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Article
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*33 TRANSPARENCY IN CORPORATE GROUPS

ABSTRACT

This Article addresses a remarkable blind spot in American law: the failure to apply the well-established principles of secured credit to prevent inefficiency, confusion, and fraud in the manipulation of the webs of subsidiaries within corporate groups. In particular, "asset partitioning" has been a fashionable subject in which the central problem of non-transparency has been often mentioned but little addressed. This Article offers a concept for a new system of corporate disclosure for the benefit of creditors and other stakeholders. It would require disclosure of corporate structures and allocations of assets among affiliates to the extent the affiliates are to be treated as independent legal entities. Enforcement would follow the secured credit model: the failure to follow the rules would lead to disregard of corporate independence.

Modern secured credit law is subject to many criticisms, but the emerging versions of credit security transparency found around the world have increased both efficiency and fairness in commercial transactions. Its example suggests the basis for reforms to achieve an analogous result for the extension of credit to groups of corporations, especially in international finance where partitioning is often used in lieu of secured financing. The long-term objective is to create a body of scholarship examining this problem and to propose a regime of corporate responsibility and transparency to correct it.

INTRODUCTION

The modern corporate group is a shape-shifter.[1] It appears one moment as a single muscular mass operating under a brand famous everywhere, while ***34** in the next instant, some of its subsidiaries deal separately with lenders, suppliers, employees, customers, and government authorities in a fog of names and identities. While those dealings may be legitimate, each of these counterparties may find it difficult to evaluate the financial risks arising from a proposed transaction or venture because of a lack of information about the affiliate with which it is dealing and its relationship to the mass. In many cases, an even more serious difficulty arises after the relationship with the subsidiary has begun, because of the ability of management to change the shape of the group and its assets at will. Management's tools in that regard include employing multiple jurisdictions and multiple similar names and logos, the use of secrecy-haven jurisdictions, the transfer of assets and obligations, and cross guarantees among affiliates. Counterparties are left with a difficult task of evaluating risk and the prospects for enforcement of obligations owed to them.[2]

The very structure of a modern corporate group can make it the engine of injustice and fraud. The fundamental reason for this pernicious result is that much of the time the law gives far greater weight to the distinct legal obligations of each legal entity--the “corporate form”--than do the customers, suppliers, investors, and governments with whom they deal. Even a group’s managers and owners themselves often take little account of a corporation’s independent existence. The result may be that the corporate form is ignored for most of the life of a corporate group until, at the moment of insolvency, the corporate form arises from its desuetude to control the legal rights of all concerned. This Article argues for insistence on the observance of the corporate form throughout the life of the corporation.

There are many reasons for this disconnect between business reality and legal reality. Prominent among the causes are common names and brands used by the members of the group, along with consolidated financial statements, intra-group guarantees, and common payrolls. These business practices intersect with routine human mistakes that we are beginning to understand better under the heading of behavioral economics. The resulting ***35** vector produces the sort of perverse legal consequences outlined in this Article. The problem is both long standing and worsening. This Article seeks to do no more than to begin to define aspects of this problem and to suggest approaches to possible solutions. My argument at this stage is limited to commercial disputes. The context of injury is very often financial distress and that context is my central concern.

In connection with financial distress, the problem arises in two contexts: operational disregard of the corporate form, and manipulation of affiliates to obscure or defeat the rights of creditors. Typical of the first is lawyerly establishment of a corporate structure followed by years of neglect belatedly revealed by financial distress.[3] As Warren Buffett famously said, “you only find out who is swimming naked when the tide goes out.”[4] This phenomenon is exemplified by the insolvency of the *Nortel* corporation in which the management of the company ignored the corporate form almost entirely in the creation and employment of intellectual property and other assets.[5] The second category finds a prominent instance in the case of the *Caesars* group of casinos, in which assets and liabilities were manipulated in the midst of financial distress in a way that diverted value from creditors.[6]

This Article proposes developing a legal regime in which transparency is required with regard to the structure of a corporate group and the activities of each of its members. Conformity with the disclosures thus made would be a condition of honoring the corporate form as to the members of the group. Absent conformity with the requirements of corporate independence, the group would be treated as a single legal entity. Management should be denied the benefits of corporate distinctiveness in its affiliates unless it behaves in a way consistent with the legal rights and obligations of each entity in the corporate group. This remedy adopts the approach of Article 9,[7] which is self-enforcing: a failure to obey the rules simply nullifies the intended effect.

Admittedly, this approach would add to the expense and trouble of using limited liability to compartmentalize the legal responsibilities of a corporate group. An owner or manager seeking to enjoy the benefits of the shelter provided by limited liability would be required to honor the corporate form fromstart to finish by disclosing the structure and finances of affiliates within the corporate group and by conducting their affairs as distinct business ***36** entities, consistent with those disclosures. A manager would no longer be free to create a corporation casually and ignore it until a crisis like financial distress makes the corporate form the be-all and end-all of legal processes.

The proposed approach would benefit creditors by providing important information. However, it would also require creditors to stay on top of organizational disclosures where they seek to enjoy structural priorities in corporate-group assets that are not protected by appropriately disclosed security interests. In particular, those benefiting from asset partitioning would be required to ensure a continued honoring of the corporate form with regard to the pools of assets and liabilities. If they wish to rely upon the corporate structure for priority, they would have to ensure continuing disclosure of those priority structures.

Under existing law, any attempt to correct the confusion and injustice arising from post facto devotion to the corporate form must employ ancient and creaky legal tools, including avoidance under fraudulent conveyance law and application of substantive consolidation. All too often, those tools are ineffective or too expensive to employ. A regime that simply ignores the corporate form when it has been ignored by management of the group--carelessly or deliberately--would be a far more effective remedy. It would impose a stress on corporate structures that would require increased and better corporate lawyering. It would also impose a discipline that would promote greater simplicity in corporate organizations.

This Article states a concept for reform and suggests a project to develop that reform but does not specify solutions. It proposes that bankruptcy law serve as the primary vehicle for that reform, at least initially. The broad concept is that in bankruptcy proceedings the limited liability structures of corporate groups should be ignored and the group treated as a single entity vis-à-vis the creditors of its affiliates unless required disclosures have been made. The rules that would implement such a concept might range from very simple ones with limited effects to far-reaching changes in corporate law as applied in bankruptcy cases. The project might begin with simple rules and proceed over time to greater complexity and more substantial effect.

A simple rule might say that a corporate group must make public disclosure of its corporate structure in a specified manner. If it materially failed to do that, the group would be responsible in a bankruptcy proceeding for the obligations of its affiliates. The first version of such a rule might be limited to wholly-owned affiliates. Australia has already reached a result consistent with the one I suggest. In effect, it offers larger corporate groups a choice between filing financial statements for each subsidiary in a corporate group or filing cross-guarantees that make every affiliate in the group liable for every other affiliate's debts.[8] Many companies have chosen group ***37** liability. The approach has, not surprisingly, run into various challenges and difficulties, but it offers an important example of the feasibility of the concept offered in this Article. This, and other examples, are discussed in Part V below.

I. ILLUSTRATIONS OF THE PROBLEM

The harm that arises from blurring of the activities between a corporate group and a member of the group can arise from management's disregard of the corporate form as it conducts the group's business or from management's deliberate misallocation of its assets and liabilities. *Nortel* and *Caesars* respectively offer classic examples of each.

A. DISREGARD

The harm that can result from disregarding the corporate form is exemplified by the *Nortel* corporation. It was a large multinational corporate group headquartered in Toronto but with offices and facilities all over the world.[9] Its high-tech electronics business relied on constant research and development, the fruits of which were shared widely within the group.[10] It was managed on divisional lines that generally ignored geographical boundaries and corporate structures.[11] As it turned out, its most valuable assets by far were patents and other intellectual property registered in the appropriate offices in many countries.[12] To the extent there was any allocation of the ownership of those assets, it was largely through transfer pricing and licensing agreements structured for tax reasons and, as two courts found, of little relevance to actual ownership of the intellectual property.[13]

The consequence was that when the corporate group filed for reorganization in three jurisdictions--Canada, the United States, and the United Kingdom--the ownership of its most valuable assets was clear at the group level but utterly confused at the level of its corporate members. This ***38** confusion created an enormous potential difficulty of realizing the intellectual property. That problem was avoided, brilliantly, by an agreement of all major parties to sell the intellectual property on a global basis, ignoring geographical and corporate boundaries.[14] As a result, almost $8 billion was realized.[15]

Unfortunately, *Nortel's* management had not only created a confusing internal mess as to its assets, but also with respect to its liabilities. After the successful sale, various creditors--notably bondholders and pensioners--claimed through different affiliates and engaged in a massive legal struggle over allocation of the proceeds of the intellectual property sale.[16] The consequence was huge litigation expense--over $2 billion--and a drawn-out legal process ultimately requiring a joint televised trial in Wilmington and Toronto.[17]

In any event, the opinions of the two courts managed to reflect in large part the unitary nature of the group's ownership of the intellectual property, while also giving substantial weight to the corporate structure. Although the result was a fine piece of legal engineering, and produced at the same time a ***39** reasonable result, the careless abuse of the corporate structure was very costly and inefficient. It is really inexcusable to misplace (literally) billions of dollars of assets within a corporate group. It would be far better if the law made it clear to corporate management and its lawyers that neatly constructed corporate partitions must be taken seriously from the start and that carelessness will result in their disregard. At the same time, full transparency in the allocation of corporate assets and any material changes in that allocation would improve market efficiency and fairness to creditors.

B. MANIPULATION

I would distinguish manipulation from disregard in that disregard is the pursuit of operational objectives without any attention to corporate boundaries or obligations, while manipulation involves mindful shifting of assets and liabilities from one affiliate to another. Manipulation focuses on partitioning itself, usually for financial reasons and often in the shadow of insolvency.[18] Here, a recent and powerful example is Caesars Entertainment Company (CEC), a publicly held corporate group that consisted of the parent, CEC, and various debtor and non-debtor subsidiaries and affiliates, comprising "the world's largest and most geographically diversified casino-entertainment provider."[19] The group had many subsidiaries all over the world. Caesar's Entertainment Operating Company (CEOC), its largest operating subsidiary, owed over $18 billion when it filed for Chapter 11 bankruptcy in Delaware.

In response to allegations of abuse, the bankruptcy court appointed an examiner who filed an extensive report on the pre-petition activities of the corporate group. The examiner's summary of his findings was unusually concise:

> The principal question being investigated was whether in structuring and implementing these transactions assets were removed from CEOC to the detriment of CEOC and its creditors.
>
> The simple answer to this question is "yes."[20]

The report goes on, in 1,787 pages, to detail some fifteen complex transactions. The examiner concluded that the creditors were entitled to recover billions of dollars in diverted assets, primarily from voiding ***40** transactions among affiliates made while the company was insolvent.[21] Following this report, the Chapter 11 was resolved.[22]

At the heart of the report was this finding:

> During all of these [transactions], the Sponsors and management took the view that Caesars was one company and decisions were made from that perspective, not from the perspective of CEOC. As discussed below, once CEOC became insolvent that should no longer have been the prevailing mindset in considering potential transactions.[23]

I suggest the best response to that habit of managerial mind would be to treat the transactions as if the group was in fact a single corporate body, subject only to due consideration of the position of creditors that could show reliance to their detriment on specific corporate distinctions.[24] The reformed regime that I hope could be achieved would limit the extent to which any creditor would be entitled to so rely and might require disclosure to other creditors as a condition of that reliance. In addition, a different regime would reject the idea that attention to corporate form should be required only after an affiliate has become insolvent, when it is often too late.

II. FAILURE TO EARN THE RIGHT TO LIMIT LIABILITY

Both difficulties just described arise from abuse of a great legal invention: limited liability for corporations. Like debt itself, this concept is an engine of the economic success of the modern world, but also poses serious dangers to the fairness and efficiency of economic life. As with so many other innovations, we have been slower to grasp its costs and to contain them than to enjoy its benefits. The many ramifications of that fact are far beyond this Article or even this corporate group project. This Article focuses on serious problems that follow from the opaque liability structures of corporate groups. The abuse of these structures arises both from inattention ***41** and manipulation. Both abuses represent a kind of trivialization of the immensely powerful gift of limited liability.

When corporations were first created, limited liability was the key to permitting very large aggregations of capital for large and risky projects.[25] Even as corporations became common and easier to create, the law imposed serious protections for creditors, including par value and paid-in capital requirements, limitations on dividends while insolvent, and the like.[26] For a good while, it was not even clear that one corporation would be permitted to own another, given the risk to creditors of confusion and general flim-flam.[27]

Over time, all that has changed dramatically. Now a corporation can be created for a few hundred dollars anywhere in the world and the old protections have vanished. Even a person of modest means can own several corporations and they can be largely invisible. There are many implications of all this,[28] but one of them is that executives can find themselves captains of a legal armada of limited liability vehicles, each of which may have billions of dollars in assets or nearly none. Executives can order transfer of a king's ransom of assets among those vehicles at the flick of a properly coded email with little or no notice to various interested parties, including the armada's creditors. Real business people will often be oblivious to the distinctions of corporate ownership, from the small business person who forgets that "his" shop legally belongs to a piece of paper registered in a government office, to the high executive who does not think twice about which European subsidiary will "own" the new intellectual property just acquired. It would be invaluable to have serious empirical research about the effects of this phenomenon, but I think there is none to date.

***42** If management is often unaware of corporate distinctions, third parties--especially creditors--are even more likely to be unfocused about the exact legal entity with which they are dealing. That is especially true when the various subsidiaries' websites, stationery, and building directories all proclaim, for example, "World Wide Wicket Company,"[29] with a famous logo or brand name and, at most, the subsidiary's name in small print. In a hundred different ways, this everyday experience is likely to blur or obfuscate the sense of dealing with a distinct legal creature. Indeed, the intention of these commonalities is to encourage us to think of World Wide Wicket Company as a single entity.

What behavioral economics is teaching us is that these sorts of clues are the governing realities of human interaction and that their consequences are profound.[30] If we ignore them, we may be saying we are quite content for economic actors to be systematically misled. Without an excursus into bounded rationality,[31] I want to claim that it is wrongheaded to demand that busy executives behave consistent with a structure that is both artificial and counter-intuitive unless we have procedures that remind them to conform their behavior to the structures they create and to make basic disclosures about those structures. If we do not, we invite both inefficiency and unfairness.

III. THE FACTORS THAT OBFUSCATE CORPORATE STRUCTURES

A number of factors obfuscate the liability structures of corporate groups. Four of the most important are asset partitioning, intra-group guarantees, trademarks, and consolidated financial statements. In combination, they obscure the financial position of a corporation within a corporate group. For that reason, they tend to favor lenders and insider creditors who control their use and have full knowledge of the corporation's liability structure.

A. ASSET PARTITIONING

The most important method of obtaining repayment priorities without a security interest is asset partitioning.[32] Since its introduction to the scholarly ***43** literature by Hansmann and Kraakman,[33] it has become the subject of much academic discussion.[34] It consists of establishing privileged access for a creditor to a pool of the assets of the corporate group within the limited liability fortress of the corporate form surrounding the pool and holding out other group claimants.[35] The priority may arise because the affiliate receiving the credit promises to retain its assets and to incur no other obligations or to grant any liens. It may be expanded by a guarantee from another affiliate. The effect is very similar to that of a security interest with two substantial differences: there is no property interest that will carry the priority along with the assets if they are moved elsewhere in the corporate structure; and there is no disclosure required as a condition of the priority.[36]

The first difference means that the priority must be protected by covenants forbidding transfer without approval of the favored creditor. Yet breach of such a covenant merely gives rise to an unsecured breach of contract claim against the diminished pool, which is obviously unsatisfactory.[37] The priority may be protected to some extent by regular financial reports to the creditor from the affiliate and guarantors. The financial reports permit prompt action if the priority is threatened, but that means the priority obtained through partitioning requires considerably more policing than a security interest even under current law.[38] On the other hand, as to the asset pool extant at the time of filing, the priority has a good chance of prevailing in bankruptcy.

When security interests create much stronger priorities, why partitioning? There are two benefits: nondisclosure and international ***44** flexibility. For a private company in the United States, there is no legal requirement of disclosure of the existence of pools of assets reserved for privileged creditors within a corporate group. Even in public companies, there are few disclosures and they are often obscured in footnotes or exhibits.[39] By contrast, disclosure of a security interest is simple and blunt, although modern statutes permit the disclosures to be vague.[40] Thus, through either disregard or manipulation, partitioning creates priorities often invisible to all but insiders.

An increasing use of partitioning is in international cases. A common example is a finance subsidiary with few assets that issues bonds or notes to public investors. The substance of the group's economic exposure to repayment is provided by a guarantee, often by the group parent or an important operating affiliate. The use of this approach reflects the difficulty under current law of using a security interest to provide priority. Multinationals require flexibility to move assets freely across borders, physically or by way of financial arrangements, and we do not yet have a functioning international system of security.[41] Partitioning is a useful way to provide priority without security, although with the disadvantages mentioned above. But the result is obfuscation.

B. GUARANTEES

With or without a specific asset partitioning, guarantees within a corporate group are a central instrument of priority and obfuscation. Yet Anglo-American law has never taken sufficient account of the close relationship between security and guarantees. Guarantees create many of the same needs for disclosure as with security interests and should be treated in a similar way.[42] The Europeans long ago realized the two "credit enhancements" are closely related.[43]

Within a corporate group, a guarantee provides a door to another asset trove with greater priority in those assets than the one available to creditors "higher" in the corporate structure. The creditors of the parent of the guaranteeing affiliate have a claim on the affiliate's assets only indirectly, ***45** through the parent's equity position. That position is subordinate to the creditors of the affiliate, including beneficiaries of the guarantee by the affiliate, so the "upstream" creditors have only a low-priority indirect claim on the assets of the guaranteeing subsidiary. Thus, a creditor who is higher in the organization structure is actually lower in the priority structure. In addition, the upstream creditors have less legal protection against prejudicial activities of the affiliate. The beneficiary of a subsidiary's guarantee is a creditor entitled to the protections of the legal remedies discussed below as to the subsidiary's assets. Although those remedies are inadequate, they are much better than those available to upstream creditors.

In addition to the effect of the guarantee upon the creditors higher in the corporate structure, the existence of guarantees is obviously very important to the direct creditors of the guaranteeing affiliate itself, since the guarantee will generally be at least *pari passu* with other creditors and thus an additional drain on the asset pool in case of distress. Disclosure to those creditors is also important. For all these reasons, there is a powerful case for requiring disclosure for guarantees as we do for security interests

If guarantees were treated as akin to security interests, disclosure would be a condition of their enforcement against third parties (e.g., other creditors of the guarantor or the group): undisclosed guarantees should be unenforceable. That subject is too broad for this Article, but would be an important part of reforms of the sort discussed here.

C. TRADEMARKS

The prior work that most anticipates this project is an excellent article by Professor Lynn LoPucki.[44] He discusses the confusion arising from the corporate maze. His discussion centers on the role of trademarks in creating the appearance of a unified supplier of goods and services while the corporate-form doctrine limits liability to the particular corporate entity with which the other party deals directly. His focus is primarily on tort victims and consumers, but he would protect a wider range of parties under the heading of "customers" as defined.[45]

Professor LoPucki would make the trademark licensor responsible under specified circumstances for obligations incurred by its licensee.[46] His approach is like the one I offer in that it would impose liability on members of a corporate group in respect of other members of the group. He would do so on the ground that limiting liability to one member of a group may be seriously misleading in the context of a common (often global) trademark.[47] Common trademarks often result in a tacit misrepresentation of the identity ***46** of the party with whom one is dealing and they are a crucial way in which limited liability may work an injustice through that misrepresentation. He offers a number of telling examples.[48]

Our approaches obviously differ in that his central point is trademark and mine is the corporate group per se. He limits his range to "customers" while I hope to protect all creditors. His proposal creates liability in entities not owned or controlled by a corporate group (like franchisors), while mine is limited to those corporations who are considered members of such a group. The trademark connection would impose liability for specific obligations, while I propose to treat the entire corporate group as an entity to the extent that management fails to maintain a fully disclosed corporate structure. He is much more concerned with evasion of liability in tort.

There are pluses and minuses with each approach. The evils to be remedied are similar and overlap. Nothing precludes adopting both.

D. CONSOLIDATED FINANCIAL STATEMENTS

Intra-group guarantees are among the data suppressed by consolidated financial statements. Consolidation makes it difficult or impossible to ascertain the legal location (to coin a phrase) of assets and liabilities within the group.[49] That is especially troubling in the instance of partitioning-for-priority, but it is not limited to that situation. Thus, consolidated statements may be relied upon for years, with interested parties discovering only in a financial crisis that there are a host of intra-group asset stashes and guarantees over which the lawyers will struggle on their behalf. The previously obscure corporate form will often be at the center of the struggle.

IV. INADEQUATE REMEDIES

It is surely unnecessary to go to great length to discuss the weakness and expense of existing remedies for disregard and manipulation of the corporate form. "Substantive consolidation" is a good example. The opinion of Judge Ambro in *Owens Corning*[50] is a careful and generally accurate description of the law of substantive consolidation, even if a bit extreme at the margins. There, the bank lenders relied on guarantees that selectively consolidated key ***47** subsidiaries for priority purposes, leaving only bits for the rest of the creditors.[51] The latter may have relied on the fact that the management ran the company, as with *Nortel*, as one entity,[52] but current law does not protect them. It permits management to consolidate, deconsolidate, and semi-consolidate pretty much at will.[53] It imposes no duty on the creditor-beneficiaries to ensure that the company's officers are careful to treat each relevant subsidiary as a separate company owed separate duties, or to make full and timely disclosures of the accordion-like movements of intra-group assets and liabilities. The court extended the protection of the corporate form even though "there existed 'substantial identity between ... OCD and its wholly-owned subsidiaries.'"[54] The corporate form only emerged from the lawyers' briefcases when financial distress became apparent.

The *Owens Corning* decision reveals that substantive consolidation is quite a weak basis for ensuring that the corporate form is honored rather than disregarded. Its focus in most cases is on the observance of corporate formalities,[55] the last thing that will be known to those relying on the corporate group's unified appearance. For a doctrine that should matter most in its effect on creditors and other third parties, this preoccupation with keeping a tidy minute book full of board consents is nearly farcical. When the law limits liability, surely that limit should be crystal clear in outline and effect to each of those who deal with a corporation. The actions of management should reflect each affiliate's distinct obligations at all times.

As the examiner's report in *Caesars* makes clear, fraudulent conveyance law as a remedy for manipulation also has its limitations, especially because of its tie to insolvency. It requires insolvency at the moment of the transfer or as its immediate consequence.[56] Although the *Caesars* examiner believed ***48** that insolvency could be shown at most relevant times in that case,[57] one wonders if that would have been true in the cold light of the courtroom. Proving insolvency as of a given day in the past is not such an easy thing, especially in cases like *Caesars* where the questionable transactions extended over a number of years before bankruptcy. In a related area, much of the criticism of the "zone of insolvency" jurisprudence in Delaware[58] has turned on the difficulty of the board of directors knowing that the company is insolvent at a given moment.[59] How much more difficult might it be to show the crucial fact of insolvency as to a single affiliate that transferred assets or made a guarantee on a certain morning.

V. APPROACHES TO SOLUTIONS

The discussion so far leads to a starting point for a solution--or at least an amelioration--of these problems of disregard and manipulation. The two necessary elements are on-going respect for the corporate form and the protection of third parties. Both are achieved through disclosure by analogy to Article 9.

Under Article 9, a creditor can obtain a security interest in some or all of the debtor's property by getting the debtor's agreement. What the creditor obtains is the right to seize and sell that property and thus to get the proceeds of the sale.[60] If the creditor wants a priority in that property's value as against third parties, it must make a timely filing in prescribed form in a prescribed public office.[61] If it does, then the creditor is entitled to priority in the proceeds of sale.[62] If it does not follow the disclosure rules of Article 9, or follows them too late, it will not be entitled to enforce those rights as against other creditors of the debtor.[63] The value of the property will be available to all creditors, at least potentially.[64] In bankruptcy, it will go into a common pool for the benefit of them all.

Article 9 is a brilliant piece of legal engineering in at least two respects. First, it imposes a simple and inexpensive method of disclosure of the ***49** existence of an important legal claim against a debtor, one that may in the future affect the rights of anyone dealing with the debtor.[65] But for the disclosure, a third party might well be unaware of the claimand be prejudiced thereby. The second brilliant idea is that the rules of Article 9 are self-enforcing to a large degree. If, for example, a secured party fails to file a required financing statement in a timely way, that party will have no priority in the relevant property of the debtor but will have to share its value with the other creditors of the debtor. The undisclosed interest is simply unenforceable. Most of the time there is no litigation because its outcome would be a foregone conclusion.

Because this Article is merely the introduction of a concept for reform, I will not try to elaborate the sorts of rules that might limit limited liability in corporate groups. Nonetheless, it will be helpful to offer some possibilities that reformers might explore.

Directly on point are procedures adopted in Australia. Larger corporations are offered a choice between filing financial statements for each subsidiary in a corporate group or filing cross-guarantees that make every affiliate in the group liable for every other affiliate's debts.[66] It appears that many companies have chosen the cross-guarantee alternative.[67] There have been various challenges and difficulties,[68] but this procedure offers an important example of the feasibility of bringing order to the corporate group chaos. Adoption of a rule with similar effect might be a first step toward reform in the United States.

The simplest possible rule would be to permit enterprises to opt into complete entity treatment of a corporate group, a next-step approach that has been proposed in Australia.[69] Group liability would be announced through a public filing putting creditors on notice. It is not clear, however, how many enterprises would be willing to adopt that approach. The current Australian ***50** approach embraces essentially the overall idea suggested here: disclose the key information about the group and its affiliates or accept a form of group liability. Whether the specifics of that approach--the cross-guarantees work through a trust--is the best method to protect creditors should be one of the questions with which reformers should start.

In any case, the key point is to offer a choice to each corporate group rather than imposing a one-size-fits-all solution. For example, a group might have to choose entity treatment of a stated sort unless it makes detailed disclosures of a specified sort as to each subsidiary that will be managed as a truly independent corporate entity. As to that subsidiary, attention to the independence of that entity will be rewarded with stand-alone limited liability.

One of the benefits of creating such an option could be that the cross-guarantees would be contracts, permitting enforcement as such throughout the world. The voluntary, contractual nature of the guarantees would be demonstrated by the existence of the choice each corporate group could make between disclosure and the guarantee contract.

Given current international financing methods, the most salient rule might be a requirement that asset partitioning, as defined, be ineffective unless disclosed, just as a security interest would be. The definition of partitioning for this purpose might include the existence of covenants typical of partitioning, including agreements that preclude or limit the transfers of assets and the incurring of liabilities. Grants to a lender of a "golden share" permitting control of corporate actions might also be a defining characteristic.

Another example might be the general rule stated earlier: the group must choose between disclosure of the group's corporate structure or some form of entity treatment. The rule might require that the disclosure include the ownership of material assets, like the real estate on which each of the retail stores owned by the group's affiliates are located or, as with *Nortel*, the group's intellectual property. Failure to specify and disclose the legal location of an asset might lead to treatment of the asset as owned by the group, an approach that might have saved more than $2 billion in litigation costs in *Nortel*. The point would be transparency; management would be free to manage, but creditors and others would be informed. The rule makers would determine the extent of disclosure, balancing fair notice against protection of business plans and methods.

Intra-group transfers might be ineffective unless timely disclosed in the same way. The simple rule could apply to guarantees as well, so that no intra-group guarantee would be enforceable in bankruptcy if not disclosed as required. Rules of that sort would be beneficial as against the sort of manipulation of assets found in *Caesars*. There, some important assets were allegedly transferred years before the actual filing of bankruptcy. A rule rendering undisclosed transfers ineffective would encourage notice to ***51** affected parties and permit stakeholders to take any appropriate legal action to facilitate the unwinding of improper transactions. If the transfers were legal and transparent, they would take effect, but creditors, shareholders, and others would be on notice. If disclosure was not made, no showing of insolvency would be required to make the transactions ineffective.

Bankruptcy law is the logical place for these reforms, because the central point of the limited liability shield is to constrain the rights creditors would normally have as against those with whom they have dealt. Most of the rest of corporate law is devoted in one way or another to governance issues. The limitations of creditors' rights assume importance almost always in the context of financial distress.

If the reforms are made as part of bankruptcy law, many complexities arising from corporations organized in multiple countries--often tax and secrecy havens--would be avoided. In the United States, for example, the disclosure rules could be applied to foreign groups operating in our country with the usual attention to minimum contacts to ensure fairness.[70] Difficult questions would remain, as in all multinational bankruptcies in a global marketplace governed by national rules.

In summary, what may seem to some a radical proposal is in fact a modest return to basics in treating the corporate form--that is, limited liability--with the care and precision that it deserves. It is a powerful and dangerous concept that risks injustice and irresponsibility, but much of that cost can be contained. A simple requirement for disclosure by corporations of a certain size, plus maintenance of the legal structure thus disclosed, including its balance sheet basics, would be the only change from current practice vis-à-vis creditors in the event of an insolvency proceeding. In that way, the corporate form would truly be honored in its observance throughout the life of the corporation, not merely in its last rites.

CONCLUSION

The development of my suggested approach would take some time and likely would proceed step by step, starting with simple rules and building from that base as experience may dictate. On the down side for lawyers, this approach would threaten some of their carefully-sculpted corporate structures. On the other hand, this approach would increase work for transactional lawyers and for accountants through systematic checkups to ensure proper respect for the corporate entity. As an offset, it would materially reduce the need for litigators.

From a broader point of view, the suggested approach might be part of an effort to focus lawyers on the perspective of the users of our legal machines rather than that of the lawyers who construct and maintain them. ***52** For example, lawyers tend to focus on predictability from their own parochial viewpoint: what legal rule will help lawyers predict a result as opposed to what legal rule will best enable investors and creditors to predict the consequences of their investments and extensions of credit.

Footnotes

aa1 Benno C. Schmidt Chair of Business Law, The University of Texas School of Law. I am grateful to Weston Kowert and Yanan Zhao, both Texas '18, and to Gregory Boyle and Madeline Smart, both Texas '19, for their research for this paper. I am also grateful to David Mack, a prominent investor advisor and bankruptcy expert who participated in the conference at which this Article was presented. He enlightened me concerning the Australian system of corporate group disclosure discussed *infra*.

1 I use the term "corporate group" in this Article to refer to groups that have an active group management. I do not discuss passive groups, in which a parent is essentially an investment company that intervenes rarely in the management of an affiliate and then mainly to change its leadership. Investment groups, and the sometimes-blurry line between active and passive, are outside my scope on this occasion. Generally, when I refer to corporations, I mean to include legal entities of all kinds other than natural persons. I do not address the recent UNCITRAL proposals for managing the international insolvency proceedings of corporate groups. U.N. Comm'n on Int'l Trade Law, Working Grp. V (Insolvency Law), Facilitating the Cross-Border Insolvency of Enterprise Groups: Draft Legislative Provisions, U.N. Doc. A/CN.9/WG.V/WP.158 (Feb. 26, 2018).

2 *See* Harry Rajak, *Corporate Groups and Cross-Border Bankruptcy*, 44 TEX. INT'L L.J. 521, 533-34 (2009). A number of articles have discussed these issues with regard to various common law doctrines and theories of the corporation, but none of them have focused on transparency as the key to treatment of a corporate group or, conversely, treatment of affiliate liability as "enterprise" or "firm"--absent conformity with a set of rules governing transparency. *See, e.g., id.*; Jonathan M. Landers, *A Unified Approach To Parent, Subsidiary, and Affiliate Questions in Bankruptcy*, 42 U. CHI. L. REV. 589, 619 (1975); Virginia Harper Ho, *Theories of Corporate Groups: Corporate Identity Reconceived*, 42 SETON HALL L. REV. 879, 934-35 (2012); Sandra K. Miller, *Piercing the Corporate Veil Among Affiliated Companies in the European Community and in the U.S.: A Comparative Analysis of U.S., German, and U.K. Veilpiercing Approaches*, 36 AM. BUS. L.J. 73, 130 (1998); Robert B. Thompson, *Piercing the Veil: Is the Common Law the Problem?*, 37 CONN. L. REV. 619, 624 (2005); Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1043 (1991) [hereinafter Thompson, *Empirical Study*].

3 In the English language, most of the world uses the word "insolvency" for a proceeding involving the financial distress of a business. We in North America generally say "bankruptcy" for such proceedings involving either a natural person or a business. I will employ the North American usage.

4 Warren E. Buffett, Letter to Shareholders of Berkshire's Hathaway Inc. 10 (Feb. 28, 2002), http://www.berkshirehathaway.com/letters/2001pdf.pdf.

5 *See In re* Nortel Networks, Inc., 532 B.R. 494, 510, 540-47 (Bankr. D. Del. 2015).

6 Final Report of Examiner, Richard J. Davis at 1, *In re* Caesars Entm't Operating Co., Inc., No. 15-01145 (ABG) (Mar. 15, 2016); *In re* Caesars, 15 B 1145, 2016 WL 7477566, at *1 (Bankr. N.D. Ill. Sept. 21, 2016).

7 U.C.C. § 9 (AM. LAW INST. & UNIF. LAW COMM'N 2017).

8 Explanatory Statement, ASIC Corporations (Amendment) Instrument 2016/1211 (2001 Corporations Act) (Austl.).

9 *In re* Nortel Networks, Inc., 532 B.R. at 500.

10 *Id.* at 501-02.

11 *Id.* at 502.

12 *Id.* at 529.

13 *Id.* at 510, 540-47 (finding that the Master Research and Development Agreement regarding the intellectual property addressed ownership for tax purposes only and did not govern the allocation of the interests); Nortel Networks Corp. (Re), 09-CL-7950, 2015 O.N.S.C. 2987, paras. 175-85 (Can. Ont. Sup. Ct. J. May 12, 2015) (finding that the MRDA was a tax-driven document designed to implement *Nortel's* transfer pricing policies, but it does not decide the allocation of the intellectual property rights). As the two courts recognized, within a multinational corporate group in which intellectual property is broadly shared among its members, R&D agreements are primarily used as a method to minimize taxes by allocating ownership and costs in a tax-favorable way. Noam Noked, *Integrated Tax Policy Approach to Designing Research & Development Tax Benefits*, 34 VA. TAX REV. 109, 124-26 (2014). In addition to the assertions made to tax authorities, the parties urged the allocation of ownership based on the amount of revenue from intellectual property, national registration of intellectual property, and various other possible indicia of ownership. *See In re* Nortel *Networks, Inc.*, 532 B.R. at 520-31 (summarizing positions taken by each party).

14 Imagine if the intellectual property had been offered company by company and by country of registration, with ownership a confused tangle among the parent and numerous subsidiaries and their filings in a large number of jurisdictions. Obviously, buyers would have paid bottom dollar for such an invitation to endless lawsuits.

15 A similar result is being sought on the claims side of the balance sheet in the *China Fishery* case. *See* Chapter 11 Trustee and the Other Debtors' Joint Motion for an Order Approving the Settlement Agreement at 9-10, *In re* China Fishery Group Ltd. *(Cayman)*, No. 1:16-bk-11895 (Bankr. S.D.N.Y. Feb. 21, 2018). There the trustee proposed a settlement of intra-group claims to enhance the value of a proposed sale of assets. *Id.* at 5, 29-36 The pleadings illustrate the enormous expense and difficulty involved in trying to unravel such claims. *Id.*; Order Approving the Settlement Agreement, *In re* China Fishery Group Limited (Cayman), No. 1:16-bk-11895 (Bankr. S.D.N.Y. Apr. 26, 2018). Of course, substantive consolidation is commonplace in the reorganization of companies under Chapter 11. William H. Widen, *Corporate Form and Substantive Consolidation*, 75 GEO. WASH. L. REV. 237, 251-55 (2007).

16 *See In re* Nortel, 532 B.R. at 520-31.

17 Jay Lawrence Westbrook, *Corporate Formalism in a Global Economy*, ANN. REV. OF INSOLVENCY L. 311, 315-16 (2015) (Janis P. Sarra and Barbara Romaine, eds.); *see generally* Lauren L. Peacock, *A Tale of Two Courts: The Nortel Cross-Border Bankruptcy Trial*, 23 AM. BANKR. INST. L. REV. 543, 544 (2015); Tom Hals, *U.S., Canadian Courts Begin Unusual Trial over Nortel Billions*, REUTERS, May 12, 2014, https://www.reuters.com/article/*Nortel*-bankruptcy-trial/u-s-canadian-courts-begin-unusual-trial-over-*Nortel*-billions-idUSL1N0NY0W520140512?feedType=RSS. The allocation was ultimately resolved by settlement against a backdrop of approval of the lower court's resolution in Canada but an uncertain result that was pending on appeal in the United

States. Nortel Networks Corp., (Re), 09-CL-7950 2016 CarswellOnt 19293; *In re* Nortel Networks Inc., 2016 WL 2899225, at *4 (D. Del. May 17, 2016). The settlement was confirmed by the Canadian and U.S. courts on January 24, 2017. Nortel Networks Corp. (Re), 09-CL-7950, 2017 CarswellOnt 1119 (Can. Ont. Sup. Ct. J. Jan. 24, 2017); Order Approving Settlement and Plans Support Agreement, Nortel Networks Corp. (Re), 09-CL-7950, 2017 CarswellOnt 1119 (Can. Ont. Sup. Ct. J. Jan. 24, 2017); *see generally* Victoria Holtzinger, *Nortel Canada Announces Effectiveness of Global Settlement and Support Agreement and CCA Plan of Arrangement*, MARKETWIRED, May 8, 2017, http://www.marketwired.com/press-release/*Nortel*-canada-announces-effectiveness-global-settlement-support-agreement-ccaa-plan-2214799.htm.

18 I do not mean in this essay to address improper intent. The existence of corporate venality is not my subject, although manipulation and wrongdoing are fairly often related.

19 Complaint for Declaratory and Injunctive Relief at 13, *In re* Caesars Entm't Operating Co., Inc. et al., No. 15-01145 (Mar. 11, 2015); *see* Davis, *supra* note 6, at 99. The bankruptcy court appointed an examiner who filed an extensive report on the pre-petition activities of the corporate group. Order Granting in Part and Denying in Part Motion to Appoint Examiner at 1-2, *In re* Caesars Entm't Operating Co., Inc. et al., No. 15-01145 (Mar. 12, 2015). Most of the facts briefly summarized herein are taken from that report. *See generally* Davis, *supra* note 6.

20 Davis, *supra* note 6, at 1.

21 *Id.* at 2. Many of the transactions involved the "Sponsors," including Caesars' owners and their affiliates. However, most of them were not simply transfers to insiders--as was true, for example, in *In re* James River Coal Co., 360 B.R. 139, 148 (Bankr. E.D. Va. 2007)--but involved moving assets among subsidiaries to the benefit of the ultimate, nonbankrupt group parent and the detriment of the debtor companies and their creditors.

22 Modified Plan at 1, *In re* Caesars Entm't Operating Co., Inc., Bankr. N.D. Ill. (2017) (1:15-bl-01145); Order Confirming Plan at 3, *In re* Caesars Entm't Operating Co., Inc., Bankr. N.D. Ill. (2017) (1:15-bl-01145); Jacqueline Palank, *Caesars Unit Wins Court Approval for Chapter 11 Exit Plan; Restructuring plan will cut CEOC's debt by about $10 billion*, WALL ST. J. (Jan. 17, 2017), https://www.wsj.com/articles/caesars-unit-wins-court-approval-for-chapter-11-exit-plan-1484675918 ("Caesars said it settled the feud with junior creditors. Caesars and its backers agreed to contribute more than $5 billion to support the CEOC restructuring, up from a $1.5 billion pledge from Caesars at the start of the bankruptcy."). Settlement according to these terms seems to demonstrate that there were indeed serious questions about these transactions.

23 Davis, *supra* note 6, at 5.

24 *See* *In re* Owens Corning, 419 F.3d 195, 212 (3d Cir. 2005). *See generally* John A.E. Pottow, 9 BROOK. J. CORP. FIN. & COM. L. 202 (2014).

25 *See* Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573, 575 (1986) ("Limited liability now enables a corporate group organized in tiers of companies to insulate each corporate tier of the group, and thus, achieve layers of insulation for the parent corporation from liability for the obligations of its numerous subsidiaries."); *see also* JONATHAN BARRON BASKIN & PAUL J. MIRANTI JR, A HISTORY OF CORPORATE FINANCE 142 (1997) ([W]ith limited liability, two corporations having comparable financial standing could both have equal access to credit without regard to the economic circumstances of their principals"); Frederick Tung, *Limited Liability and Creditors' Rights: The Limits of Risk Shifting to Creditors*, 34 GA. L. REV. 547, 549 (2000); John H. Matheson, *The Limits of Business Limited Liability: Entity Veil Piercing and Successor Liability Doctrines*, 31 WM. MITCHELL L. REV. 411, 414 (2004); *see also* PHILLIP L. BLUMBERG ET AL., BLUMBERG ON CORPORATE GROUPS, § 6.02, 6-5 (2006) (discussing in detail a variety of issues related to corporate groups).

26 *See* David Millon, *Theories of the Corporation*, 1990 DUKE L. REV. 201, 210, n.43 (1990); Phillip McGough, *Statutory Limits on*

a Corporation's Right to Make Distributions to Shareholders: The Law of Distribution in the 1984 Revised Model Business Corporation Act, 21 AKRON L. REV. 27, 30 (1987).

27 *See* Millon, *supra* note 26, at 209, n.37 ("The states also used general incorporation acts to restrict the economic power of corporations in other ways. Of particular importance were prohibitions on ownership of stock of other corporations ...."); *see also* STEPHEN GLOVER, BUSINESS SEPARATION TRANSACTIONS: SPIN-OFFS, SUBSIDIARY IPOS AND TRACKING STOCK 3-14 (2006) ("To the extent the companies identify themselves in the same way, the risk of confusion ... increases.").

28 *See, e.g.*, Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 20-23, 38-54 (1996).

29 *See generally* HOW TO SUCCEED IN BUSINESS WITHOUT REALLY TRYING (The Mirisch Corporation 1967).

30 *See generally* DANIEL KAHNEMAN, THINKING FAST AND SLOW (2011).

31 *See generally* BOUNDED RATIONALITY: THE ADAPTIVE TOOLBOX (Gerd Gigerenzer & Reinhard Selten eds., 2002).

32 *See* Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 394, 399-401 (2000) (explaining that asset partitioning will protect the creditors from the parent company's drainage of assets in subsidiaries when the subsidiaries are simply operated as divisions within the single conglomerate corporate shell); *see also* Henry Hansmann & Richard Squire, *External and Internal Asset Partitioning: Corporations and Their Subsidiaries, in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 270-71 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018) (arguing that courts should be inclined to allow "internal partitioning" in corporate groups that fail to keep accurate entity-level records, provided that they maintain accurate accounts, because it can reduce administrative costs and agency costs of debt).

33 *See* Hansmann & Kraakman, *The Essential Role of Organizational Law, supra* note 32, at 394-96 (defining asset partitioning).

34 *See, e.g.*, Marcus Cole, *Limiting Liability Through Bankruptcy*, 70 U. CIN. L. REV. 1245, 1255-57 (2002); Robert B. Thompson, *Agency Law and Asset Partitioning*, 71 U. CIN. L. REV. 1321, 1323 (2003); Edward M. Iacobucci & George G. Triantis, *Economic and Legal Boundaries of Firms*, 93 VA. L. REV. 515, 518 (2007); Richard Squire, *The Case for Symmetry in Creditors' Rights*, 118 YALE L. J. 806 (2009); Anthony J. Casey, *The New Corporate Web: Tailored Entity Partitions and Creditors Selective Enforcement*, 124 YALE L. J. 2680, 2705 (2015); Morgan Ricks, *Organizational Law as Commitment Device*, 70 VAND. L. REV. 1303, 1311 (2017).

35 Closely related is the idea of a "bankruptcy remote" corporation, a form of asset partitioning that seeks to separate a pool of assets from the insolvency of their equitable owner. A recent bankruptcy court decision upheld this arrangement and was affirmed on appeal. Patterson Belknap Webb & Tyler LLP, *Bankruptcy Remoteness Going to a Court of Appeals*, JDSUPRA (Feb. 23, 2018), https://www.jdsupra.com/legalnews/bankruptcy-remoteness-going-to-a-court-84999/; *In re* Franchise Servs. of N. Am., Inc., 891 F.3d 198, 214 (5th Cir. 2018), as revised (June 14, 2018); *In re* Franchise Servs. of N. Am., Inc., No. 1702316EE 2018 WL 485959, at *5 (Bankr. S.D. Miss. Jan. 17, 2018) *aff'd*, 891 F.3d 198 (5th Cir. 2018), *as revised* (June 14, 2018).

36 Richard Squire, *Strategic Liability in the Corporate Group*, 78 U. CHI. L. REV. 605, 612 (2011).

37 Barry E. Adler & Marcel Kahan, *The Technology of Creditor Protection*, 161 U. PA. L. REV. 1773, 1779 (2013).

38 *Id.* at 1780.

39 *See* Lynn M. LoPucki, *Toward a Trademark-Based Liability System*, 49 UCLA L. REV. 1099, 1111 (2002).

40 *See generally* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 1229 (6th ed. 2010); GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 468-69 (1965).

41 Some important progress has been made in specialized areas. *See* Convention on International Interests in Mobile Equipment, Nov. 16, 2001, 2307 U.N.T.S. 285, available at http://www.unidroit.org/english/conventions/mobile-equipment/mobile-equipment.pdf; Roy Goode, *Private Commercial Law Conventions and Public and Private International Law: The Radical Approach of the Cape Town Convention 2001 and its Protocols*, INTL. & COMP. L. Q. 65(3), 523-40 (2016).

42 *See generally* ULRICH DROBNIG, PRESENT AND FUTURE OF REAL AND PERSONAL SECURITY, IN CONVERGENCE OF LEGAL SYSTEMS IN THE 21ST CENTURY 541, 543-44 (2002).

43 *Id.*

44 LoPucki, *supra* note 39, at 1100.

45 *Id.* at 1121.

46 *Id.* at 1128-30.

47 *Id.* at 1099.

48 *Id.*; *see, e.g.*, Mobil Oil Corp. v. Bransford, 648 So. 2d 119, 121 (Fla. 1995) (holding Mobil Oil Corp. not liable for an assault committed at a Mobil gas station by an employee wearing a Mobil uniform because the employee was employed by a franchisee and not by Mobil Oil Corp.); Yoder v. Honeywell Inc., 104 F.3d 1215, 1223-24 (10th Cir. 1997) (holding Honeywell Inc. not liable for defective products bearing its trademark, despite the fact that the products bore no other indication of their source); Young v. Jones, 816 F. Supp. 1070, 1074-75 (D.S.C. 1992), *aff'd sub nom*; Young v. F.D.I.C., 103 F.3d 1180, 1192 (4th Cir. 1997) (holding Price Waterhouse not liable for damages resulting from reliance on an erroneous audit letter issued on Price Waterhouse letterhead by a firm licensed to use the Price Waterhouse trademark, despite the fact that the letter gave no other indication of its source).

49 *See* Widen, *supra* note 15, at 282.

50 *In re* Owens Corning, 419 F.3d 195, 199 (3d Cir. 2005).

51 *Id.* at 201-02.

52 *In re* Owens Corning, 316 B.R. 168, 171 (Bankr. D. Del. 2004), *rev'd and remanded*, 419 F.3d 195 (3d Cir. 2005).

53 *In re* Owens Corning, 419 F.3d 195, 216 (3d Cir. 2005) (reversing the lower court's application of substantive consolidation).

54 *Id.* at 202. Even the appellate court recognized "sloppy bookkeeping" among the corporate group. *Id.* at 200.

55 Seth D. Amera & Alan Kolod, *Substantive Consolidation: Getting Back to Basics*, 14 AM. BANKR. INST. L. REV. 1, 20 (2006). Much the same weaknesses are found in related doctrines, such as piercing the corporate veil. A study of reported cases conducted by Robert Thompson suggested that more than one-third of veil-piercing attempts were successful among the reported cases. Thompson, *Empirical Study, supra* note 2. That result seems inconsistent with the general view so we need others to follow his important lead in bring empiricism to these issues. *Id.* at 1070.

56 11 U.S.C. §§ 544, 548 (2012); UNIF. VOIDABLE TRANSACTIONS ACT § 5 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2014). Of course, an action based upon actual fraudulent intent does not require insolvency but fraud is rare and hard to prove. Atwater v. Jones, 34 Ohio Cir. Dec. 605, 609-10 (Ohio Ct. App. 1902) ("[A] party who commits a fraud always covers up his proceedings in a way that it is difficult, if not impossible, in nearly all cases, to prove the very act or the very intent of the party who has committed the fraud.").

57 Davis, *supra* note 6, at 2. ("By December 31, 2008, and continuing through 2014, there is a strong case that CEOC was insolvent, and from the last quarter of 2013 through 2014 (when the most significant transactions took place) it was certainly insolvent.").

58 Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc'ns Corp., Civ. A. No. 12150, 1991 WL 277613, at *34 (Del. Dec. 30, 1991).

59 *See* North Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 101 (Del. 2007) (emphasizing the "need for providing directors with definitive guidance"); Henry T. C. Hu & Jay Lawrence Westbrook, *Abolition of the Corporate Duty to Creditors*, 107 COLUM. L. REV. 1321, 1342, n.68 and accompanying text (2007) (summarizing literature criticizing the "zone of insolvency" idea for its lack of certainty).

60 James J. White, SECURED TRANSACTIONS TEACHING MATERIALS 41 (3d ed. 2005); White & Summers, *supra* note 40, at 1335.

61 White, *supra* note 60, at 19; White & Summers, *supra* note 40, at 1215.

62 White, *supra* note 60, at 41; White & Summers, *supra* note 40, at 1194.

63 White, *supra* note 60, at 42; White & Summers, *supra* note 40 at 1194.

64 *Id.* at 18; White & Summers, *supra* note 40 at 1194.

65 Arguably, Article 9 is not as rigorous today as it should be in ensuring sufficient disclosure, but that is not today's subject. *See* Jonathan C. Lipson, *Secrets and Liens: The End of Notice in Commercial Finance Law*, 21 EMORY BANKR. DEV. J. 421, 517 (2005); Gerald T. McLaughlin, *''Seek but You May Not Find'': Non-UCC Recorded, Unrecorded and Hidden Security Interests Under Article 9 of the Uniform Commercial Code*, 53 FORDHAM L. REV. 953, 953-54 (1985).

66 R P Austin & Professor I M Ramsay Ford, Austin & Ramsay's Principles of Corporations Law, § 20.250 (update June 2018). The rule is that in the bankruptcy of any affiliate, "the surviving company" would make up any shortfall. *Id.*

[67] *Id.* For older data, *see* Graeme Dean & Frank Clark, *Corporate Officers' Views on Cross Guarantees And Other Proposals To "Lift The Corporate Veil,"* 23 CO. & SEC. L. J. 299, 304, 305 fig. 1 (2005) ("As a proportion of all Australian listed companies, approximately 15% of all listed companies have executed a Deed of Cross Guarantee; of the 'Top 50'--more than 50%; of the 'Top 200'--approximately 40%. Further, our Deed database reveals that as at June 30, 1999, [sic] the number of operating closed groups exceeded 800, and was growing at around 10% per annum.").

[68] One difficulty is the limitation of the effect to liquidation cases amidst the growing use of reorganization procedures. Dean & Clarke, *supra* note 67, at 303-04.

[69] Jennifer Dickfos, *Enterprise Liability for Corporate Groups: A More Efficient Outcome for Creditors*, 25 AUSTRL. J. OF CORP. L. 242, 242-47 (2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2257465.

[70] The Australian rules apply to foreign companies doing business in Australia. *See* Corporations Act 2001 (Cth) pt. 5B.2, div. 2.

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