁴

B. The Second Circuit’s Decision on Appeal

The second circuit’s refusal to uphold the trial court’s decision—to, in effect, use SBE to judicially re-write the contract—can only be described as a judicial step back from the brink of disaster. In so ruling, the court retreated from its analysis in the earlier appeal and made clear that it would not allow the application of SBE theory to re-interpret the provisions of a contract.⁸⁵ After finding that the trial court erred in determining that the contract was ambiguous, the second circuit then properly analyzed the application of SBE theory to Entergy Corporation using standards similar to those employed in traditional veil-

81. *Id.*

82. *Id.*

83. *Town of Haynesville, Inc. v. Entergy Corp. (Haynesville II)*, 956 So. 2d 192, 195 (La. App. 2d Cir.), *writ denied*, 964 So. 2d 334 (La. 2007).

84. *Id.*

85. *Id.* at 197.

piercing cases.⁸⁶ Although the second circuit should be commended for its departure from its previous analysis by refusing to expand SBE theory into the realm of contract interpretation, it failed to explicitly state the underlying principle of its holding. The court should have made clear that absent any showing of fraud or misuse of the corporate form, SBE theory should not be used to disregard the bedrock principle of Louisiana business law respecting corporate separateness and its intrinsic protection of limited liability. Even without such an explicit statement, it is arguable that the second circuit's opinion in *Haynesville* provides a much needed judicial precedent rejecting SBE theory in general and its reliance on the mere fact of control to trigger group liability.

1. Contract Interpretation and the Civil Code

The second circuit began its two step analysis of the trial court's decision by first discussing the relevant Civil Code articles on contract interpretation. Namely, "[t]he interpretation of a contract is the determination of the common intent of parties with the courts giving the contractual words their generally prevailing meaning unless the words have acquired a technical meaning."⁸⁷ "A doubtful provision must be interpreted in light of, *inter alia*, the conduct of the parties before and after the formation of the contract."⁸⁸ And when the words of a contract are clear and unambiguous, they should be enforced as written.⁸⁹

Applying these principles to the facts of the case, the court overturned the trial court's finding that the most favored nation agreement was ambiguous. Specifically, the court found that:

The trial court erred in its determination that the [most favored nation] clause is ambiguous in that "it does not provide for what is intended in the event the obligor, [LP&L], changes ownership, changes names, or through the actions of a parent or affiliated company, pays a franchise fee of greater than 2% to some other municipality."⁹⁰

The court gave three reasons for this decision.⁹¹ First, "a change in the name of a corporation has no effect on the rights and

86. *Id.* at 196–98.

87. *Id.* at 195 (citing LA. CIV. CODE arts. 2045, 2047 (2007); other citations omitted).

88. *Id.* (citing LA. CIV. CODE art. 2053).

89. *Id.* (citing LA. CIV. CODE art. 2046).

90. *Id.* at 195–96.

91. *Id.* at 196.

obligations of the parties to an agreement.”⁹² Second, ELI did not change ownership when its parent company changed its name from GSU to Entergy Corporation.⁹³ Third, the agreement explicitly required LP&L to pay a higher franchise fee to trigger additional obligations and Haynesville offered no proof that a parent or other affiliate paid a higher fee on behalf of LP&L.⁹⁴ In this last reason, the court seemed to be foreshadowing its SBE analysis by suggesting that there had been no breach of any contractually implied duty of good faith.

2. *Entergy Is Not an SBE*

Moving to the second step of its analysis, the second circuit reviewed the trial court’s determination that Entergy Corporation was a single business enterprise. Citing *Green*, the second circuit began in a similar fashion to its previous opinion by restating the eighteen factor test established by the first circuit. The court found that the trial court’s determination of Entergy Corporation to be an SBE relied on the presence of four factors.⁹⁵ First, ELI was a wholly owned subsidiary of Entergy Corporation and thus had de facto working control over its subsidiary.⁹⁶ Second, ELI, Entergy Corporation, and its other subsidiaries share common directors and/or officers.⁹⁷ Third, Entergy Corporation published an advertisement in 1996 stating that Entergy was unifying five separate power companies into a cohesive whole.⁹⁸ And lastly, franchise fee payments were made on behalf of ELI to Haynesville by Entergy Services, Inc. (ESI), who also acted as agent for a number of other Entergy affiliates.⁹⁹ In a departure from its previous opinion, the second circuit then rejected each of these factors as grounds for piercing the corporate veil.

The second circuit began this reversal with arguably the most important statement in the opinion: “control alone is not sufficient to warrant a piercing of the corporate veil.”¹⁰⁰ With this one statement, the court was effectively subjecting SBE cases to the same standards that apply in traditional veil-piercing cases and thus undercut the application of SBE theory without a showing of

92. *Id.* (citation omitted).

93. *Id.*

94. *Id.*

95. *Id.* at 197.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

fraud or misuse of the corporate form. This statement also provides a basis for arguing that the jurisprudential scope of the opinion extends beyond the contractual interpretation arena and directly challenges SBE theory itself. Continuing on this theme, the court stated that “[t]he involvement of a sole or majority shareholder in a corporation is not sufficient alone to establish a basis for disregarding the corporate entity”¹⁰¹ and that “in Louisiana the concept of the separation of the corporate entity from those who compose it is the general rule and is firmly established.”¹⁰² By rejecting the first two factors relied upon by the trial court, the second circuit found that mere control and overlap of employees are insufficient to warrant piercing of the corporate veil.¹⁰³ The court then, in a very interesting tailoring of its analysis to the particular defendant at hand, suggested that because Entergy’s corporate structure and activities are regulated under the federal PUHCA, there might have been a federal preemption concern.¹⁰⁴

The court then made quick work of the trial court’s reliance on the newspaper advertisement as evidence that Entergy is an SBE. Noting that the ad was run in 1996, eleven years after the contract was formed, the court stated that “[t]he semantics of a commercial advertisement cannot be construed to alter an unambiguous agreement between Entergy and Haynesville.”¹⁰⁵

By engaging in a hybrid of contract interpretation and traditional veil-piercing analysis, the second circuit found numerous errors in the trial court’s reliance on LP&L changing its name to ELI and ESI acting as the common agent for the affiliated companies.¹⁰⁶ First, the court held that sharing a common agent or having a centralized accounting system simply did not make the contract ambiguous. Furthermore, because these events didn’t even occur until more than ten years *after* the parties signed the agreement, “subsequent changes, not contemplated by the parties at the time of the agreement cannot be considered to render the contract ambiguous.”¹⁰⁷ Finally, the court noted that there was no evidence that the intent of the parties was to include the actions of any other entity besides ELI,¹⁰⁸ nor was there an allegation that the

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* The interesting question of whether SBE theory should ever be applied to a federally-regulated industry is one that is left open by this Note.

105. *Id.* at 197.

106. *Haynesville II*, 956 So. 2d at 198.

107. *Id.*

108. *Id.* at 195 (“Despite the fact that in January 1985, LP&L had a parent corporation and subsidiary corporations, no words are used to expand the

structure of Entergy Corporation was formed with the intent to defraud Haynesville.¹⁰⁹ Because “Louisiana law is well established that corporate separateness is to be recognized and respected[,]” piercing the corporate veil should be “considered a radical remedy only employed in exceptional circumstances.”¹¹⁰ Thus, without any evidence of fraud, the only way Haynesville could succeed in piercing the corporate veil was by showing that Entergy Corporation and its subsidiaries were “alter egos” of each other.¹¹¹ This approach is much closer to a traditional veil-piercing analysis than SBE.

Applying the five-factor test used in traditional veil-piercing cases,¹¹² the court found that none of the factors were satisfied by the evidence in the record.¹¹³ Further blending SBE theory and traditional veil-piercing analysis, the court stated, “[t]here is simply no wrongdoing or other extraordinary circumstances present in the relationship between Haynesville and LP&L that justifies disregarding the law of persons and . . . Louisiana corporations.”¹¹⁴ Contradicting its previous opinion, the court asserted that the terms of most favored nation agreements are not affected by SBE theory and that use of SBE theory to interpret the agreement is improper.¹¹⁵

Reading both of the second circuit’s opinions together, it is apparent that the court has reversed its analysis. The court’s opinion on summary judgment effectively approved the application of SBE theory to a contractual interpretation setting and casts the issue as a question of fact as opposed to a question of law. This appears contrary to the court’s opinion on the merits where the analysis indicated a question of law. First, if control alone does not warrant the piercing of the corporate veil, then Haynesville’s failure to even allege fraud or misuse of the corporate form should have been fatal to its claim.¹¹⁶ Second, the court intimated that a corporate structure formed under the rubric of a federal statutory scheme (PUHCA) could not be found to be an SBE without

triggering event beyond LP&L’s contracting with another town or municipality in the renewal of LP&L’s franchise fee.”).

109. *Id.* at 198.

110. *Id.*

111. *Id.*

112. See MORRIS & HOLMES, *supra* note 9, § 32.02, at 56.

113. *Haynesville II*, 956 So. 2d at 198–99.

114. *Id.* at 199.

115. *Id.*

116. *Id.* at 197.

producing a serious preemption concern.¹¹⁷ Finally, the court's statement that the use of SBE theory for the purpose of interpreting the agreement between the two parties is improper effectively precludes its application as a valid theory of law in this case.¹¹⁸

Ultimately, the second circuit's reversal of the trial court's decision on the merits brought a welcome measure of sanity to the application of SBE theory in Louisiana. It attempts to halt what has been described as the first circuit's "'Sherman's March' through Louisiana's piercing-the-corporate-veil jurisprudence."¹¹⁹ Although the court only expressly held that the use of SBE theory to interpret a provision in a contract is improper, other language in the opinion seems to suggest a far broader conclusion. The court plainly stated that the mere factor of control is not enough to disregard corporate separateness and applied the requirements of fraud or misuse of the corporate form found in traditional veil-piercing jurisprudence to an SBE analysis. If SBE theory and its eighteen factor test allow the mere control of one company by another to trigger liability, then the jurisprudential scope of the second circuit's opinion in *Haynesville* goes beyond the realm of contractual interpretation and directly challenges SBE theory itself. Though the second circuit deserves high praise for this challenge, it is regrettable that the court did not further explain its reasoning. SBE jurisprudence and Louisiana business interests would have greatly benefitted from a more in-depth judicial statement on the policy reasons behind the necessity of holding SBE theory to the same high standards of traditional veil-piercing. Still, *Haynesville* provides an important first step in the rejection of SBE theory and its reliance on the mere factor of control to trigger group liability. As the Supreme Court of Louisiana has declined to grant writs in this matter, this author hopes that other circuits in Louisiana will follow the second circuit's logic in *Haynesville* and refuse to apply SBE theory in the absence of a showing of fraud or misuse of the corporate form.

IV. CONCLUSION

It has been noted by other commentators that "Louisiana is a capital-poor state that grounds its hopes of business and economic development on the strategy of attracting outside capital to invest

117. *Id.* at 197–98 ("To find that the commonality of personnel or centralization of certain aspects of control constitute a single business enterprise in the context of a public utility would undermine the PUHCA.").

118. *Id.* at 199.

119. Posin, *supra* note 19, at 357.

in this state.”¹²⁰ The broad application of SBE theory to undermine the principle of granting limited liability to corporations and LLCs could prove damaging to this strategy and the future of our state’s economy. Post-Katrina Louisiana can ill afford to discourage business investment through unsound and unpredictable business laws. Therefore, Louisiana courts should make it clear that absent fraud or misuse of the corporate form, they will consistently respect the legitimate use of the multiple entity corporate form and its inherent limited liability protection.

*James Dunne**

120. Posin, *supra* note 19, at 364.

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