

Corporate Law: Consumer's Co-Op v. Olsen, 142 Wis. 2d 465, 419 N.W.2d 211 (1988)

Sheryl L. Kelley

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NOTE

CORPORATE LAW — *Consumer's Co-Op v. Olsen*, 142 Wis. 2d 465, 419 N.W.2d 211 (1988)

A fundamental rule of corporate law is that corporate shareholders are not personally responsible for the debts and obligations of the corporation itself. The concept of "limited liability" is one of the greatest advantages of the corporate form¹ and is considered one of the most important legal developments of the nineteenth century.²

Nevertheless, every rule has its exceptions. Courts are generally in agreement that abuse of the limited liability concept justifies piercing the "corporate veil" to hold the shareholders personally liable. However, the exact actions or omissions required to pierce the corporate veil are still quite vague.³

In *Consumer's Co-Op v. Olsen*,⁴ the Wisconsin Supreme Court found the level of capitalization at a corporation's inception,⁵ while not independently sufficient to justify piercing the corporate veil, is significant to a determination of whether to disregard the corporate entity. The court held that the corporate creditor had waived its right to assert undercapitalization as a theory to pierce the veil under the doctrines of waiver and estoppel.⁶ While the court acknowledged the need for distinct methods of evaluating con-

1. Hancock, *Piercing the Corporate Veil*, 3 CORP. COUNS. Q. 110, 111 (1987).

2. Barber, *Piercing the Corporate Veil*, 17 WILLAMETTE L. REV. 371, 371-72 (1981).

As Professor Douglas of Yale referred to the theory in 1929:

Limited liability is now accepted in theory and in practice. It is ingrained in our economic and legal systems. The social and economic order is arranged accordingly. Our philosophy accepts it. It is legitimate for man or a group of men to stake only a part of their fortune on enterprise. Legislatures, courts and business usage have made it so.

Douglas & Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L.J. 193, 193-94 (1929).

3. See Hamilton, *The Corporate Entity*, 49 TEX. L. REV. 979 (1971).

4. 142 Wis. 2d 465, 419 N.W.2d 211 (1988).

5. *Id.* at 486, 419 N.W.2d at 218.

6. *Id.* at 495, 419 N.W.2d at 222.

In *Bostwick-Braun Co. v. Szews*, 645 F. Supp. 221 (W.D. Wis. 1986), the district court explained the new defense to piercing the corporate veil in Wisconsin:

If an individual intentionally relinquishes a known right, either expressly or by conduct inconsistent with an intent to enforce that right, he has waived it. Estoppel, on the other hand, focuses on the effects of the conduct of the obligee. It arises when a party's conduct misleads another into believing that a right will not be enforced and causes the other party to act to his detriment in reliance upon this belief.

tract and tort claims, it reiterated the need for a case-by-case analysis to ensure equitable results, further clouding the issue.⁷

This Note begins with a brief description of the facts in *Consumer's Co-Op*. Next, the development of the corporate entity and limited liability principles is discussed, followed by an analysis of the court's decision. Finally, this Note considers the impact of this decision on corporate law and concludes that *Consumer's Co-Op* further confuses rather than clarifies the area, thereby deterring prospective investors and creating excessive litigation.

I. STATEMENT OF THE CASE

ECO of Elkhorn, Inc. ("ECO") was incorporated by Chris Olsen on January 14, 1980.⁸ At the first of two formal meetings of the board of directors, Chris, Jack, and Nancy Olsen were elected President and general manager, treasurer and accountant, and secretary of ECO, respectively.⁹ Soon after incorporation, ECO began experiencing financial difficulties which resulted in a negative shareholder's equity¹⁰ and an inability to satisfy debts owed to its major creditor, Consumer's Co-Op of Walworth County ("Consumer's").¹¹ ECO filed for reorganization, leaving Consumer's judgment against ECO unsatisfied. Consumer's initiated a suit against the two major shareholders, Chris and Jack Olsen, seeking to hold them personally liable for the debts of the corporation.¹²

The trial court found sufficient evidence to justify the imposition of personal liability for corporate debts.¹³ Excessive control exercised by the ma-

Id. at 226-27; *see also* J.H. Cohn & Co. v. American Appraisal Assoc., 628 F.2d 994 (7th Cir. 1980).

7. *Consumer's Co-Op*, 142 Wis. 2d at 484-85, 419 N.W.2d at 217-18.

8. *Consumer's Co-Op v. Olsen*, 142 Wis. 2d 465, 470, 419 N.W.2d 211, 212 (1988).

9. Each contributed capital totaling \$7,018.25. *Id.* at 470, 419 N.W.2d at 212.

10. ECO's financial difficulties increased in severity each year as follows:

<i>Negative shareholder's equity</i>	
1981	\$ 2,723.02
1982	\$ 62,815.60
1983	\$148,927.92
1984	\$189,362.26

Id. at 471, 419 N.W.2d at 212.

11. One of Chris Olsen's personal credit accounts was changed to a corporate account at the time of ECO's incorporation for the purchase of bulk fuel. Although ECO was not current in payments beginning in June or July 1983, Consumer's extended credit until March 21, 1984 contrary to its credit plan. *Id.* at 471-72, 419 N.W.2d at 212-13.

12. *Id.* at 470, 419 N.W.2d at 212.

13. The trial court entered judgment in the amount of \$38,851.42. *Id.*

jority shareholder, Chris Olsen, and an inadequate level of capitalization¹⁴ were found to be material factors in reaching this decision. The defendants appealed.¹⁵

Upon certification of the action by the court of appeals,¹⁶ the Wisconsin Supreme Court reversed the trial court's decision, concluding that the capitalization of a corporation must be analyzed at its inception,¹⁷ and that ECO's capitalization at inception was more than adequate.¹⁸ The court further held that in claims which arise from a contractual relationship, the doctrines of waiver and estoppel may be more appropriate than precluding the equitable remedy of piercing the corporate veil.¹⁹

II. BACKGROUND

A. *Development of the Concept of Limited Liability*

Although corporate shareholders were not immune from liability for corporate debts or obligations at common law, shareholder insulation from such liability has been a cornerstone of corporate law in the United States

14. Later, the Wisconsin Supreme Court noted that the trial court never indicated how and when ECO's capitalization was analyzed. *Id.* at 491, 419 N.W.2d at 220. For further discussion, see *infra* note 62 and accompanying text.

15. The appellant contended on appeal the following: (1) control is not a factor significant in a determination of whether to pierce the corporate veil where the corporation under consideration is operated as a close corporation; (2) undercapitalization is not a factor relevant to a determination of whether to pierce the corporate veil where the action arises from a contract as opposed to tortious conduct; and (3) even if a relevant factor, undercapitalization does not constitute a sufficient basis to justify a decision to disregard the corporate entity. *Id.* at 473, 419 N.W.2d at 213.

16. WIS. STAT. § 809.61 provides as follows:

The supreme court may take jurisdiction of an appeal or other proceeding in the court of appeals upon certification by the court of appeals or upon the supreme court's own motion. The supreme court may refuse to take jurisdiction of an appeal or other proceeding certified to it by the court of appeals.

Id.

The Wisconsin Supreme Court accepted jurisdiction based on two issues of importance which were certified by the court of appeals. The court of appeals based its certification on (1) the issue of whether fraud is an essential element which must be proved to pierce the corporate veil, and (2) whether and under what circumstances, if any, undercapitalization can serve as a basis to pierce the corporate veil. *Consumer's Co-Op*, 142 Wis. 2d at 473 n.1, 419 N.W.2d at 213 n.1.

17. 142 Wis. 2d at 486, 419 N.W.2d at 218.

18. *Id.* at 491, 419 N.W.2d at 220-21. For a discussion of the court's reliance on precedents to support its holding, see *infra* note 70 and accompanying text.

19. *Id.* at 481, 419 N.W.2d at 216.

since the nineteenth century.²⁰ The majority of states have enacted statutes limiting a shareholder's liability²¹ to the cost of the shares held.²²

The American corporation is generally recognized as a legal entity, separate and distinct from its shareholders²³ — a person in the eyes of the law.²⁴ Albeit fictitious, it enjoys the status of "citizen," with the rights and privileges and corresponding duties and obligations.²⁵ In this vein, the corporate entity alone is deemed wholly responsible for its actions, including corporate debts.²⁶

Cloaked with its own separate identity, the corporation proved to be an ideal vehicle to promote important underlying policies during the industrialization and development of large business entities.²⁷ However, when invoked in support of an end which is subversive of this policy, the courts may disregard the corporate form.²⁸ This action is often referred to as

20. For an extensive review of the English history of the corporate entity, see BALLANTINE, *BALLANTINE ON CORPORATIONS* § 118-42 (rev. ed. 1946) and 1 W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 24-28 (rev. perm. ed. 1983).

21. Dodd, *The Evolution of Limited Liability in American Industry: Massachusetts*, 61 HARV. L. REV. 1351, 1352-53 (1948). For a thorough review of the origins of limited liability, see Hackney & Benson, *Shareholder Liability for Inadequate Capital*, 43 U. PITT. L. REV. 837 (1982).

22. The early history of limited liability indicates that some states created corporations with express provisions in their Articles of Incorporation for unlimited shareholder liability. Hackney & Benson, *supra* note 21, at 847.

23. *Jonas v. State*, 19 Wis. 2d 638, 644, 121 N.W.2d 235, 238 (1963). The Wisconsin Supreme Court adopted this view in *Milwaukee Toy Co. v. Industrial Comm'n*, 203 Wis. 493, 234 N.W. 748 (1931). For a discussion of this decision, see *infra* note 36 and accompanying text.

More recently, the Wisconsin Supreme Court reiterated a similar principle in *Sprecher v. Weston's Bar, Inc.*, 78 Wis. 2d 26, 253 N.W.2d 493 (1977), which stated:

This court has long taken the position that a corporation is treated as an entity separate from its shareholders under all ordinary circumstances and thus that contracts entered into for the corporation by its officers or agents are contracts of the corporation as a distinct legal entity and neither confer rights nor impose liabilities or restrictions on the shareholders individually.

Id. at 37, 253 N.W.2d at 498.

24. See *Klein v. Board of Tax Supervisors*, 282 U.S. 19 (1930); see also 18 AM. JUR. 2D *Corporations* § 63 (1985) (Persons are divided by the law into persons natural and persons artificial. The term "person" at common law includes both natural and artificial persons, and therefore as a general rule includes corporations).

25. 18 AM. JUR. 2D *Corporations* §§ 63, 64, at 874-75 (1985).

26. *Amoco Chemicals Corp. v. Bach*, 222 Kan. 589, 567 P.2d 1337 (1977). In *Bach*, the court stated, "[w]e start with the basic premise that a corporation and its stockholders are presumed separate and distinct, whether the corporation has many stockholders or only one. Debts of the corporation are not the individual indebtedness of stockholders." *Id.* at 593, 567 P.2d at 1341.

27. Barber, *supra* note 2, at 372.

28. For an extensive list of cases adopting this policy, see generally 18 AM. JUR. 2D *Corporations* § 43 (1985).

piercing the corporate veil.²⁹ Because the law permits the incorporation of a business for the very purpose of escaping personal liability, the corporate entity is not to be regarded lightly.³⁰ Accordingly, "the principle of piercing the fiction of the corporate entity is to be applied cautiously."³¹

Although courts³² have attempted to articulate the factors considered in determining whether to hold shareholders personally liable for corporate debts, "precise requirements . . . rarely have been articulated."³³ Courts have depended upon the premise that "[r]igid rules and fixed formulas are futile in this area of hazy equities and judicial retrospections"³⁴ and that inasmuch as it is essentially equitable in character, the disregard of the corporate entity doctrine will necessarily vary according to the circumstances of each case.³⁵

B. Milwaukee Toy Co. v. Industrial Commission

The landmark case of *Milwaukee Toy Co. v. Industrial Commission*³⁶ attempted to develop a general principle to which all courts could refer in determining the propriety of piercing the corporate veil. Justice Fowler stated that if "applying the corporate fiction would accomplish some fraudulent purpose, operate as a constructive fraud, or defeat some strong equita-

29. Barber, *supra* note 2, at 372; C. Krendl & J. Krendl, *Piercing the Corporate Veil: Focusing the Inquiry*, 55 DEN. L.J. 1, 2 (1978); Note, *Piercing the Corporate Veil: It Can Work in Reverse*, 33 MERCER L. REV. 633 (1982).

30. *Milwaukee Toy Co. v. Industrial Comm'n*, 203 Wis. 493, 496, 234 N.W. 748, 749 (1931).

31. 18 AM. JUR. 2D *Corporations* § 43, at 842 (1985).

32. Justice Cardozo was among the many who attempted to clarify this area of the law. Unfortunately, his standard for determining when the corporate entity would be disregarded clarified very little. He stated that "when the sacrifice is essential to the end that some accepted public policy may be defended or upheld" the corporate entity would be ignored. *Berkey v. Third Ave. Ry. Co.*, 244 N.Y. 84, 95, 155 N.E. 58, 61 (1926).

33. Barber, *supra* note 2, at 373. Professor Hamilton, a leading authority on corporate law, aptly described the shortcomings of the law when he stated:

This language is inherently unsatisfactory since it merely states the conclusion and gives no guide to the considerations that lead a court to decide that a particular case should be considered an exception to the general principle of nonliability. A systematic analysis, moreover, is not readily discernible in the cases, and many courts continue to rely on metaphors to explain their results.

Id. at 373-74, n.14 (citation omitted).

34. Cataldo, *Limited Liability with One-Man Companies and Subsidiary Corporations*, 18 LAW & CONTEMP. PROBS. 473, 496 (1953).

35. See, e.g., *Swanson v. Levy*, 509 F.2d 859, 861-62 (9th Cir. 1975); *Stap v. Chicago Aces Tennis Team, Inc.*, 63 Ill. App. 3d 23, 28, 379 N.E.2d 1298, 1302 (1978).

36. 203 Wis. 493, 234 N.W. 748 (1931).

ble claim, the fiction is disregarded³⁷ and the shareholders are held liable for the debts incurred by the corporation.

Since 1931, this principle has been reiterated by nearly every court facing this issue. In determining whether this principle has been upheld, courts look to any improper use of the corporate form, which is generally defined as any "failure to conform to a judicially imposed normative model of corporateness."³⁸ Additionally, the normative model of "corporateness" requires that limited liability should only be available to a corporation if a certain amount of capital investment has actually been made.³⁹ This theory of undercapitalization⁴⁰ was first considered at the turn of the century⁴¹ and is now one of the principle factors used by courts to establish misuse of the corporate privilege.

C. *The Contract versus Tort Distinction*

When inadequate capitalization is a factor considered for imposing liability, most courts make a distinction between contract and tort claimants.⁴² In contract claims, the courts rarely pierce the corporate veil⁴³ based on the assumption that corporate capitalization is a matter of public record and, therefore, the creditor knew or had the opportunity to determine the corporation's financial condition.⁴⁴ The contract claimant is con-

37. *Id.* at 496, 234 N.W. at 749; *see also* Horticultural Enter. Corp. v. Allstate Ins. Co., 477 F. Supp. 161 (C.D. Cal. 1979). *See generally* W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41.30 (rev. perm. ed. 1983).

38. Hackney & Benson, *supra* note 21, at 857. Adherence to the stated formulation generally signifies the existence of a true corporate entity. Labadie Coal Co. v. Black, 672 F.2d 92, 97 (D.C. Cir. 1982).

39. Hackney & Benson, *supra* note 21, at 858. The Massachusetts Supreme Court stated in *Hanson v. Bradley*, 298 Mass. 371, 10 N.E.2d 259 (1937):

The original purpose of laws permitting the formation of corporations was to enable stockholders to put at risk of the business capital reasonably adequate for its needs, and thereby keep free from that risk their uninvested assets and their personal responsibility. That, as our corporation laws have long attested, has been deemed consonant with the public interest, and a fair compromise between the desire of investors for the fullest immunity and the desire of creditors for the fullest means of satisfaction.

Id. at ___, 10 N.E.2d at 263-64.

40. In *Ruppa v. American States Ins. Co.*, 91 Wis. 2d 628, 284 N.W.2d 318 (1979), the Wisconsin Supreme Court adopted the definition of undercapitalization as found in *Anderson v. Abbott*, 321 U.S. 349 (1944), as an "obvious inadequacy of capital measured by the nature and magnitude of the corporate undertaking." *Ruppa*, 91 Wis. 2d at 645, 284 N.W.2d at 324 (quoting *Anderson v. Abbott*, 321 U.S. 349, 362 (1944)).

41. The earliest known case that relied on the theory of undercapitalization is *Oriental Inv. Co. v. Barclay*, 25 Tex. Civ. App. 543, 64 S.W. 80 (Tex. Ct. App. 1901).

42. Hackney & Benson, *supra* note 21, at 860.

43. Hancock, *supra* note 1, at 112.

44. Hackney & Benson, *supra* note 21, at 861-62.

sidered a "voluntary" creditor⁴⁵ who will not ordinarily be entitled to assert undercapitalization as a factor in seeking to hold the shareholders personally liable.⁴⁶

In tort claims, the courts are relatively more open to piercing the corporate veil if it appears that to do so will yield a more equitable result.⁴⁷ Since a tort claimant has no choice in the selection of his debtor and no opportunity to examine its financial condition, the courts are more inclined to hold shareholders liable for the torts of their corporations when the element of inadequate capitalization is present.⁴⁸ Although inadequate capitalization is a critical consideration to the denial of limited liability in tort cases, nearly every tort case in which undercapitalization was stressed and found was also supported by additional factors constituting an abuse of the corporate form.⁴⁹ Therefore, the true significance of undercapitalization to the courts' evaluations is still unknown.

III. AN EVALUATION OF *CONSUMER'S CO-OP*

In *Consumer's Co-Op*,⁵⁰ the Wisconsin Supreme Court relied heavily on the fundamental premise in its 1931 decision of *Milwaukee Toy Co. v. Industrial Commission*⁵¹ that "[b]y legal fiction the corporation is a separate entity and is treated as such under all ordinary circumstances."⁵² Above all, the court emphasized the subliminal theme of *Milwaukee Toy* that the legal entity is not to be lightly disregarded.⁵³

To illustrate under what circumstances the *Milwaukee Toy* principle would be abandoned, the court took notice of two recent Wisconsin Supreme Court cases, *Wiebke v. Richardson & Sons, Inc.*⁵⁴ and *Sprecher v.*

45. However, not all creditors have the same opportunity to investigate the corporation's financial background. Where a transaction is small or the creditor lacks bargaining power to obtain financial data, etc., the contract creditor should not be considered a voluntary creditor. *Id.* at 863.

46. Most courts, however, hold that contract creditors may still pierce the veil if a corporation has misrepresented its financial responsibility to the creditor. In *Edwards Co. v. Monogram Indus. Inc.*, 730 F.2d 977 (5th Cir. 1984), the Fifth Circuit stated, "in order to pierce the corporate veil on a contract claim in Texas, a showing of fraud or injustice is required . . ." *Id.* at 979; see also *Hancock, supra* note 1, at 112.

47. *Hancock, supra* note 1, at 113.

48. *Abraham v. Lake Forest, Inc.*, 377 So. 2d 465 (La. Ct. App. 1979). See generally *Cataldo, supra* note 34, at 475-78.

49. *Hackney & Benson, supra* note 21, at 869.

50. 142 Wis. 2d 465, 419 N.W.2d 211 (1988).

51. 203 Wis. 493, 234 N.W. 748 (1931).

52. *Consumer's Co-Op*, 142 Wis. 2d at 474, 419 N.W.2d at 213.

53. *Id.* at 475, 419 N.W.2d at 214.

54. 83 Wis. 2d 359, 265 N.W.2d 571 (1978).

*Weston's Bar, Inc.*⁵⁵ Both reaffirmed this principle, but nevertheless disregarded the corporate entity. In *Sprecher*, the defendants disregarded corporate formalities⁵⁶ and took out in salary most of the corporate profits. In *Wiebke*, the defendant treated the corporate checking account as his personal account and, although he did not take wages, he did withdraw funds without making additions to capital.⁵⁷

In the determination of whether to disregard the corporate form, both holdings stated generally that the disregard of corporate formalities alone is insufficient.⁵⁸ The corporate form must also be "used to evade an obligation, to gain an unjust advantage or to commit an injustice."⁵⁹

In attempting to explain the vagueness of the Wisconsin Supreme Court's standard, Justice Ceci in *Consumer's Co-Op* frequently made reference to the need for flexibility and a case-by-case analysis in making the determination of whether to disregard the corporate entity.⁶⁰ The court reiterated the reasoning of a previous court which stated that all possible factors must be considered in determining whether to pierce the corporate veil.⁶¹

A. *The Relationship of Undercapitalization to Piercing the Corporate Veil*

The court reaffirmed its position in *Consumer's Co-Op* that undercapitalization, while not "independently sufficient ground[s] to pierce the corporate veil," is a significant consideration.⁶² A firm stance was taken as to the point in time the corporation's capitalization is to be analyzed. In rejecting the respondent's contention that there is a continuing requirement to maintain an adequate level of capitalization, the court relied on *Gelatt v.*

55. 78 Wis. 2d 26, 253 N.W.2d 493 (1977).

56. The *Consumer's Co-Op* court noted that in *Sprecher*, "the individual defendants made no serious attempt to hold corporate meetings or to maintain records of corporate meetings and that [the corporation] had no substantial assets . . ." 142 Wis. 2d at 475, 419 N.W.2d at 214 (quoting *Sprecher*, 78 Wis. 2d at 38-39, 253 N.W.2d at 498).

57. *Wiebke*, 83 Wis. 2d at 364, 265 N.W.2d at 574.

58. *Consumer's Co-Op*, 142 Wis. 2d at 476, 419 N.W.2d at 214.

59. *Wiebke*, 83 Wis. 2d at 363, 265 N.W.2d at 573.

60. *Consumer's Co-Op*, 142 Wis. 2d at 485-86, 419 N.W.2d at 218.

61. The court recognized:

It is not the presence or absence of any particular factor that is determinative. Rather, it is a combination of factors which, when taken together with an element of injustice or abuse of corporate privilege, suggest that the corporate entity attacked was . . . the "mere instrumentality or tool of the shareholder."

142 Wis. 2d at 485-86, 419 N.W.2d at 218 (quoting *Glenn v. Wagner*, 313 N.C. 450, 458, 329 S.E.2d 326, 332 (1985)).

62. *Consumer's Co-Op*, 142 Wis. 2d at 482, 419 N.W.2d at 217.

DeDakis,⁶³ which implicitly rejected that argument and stated that the adequacy of capital is to be measured as of the time of corporate formation.⁶⁴ Therefore, once shareholders have adequately capitalized the corporation, there is no requirement that they provide for losses beyond the amount of their original subscription in the corporation.⁶⁵

In determining what constitutes sufficient capitalization, Justice Ceci reaffirmed the standard set in *Ruppa v. American States Insurance Co.*⁶⁶ The *Ruppa* court "emphasize[d] economic viability rather than an inflexible computation of minimal capitalization: a corporation is undercapitalized when there is an obvious inadequacy of capital, 'measured by the nature and magnitude of the corporate undertaking.'" ⁶⁷ Thus, in *Consumer's Co-Op*, the appellant corporation was found to be more than sufficiently capitalized in relation to the "slight size" of its initial undertaking.⁶⁸

B. Piercing the Corporate Veil as an Equitable Remedy

The court rejected the appellant's argument that, due to the status of the respondent as a voluntary creditor, it is barred from asserting undercapitalization as a factor in determining whether to disregard the corporate entity.⁶⁹ The court agreed with the reasoning in a United States Court of Appeals case⁷⁰ that inadequate capital may be a factor relevant to whether "an injustice is present sufficient to justify piercing the corporate veil in a contract case."⁷¹

The Wisconsin Supreme Court acknowledged that the "volitional nature" of contract cases necessitates that a distinction be made between contract and tort cases.⁷² However, it concluded that application of the

63. 77 Wis. 2d 578, 254 N.W.2d 171 (1977).

64. *Consumer's Co-Op*, 142 Wis. 2d at 486, 419 N.W.2d at 218 (citing W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 44.1 (rev. perm. ed. 1983)).

65. *Id.* at 487, 419 N.W.2d at 219. However, in cases where the corporation has distinctly changed the nature and magnitude of its business, the court will inquire as to the level of capital at the time of its change as well as at its inception. *Id.*

66. 91 Wis. 2d 628, 284 N.W.2d 318 (1979).

67. *Consumer's Co-Op*, 142 Wis. 2d at 488, 419 N.W.2d at 218-19 (quoting *Am. States Ins. Co.*, 91 Wis. 2d 628, 645, 284 N.W.2d 318, 324 (1979)).

68. See *supra* note 18 and accompanying text.

69. *Consumer's Co-Op*, 142 Wis. 2d at 480, 419 N.W.2d at 216.

70. *Labadie Coal Co. v. Black*, 672 F.2d 92 (D.C. Cir. 1982). The *Labadie* court quoted the opinion of another commentator who noted, "[i]f the prior opportunity to investigate is a consideration, then the plaintiff's lack of sophistication is equally tenable against the presumption that they knowingly assumed the risk of the corporation's undercapitalization." *Id.* at 100 (quoting Barber, *supra* note 2, at 386).

71. *Consumer's Co-Op*, 142 Wis. 2d at 481, 419 N.W.2d at 216.

72. *Id.*

equitable remedy of piercing the corporate veil is inappropriate in contract cases. Instead, the doctrines of estoppel and waiver are more suitable.⁷³ These doctrines are not to be systematically applied in all contract cases. Rather, a case-by-case analysis should be used to maintain flexibility and assure equitable results in all cases.

The court found the doctrines of waiver and estoppel applicable considering two key facts in this case: The fact that Consumer's did not investigate the capital structure of ECO before extending credit, and the fact that after ECO failed to make regular payments, Consumer's continued to extend credit even after ECO failed to make regular payments.⁷⁴ Since the court had already found the appellant's initial capitalization adequate, the respondent was precluded from asserting any claim as to subsequent undercapitalization as a factor to justify disregard of the corporate entity.⁷⁵

IV. ANALYSIS

In *Consumer's Co-Op v. Olsen*,⁷⁶ the Wisconsin Court of Appeals, by certifying two issues of importance to the determination of whether to pierce the corporate veil,⁷⁷ recognized the need for further clarification by the state's highest court. *Consumer's Co-Op* illustrates a futile attempt by the Wisconsin Supreme Court to elaborate on the issues as requested by the lower court.

In *Consumer's Co-Op*, the Wisconsin Supreme Court held that fraud was not required to pierce the corporate veil;⁷⁸ that undercapitalization at a corporation's inception was an important element in the determination of whether limited liability is deserved;⁷⁹ and that the doctrines of waiver and estoppel were more appropriate than applying the remedy of piercing the corporate veil in contract cases.⁸⁰

This case clarified the point at which undercapitalization is used as the primary factor justifying the disregard of the corporate entity. Based on this decision, subsequent undercapitalization is not a factor to be used to disregard the corporate entity.⁸¹ Therefore, other factors must exist before

73. *Id.* (footnote omitted).

74. *Id.* at 494, 419 N.W.2d at 222.

75. *Id.* at 497, 419 N.W.2d at 223.

76. 142 Wis. 2d 465, 419 N.W.2d 211 (1988).

77. *Id.* at 473 n.1, 419 N.W.2d at 213 n.1. For further discussion of the issues certified, see *supra* note 16 and accompanying text.

78. 142 Wis. 2d at 480, 419 N.W.2d at 216.

79. *Id.* at 486, 419 N.W.2d at 218.

80. *Id.* at 481, 419 N.W.2d at 216; see *supra* note 19 and accompanying text.

81. *Id.* at 497, 419 N.W.2d at 223; see *supra* note 75 and accompanying text.

the corporate veil will be pierced. Unfortunately, the court failed to go one step further and identify the circumstances which justify piercing it.

A. Undercapitalization as a Standard for Piercing the Corporate Veil

Most courts fail to explain their rationale as to what constitutes adequate corporate capitalization.⁸² The *Consumer's Co-Op* court did firmly state that sufficiency of capital was to be analyzed at the corporation's inception.⁸³ The court also acknowledged the contribution that the capitalization factor makes to the evaluation process, but it made no attempt to explain exactly how the adequacy of a corporation's capital is measured. The court again relied on precedent to provide us with a useless, overly-broad standard from which capitalization is to be measured. The court reiterated the standard for undercapitalization — when there is an "obvious inadequacy of capital 'measured by the nature and magnitude of the corporate undertaking.'"⁸⁴ This standard, while extremely flexible, gives little guidance to those attempting to assure themselves that this issue would not be decided against them if challenged. As a result, since the court, once again, did not divulge the specific factors to be considered in analyzing the capital undertaking, our understanding of what constitutes a sufficient level of capitalization is still uncertain.

B. Necessity for Establishing Guidelines to Pierce the Corporate Veil

Firmly established guidelines are essential to the continued economic prosperity which has resulted from the creation of the corporate entity. This unique principle allows the average person to make capital contributions in even high-risk ventures without fearing personal liability for the fate of the endeavor. While courts continue to stress the importance of respecting the corporate entity and protecting the shareholders, the lack of firmly established guidelines may turn this general rule into an exception.

This lack of guidance creates two problems. First, it generates excessive litigation. Second, arbitrary holdings by different courts act as a deterrent to prospective investors who fear the ever-increasing chance of a lawsuit brought for any number of reasons.

While shareholders should understand the corporate law as it pertains to required and forbidden actions of corporate shareholders, additional "rules of the game" implemented by the court system could only clarify the law and promote adherence. The result: shareholders will be on notice of

82. Barber, *supra* note 2, at 394.

83. *Consumer's Co-Op*, 142 Wis. 2d at 486, 419 N.W.2d at 218.

84. *Id.* at 488, 419 N.W.2d at 219; see *supra* note 67 and accompanying text.

exactly what actions are construed as improper in the eyes of the law, thereby ridding our justice system of unnecessary litigation.

The main purpose behind the general rule of limited shareholder liability is to promote investment and stimulate economic growth. While it is understood that abuse of this privilege justifies exceptions, care must be taken to ensure the exceptions do not swallow the rule or act to defeat its purpose. The seemingly unrelated exceptions formulated by courts serve to diminish the appeal of capital investments. Shareholders realize that the lack of uniformity leaves them defenseless against any given court's interpretation of what it feels a corporation should be and how it should be operated. Eventually, the very purpose for which limited liability was implemented will be negated, resulting in certain economic decline.

V. CONCLUSION

The court's holding, while providing a standard as to when a corporation's capitalization is to be analyzed, failed to address critical questions arising from this decision. The court's failure to take the opportunity to clarify this area of the law will necessarily lead to further litigation and depressed capital investments until established standards are set by future courts.

SHERYL L. KELLEY