

VEIL-PIERCING'S PROCEDURE

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Abstract

With the lines between shareholders and corporations blurring over constitutional rights like free exercise of religion and political speech, questions as to how and under what circumstances the law respects or disregards the separation between shareholders and their corporations have never been more urgent. In the corporate law literature, these inquiries have overwhelmingly focused on the doctrine of piercing the corporate veil, a judicial mechanism normally applied to hold shareholders responsible for the obligations of corporations. The last twenty years of veil-piercing scholarship has been largely devoted to empirical analyses of veil-piercing cases collected from Lexis and Westlaw searches. Since 1991, scholars have been trying to mine cases for ever more variables that might predict when and under what circumstances judges disregard the separation between shareholders and their corporations. This Article argues that these scholars have focused on the substance of veil-piercing law to the detriment of another factor: civil procedure. This Article is the first to survey civil procedure and evidentiary rules that affect existing veil-piercing studies including pleading standards, threshold presumptions, burdens of proof, jury access and waiver. The Article ultimately argues that phenomena scholars now ascribe to the “incoherence” of veil-piercing law are explicable in the context of veil-piercing’s procedural fluidity.

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INTRODUCTION

After decades of invulnerability in state and federal courts, tobacco firms in the 1990s and 2000s began to face increasing and potentially catastrophic liability over claims that they had hidden the risks of tobacco consumption (including risks to non-users), manipulated nicotine levels in cigarettes, intentionally misled consumers about the relative benefits of “light” cigarettes, and, ultimately, imposed billions of dollars of health and other costs on consumers, governments and insurers.¹ This liability was even more threatening at that time because the major tobacco firms were integrated into diversified companies like Kraft, Nabisco, and B.A.T. Industries.² Directors and managers feared that successful plaintiffs would not only bankrupt divisions dedicated to tobacco manufacturing, promotion, and distribution, but might reach other corporate assets held by consumer products, brand management, or financial services units through the legal doctrine known generally as “piercing the corporate veil.”

Legal scholars weighing in on the tobacco firms’ fate overwhelmingly focused on the substantive law of veil-piercing and advised the tobacco firms to house their tobacco businesses in separate corporate entities. Doing so, they claimed, would protect non-tobacco assets. Columbia’s Harvey Goldschmidt opined that formally separating tobacco-related businesses from food units would make courts “more reluctant” to pierce the corporate veil.³ Stanford’s Joseph Grundfest agreed noting that “absent anything extraordinary”, courts would not pierce if tobacco-related businesses were spun off.⁴ Renowned veil-piercing treatise author Stephen Presser argued that non-tobacco assets would be protected from plaintiffs’ claims as long as the firms made sure the tobacco businesses were not “controlled” by a parent corporation and could prove that they were not segregating the businesses to evade existing liabilities.⁵

To be sure, tobacco firms took scholars’ advice seriously. An internal memorandum circulated after R.J. Reynolds Tobacco Holdings, Inc. was separated from Nabisco Group Holdings Corp. in 1999 ordered that every detail of corporate separateness be observed:

1. See, e.g., *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006) *aff’d in part, vacated in part*, 566 F.3d 1095 (D.C. Cir. 2009) and *order clarified*, 778 F. Supp. 2d 8 (D.D.C. 2011).

2. See Michael Arndt, *It Just Got Hotter in Kraft’s Kitchen*, *Bus. Wk.*, Feb. 12, 2007, at 36 (discussing Altria’s spin off of Kraft Foods Inc. in 2007).

3. *National Law Journal*, June 1994.

4. *Id.*

5. SCB Conference Call with Stephen Presser, May 24, 1999, *available at* <http://legacy.library.ucsf.edu/tid/rmm09e00>.

It is critical that we not confuse third parties about which company is acting in a particular situation. If the corporate separateness of Holdings and Tobacco is not maintained, a court could treat the two entities as one and permit a plaintiff in a tobacco lawsuit to pierce the corporate veil and reach the parent company's assets.⁶

But tobacco firms did not limit their efforts at asset protection to restructuring their businesses or adopting veil-piercing deterrent policies. They also played for the rules. In litigation across the country, tobacco firms argued that they enjoyed evidentiary presumptions, plaintiffs bore heightened burdens of proof, veil-piercing inquiries applied to procedural aspects of litigation with the same force as underlying substantive claims, courts should reject corporate separateness as a defendant's affirmative defense, and that plaintiffs should not have access to a jury on veil-piercing claims.⁷ As early as 1989, Philip Morris had developed a litigation manual on intercorporate liability, which set out strategies for both substantive and procedural claims against veil-piercing.⁸ Despite the importance tobacco firms attached to procedural factors affecting veil-piercing, legal scholars neglected them.

This article addresses those factors, arguing in essence that the civil procedure of corporate veil-piercing has been marginalized by advocates, scholars and judges alike. Indeed, in arguably the most important case of the Supreme Court's 2014 term, Justice Alito writing for the majority concluded that a "closely held" for-profit corporation was a person for purposes of the Religious Freedom Restoration Act without defining how or why a corporation might be considered "closely held."⁹ In a stinging dissent, Justice Ginsburg pointed out the same problem, but limited her analysis to the substantial consequences of giving for-profit corporations

6. Memorandum from McDara P. Folan III, Vice President and Deputy Gen. Counsel and Sec'y, RJ Reynolds Tobacco Holdings, Inc., to Key Managers (Nov. 19, 1999) (emphasis omitted).

7. See *BAT Industries, p.l.c. v. Delaware Superior Court*, Cause No.18S00—9712-OR-670 (Supreme Court of Indiana, Jan. 12, 1998); see also *Dewey v. R.J. Reynolds Tobacco Co.*, 536 A.2d 243 (1988); *State v. Philip Morris, Inc.*, 686 N.Y.S.2d (N.Y. Sup. Ct. Dec. 23, 1998); R.J.R. Nabisco Holdings Corp.'s Memorandum in Support of Motion in Limine to Exclude Certain Evidence, R.J.R. Nabisco Holdings, Corporations v. Dunn, 657 N.E.2d 1220 (Ind. 1995).

8. PHILIP MORRIS COMPANIES INC., LITIGATION MANUAL ON INTERCORPORATE LIABILITY (April 1989), available at <http://legacy.library.ucsf.edu/tid/cgf22d00>.

9. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); see also *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1135 (10th Cir. 2013) ("[W]e cannot see why an individual operating for-profit retains Free Exercise protections but an individual who incorporates—even as the sole shareholder—does not, even though he engages in the exact same activities as before."); Stephen M. Bainbridge, *Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of Incorporated Employers*, 16 GREEN BAG 235 (2013).

“personhood” under RFRA.¹⁰ To be sure, *Burwell v. Hobby Lobby Stores, Inc.* was a veil-piercing case. Hobby Lobby’s controlling shareholders argued that they could not comply with certain coverage mandates imposed by the Patient Protection and Affordable Care Act “unless . . . [they] personally direct[ed] the corporations to do so.”¹¹ Yet to both Alito and Ginsburg, the fundamental issue of corporate separateness was masked behind a range of policy and statutory considerations. Neither mentioned state veil-piercing law nor even clarified the relationship between state-incorporated entities and eligibility for federal religious freedom protections. If they had done so, it would have exposed the unmanageable diversity and complexity involved in separating corporations, their shareholder, and their managers in the closely held context.

This Article explores the procedural diversity that characterizes corporate veil-piercing, bringing to light the crucial role civil procedure plays in veil-piercing adjudication and exposing weaknesses in current veil-piercing studies. Influenced by Robert Thompson’s pathbreaking study of veil-piercing in state and federal courts, veil-piercing scholars have since 1991 focused their research on collections of reported and unreported cases, examining the profiles of plaintiffs and defendants; the type of claim (e.g. tort or contract) likeliest to prevail; the rate at which courts pierce; and the relative importance of one factor or another in reaching veil-piercing conclusions.¹² This undertaking is vast. In their 2010 study of corporate veil piercing in federal courts, Christina Boyd and David Hoffman noted that there were “hundreds” of articles on veil piercing.¹³ When he revisited and refined Thompson’s study, Peter Oh described the regular use of scholars’ veil-piercing research to

10. *Burwell*, 134 S. Ct. at 2797 (Ginsburg, J., dissenting) (“Although the Court attempts to cabin its language to closely held corporations, its logic extends to corporations of any size, public or private.”).

11. Brief for Respondents at *27, *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1135 (10th Cir. 2013) (No. 13-354).

12. See, e.g., Nicholas L. Georgakopoulos, *Contract-Centered Veil Piercing*, 13 STAN. J.L. BUS. & FIN. 121 (2007); Peter B. Oh, *Veil-Piercing*, 89 TEX. L. REV. 81 (2010); Lee C. Hodge & Andrew B. Sachs, *Empirical Study, Piercing the Mist: Bringing the Thompson Study into the 1990s*, 43 WAKE FOREST L. REV. 341, 347 (2008) (analyzing 228 cases from 1986 to 1995); John H. Matheson, *Why Courts Pierce: An Empirical Study of Piercing the Corporate Veil*, 7 BERKELEY BUS. L.J. 1 (2010) [hereinafter *Why Courts Pierce*]; Richmond McPherson & Nader Raja, *Corporate Justice: An Empirical Study of Piercing Rates and Factors Courts Consider When Piercing the Corporate Veil*, 45 WAKE FOREST L. REV. 931, 940 (2010) (examining 236 cases from 1996 to 2005); Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036 (1991) [hereinafter *Piercing the Corporate Veil*]; Robert B. Thompson, *Piercing the Veil Within Corporate Groups: Corporate Shareholders as Mere Investors*, 13 CONN. J. INT’L L. 379 (1999).

13. Christina L. Boyd & David A. Hoffman, *Disputing Limited Liability*, 104 NW. U. L. REV. 854, 854 (2010).

shape judicial and legislative policy not only in the U.S. but around the world.¹⁴

Following Karl Llewellyn's admonition that "what substantive law says should be means nothing except in terms of what procedure says that you can make real," this article aims to shift the debate away from its current focus on parties and substance, toward the *process* of piercing the corporate veil.¹⁵ The reasons for doing so are two-fold. First, while current empirical treatments attempt to assess the wide range of factors affecting veil-piercing outcomes, they tend to either deemphasize or entirely ignore procedural variables that impact the success of veil-piercing claims. Neither state nor federal procedure is uniform in how veil-piercing cases are adjudicated. Pleading standards, for example, range from liberal notice to specific or heightened pleading for veil-piercing actions. Despite the recurrent mantra in the literature that veil-piercing is an "equitable" doctrine, federal and state courts regularly submit the question of whether to pierce the corporate veil to a jury and in at least 10 states and the District of Columbia, claimants enjoy a fairly clear right to a jury trial on that issue.¹⁶ Evidentiary standards and burdens also vary. Some states apply a preponderance of the evidence standard while others impose a clear-and-convincing burden.¹⁷ In some cases, courts presume corporate-shareholder separation, requiring plaintiffs to plead and prove elements sufficient for a finding of piercing the corporate veil while others authorize or require the corporate veil to be raised as an affirmative defense.¹⁸ As the question of whether a corporation is separate from its owners or not metastasizes through an increasing number of state and federal regulatory schemes, the *process* by which corporations are handled by judges will require more certainty and definition than now prevails.¹⁹

Second, the focus on parties and substance of corporate veil-piercing distracts from the universe of other options available to litigants to combine shareholders and corporations for a wide range of reasons. In state jurisdictions where veil piercing faces substantial procedural hurdles and/or no access to a jury, litigants resort to alternative claims including enterprise liability, equitable subordination, fraudulent conveyance, theories of agency, and varieties of civil conspiracy claims to reach shareholders.²⁰ Scholars, of course, have long been aware of these alternatives but have not

14. Peter B. Oh, *Veil Piercing*, 89 TEX. L. REV. 81, 91 (2010).

15. KARL LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 17 (2012)

16. See discussion *infra* Part IV.B.

17. See *supra* note 12.

18. *Id.*

19. *Id.*

20. *Amfac Foods, Inc. v. Int'l Sys. & Controls Corp.*, 654 P.2d 1092, 1098 (Or. 1982) (listing alternative theories that might be pursued along with veil-piercing).

systematically studied their use as the result of the options civil procedure offers and shapes. These alternatives will similarly guide relevant questions as to how shareholders may use the corporate veil as a “sword” against creditor claims but a “shield” against regulatory measures.

Assessing the influence of rules of civil procedure may help in bringing clarity to curiosities that have emerged from aggregate analyses. Maryland courts, known for their hostility to veil-piercing, work under rules which disallow veil-piercing as an independent cause of action, generally provide no access to a jury's determination for veil-piercing claims, and require a plaintiff to meet a clear-and-convincing standard of proof.²¹ North Dakota courts, which oversee one of the highest veil-piercing rates, apply liberal notice pleading to veil-piercing claims and subject them only to a preponderance of the evidence burden. Existing narratives attribute the difference between Maryland and North Dakota to the relative importance of “fraud” and “undercapitalization” as factors courts weigh in piercing the corporate veil.²²

The purpose of this Article is to identify and draw focus to the analytical difficulties implicit in empirical studies of veil piercing that have not yet been adequately addressed. Experimental statistical treatments of cases culled from larger data sets obtained through using search terms in Westlaw and Lexis seek to affirm or negate certain expectations through correlations between variables. The classic case in the veil-piercing literature is the contract/tort distinction. Before Thompson's study, scholars generally agreed that veil-piercing was easier in tort actions with the plausible explanation that tort creditors were less able to protect themselves from abusive uses of the limited liability business entity.²³ Thompson's study upended the conventional wisdom, demonstrating, at least according to the methodology he applied, that contract actions were more likely to result in a veil-piercing outcome.²⁴ Peter Oh's 2010 study suggested a return to the conventional wisdom favoring tort actions by carefully categorizing actions for fraud, again based on whether a plaintiff successfully reached shareholder assets.²⁵ Correlation, of course, is not causation and these and other studies depend on whether any given researcher has correctly identified the relevant phenomena and controlled for alternative possibilities. The most

21. JAMES J. HANKS, JR., § 4.18 PIERCING THE CORPORATE VEIL “A HERCULEAN TASK” MDCLW (2013).

22. Oh, *supra* note 14, at 118.

23. 2 PHILLIP I. BLUMBERG ET AL., BLUMBERG ON CORPORATE GROUPS § 57.04, 57-8, (2nd ed. 2009); Stephen Presser, PIERCING THE CORPORATE VEIL, §1:7 (2010).

24. Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1058 (1991).

25. Oh, *supra* note 14.

prominent studies of veil piercing focus on *whether* the veil is pierced in various contexts e.g. contract, tort, closely held corporations, in a dispositive or discovery motion; upon a central veil-piercing theory e.g. undercapitalization, commingling of funds, or failure to observe corporate formalities; and, applying a certain state's law. Scholars have paid significantly less attention to *how* the veil is pierced.

Part I of this Article provides a brief summary of the law of veil-piercing and surveys the existing literature beginning with Robert Thompson's 1991 article. This section of the Article demonstrates the general tendency of empirical veil-piercing work to neglect procedural variables. Parts II and III survey, respectively, state and federal rules of civil procedure and evidence for factors which influence the course of a veil-piercing claim: 1) must plaintiffs bring an independent cause of action for piercing the corporate veil or is it a remedy for an underlying action? 2) if not specifically pled before trial, is the claim waived? 3) if not waived, do the rules of civil procedure or evidence nevertheless encourage or discourage veil-piercing plaintiffs to bring those claims toward the beginning of litigation? 4) which burden of proof must a litigant meet to prevail on veil-piercing claim or defense? 5) who determines whether the corporate veil will be pierced, the judge or the jury? Part IV uses the procedural variables explored in Parts II and III to explain both why current empirical treatments of veil-piercing tell us less than they might while simultaneously suggesting that some of the curiosities in those studies may be understood as a function of the paths civil procedure shapes for veil-piercing claimants. In Part V, I argue that, without accounting for procedural variables, existing empirical studies tell us little about either litigant or judicial behavior relevant to veil-piercing disputes.

I. VEIL-PIERCING: AN OVERVIEW

When general corporation codes replaced the special state legislative charters that characterized the limited liability entities of the 1800s, corporations shifted in the American economic, legal, and political landscape from unusual – and highly circumscribed – beings created by the state to pedestrian entities with increasingly equal rights to natural persons.²⁶ In recent years, this trend has accelerated as the U.S. Supreme Court and lower federal courts have extended their rights – like political expression and free exercise of religion – normally ascribed to natural persons.²⁷ As a corollary to

26. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 171-72 (3d ed. 2005).

27. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (rejecting generally any difference between natural persons and corporations for purposes of First Amendment political speech protection); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1135 (10th Cir. 2013) (ruling that a private for-profit corporation could bring a claim under the Religious Freedom Restoration Act).

their distinctness and independence, corporations' legal existence stands separate and apart from the shareholders of the corporation, who in exchange for investment of their capital face limited consequences for corporate debts and liabilities. "The purpose of such separation is to insulate the stockholders from the liabilities of the corporation, thus limiting their liability to only the amount that . . . [they] voluntarily put at risk."²⁸ This "limited liability . . . promote[s] commerce and industrial growth by encouraging shareholders to make capital contributions to corporations without subjecting all their personal wealth to the risks of the business."²⁹ The separation between shareholders and corporations has facilitated some of the most important features of modern capitalism: efficient stock markets for the trading of ownership interests; diversification of investment risk; subsidized risk-taking by corporate managers; and, most importantly, enhanced capital flows to entrepreneurs.³⁰

The benefits flowing from the separation of shareholders and their corporations are accompanied by significant costs, the management of which remain contested among legal scholars.³¹ The separation of ownership and control empowers corporate managers to act in their own interests at the expense of not only shareholders but other constituencies like employees, communities, consumers, suppliers and other creditors.³² The extent and management of those costs manifest differently between corporations whose shares are publicly traded (and therefore are subject to at least some level of market discipline) and those whose shares are closely held, often partially or wholly re-uniting ownership and control in the same persons or entities. Indeed, it is the principle of control which undergirds the doctrine of veil-piercing, which courts have, so far, only applied to closely held corporations.³³

28. Salt Lake City Corp. v. James Constructors, Inc., 761 P.2d 42, 46 (Utah Ct. App. 1988).

29. David H. Barber, *Piercing the Corporate Veil*, 17 WILLAMETTE L. REV. 371, 371 (1981) (citing N. LATTIN, *THE LAW OF CORPORATIONS* 11-12 (2d ed. 1971)).

30. ADOLF BERLE & GARDINER MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932); Eugene F. Fama, *Efficient Capital Markets: a Review of Theory and Empirical Work*, 25 J. OF FIN. 383 (1970).

31. See generally Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1925 (1991); David Million, *Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability*, 56 EMORY L.J. 1305, 1307 (2007) ("[L]imited liability should not provide the occasion for shareholders to behave opportunistically toward third parties."); Paul Halpern et al., *An Economic Analysis of Limited Liability in Corporation Law*, 30 U. TORONTO L.J. 117, 148-49 (1980).

32. Adolf Berle and Gardiner Means, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932); E. Merrick Dodd, Jr., *AMERICAN BUSINESS CORPORATIONS UNTIL 1860* 85-92 (1954); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932).

33. Thompson, *Piercing the Corporate Veil*, *supra* note 12, at 1047.

Simply stated, veil-piercing allows courts to disregard the artificial “veil” separating shareholders and corporations and allows a litigant to treat them as one for a range of reasons, the most common of which is the pool of assets available to satisfy legal liabilities.³⁴ In the archetypal case, a shareholder, acting as a director, a manager, or other ostensibly authorized agent of the corporation, will enter into a contract or commit a civil wrong attributable to the corporation. A creditor (either contract or tort) will seek to recover from both the shareholder and the corporation nominally responsible for the liability.

Veil-piercing, of course, is not the only legal theory under which shareholders and corporations may be unified for legal purposes. Depending on factual context and procedural background, plaintiffs may pursue theories of agency, aiding and abetting, a menu of equitable doctrines, civil conspiracy, enterprise liability, fraudulent conveyance, or violation of statutory duties that effectively erase distinctions between regulation-violating, contract-breaching, and tort-perpetrating participants.³⁵ This in part explains the jurisprudential and scholarly frustration with the law of veil-piercing.³⁶ Early courts borrowed concepts from agency law, applying the “alter ego” or “mere instrumentality” tests when determining if the corporate form should be disregarded.³⁷ The core of veil-piercing law is actually remarkably uniform across jurisdictions, requiring that a court find variations on “complete control and domination [and] . . . a shareholder perpetuat[ing] a fraud, wrong, or injustice that has proximately caused unjust loss or injury to the plaintiff.”³⁸ Jurisdictions have, to the consternation of judges, legislators and scholars alike, expanded the factors to be considered for both the first “control” prong and the second “wrong” prong, while some jurisdictions have unevenly or completely failed to apply causation as

34. I. Maurice Wormser, *Piercing the Veil of Corporate Entity*, 12 COLUM. L. REV. 496, 496-99 (1912).

35. See *Equity Trust Co. Custodian FBO Eisenmenger IRA v. Cole*, 766 N.W.2d 334, 337 (Minn. Ct. App. 2009) (plaintiff investors alleged alter ego theory to hold defendants liable individually for claims surrounding several claims, among these included “breach of . . . fiduciary dut[ies], breach of contract, intentional and negligent misrepresentation, [and] civil theft”).

36. *Amfac Foods, Inc. v. Int’l Sys. & Controls Corp.*, 654 P.2d 1092, 1096 (Or. 1982) (noting that inconsistent and vague standards for piercing the corporate veil “has troubled judges and lawyers for a century or so”).

37. The Fifth Circuit, offering some colorful examples of “mere instrumentalities,” which include: “[a]n adjunct, creature, device, stooge, or dummy.” *Edwards Co. v. Monogram Indus.*, 700 F.2d 994, 1000 (5th Cir. 1983); *United States v. Milwaukee Refrigerator Transit Co.*, 142 F. 247, 253 (E.D. Wis. 1905) (describing a firm as the “alter ego” of a “dummy” corporation); *Advanced Const. Corp. v. Pilecki*, 901 A.2d 189, 196 (Me. 2006) (applying law of agency to find shareholder liable for corporate debt).

38. Oh, *supra* note 12, at 84.

a requirement.³⁹

Because of these divergences and incongruities, the literature addressing veil-piercing is humorously indignant. Frank Easterbook and Daniel Fischel quipped that “[p]iercing’ seems to happen freakishly. Like lightning, it is rare, severe, and unprincipled.”⁴⁰ David Millon described veil-piercing as “incoherent.”⁴¹ Stephen Presser recalls early scholars who declared veil-piercing was “vague and illusory” and a “legal quagmire.”⁴² Judicial opinions echo the scholarly sentiment.⁴³ Legal scholars have advocated its abolition, its statutory codification, and even a return to its arguable origin as a purely equitable remedy.⁴⁴

The criticism is sweeping and, frankly, unfair. Judges adjudicating veil-piercing claims clearly do so with regard for the important policy rationales underlying the separation between shareholders and corporations.⁴⁵ Yet the doctrine itself implicates both judges’ duty to adhere to legislative mandates to respect the corporate veil and their more regular role in shepherding civil disputes. Veil-piercing survived the major revolutions in federal and

39. See, e.g., *Baatz v. Arrow Bar*, 452 N.W.2d 138, 141 (S.D. 1990) (including within the court’s inquiry “1) fraudulent representation by corporation directors; 2) undercapitalization; 3) failure to observe corporate formalities; 4) absence of corporate records; 5) payment by the corporation of individual obligations; or 6) use of the corporation to promote fraud, injustice, or illegalities.”); *Mesler v. Bragg Mgmt. Co.*, 702 P.2d 601, 606 (Cal. 1985) (“There are, nevertheless, two general requirements: ‘(1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow.’”) (quoting *Automotriz v. Resnick*, 306 P.2d 1, 3 (Cal. 1957)). Other jurisdictions do not require proof of the third element.

40. Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89 (1985).

41. David Millon, *Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability*, 56 EMORY L.J. 1305, 1381 (2007).

42. Presser, *supra* note 23, at 9.

43. *Amfac Foods, Inc. v. Int’l Sys. & Controls Corp.*, 654 P.2d 1092, 1097 (1982) (“[M]any judicial opinions contain alluring but largely unhelpful rhetorical devices which purport to state a rule, but generally state merely a result.”).

44. Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479 (2001); John H. Matheson & Raymond B. Eby, *The Doctrine of Piercing the Veil in an Era of Multiple Limited Liability Entities: An Opportunity to Codify the Test for Waiving Owners’ Limited-Liability Protection*, 75 WASH. L. REV. 147 (2000); Peter Oh, *Veil-Piercing Unbound*, 93 B.U. L. REV. 89 (2013) [hereinafter Oh, *Veil-Piercing Unbound*].

45. *Johnson v. Exclusive Props. Unlimited*, 720 A.2d 568, 571 n.2 (Me. 1998) (“The decision to pierce the corporate veil involves a determination of ‘whether-considering the totality of the evidence-the policy behind the presumption of corporate independence and limited shareholder liability-encouragement of business development-is outweighed by the policy justifying disregarding the corporate form-the need to protect those who deal with the corporation.’”) (quoting *Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc.*, 933 F.2d 131, 139 (2d Cir. 1991)).

state civil procedure as an equitable doctrine with features of an independent cause of action. As an equitable doctrine it should be available only where there is no adequate remedy at law, but it often accompanies legal claims resolved by juries. Closely identified with fraud, veil-piercing lends itself to the heightened standards of pleading demanded by the Federal Rules of Civil Procedure and many state procedural systems, the latter of which also regularly enhance evidentiary burdens for fraud claims.⁴⁶ Within this procedural context, judges balance legislative admonitions to safeguard corporate-shareholder separation with their own institutional interests in protecting equitable powers as well as equally potent constitutional norms favoring jury determinations of fact.⁴⁷

A. Analytical Foci of Current Studies

While scholarly attention to veil-piercing long pre-dated Robert Thompson's path-breaking veil-piercing study, his was the first to systematically collect instances where courts applied the doctrine, distribute those instances into discrete categories, and draw conclusions based on aggregate data, although he urged care in the use of those conclusions for any firm policy or jurisprudential decision-making.⁴⁸ Some of Thompson's findings dovetailed with the observations and expectations of corporate law commentators. For example, courts pierced only against closely held corporations and never against publicly traded corporations; pierced more against individual shareholders than collective groups of shareholders; and, government plaintiffs succeeded in veil-piercing claims more readily than private parties.⁴⁹ Other findings challenged the conventional wisdom, especially the differences between successful actions in contract versus tort (42% to 31% respectively) and the greater likelihood that the assets of individual, rather than corporate,

46. See Presser, *supra* note 23, at 10.

47. See, e.g., *Wm. Passalacqua Builders South, Inc. v. Resnick Developers South, Inc.*, 933 F.2d 131, 134-135 (2d Cir. 1991) ("Moreover, as a practical matter separate from Seventh Amendment considerations, whether or not those factors—discussed later in our analysis—that will justify ignoring the corporate form and imposing liability on affiliated corporations or shareholders are present in a given case is the sort of determination usually made by a jury because it is so fact specific."); *Baldwin Cnty. Sav. & Loan Ass'n v. Chancellor Land Co.*, 533 So. 2d 217, 219 (Ala. 1988) (stating that whether one is the alter ego of another is a question of fact for the jury); *Allman Hubble Tugboat Co. v. Reliance Dev. Corp., et al.*, 74 P.2d 985, 987 (Wash. 1938) ("[T]he jury had a right to find that the Reliance Development Corporation was not organized in good faith, and that it was a mere shell or form to protect the appellants from liability . . .").

48. See Thompson, *Piercing the Corporate Veil: An Empirical Study*, *supra* note 12, at 1046.

49. *Id.* at 1055-57.

shareholders would be reached.⁵⁰

Thompson's study exercised an enormous influence over not only policy and jurisprudential decision-making, but scholars' approach to veil-piercing research. After 1991, scholars, including Thompson himself, began assembling larger collections of cases to determine which veil-piercing factors courts based their decisions on most frequently, which state laws were most and least friendly to veil-piercing, and whether a certain kind of party (e.g. individual or corporate) enjoyed greater success.⁵¹ Thompson updated his findings in 1995, adding 2200 cases, slightly modifying his categories but ultimately determining that "the recent data indicates that these results fit within the pattern of the original study."⁵² John Matheson applied a multiple logistic regression analysis to a smaller collection of cases, determining that Thompson's conclusions, inter alia, understated courts' preferences for (1) piercing to reach individual rather than corporate shareholders and, (2) finding in favor of corporate (or entity) plaintiffs far more than individual plaintiffs.⁵³ Matheson analyzed cases covering a longer time span, but ultimately examined far fewer cases because he excluded cases that "1) failed to reach the merits of the piercing issue; 2) had a statutory basis for piercing; 3) pierced to gain jurisdiction over a party; 4) constituted horizontal piercing; or 5) constituted reverse piercing."⁵⁴ Several additional studies aimed at revising or updating Thompson's methodology specifically.⁵⁵ Others examined only one veil-piercing factor or issue-area for which courts had used veil-piercing. John Swain and Edwin Aguilar, for example, collected cases specific to the use of veil-piercing to exercise personal jurisdiction over affiliate corporations.⁵⁶

In 2010, Christina Boyd and David Hoffman published their analysis of veil-piercing, focusing not on the ultimate conclusions of state and federal courts, but rather examining the dockets of federal district courts between 2000 and 2005 and including veil-piercing arguments raised in

50. *Id.* at 1058.

51. Robert B. Thompson, *Piercing the Veil Within Corporate Groups: Corporate Shareholders as Mere Investors*, 13 CONN. J. INT'L L. 379, 380, 385-87, 392 (1999).

52. *Id.* at 385.

53. John H. Matheson, *Why Courts Pierce: An Empirical Study of Piercing the Corporate Veil*, 7 BERKELEY BUS. L.J. 1, 4, 14-15 (2009).

54. *Id.* at 10 n.30.

55. See, e.g., Hodge & Sachs, *supra* note 12, at 347, 349-50 (analyzing 483 cases out of 2,901 which "show[ed] an increasing reluctance of courts to pierce the corporate veil"); McPherson & Raja, *supra* note 12, at 940 (analyzing every sixth case chronologically to create a sample of 638 cases).

56. John A. Swain & Edwin E. Aguilar, *Piercing the Veil to Assert Personal Jurisdiction over Corporate Affiliates: An Empirical Study of the Cannon Doctrine*, 84 B.U. L. REV. 445, 449-50 (2004).

preliminary motion practice, during discovery, at summary judgment, at trial, or in post-trial practice. [They] also analyzed the significant non-veil piercing motion practice in each case as a control. The resulting database consists of a set of observations which speak to the life of veil piercing law, rather than the gauzy rationalizations presented by judges' written opinions.⁵⁷

Boyd and Hoffman also coded for factors like judicial characteristics and ideology.⁵⁸ While their article uniquely assessed the relevance of legal and non-legal factors (e.g. defendant's size and judicial ideology), other determinations supported previous empirical work including the association of undercapitalization and contract actions with veil-piercing success.⁵⁹ Most recently, Peter Oh revisited Thompson's methodology aiming at explaining the counterintuitive outcomes for veil-piercing actions in contract or tort (or, more flexibly, voluntary versus involuntary creditor claims).⁶⁰ Claiming to have assembled "the most comprehensive portrait of veil-piercing decisions yet," Oh examined the presence and context of fraud as a veil-piercing ground, finding not only that tort-based veil-piercing claims succeed at a higher rate than contract claims, but that this tort success obtained even without accounting for fraud and in Thompson's original timeframe.⁶¹

B. The Neglect of Procedural Variables

Scholars are certainly aware that the civil procedure of veil-piercing matters, even if they do not necessarily account for the procedural diversity that characterizes veil-piercing claims. Arguably, Boyd's and Hoffman's most important contribution is that they examined entire dockets, conscious that veil-piercing disputes arise in "fighting off a defendant's motion to dismiss veil piercing allegations; obtaining veil piercing-related discovery from a shareholder; keeping a case in federal court on the ground that two purportedly different parties might really be one; and, most importantly, surviving summary judgment."⁶² Similarly, Peter Oh's greatest contribution to the current debate may be his focus on the issue of fraud and how its use as a contract or tort theory in litigation may affect aggregate outcomes.⁶³ John Matheson's 2009 study focused on the (growing) list of factors courts consider when deciding whether to pierce the corporate veil—commingling of funds, undercapitalization, failure to observe formalities, and others—and

57. Boyd & Hoffman, *supra* note 13, at 856.

58. *Id.* at 857.

59. *Id.* at 862.

60. See Oh, *supra* note 14, at 137-40.

61. *Id.* at 81.

62. Boyd & Hoffman, *supra* note 13, at 864.

63. Oh, *supra* note 14, at 89.

which of those effectively signaled likely success for veil-piercing plaintiffs.⁶⁴

Yet for this awareness, civil procedure remains curiously sidelined. Boyd's and Hoffman's analysis is limited to data obtained from federal court litigation between 2000 and 2005, so the conclusions they draw apply to the roughly 30% of veil piercing cases adjudicated in federal courts.⁶⁵ The vast majority of veil-piercing cases, of course, are handled by state judges under state rules of civil procedure.⁶⁶ Even within their data set, litigation in federal court is impliedly uniform when the reality is far different.⁶⁷ Federal district courts sitting in diversity, for example, have applied a range of pleading standards to veil-piercing cases, even before the U.S. Supreme Court's decisions and *Bell Atlantic Corp. v. Twombly*,⁶⁸ and *Ashcroft v. Iqbal*,⁶⁹ significantly complicated the pleading standards picture. District courts sitting in the Seventh Circuit are bound to apply that court's decision that veil-piercing claims are not covered by the Seventh Amendment while district courts in the Second Circuit must give claimants a right to a jury trial on veil-piercing claims.⁷⁰

While almost certainly influencing the commencement, course and resolution of veil-piercing claims, these variables disappear in current analyses with no obvious effort to identify them or variables that might serve as proxies. John Matheson, for example, only examined cases where a court reached the merits of a veil-piercing claim, thus including cases from jurisdictions where veil-piercing may or must be brought along with related claims, but excluding cases where a claimant must exhaust other legal theories like breach of fiduciary duty.⁷¹ Peter Oh is to be credited with emphasizing the role of fraud in veil-piercing cases, but without assessing evidentiary standards under which fraud is adjudicated by triers of fact, his insight may tell us little about veil-piercing and more about the relative ease of bringing fraud actions in different jurisdictions. He

64. See Matheson, *Why Courts Pierce*, *supra* note 12, at 1-5.

65. Boyd & Hoffman, *supra* note 13, at 877.

66. Oh, *supra* note 14, at 113.

67. Boyd & Hoffman, *supra* note 13, at 878 n.121.

68. 550 U.S. 544 (2007).

69. 556 U.S. 662 (2009).

70. *Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc.*, 933 F.2d 131, 134-135 (2d Cir. 1991); *Int'l Fin. Servs. Corp. v. Chromas Techs. Canada, Inc.*, 356 F.3d 731, 737 (7th Cir. 2004) (conceding that if a jury makes a factual determination relevant to a veil-piercing analysis, the district court judge would be bound by that factual determination).

71. See John H. Matheson, *The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context*, 87 N.C. L. REV. 1091 (2009) (examining 360 parent-subsubsidiary cases from January 1, 1990 to March 1, 2008).

further assumes that “veil-piercing is a remedial instrument for satisfying a judgment that stands apart from a matter’s substantive cause(s) of action” but in the many jurisdictions that require or goad plaintiffs to bring veil-piercing actions early in litigation, veil-piercing shapes the entire dispute and, in fact, may play a role in settlement that Thompson, Oh, Boyd, and Hoffman concede challenges any empirical analysis of veil-piercing to date.⁷²

II. VEIL-PIERCING AND THE RELEVANCE OF PROCEDURE

Because of the questions they ask, scholars tend to ascribe to veil-piercing a kind of procedural homogeneity. In the typical depiction, veil-piercing is an “equitable remedy” exercised by a judge at the end of litigation when a judgment for a corporate creditor remains unsatisfied and the relative involvement of one or more shareholders in the underlying contract breach or tort is assessed under a presumably uniform although unstated burden of proof. It is unsurprising, then, that when it is studied with these legal priors implicitly or explicitly informing the inquiry, it appears unpredictable and incoherent.

The reality is that veil-piercing claims run the gamut from free-standing causes of action (which under the law of waiver in some jurisdictions must be pleaded early in litigation) to affirmative defenses to, indeed, equitable remedies enforced at the end of litigation. Those claims or the claims to which they are tied are subject to burdens of proof ranging from preponderance of the evidence to clear-and-convincing evidence, which may or may not, in turn, be a proper subject for accepting expert testimony. State jurisdictions have developed separate causes of action applicable to individual versus corporate defendants in veil-piercing cases. Many jurisdictions place the decision as to veil-piercing in the hands of the jury, not the judge, inevitably influencing a number of factors,

72. Oh, *supra* note 14, at 106. It is worth noting that Jonathan R. Macey and Joshua Mitts have recently published a study analyzing 9,380 veil-piercing decisions and propose a new taxonomy for veil-piercing studies based on the policy rationales courts are “really” applying. As with other studies, Macey and Mitts do not analyze the confounding effects rules of civil procedure play, although they are attentive to certain discrepancies caused by, for example, an effort to pierce the corporate veil for jurisdictional rather than judgment satisfaction purposes. Although they situate their study in previous efforts like Thompson’s, Oh’s, and Matheson’s, their project is different. Their textual analysis necessarily excludes many of the variables considered in previous studies and, relatedly, takes what judges say in written opinions more seriously. In other words, Boyd & Hoffman, Thompson, Oh, and Matheson are skeptical about the relationship between what judges say and veil-piercing outcomes. I am less skeptical but believe what they say is shaped by the procedural systems in which they operate. Macey and Mitts conclude that what they say matters a great deal. See Jonathan Macey & Joshua Mitts, *Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil*, 100 CORNELL L. REV. 99 (2014).

including predisposition toward settlement.⁷³ These nuances leach into federal district courts through the obligations imposed by the U.S. Supreme Court in *Erie Railroad Co. v. Tompkins*, effectively requiring federal courts exercising diversity jurisdiction to apply both the Federal Rules of Civil Procedure (FRCP) and substantive state law.⁷⁴ The procedure/substance dichotomy spawned by *Erie* and its progeny poses problems for the conclusions advanced in the existing veil-piercing literature, even studies as careful and comprehensive as Boyd's and Hoffman's.

A. Veil-Piercing as Pleading and Presumption

1. Veil-Piercing as Cause of Action or Affirmative Defense

It is fitting that as a judicial device to allocate the risk society bears for its grant of limited liability to entrepreneurs, it is equally plausible that plaintiffs and defendants might bear the initial burden of proving or disproving the corporate integrity limited liability demands. In other words, it makes as much sense to require that defendants plead and prove their adherence to state incorporation requirements as an affirmative defense to shareholder liability as to require creditor plaintiffs to bear the burden of pleading and proving each element of a claim that shareholder defendants have failed to so perform. In a famous essay on this choice, Edward Cleary identified three general criteria courts use: policy, fairness, and probability.⁷⁵

As a condition of obtaining limited liability, corporations must file a certificate of incorporation with state agencies, typically the secretary of state,⁷⁶ providing potential veil-piercing claimants with a substantial amount of inexpensive information as to shareholders and interested parties. Federal Rule of Civil Procedure 7.1, although aimed primarily at judicial integrity, requires corporate parties to identify parent corporations and imposes an ongoing obligation to inform the court of changes, allowing veil-piercing litigants' attorneys to expand their investigations into broader corporate families.⁷⁷ Some states have adopted mirror provisions of FRCP 7.1.⁷⁸ Moreover, at least for contract creditors, shareholders are frequently required to personally guarantee the performance of business obligations,

73. See e.g. Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849, 852 (1998).

74. 304 U.S. 64, 78 (1938).

75. Edward W. Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 11-13 (1959).

76. M. Thomas Arnold, *Administrative Aspects of State Corporation Law*, 28 U. RICH. L. REV. 1, 6, 19 (1994).

77. FED. R. CIV. P. 7.1.

78. MONT. R. CIV. P. 7.1; NEV. R. CIV. P. 7.1; D.C. SUPER. CT. R. CIV. P. 7.1; MASS. SUP. JUD. CT. RULE 1:21.

especially debt.⁷⁹ State legislatures are fairly uniform in their statements that judges keep shareholders and the corporations they own legally separate, and some affirmatively excuse the failure to observe corporate formalities for adjudicating questions regarding corporation/shareholder separation.⁸⁰ Policy and fairness rationales therefore counsel that plaintiffs bear an initial burden to plead and prove claims asserting that shareholders and corporate entities be united for certain legal purposes.

On the other hand, outside the formal filing requirements, state statutes impose on corporations annual meeting requirements (or decision-making alternatives that require notice and written evidence), annual filing statements that vary in level of detail, and running obligations to make books and records available for shareholder inspection.⁸¹ Because these obligations appear to be part of the grand bargain for limited liability, a “probabilistic” inquiry suggests that most corporations observe these and other corporate formalities most of the time. Shareholders, especially controlling shareholders, might be justifiably expected to bear the initial burden of pleading and proving incorporation and related practices as an affirmative defense.

Indeed, divergence in state procedure manifests along not only the plaintiffs’ and defendants’ initial burdens but along other axes that effectively shift the pleading and presumption burdens between movants and opponents of veil-piercing actions.⁸² In Louisiana’s First Circuit, for example, a shareholder may assert the corporate shield as a defense to liability, but in doing so bears the initial burden of proving the existence of the corporation and may carry this burden by the use of corporate charter or other documents.⁸³ If the shareholder is successful, the burden then shifts to the plaintiff to prove by clear and convincing evidence that the corporate form

79. See Daniel R. Kahan, *Shareholder Liability for Corporate Torts: A Historical Perspective*, 97 GEO. L.J. 1085, 1089 n.12 (2009) (citing F. HODGE O’NEAL, *CLOSE CORPORATIONS: LAW AND PRACTICE* 40 n.11 (1958)) (noting that ‘incorporation does not often provide limited liability’ for the close corporation’s shareholders because prospective lenders often require, as condition to allowing the corporation to borrow, that shareholders assume personal liability for the debt”).

80. See, e.g., WIS. STAT. ANN. § 180.1835 (2013) (“The failure of a statutory close corporation to observe usual corporate formalities or requirements relating to the exercise of its corporate powers or the management of its business and affairs is not grounds for imposing personal liability on the shareholders for obligations of the corporation.”).

81. See, e.g., DEL. CODE ANN. tit. 8, § 211 (2009) (annual meeting); MASS. GEN. LAWS ANN. ch. 156D, § 7.20 (2004) (information for shareholders); DEL. CODE ANN. tit. 8, § 220 (2010) (same).

82. See, e.g., Krause v. Great Lakes Holdings, Inc., 563 A.2d 1182, 1191 (Pa. Super. Ct. 1989); Carruthers v. Flaum, 365 F. Supp. 2d 448, 474 (S.D.N.Y. 2005).

83. McDonough Marine Serv. v. Doucet, 694 So. 2d 305, 309 (La. Ct. App. 1996).

should be disregarded.⁸⁴ Similarly, a corporate veil defense has been raised in Idaho,⁸⁵ Ohio,⁸⁶ and Texas⁸⁷ and allowed as a possibility in Utah.⁸⁸ The allocation of an initial pleading burden may depend on the nature of the dispute and whether a governmental or non-governmental party is involved.⁸⁹

2. Legal Claim or Equitable Remedy

Similarly, parties urging a court to disregard the veil between the corporation and its shareholders may be required to raise the issue early in the litigation or have it deemed waived or precluded; other jurisdictions may allow or require a prevailing party to request that judges exercise their equitable powers to grant relief, presumably doing so because there is no adequate remedy at law. This dichotomy is complicated further in jurisdictions that either maintain the division between courts of equity and law or where their merger is incomplete. Analysts frequently assume that veil-piercing occurs at the end of prior litigation, as an “equitable remedy” applied when liability for a contract, tort or other action has been established. Peter Oh, for example, citing a 1992 Texas appellate court decision, writes that “veil-piercing is a remedial instrument for satisfying a judgment that stands apart from a matter’s substantive cause(s) of action; a veil-piercing request is thus among the last things courts tend to hear within a dispute.”⁹⁰ There is no obvious reason why this would even ordinarily be the case.

As with initial pleading burdens, the requirement that a party bring a veil-piercing claim or the availability of veil-piercing as strictly equitable relief is plausibly driven by a number of policy and fairness considerations. Plaintiffs and their attorneys are often aware or at little expense could become aware with the commencement of litigation that ownership and control behind a given dispute may involve a complex web of corporate and individual parties. The general set of sanctions rules of civil procedure impose

84. See *Cahn Elec. Appliance Co. v. Harper*, 430 So. 2d 143, 145 (La. Ct. App. 1983).

85. See *Wash. Fed. Sav. v. Van Engelen*, 289 P.3d 50, 56 (Idaho 2012).

86. *Galbreath v. Martin*, No. 12AP-324, 2013 WL 151491, at *3 (Ohio Ct. App. Jan. 15, 2013).

87. See *Bailey v. Fleming*, No. 14-95-01470-CV, 1997 WL 634166, at *3 (Tex. App. Oct. 16, 1997); *Butler v. Joseph's Wine Shop, Inc.*, 633 S.W.2d 926, 929 (Tex. App. 1982).

88. *Ottens v. McNeil*, 239 P.3d 308, 320-21 (Utah Ct. App. 2010).

89. *Ark. Bank & Trust Co. v. Douglass*, 885 S.W.2d 863, 870 (Ark. 1994) (citing *Woodyard v. Ark. Diversified Ins. Co.*, 594 S.W.2d 13, 14-17 (Ark. 1980)).

90. Oh, *supra* note 14, at 106 (citing *Kern v. Gleason*, 840 S.W.2d 730, 736 (Tex. App. 1992) (“The piercing of the corporate veil is not a separate cause of action The various doctrines for disregarding the corporate entity are only remedial, for they only expand the potential sources of recovery.”)).

for failure to reasonably bring as many claims and parties together in the same dispute *should* counsel toward a requirement that veil-piercing be pleaded early in litigation.⁹¹

Indeed, in some jurisdictions, veil-piercing elements must be pled before trial or they are waived.⁹² In *Lipp v. Bruce*, the plaintiffs did not assert a cause of action alleging facts which would support a claim for piercing the corporate veil until responding to a motion for summary judgment.⁹³ The Michigan appellate court found that the plaintiffs had waived any ground for such an assertion and were not allowed to make a showing of the elements for piercing the corporate veil.⁹⁴ In *Shockley v. Harry Sander Realty Co.*, the plaintiff filed its action against the defendants before the limitations period had run on the underlying liability claim and successfully obtained a judgment.⁹⁵ When the judgment remained unsatisfied after execution, the plaintiff filed another lawsuit seeking to pierce the corporate veil. In finding that the limitations period had passed on the piercing claim, the Missouri Court of Appeals ruled that the defendants should have joined the veil-piercing request with their initial action.⁹⁶

Many jurisdictions, it is true, have selected the alternative course allowing judgment creditors to bring subsequent actions in equity, although for varying reasons.⁹⁷ Some states which have concluded that piercing the corporate veil is not an independent cause of action⁹⁸ have done so in reliance on § 41.10 of Fletcher's *Cyclopedia of the Law of Corporations* which states that standing

91. Under Federal Rule of Civil Procedure 13(a), counterclaims that arise out of the transaction or occurrence that is the subject matter of the opposing party's claim and do not raise jurisdictional problems are waived if not raised. *See Tax Track Sys. Corp. v. New Investor World, Inc.*, 478 F.3d 783, 786 (7th Cir. 2007).

92. *See Endsley Elec., Inc. v. Altech, Inc.*, 378 S.W.3d 15, 22 (Tex. App. 2012) ("The various theories for piercing the corporate veil must be specifically pled or they are waived . . .") (citing *Mapco, Inc. v. Carter*, 817 S.W.2d 686, 688 (Tex. 1991); *Seidler v. Morgan*, 277 S.W.3d 549, 557 (Tex. App. 2009); *Town Hall Estates-Whitney, Inc. v. Winters*, 220 S.W.3d 71, 86 (Tex. App. 2007)); *see also Vichi v. Koninklijke Philips Electronics*, No. CIV.A 2578-VCP, 2009 WL 4345724, at *20 (Del. Ch. Dec. 1, 2009) ("It is settled Delaware law that a party waives a [veil-piercing] argument by not including it in its brief.").

93. No. 270264, 2007 WL 2935027, at *2 (Mich. Ct. App. Oct. 9, 2007).

94. *Seasword v. Hilti Inc.*, 537 N.W.2d 221, 224 (Mich. 1995); *see also Kostopoulos v. Crimmins*, No. 299478, 2011 WL 6848354, at *3 (Mich. Ct. App. Dec. 29, 2011) (concluding that veil-piercing is not a cause of action in Michigan).

95. 720 S.W.2d 418, 419-20 (Mo. Ct. App. 1986).

96. *Id.* at 421.

97. Thomas V. Harris, *Washington's Doctrine of Corporate Disregard*, 56 WASH. L. REV. 253, 263-67 (1981).

98. *See Drury Dev. Corp. v. Found. Ins. Co.*, 668 S.E.2d 798, 801 (S.C. 2008); *Phillips v. United Heritage Corp.*, 319 S.W.3d 156, 158 (Tex. App. 2010).

alone “[veil-piercing] creates no cause of action.”⁹⁹ Alabama,¹⁰⁰ Massachusetts,¹⁰¹ and New York, for example, have explicitly invoked Fletcher’s treatise as authority for refusing to recognize veil-piercing as a cause of action separate from claims against the corporation generally.¹⁰² Others locate the rationale squarely within the procedural context, distinguishing the “substantive” law of the related contract, tort or equitable action.¹⁰³ Still others tie their refusal to acknowledge an independent cause of action for veil-piercing as a function of the statutory demand for limited liability prevailing over the less democratic but important equitable powers of judges.¹⁰⁴

Most jurisdictions, however, ascribe no firm or consistent rationale, or allow veil-piercing claims to proceed as independent causes of action without any discussion as to their substantive or procedural origin.¹⁰⁵ Clearly wrestling with the question as a matter of Arizona law, a federal district court concluded that “[t]he Court could not find an Arizona case specifically addressing whether an alter ego claim is a separate and distinct cause of action that can stand alone.”¹⁰⁶ The court noted that dicta from several Arizona cases

99. 1 WILLIAM MEADE FLETCHER, *FLETCHER CYC. OF THE LAW OF CORP.* § 41.10 (2014).

100. *See Ex. Parte Thorn*, 788 So.2d 140 (Ala. 2000); *see also* *Thorne v. C & S Sales Grp.*, 577 So.2d 1264, 1265-67 (Ala. 1991) (upholding a jury’s determination that a stockholder had used the corporation as an alter ego and holding the stockholder liable for breach of contract); *Baldwin Cnty. Sav. & Loan Ass’n v. Chancellor Land Co.*, 533 So.2d 217, 219 (Ala. 1988) (stating that whether one is the alter ego of another is a “question of fact for the jury”).

101. *See e.g.* *Heimlich v. Friedfertig*, No. 07-P-817, 2008 WL 4500221, at *1 (Mass. App. Ct. 2008).

102. *Matter of Morris v. State Dep’t of Taxation & Fin.*, 623 N.E.2d 1157, 1160 (N.Y. 1993); *Old Republic Nat’l Title Ins. Co. v. Moskowitz*, 297 A.D.2d 724, 725 (N.Y. App. Div. 2002) (“The concept [of piercing the corporate veil] is equitable in nature and assumes that the corporation itself is liable for the obligation sought to be imposed . . . Thus, an attempt of a third party to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners.” (citation omitted)).

103. *Hennessey’s Tavern, Inc. v. Am. Air Filter Co.*, 251 Cal. Rptr. 859, 865 (Ct. App. 1988).

104. *See Dixon v. Process Corp.*, 382 A.2d 893, 900 (Md. 1978) (“[T]here was no fraud and . . . no paramount equity was present in the case *sub judice* which required the intervention of equity’s awesome powers.”) (emphasis added).

105. *See Lampkin v. Thrash*, 81 So. 3d 1193, 1199 (Miss. Ct. App. 2012); *Wolf v. Walt*, 530 N.W.2d 890, 895 (Neb. 1995) (“Wolf alleged four causes of action: conversion, constructive fraud, breach of contract, and bailment. Wolf further alleged that Walt operated Flat Top as a façade for his personal business enterprises and asked the court for an order disregarding Flat Top’s corporate identity.”).

106. *Five Points Hotel P’ship v. Pinsonneault*, 835 F. Supp. 2d 753, 759 (D. Ariz. 2011).

suggest that a party may bring a separate veil piercing claim.¹⁰⁷ In *Sheffield Services Co. v. Trowbridge*, the Colorado Court of Appeals noted:

The complaint sufficiently identifies the transactions involved in this case and states that “the individual defendants are named in their individual capacities.” It alleges that Trowbridge “participated in the torts through direct involvement in the wrongful conduct of the [LLCs], including specific authorization, direction, active participation, or cooperation in the wrongful conduct that is alleged in this complaint.” It also alleges Trowbridge engaged in wrongful transfers of distributions and income he received from the LLCs to others despite the LLCs’ existing obligations to Sheffield.¹⁰⁸

The case implies not only that a veil-piercing action is an independent claim, but, in that case, that it can be tried even without being specifically pled. In *Krause v. Great Lakes Holdings, Inc.*, the Pennsylvania Superior Court explicitly acknowledged that, depending on context, veil-piercing claims may constitute independent causes of action or “amplifications” of prior actions under Pennsylvania law.¹⁰⁹

Even jurisdictions that do not punish veil-piercing claimants for failing to raise veil piercing in the initial action create procedural loopholes by which they may circumvent the requirement to obtain a prior judgment. By statute, piercing the corporate veil under Kansas law is allowed in the limited circumstance where judgment has been obtained against the corporation and the execution thereon is unsatisfactory.¹¹⁰ However, Kansas courts have crafted an exception to the statute where obtaining a prior judgment would be impracticable.¹¹¹ In doing so, the courts have created a quasi-

107. *Id.* (citing *Chalpin v. Snyder*, 207 P.3d 666, 670 (Ariz. Ct. App. 2008) (“The trial court, however, allowed Reliance to take its claims of fraud and alter-ego to a jury. Ultimately, Reliance did not request a jury instruction for its alter-ego claim.”) (emphasis added by the court)); *GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 795 P.2d 827, 835 (Ariz. Ct. App. 1990) (“In the case before us, the complaint contained four counts . . . Count I alleged that [] was responsible for the debt owed by [] and [] pursuant to an alter ego theory of liability . . .”). *Contra Sandpiper Resorts Dev. Corp. v. Global Realty Invs., LLC*, No. 2:08-CV-01360JWS, 2012 WL 3234242, at *6 (D. Ariz. Aug. 6, 2012) (“Piercing the corporate veil is not a stand alone legal claim.”).

108. *Sheffield Servs. Co. v. Trowbridge*, 211 P.3d 714, 718 (Colo. App. 2009), *overruled by* *Weinstein v. Colborne Foodbotics, LLC*, 302 P.3d 263 (Colo. 2013). *Contra Swinerton Builders v. Nassi*, 272 P.3d 1174, 1177 (Colo. App. 2012) (concluding that veil-piercing is not a separate and independent cause of action and that “[a] claimant seeking to pierce the corporate veil must make a clear and convincing showing that each of the foregoing factors has been satisfied.”).

109. 563 A.2d 1182, 1191 (Pa. Super. Ct. 1989); see Mark C. Larson, *Piercing the Veil of Pennsylvania Limited Liability Companies*, 75 Pa. B. ASSN. Q. 124, 126 (2004).

110. KAN. STAT. ANN. § 17-7101(b) (2009).

111. See *Kilpatrick Bros., Inc. v. Poynter*, 473 P.2d 33, 40 (Kan. 1970).

independent cause of action for veil-piercing which may accompany other legal claims.

Thus, rules of civil procedure can be seen as exercising at least three influences on when and how veil-piercing claims are adjudicated. They may be specifically authorized as independent causes of action which must be pled before trial along with related claims or abandoned by virtue of statutes of limitations, waiver, or *res judicata*. Veil-piercing may be authorized purely as an equitable remedy unavailable until it is evident that there is no adequate remedy at law, i.e., a previous judgment remains unsatisfied.¹¹² Finally, a veil-piercing claim may exist principally as a remedy but with sufficient potential procedural sanctions so that litigants are encouraged to bring the claim early in litigation.¹¹³ For example, in Texas, where a post-judgment suit for veil-piercing is not typically barred by *res judicata*, a subsequent suit may be precluded if prior litigation resulted in the adjudication of a relevant material fact.¹¹⁴ So, even though veil-piercing is technically a remedy under Texas law,¹¹⁵ it is procedurally encouraged to be brought along with related contract, tort and statutory claims.¹¹⁶ In other jurisdictions, the process by which the division between actions at law or in equity was maintained, merged or otherwise managed, influences the course of veil-piercing claims. For example, in Delaware, veil-piercing must be brought as an action in equity, so that a litigant who successfully obtains an action at law must nevertheless turn to the chancery courts for relief under a veil-piercing theory.¹¹⁷

3. Notice Versus Specific Pleading

Within the jurisdictions that either require or encourage veil-piercing claims to accompany other claims against corporations and their shareholders, pleading standards vary in their stringency.¹¹⁸ At

112. *Lane v. Mont. Fourth Judicial Dist. Court*, 68 P.3d 819, 824 (Mont. 2003) (collecting cases in which veil piercing claims are not precluded because they are based on satisfaction of a judgment).

113. For example, Federal Rule of Civil Procedure 19 requires that parties be joined who are necessary for the disposition of the dispute or whose interests may be jeopardized if they do not participate. FED. R. CIV. P. 19. Many states have their own versions of Rule 19 which in many cases will encourage parties to bring both corporations and their shareholders into the dispute, implicating a veil-piercing determination.

114. *See Strange v. Estate of Lindemann*, 408 S.W.3d 658 (Tex. App. 2013).

115. *See Phillips v. United Heritage Corp.*, 319 S.W.3d 156, 158 (Tex. App. 2010).

116. Robert W. Hamilton et. al., 20 Tex. Prac., Business Organizations § 26.12 (2d ed.).

117. *See Sonne v. Sacks*, 314 A.2d 194, 197 (Del. 1973).

118. *See e.g., Discovery Techs., Inc. v. AvidCare Corp.*, 2005 WL 350438, at *4 (Wis. Ct. App. Feb. 15, 2005) (upholding lower court's dismissal of complaint on the veil piercing claim stating despite adoption of notice pleading, complaint failed to allege

one end, and closely associated with jurisdictions that empirical studies have assessed as liberal with respect to veil-piercing outcomes, is simple notice pleading without specific or separate allegations as to a veil-piercing or alter ego theory.¹¹⁹ In North Dakota, for example, under the state's "liberal pleading rules," plaintiffs are not even required to plead with specificity the facts supporting their claim or the factors considered in piercing the corporate veil.¹²⁰ In Indiana, a party may prevail on a veil-piercing claim not raised in the pleadings but tried by express or implied consent.¹²¹ Similarly, at least one Ohio jurisdiction effectively adopted Wright & Miller's treatise standard for notice pleading even in veil piercing claims:

the complaint, and other relief-claiming pleadings need not state with precision all elements that give rise to a legal basis for recovery as long as fair notice of the nature of the action is provided. However, the complaint must contain either direct allegations on every material point necessary to sustain a recovery on any legal theory, even though it may not be the theory suggested or intended by the pleader, *or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial.* (emphasis in original).¹²²

Thompson and Oh both assign Indiana and North Dakota law a veil-piercing rate of greater than 60% and Ohio greater than 55% without assessing the influence pleading standards may exercise. Thompson notes the success of "conclusory" reasons courts offered when deciding to pierce.¹²³ As examples, he uses the number of times

sufficient factual basis to give individual defendant notice that he would be held personally liable).

119. *Garcia v. Coffman*, 946 P.2d 216, 219 (N.M. Ct. App. 1997) *Petty v. Bank of N.M. Holding Co.*, 787 P.2d 443, 445 (N.M. 1990) ("Under our rules of 'notice pleading,' it is sufficient that defendants be given only a fair idea of the nature of the claim asserted against them sufficient to apprise them of the general basis of the claim."); *See also Strong v. Hegarty*, 1996 Mass. App. Div. 92 (Dist. Ct. 1996) ("A complaint seeking to pierce the corporate veil must allege "facts sufficient to support" that theory, but need not explicitly identify veil piercing as a theory for recovery.").

120. *Jablonsky v. Klemm*, 377 N.W.2d 560, 565 (N.D. 1985).

121. *A.B.C. Home & Real Estate Inspection, Inc. v. Plummer*, 500 N.E.2d 1257, 1260 (Ind. Ct. App. 1986) (citing IND. R. TRIAL P. 15(B)).

122. *Geier v. Nat'l GG Indus., Inc.*, No. 98-L-172, 1999 WL 1313640, at *4 (Ohio Ct. App. Dec. 23, 1999) ("In both assignments, Wagner argues that because Geier did not specifically set forth the "piercing the corporate veil" theory of liability in his complaint, the court should not have permitted the theory of liability to be presented to the jury. Secondly, he argues the issue was not tried by the implied consent of the parties. Lastly, he claims that as a result of lack of notice that piercing the corporate veil would be an issue at trial, his defense was unfairly prejudiced. Wagner's objections are essentially procedural in nature." *Id.* at *3.).

123. Thompson, *Piercing the Corporate Veil: An Empirical Study*, *supra* note 12, at 1063.

courts mention “instrumentality” and “alter ego” and their evident tie to high veil piercing rates.¹²⁴ Yet “conclusory” allegations are to some extent what notice pleading jurisdictions allow. The predicted effect would be a disproportionate number of cases from notice pleading jurisdictions, a variable no current study assesses.

Other jurisdictions, especially those which closely tie veil-piercing to fraud, impose heightened pleading standards. In Maryland, a plaintiff must plead facts sufficient to pierce the corporate veil to redress fraud or “to protect a paramount equity.”¹²⁵ Since no party has successfully brought a claim under the latter theory, veil-piercing actions are essentially held to the heightened pleading (and proof) standards Maryland courts require for fraud actions.¹²⁶ In New York, at the pleading stage, a plaintiff must set forth “sufficiently [particularized] statements” showing that the person or persons who are in control of the corporation “are actually doing business in their individual capacities”¹²⁷ As part of its broad attempt to unify disparate practices in Oregon trial and appellate courts, the Supreme Court of Oregon required any theory of recovery, especially veil-piercing, to be separately and specifically pleaded.¹²⁸ In *De La Fontaine Warehouses, Inc. v. Lang*, a complaint which alleged facts to support two veil-piercing factors was insufficiently pled because it contained no facts to support a finding that the corporation was used to commit fraud or that equity required veil-piercing.¹²⁹

Indeed, even in the federal court system where the Federal Rules of Civil Procedure should theoretically smooth out pleading variation, there is substantial divergence as to whether veil-piercing plaintiffs must plead veil piercing or waive the right to raise those claims in the litigation. Boyd and Hoffman, for example, argue that “requiring the pleading of a piercing claim (including in amendments) is the majority rule” citing ten federal court cases but in discussing the minority rule identify three federal district courts which allowed veil-

124. *Id.*

125. JAMES J. HANKS, JR., MARYLAND CORPORATION LAW § 4.18 PIERCING THE CORPORATE VEIL “A HERCULEAN TASK” (Supp. 2013).

126. *See Residential Warranty Corp. v. Bancroft Homes Greenspring Valley, Inc.*, 728 A.2d 783, 789 (Md. App. 1999) (although the Court of Appeals has opined that a corporation may be pierced to enforce a paramount equity, no Maryland appellate court has permitted this to occur).

127. *Walkovszky v. Carlton*, 223 N.E.2d 6, 10 (N.Y. 1966). *Contra Goldberg v. Lee Exp. Cab Corp.*, 634 N.Y.S.2d 337, 338 (N.Y. Sup. Ct. 1995), *aff'd*, 642 N.Y.S.2d 292 (App. Div. 1996) (“[P]laintiffs have set forth ‘a cognizable action for piercing the corporate veil[s] and assigning personal liability’ to defendant More in this action.”).

128. *See Amfac Foods, Inc. v. Int'l Sys. & Controls Corp.*, 654 P.2d 1092, 1098 (Or. 1982).

129. 2005 WL 503721, at *1 (Mass. Jan. 14, 2005).

piercing claims based on liberal notice pleading.¹³⁰ Although it is not clear what method they used to determine “majority” and “minority” rules, even if they are ultimately correct, the minority view is a considerable one which, as they concede, may under represent successful veil-piercing efforts in these “lenient” jurisdictions. This is one of several distortions arising from Erie discussed below.

B. Elements of Veil-Piercing Claims

Despite the influences civil procedure exercises over when and how veil-piercing claims may be brought, corporate law scholars, treatise-writers, and empirical observers have overwhelmingly focused on the core inquiry courts undertake when deciding whether, and under what circumstances, to pierce the corporate veil, emphasizing the evident arbitrariness in applying those inquiries.¹³¹ Those venturing into the subject after 1985 are obliged to quote Easterbook and Fischel’s pithy phrase equating veil-piercing to lightning for its mystery and unpredictability.¹³² The subtext of these criticisms almost always implicates judges themselves. Presser, for example, argues that veil-piercing is “a doctrine applied by courts in an extremely discretionary manner, in accordance with the individual conscience of judges.”¹³³

Given the frustration scholars express over the unpredictability of veil-piercing, it is surprising that the scholarly inquiry has focused on the aspect of veil-piercing over which there is broad agreement. Ever since Frederick J. Powell sought to codify and expand Maurice Wormser’s normative work as to when the corporate veil should or should not be pierced, (a phrase Wormser is crediting with popularizing), Powell’s three-part test has generally been asserted as representative of what courts actually do. Powell’s “rule” allows courts to pierce the corporate veil, provided a court find “complete control and domination, [by] a shareholder . . . perpetuat[ing] a fraud, wrong, or injustice that has proximately caused unjust loss or injury to the plaintiff”.¹³⁴ Powell further compiled the inquiries courts undertook within each of the three parts of the test, including ownership of stock, overlapping directors and officers, undercapitalization, commingling of corporate and shareholder funds

130. Boyd & Hoffman, *supra* note 13, at n. 121.

131. Presser, *Piercing the Corporate Veil*, 2010 §1:1.

132. See Peter Conti-Brown, *Elective Shareholder Liability*, 64 STAN. L. REV. 409, 434 (2012) (“[L]ightning, . . . is rare, severe, and unprincipled.”); Matheson, *supra* note 71, at 1100; Oh, *supra* note 14, at 85; P.R. Strauss, *Control and/or Misconduct: Clarifying the Test for Piercing the Corporate Veil in Alaska*, 9 ALASKA L. REV. 65, 65 n.4 (1992); Glenn G. Morris, *Piercing the Corporate Veil in Louisiana*, 52 LA. L. REV. 271, 272 n.3 (1991).

133. Presser, *supra* note 131, §1.1.

134. Oh, *supra* note 14, at 84.

and property, and observation of corporate formalities.¹³⁵ In a seminal article on the history of the debate, Cathy and James Krendl wrote that Powell's formulation "is of interest, not only because it is perhaps the most frequently applied and most clearly articulated of the rules in the corporate veil area, but also because its parts include most of the other rules in this area."¹³⁶ Robert Thompson and Charles O'Kelley note that "judicial and academic [commentators] have expanded and re-arranged [Powell's] lists, and most court opinions are structured so as to give the appearance that the court has actually applied the test and the factors."¹³⁷ Peter Oh similarly identifies Powell's test as the "most common" veil-piercing test.¹³⁸

To be sure, there are indeterminacies within Powell's framework. Undercapitalization, for example, may independently show that a shareholder controlled the corporation (e.g. it was undercapitalized because a controlling shareholder siphoned away its funds); that the undercapitalization itself served as the wrong committed (e.g. a corporation undertook excessively risky activities without adequate self or second-party insurance to adequately protect the public against those risks); and, that the undercapitalization was the proximate cause of a plaintiff's injury (e.g. there would be no veil-piercing action but for a judgment the corporation could not satisfy).

It is not clear, however, that this indeterminacy ultimately explains veil-piercing's unpredictability. Indeed, it is a subtle but important assumption of this paper that the elements of veil-piercing claims are, as commentators have noted, relatively uniform.¹³⁹ Part of the problem with the existing literature is that scholars place these elements at the core of their inquiry, seeking to explain why if the elements are uniform the outcomes are not.¹⁴⁰ As I noted in the discussion of pleading and presumption above, the availability of the corporate form itself implicates a deal between entrepreneurs and society which is reflected in procedural variation when that deal is in dispute. In this Part, my intent is not to re-hash the debate over core veil-piercing inquiries, but only to survey the ways in which civil procedure shapes those inquiries. Because few states have codified veil-piercing tests, courts are often left to decide whether, and under what conditions, veil-piercing claims may proceed.¹⁴¹

135. Cathy S. Krendl & James R. Krendl, *Piercing the Corporate Veil: Focusing the Inquiry*, 55 DENV. L.J. 1, 13 n.41 (1978).

136. *Id.* at 13.

137. CHARLES R.T. O'KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS 609 (6th ed. 2010).

138. *See* Oh, *supra* note 14, at 84.

139. *See supra* notes 38-39 and accompanying text.

140. *See supra* notes 40-41 and accompanying text.

141. *See, e.g.*, NEV. REV. STAT. § 78.747 (2014) ("2. A stockholder, director or officer acts as the alter ego of a corporation if:

1. Distinctions between Corporate and Natural Person Shareholders

One of Thompson's findings which surprised corporate law scholars was that courts within his dataset pierced to reach individuals more frequently than they pierced to reach corporate shareholders.¹⁴² But many jurisdictions make available additional legal theories tailored to suits against corporate families, especially in the tort context. The result is that actions that successfully unify shareholder and corporate assets may not be caught by the database searches current studies employ. This may explain why success against individual shareholders occurs at a disproportionately higher rate in these study results.

In Georgia, veil-piercing theories against individuals and corporate groups are divided, respectively, into "alter ego" and "business conduit" tests.¹⁴³ While Georgia courts have over time collapsed the inquiries related to these kinds of suits, the nominal distinction remains.¹⁴⁴

The business conduit theory relates to the activities of two or more corporations, usually a parent and its subsidiary, which operate in such a manner that the subsidiary corporation retains insufficient earnings to finance its activities and pay its obligations. In such instances, the profits are channeled to the parent, while the obligations remain with the undercapitalized subsidiary. The alter ego doctrine arises where the parent corporation or corporate officers, directors or stockholders disregard the corporate entity by commingling and confusing their personal affairs and business with those of the corporation, treating the corporate property as their own.¹⁴⁵

Similarly, in Massachusetts, different tests apply to a single enterprise theory of corporate liability versus suits to reach the assets of individual shareholders. A mix of state and federal courts applying Massachusetts law suggest that while a showing of fraud or improper purpose is required for the latter, the former relies more

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- (a) The corporation is influenced and governed by the stockholder, director or officer;
(b) There is such unity of interest and ownership that the corporation and the stockholder, director or officer are inseparable from each other; and
(c) Adherence to the corporate fiction of a separate entity would sanction fraud or promote a manifest injustice.

3. The question of whether a stockholder, director or officer acts as the alter ego of a corporation must be determined by the court as a matter of law.”)

142. FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 56 n.9 (1991).

143. STUART FINESTONE, *GEORGIA POST-JUDGMENT COLLECTION* § 13:4 (5th ed. 2013).

144. *Id.*

145. *Id.*

generally on principles of agency, and the two inquiries differ in key respects.¹⁴⁶

In Texas, individual shareholders were not included in one of the earlier and most quoted formulations of the rule;¹⁴⁷ and until 2009, which covers nearly the entire time frame under which empirical studies of veil-piercing cases were conducted, a “single business enterprise” theory in Texas allowed plaintiffs to aggregate corporate groups for liability purposes.¹⁴⁸ Even after the Supreme Court of Texas spoke specifically to the single business enterprise theory in *SSP Partners v. Gladstrong Investments*,¹⁴⁹ Texas courts appear to continue to allow the theory—without accompanying veil-piercing claims—to apply to negligence cases involving corporate groups.¹⁵⁰ California has similarly adopted the single business enterprise theory to apply to sibling corporations, while alter ego liability applies in the parent-subsidiary context.¹⁵¹ In Louisiana, a separate single business enterprise theory applies to corporate siblings and parents, with components of the test that are “similar” to other veil-piercing inquiries, but ultimately hinge on a determination that “When a group of . . . corporations integrate their resources to achieve a common business purpose” and do not operate as separate entities, each affiliated corporation may be held liable “for debts incurred in pursuit of the . . . general business purpose.”¹⁵² This standard is similar for liability associated with a joint venture, available in most states, although not uniformly defined.

2. Distinctions between Contract, Tort and Other Claims

Veil-piercing theories may be based on the breach of a number of

146. See *Pepsi-Cola Metro. Bottling Co. v. Checkers, Inc.*, 754 F.2d 10, 15 (1st Cir. 1985); *George Hyman Constr. Co. v. Gateman*, 16 F. Supp. 2d 129, 158 (D. Mass. 1998) (asserting heightened proof to reach individual shareholders); *Evans v. Multicon Constr. Corp.*, 574 N.E.2d 395, 398 (Mass. App. Ct. 1991) (discussing piercing against individuals); *My Bread Baking Co. v. Cumberland Farms, Inc.*, 233 N.E.2d 748, 752 (Mass. 1968) (discussing piercing in corporate groups).

147. See *Cont'l Supply Co. v. Forrest E. Gilmore Co.*, 55 S.W.2d 622, 628 (Tex. Civ. App. 1933).

148. *SSP Partners v. Gladstrong Invs. Co.*, 275 S.W.3d 444, 450-51 (Tex. 2009).

149. *Id.* at 451-56.

150. *Richards v. Transocean, Inc.*, 333 S.W.3d 326, 331 (Tex. App. 2010).

151. *Las Palmas Assocs. v. Las Palmas Ctr. Assocs.*, 235 Cal. App.3d 1220, 1249-50 (Cal. Ct. App. 1991).

152. *Brown v. ANA Ins. Grp.*, 965 So.2d 902, 926 (La. Ct. App. 2007). The “single business enterprise” doctrine is a theory for imposing liability where two or more business entities act as one. Generally, under the doctrine, when corporations integrate their resources in operations to achieve a common business purpose, each business may be held liable for wrongful acts done in pursuit of that purpose. See Kurt A. Strasser, *Piercing the Veil in Corporate Groups*, 37 CONN. L. REV. 637, 646 (2005); *Brown v. Auto. Cas. Ins. Co.*, 644 So.2d 723, 727 (La. Ct. App. 1994); *Green v. Champion Ins. Co.*, 577 So.2d 249, 259 (La. Ct. App. 1991).

legal duties, including those imposed by virtue of a contract or other enforceable agreement, by courts and common law doctrine like negligence and intentional torts, and by regulations and statutes covering a range of industry sectors including construction, consumer products, employment, financial instruments, insurance, medical services, motor carriers, natural resource extraction, tax, transportation, and workers' compensation.¹⁵³ In the case of the latter class of legal obligations, states are not uniform in the range of industries they regulate, the extent to which they regulate those sectors, nor the associated contractual relationships and public interests connected to those sectors. Generally speaking, "[i]n the field of . . . tax legislation, courts have generally refused, for various reasons, to separate the corporate entities of the parent company and the wholly owned subsidiary in order to grant relief from such taxes at the expense of the state."¹⁵⁴ This multiplicity alone brings into doubt the wisdom of studying aggregations of veil-piercing cases.

To the extent that veil-piercing can be accurately or effectively characterized as an equitable remedy, it should only be available where there is no adequate legal remedy otherwise provided by statutes or common law rules specific to these issue-areas.¹⁵⁵ This is why in Illinois a plaintiff may not sustain a veil-piercing action against a controlling shareholder where an alternative claim for breach of fiduciary duty against that shareholder is available.¹⁵⁶ It similarly explains why a subcontractor in Massachusetts may not pierce the corporate veil of a general contractor if it does not avail itself of alternative procedural or statutory protections.¹⁵⁷

Nevertheless, the general distinctions between contract, tort, voluntary and involuntary creditors, statutory, and criminal veil-piercing actions pervade the literature with "the distinction between common law contract and tort creditors . . . a major fault line in the law of veil piercing."¹⁵⁸ Thompson upended the conventional wisdom

153. See *LaBelle v. Crepeau*, 593 A.2d 653, 654 (Me. 1991) (limiting worker's relief to workers' compensation instead of veil-piercing claim); *Maine Aviation Corp. v. Johnson*, 196 A.2d 748, 750 (Me. 1964) (unifying corporations and shareholders for purposes of site location law).

154. *Bonnar-Vawter, Inc. v. Johnson*, 173 A.2d 141, 145 (Me. 1961).

155. See DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 380 (4th ed. 2010).

156. *Graham v. Mimms*, 444 N.E.2d 549, 561 (Ill. App. Ct. 1982).

157. See *Evans v. Multicon Constr. Corp.*, 574 N.E.2d 398, 400 (Mass. App. Ct. 1991) ("Particularly in the area of construction, there is a statutory scheme which permits subcontractors to obtain a lien for labor or material furnished against the improved real estate. . . . Evans chose not to avail himself of that remedy. A litigant may also obtain an attachment against assets of a defendant whose assets, as was the case with [Multicon Construction Corporation], might not be susceptible to an execution.").

158. *Boyd & Hoffman*, *supra* note 13, at 860 (citing Henry Hansmann and Reinier

by finding that contract creditors prevailed in veil-piercing actions at a higher rate than tort creditors, although subsequent research has not confirmed his findings.¹⁵⁹ Peter Oh's recent analysis found a substantial discrepancy toward tort creditors even in Thompson's original time period.¹⁶⁰ More importantly, Oh broke new ground on the role of fraud claims in shaping scholars' analyses of tort versus creditor claims, separately examining fraud as a hybrid claim that further confused the contract/tort landscape.¹⁶¹

But even with these nuances in the literature, the contract/tort distinction is explicit in the laws of states like Texas and West Virginia, and it plays a jurisprudentially relevant role for other states as well.¹⁶² The result is that aggregating veil-piercing outcomes for cases adjudicating contract and tort actions obscures relevant legal or evidentiary distinctions between them.

Even before the Supreme Court of Texas and the Texas legislature substantially altered the veil-piercing landscape between 1986 and 1989, contract and tort actions were subjected to different standards by courts.¹⁶³ In their analysis of Texas veil-piercing cases, Hamilton, Miller, and Ragazzo found that in contract cases, courts generally concluded that third party creditors were better positioned to bear contracting risk and therefore piercing inquiries focused on the integrity of the ex ante bargaining process or particularly egregious ex post conduct.¹⁶⁴ In tort cases, Texas courts allowed risk to be shifted to corporations based on the following factors:

- (i) the adequacy of the capitalization of the corporation in light of the nature and risks of the business being engaged in, (ii) whether available corporate funds had been responsibly utilized to provide a reasonable degree of protection to third persons tortiously injured by corporate action, typically through the purchase of liability insurance, or (iii) whether there was misuse or excessive distributions of assets to shareholders, either directly or

Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1916-23 (1991).

159. Hodge & Sachs, *supra* note 12, at 353-54.

160. See Oh, *Supra* note 14, at 127.

161. *Id.* at 89.

162. Bucyrus-Erie Co. v. Gen. Prod. Corp., 643 F.2d 413, 419 (6th Cir. 1981) (applying Ohio law).

163. Castleberry v. Branscum, 721 S.W.2d 270, 279-80 (Tex. 1986) (Gonzalez, J., dissenting).

164. ELIZABETH S. MILLER & ROBERT A. RAGAZZO, TEXAS METHODS OF PRACTICE § 46:2 (2014) ("Piercing should be permitted in contract cases only where the plaintiff can demonstrate significant abuse of the bargaining process or the manner in which the corporation's business is thereafter conducted, for example through fraud, deception, or operation of the corporation in unexpected ways that improperly divert corporate assets to shareholders while bypassing corporate liabilities.") (citing ROBERT HAMILTON, 19 TEXAS PRACTICE: BUSINESS ORGANIZATIONS § 234 (2003)).

indirectly.¹⁶⁵

In 1986, the Texas Supreme Court decided *Castleberry v. Branscum*,¹⁶⁶ which significantly expanded the grounds upon which shareholder assets might be reached as well as concluding for the first time that veil-piercing was a question for a jury.¹⁶⁷ In a dispute in which two business partners secretly established a competing business and then diverted business using the first corporation's assets, the Supreme Court of Texas used the case to establish the availability of veil-piercing in a wide range of legal situations.¹⁶⁸

The Court then set forth a broad veil-piercing test allowing Texas courts to disregard the corporate fiction, "even though corporate formalities have been observed and [the] corporate and individual property have been kept separately,' when the corporate form [has been] used 'as part of a basically unfair device to achieve an inequitable result.'"¹⁶⁹ "To prove there has been a sham to perpetrate a fraud, tort claimants and contract creditors must show only constructive fraud . . . the breach of some legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests."¹⁷⁰

The Court furthermore clarified that a veil-piercing determination was squarely the province of the jury.¹⁷¹

Following the *Castleberry* decision, the Texas legislature amended article 2.21 of the Texas Business Corporation Act in 1989.¹⁷² The Texas legislature expressly made piercing to satisfy contractual obligations impossible without a showing of actual fraud, although constructive fraud remains a valid theory for tort actions.¹⁷³

165. *Id.*

166. *Castleberry*, 721 S.W.2d 270.

167. *Id.* at 271-77; see also ROBERT W. HAMILTON AND JONATHAN R. MACEY, CASES AND MATERIALS ON CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES 347 (8th ed. 2003). The Texas law of piercing the corporate veil took a bizarre turn in *Castleberry v. Branscum* - a case decided by a five to four vote. The court rewrote the traditional piercing rhetoric so broadly that it appeared likely that thereafter shareholders' protection from liability on both contract and tort obligations had become entirely dependent on a jury's determination that the transaction met some undefined and abstract standard of fairness.

168. See *Castleberry*, 721 S.W.2d at 272 & n.3 (citing *Torregrossa v. Szele*, 603 S.W.2d 803, 804-05 (Tex. 1980); *Tigrett v. Pointer*, 580 S.W.2d 375, 381 (Tex. App. 1979)).

169. ELIZABETH S. MILLER & ROBERT A. RAGAZZO, 13 TEX. PRAC., TEXAS METHODS OF PRACTICE § 46:2 (quoting *Castleberry*, 721 S.W.2d at 271).

170. *Castleberry*, 721 S.W.2d at 273.

171. See *id.* at 273. See generally Brent Lee, *Veil Piercing and Actual Fraud Under Article 2.21 of the Texas Business Corporation Act*, 54 BAYLOR L. REV. 427, 429 (2002).

172. Tex. Bus. Corp. Act Ann. art. 2.21 (expired Jan. 1, 2011).

173. Tex. Bus. Orgs. Code Ann. § 21.223 (West 2007).

In West Virginia, the Supreme Court of Appeals adopted as part of its veil-piercing test an inquiry as to whether a party could effectively investigate a corporate counterparty's financial health and contractually secure its interests.¹⁷⁴ The Supreme Judicial Court of Maine similarly imposed "a more stringent standard of proof to a contract creditor of the corporation" than a tort creditor.¹⁷⁵ In Illinois, this distinction is even more specific in the landlord-tenant context where a party that enters into a lease with a corporation as counter-party is estopped from denying the corporation's separate existence.¹⁷⁶ Many jurisdictions do not specify particular differences in their three-part tests but allow generally for heightened review in contract cases.¹⁷⁷

Other jurisdictions, of course, specifically include and equate both contract and tort actions in veil-piercing decisions.¹⁷⁸ Yet whether or not courts apply different tests to contract or tort claims is not acknowledged in many of the most influential empirical studies.

3. Undercapitalization and Expert Testimony

Although not strictly a matter of procedure or evidence, undercapitalization is treated uniformly in studies to date.¹⁷⁹ Yet the reasons and evidentiary context of undercapitalization claims influences not only the likelihood of veil-piercing success, but also whether undercapitalization sounds principally in contract or tort.¹⁸⁰ For example, in *Laya v. Erin Homes, Inc.*, the Supreme Court of West Virginia specifically recognized the necessity for expert testimony on the issue of adequate capitalization:

For example, comparison with the capitalization of other corporations in the same or a similar line of business may be made. The capitalization of the corporation in question could be compared with the average industry-wide ratios (current ratio, acid-test ratio, debt/equity ratio, etc.) obtained from published sources (Dunn & Bradstreet, Moody's Manual of Investments, Standard and Poor's Corporation Records, etc.). These average ratios could be

174. *Laya v. Erin Homes, Inc.*, 352 S.E.2d 93, 100 (W. Va. 1986); *see also* *Hill v. Fairfield Nursing and Rehabilitation Center*, 134 So.3d 396, 412 (Ala. 2013) (Murdock, J. concurring).

175. *See Theberge v. Darbro, Inc.*, 684 A.2d 1298, 1304 (Me. 1996).

176. *Boatman v. Jordan*, 243 N.E.2d 644, 647 (Ill. Ct. App. 1968).

177. *Jablonsky v. Klemm*, 377 N.W.2d 560, 565 (N.D. 1985); *Fiumetto v. Garrett*, 749 N.E.2d 992, 1006 (Ill. App. Ct. 2001).

178. *Penn Nat. Gaming, Inc. v. Ratliff*, 954 So.2d 427, 431-32 (Miss. 2007); *Hogan v. Mayor & Aldermen of Savannah*, 320 S.E.2d 555, 558 (Ga. Ct. App. 1984).

179. *See supra* text accompanying note 2.

180. *See Teamsters Health & Welfare Fund v. World Transp., Inc.*, 241 F. Supp. 2d 499, 504 (E.D. Pa. 2003) (recognizing the importance of undercapitalization in veil-piercing analysis).

buttressed by expert testimony from certified public accountants, securities analysts, investment counselors or other qualified financial analysts. "Grossly inadequate capitalization" for the purpose of piercing the corporate veil would generally be reflected by a substantial deficiency of capital compared with that level of capitalization deemed adequate in the case by the financial analyst experts.¹⁸¹

In the *Collet* case, the Missouri Court of Appeals reasoned that capital was inadequate because it was below industry standards.¹⁸² In reaching this conclusion, the court stated: "Plaintiff's experts, whose testimony was accepted by the trial court, clearly testified [the defendant's] capitalization was far below industry standards."¹⁸³

These courts, in essence, applied a level of care standard to capitalization levels, a standard that corresponds with a negligence action. The role of expert testimony in establishing an industry standard appears relevant if not decisive. Compare these "negligence" undercapitalization cases with of the type occurring in *Consumer's Co-op of Walworth County v. Olsen*, in which a contract creditor asserted undercapitalization as a basis to pierce even though the creditor continued to allow the defendant to purchase in violation of its own contractual terms.¹⁸⁴ The court refused to pierce the veil on the basis of undercapitalization, noting that contract creditors should investigate risks involved in dealing with the defendant creditor.¹⁸⁵

C. Evidentiary Burdens

Just as pleading standards and presumptions shape the availability and course of veil-piercing claims in influential ways not adequately recognized in current studies, evidentiary burdens and standards not only shape disputes but also reflect social choices about the strength of the legal separation between shareholders and corporations.¹⁸⁶ Burdens of proof represent a choice to allocate the risk of an erroneous decision between the parties.¹⁸⁷ A preponderance

181. 352 S.E.2d 93, 101 (W. Va. 1986) (citation omitted).

182. *Collet v. American Nat'l Stores, Inc.*, 708 S.W.2d 273, 287 (Mo. Ct. App. 1986).

183. *Id.*; see also *S. Lumber & Coal Co. v. M.P. Olson Real Estate & Constr. Co.*, 426 N.W.2d 504, 510 (Neb. 1988) (holding that the corporation was not undercapitalized because plaintiff and defendant's expert agreed that corporate capitalization "was consistent with the usual course of business in the housing construction industry at the time"); *J. L. Brock Builders, Inc. v. Dahlbeck*, 391 N.W.2d 110, 114 (Neb. 1986) (finding that although experts agree that the corporation was undercapitalized, undercapitalization in the home construction business was not unusual and that home construction businesses could meet the "industry standard" capitalization).

184. 419 N.W.2d 211, 222 (Wis. 1988).

185. *Id.*

186. See *Steadman v. SEC*, 450 U.S. 91, 95 (1981) (stating that standard of proof is traditionally left to judiciary to resolve).

187. See *In re Winship*, 397 U.S. 358, 370-71 (1970) (Harlan, J., concurring) ("[A]

of the evidence standard, commonly applied in veil-piercing cases, suggests that society accepts equally the chance that a judge or a jury may reach the wrong conclusion as between a damaged party and a shareholder who relied on the legal separation between herself and the corporation. A reasonable doubt standard, most frequently applied in the criminal context, allocates the risk of loss away from the defendant, reflecting a strong desire for the wrongfully accused to be found innocent, even if it also results in the exoneration of some guilty defendants. A "clear and convincing" standard lies in between, imposing on the party who bears it a burden to produce in the mind of the judge or jury "a firm belief or conviction" or similar level of persuasion as to the allegations made.¹⁸⁸ It is typically used "in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant."¹⁸⁹

The distinction between the burdens of proof that veil-piercing parties bear and the claims which accompany or underlie a veil-piercing action frequently blurs. If a jurisdiction requires a finding of fraud as a precondition to piercing; a heightened pleading standard for fraud; and, a clear-and-convincing burden of proof for fraud, it has gone far toward closing the door altogether on veil-piercing purely as a procedural matter. Given the diversity of perspectives on the fundamental deal struck between society and entrepreneurs, it is no surprise that those perspectives are reflected in legal standards that inevitably allocate resources either toward protecting corporate/shareholder separation or circumscribing its use.

These distinctions, if they are considered, are not obvious in the literature. Thompson, for example, locates variation in courts' veil-piercing behavior "with the context, and decisions [that] reflect the differing impact of various statutory policies affecting limited liability."¹⁹⁰ Thompson does not appear to include evidentiary variations within this context, nor does he explicitly address them in his study. Peter Oh's analysis is focused on fraud,¹⁹¹ but breaking down fraud claims between contract and tort actions *ex ante* without controlling for evidentiary differences may result in effectively mixing contract and tort actions *ex post*. For example, in the veil-piercing context, many jurisdictions do not impose heightened burdens of proof, even when backed by claims of fraud.¹⁹²

standard of proof represents an attempt to instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.").

188. *Aiello v. Knoll Golf Club*, 165 A.2d 531, 533-34 (N.J. Super. Ct. App. Div. 1960).

189. *Addington v. Texas*, 441 U.S. 418, 424 (1979).

190. Thompson, *supra* note 12, at 1039.

191. Oh, *supra* note 12, at 90.

192. *See infra* Section II.C.I.

1. Preponderance of the Evidence, Heightened Standards of Proof, or Clear and Convincing Evidence

Depending on procedural context, especially whether or not a judge or jury serves as trier of fact, jurisdictions impose preponderance, clear-and-convincing, and other intermediate forms of evidentiary burden. The link between this burden and the social welfare shareholder/corporate separation is intended to promote is sometimes explicit. In *Grayson v. R.B. Ammon & Associations Inc.*, a Louisiana appellate court reasoned that, “because Louisiana considers the concept of the corporation beneficial, the principle that the corporation is a separate entity should be disregarded only in exceptional circumstances . . . [I]t is reasonable to conclude that [veil-piercing] should . . . be subjected to the same burden of proof, *i.e.*, clear and convincing evidence.¹⁹³

States that have adopted a preponderance of the evidence standard have not generally tied the decision to do so to any explicit judicial policy.¹⁹⁴ Where they have provided some rationale, courts applying a preponderance standard have stated that an action to pierce the corporate veil is no different than accompanying causes of action that also require a preponderance finding. In one of the lengthier discussions of the issue, a Connecticut appellate court rejected the suggestion that it adopt a clear-and-convincing standard, citing both federal law and practice in the states of Nebraska, Nevada and Hawaii.¹⁹⁵ Yet the issue is clearly of concern where it is

193. *Grayson v. R. B. Ammon and Assocs., Inc.*, 778 So.2d 1, 14 (La. Ct. App. 2000); see also *C.F. Trust, Inc. v. First Flight L.P.*, 580 S.E.2d 806, 811 (Va. 2003) (applying a clear and convincing standard in the reverse veil piercing context but equating the standard for reverse piercing with other veil-piercing actions for purposes of evidentiary burdens); *Harlow v. Fibron Corp.*, 671 P.2d 40, 45-46 (N.M. Ct. App. 1983) (holding that fraud was not established by clear and convincing evidence).

194. See *Fazio v. Brotman*, 371 N.W.2d 842, 846 (Iowa Ct. App. 1985); *Alternative Nursing Care, Inc. v. C.H. Wright, Inc.*, No. CV-01-168, 2003 WL 21911056, at *3 (Me. Super. Ct., Jun. 2, 2003).

195. *Litchfield Asset Management Corp. v. Howell*, 799 A.2d 298, 310-311 (2002), *overruled on other grounds by* *Robinson v. Coughlin*, 830 A.2d 1114 (2003) (citing *J.L. Brock Builders, Inc. v. Dahlbeck*, 391 N.W.2d 110 (Neb.1986) (relaxed standard for fraud); *Wyatt v. Bowers*, 747 P.2d 881 (Nev.1970) (applying the preponderance of evidence standard of proof to veil piercing)); see also *Mid-South Mgmt. Co. Inc. v. Sherwood Dev. Corp.*, 649 S.E.2d 135, 140 (S.C. Ct. App. 2007) (applying preponderance of the evidence standard to veil piercing claim); *Byars v. v. Herman*, No. 83496, 2004 WL 1532224, at *3 (Ohio Ct. App. 2004) (“To pierce the corporate veil and impose personal liability on a shareholder, the burden is on the party seeking to pierce the corporate veil to prove, by a preponderance of the evidence . . .”); *Crutchfield v. Russ-Mar, Inc.*, No. CA 98-901, 1999 WIL 151646, at *3 (Ark. Ct. App. 1999) (implicitly upholding preponderance standard); *Priskie v. Missry*, 958 So.2d 613, 613 (Fla. Ct. App. 2007) (“Generally, the rule is that the corporate veil will not be pierced absent a showing of improper conduct Three factors must be proven by a preponderance of the evidence: (1) the shareholder dominated and controlled the

raised. In *McCallum Family L.L.C. v. Winger*, a Colorado appellate court explicitly rejected the Colorado Supreme Court's dicta suggesting a clear-and-convincing standard for veil-piercing claims based on an applicable Colorado statute which generally imposes a preponderance burden for civil claims.¹⁹⁶

Other states impose an intermediate or heightened burden of proof to veil-piercing claims. Georgia courts do not expressly state what standard of proof the plaintiff must meet, but case law suggests a heightened standard is applied due to the court's practice of using caution when asked to disregard the corporate entity.¹⁹⁷ In Illinois, to pierce the corporate veil, the plaintiff bears the burden of making a "substantial showing".¹⁹⁸ New York courts impose a "heavy burden" of showing each element of a veil-piercing claim.¹⁹⁹

2. Fraud

The distinction between these social choices plays out not only in veil-piercing claims generally, but specifically as to contract, tort, or fraud actions, the latter of which may cut across the former. In 2005, a New Jersey trial court, for example, likening actions to pierce the corporate veil in the contract context to equitable fraud actions, imposed a clear-and-convincing standard of proof based on the history of equitable fraud actions in the chancery courts.²⁰⁰ It

corporation to such an extent that the corporation's independent existence, was in fact non-existent and the shareholders were in fact alter egos of the corporation (2) the corporate form must have been used fraudulently or for an improper purpose and (3) the fraudulent or improper use of the corporate form caused injury to the claimant." (quoting *Seminole Boatyard, Inc. v. Christoph*, 715 So.2d 987, 990 (Fla. Dist. Ct. App. 1998)); *Escobedo v. BHM Health Associates, Inc.*, 818 N.E.2d 930 (Ind. 2004) (A party seeking to pierce the corporate veil "may only recover from a shareholder if the party proves by a preponderance of the evidence 'that the corporate form was so ignored, controlled or manipulated that it was merely the instrumentality of another and that the misuse of the corporate form would constitute a fraud or promote injustice.'" (quoting *Aronson v. Price*, 644 N.E.2d 864, 867 (Ind. 1994)); *Ize Nantan Bagowa, Ltd. v. Scalia*, 577 P.2d 725, 729 (Ariz. Ct. App. 1978) ("[I]t is incumbent upon one seeking to pierce the corporate veil to show by preponderance of evidence that financial setup of corporation is only a sham and causes an injustice.").

196. *McCallum Family L.L.C. v. Winger*, 221 P.3d 69, 74 (Colo. App. 2009) (rejecting the clear and convincing standard imposed by the Colorado Supreme Court in *In re Phillips*, 139 P.3d 639, 644 (Colo. 2006) as outside the scope of the question certified to the Colorado Supreme Court).

197. *See, e.g., Soerries v. Dancause*, 546 S.E.2d 356, 358 (Ga. Ct. App. 2001).

198. *Kelsey Axle & Break Div. v. Presco Plastics, Inc.*, 543 N.E.2d 239, 244 (Ill. Ct. App. 1989).

199. *Joseph Kali Corp. v. A. Goldner, Inc.*, 859 N.Y.S.2d 1, 2 (2008).

200. *D.R. Horton Inc. – N.J. v. Dynastar Dev., L.L.C.*, No. MER-L-1808-00, 2005 WL 1939778, at *23 (N.J. Super. Ct. Aug. 10, 2005) ("Applying these considerations, the court concludes that a fact-finder should have a higher degree of confidence in a claim to pierce the veil on a private contract claim. The same considerations that call for a heightened level of proof in an equitable or legal fraud claim are at play in a corporate

specifically reserved the question of whether a similar burden of proof would apply in the tort context, although it suggested it would not.²⁰¹ In *ServiceMaster v. J.R.L. Enterprises*, for example, the Nebraska Supreme Court imposed a clear and convincing evidence burden of proof on a veil-piercing claim based on fraudulent misrepresentation.²⁰² In the same term, it approved a preponderance of the evidence standard—one that could be met with circumstantial evidence—where the question rested squarely on whether the corporate form was used to perpetrate fraud.²⁰³ In the former case, the dispute arose from payments due under a franchising license. In the latter, consistent with a claim for fraudulent conveyance, a sole shareholder transferred to himself all of a corporation's assets upon its dissolution, leaving a number of creditors without even partial payment.²⁰⁴ By altering the burden to that of a more stringent standard in the presence of fraud allegations, Maine courts emphasize that such allegations allow plaintiffs in veil piercing cases to prevail only if the evidence supporting them can be founded as highly probably versus merely more probable than not.²⁰⁵

Many jurisdictions, however, retain the preponderance of the evidence standard, even for fraud. In *Anthony v. Delagrang Remodeling, Inc.*,²⁰⁶ a Michigan appellate court explicitly rejected a clear-and-convincing evidentiary standard for fraud in the veil-piercing context, noting both that a preponderance standard was proper where, under Michigan law, “[f]raud may be proved by facts that are inconsistent with an honest purpose”²⁰⁷ and that “the corporate veil may be pierced even in the absence of fraud.”²⁰⁸ While the Texas legislature overruled the constructive fraud aspect of the Texas Supreme Court's *Castleberry* decision, it left the preponderance of the evidence and jury determination aspects of the decision in place; the effect was to divide actual and constructive

veil piercing claim.”); Notes, 60 HARV. L. REV. 111, 112 (1946).

201. *D.R. Horton Inc.*, 2005 WL 1939778, at *23.

202. *ServiceMaster Indus. v. J.R.L. Enterprises*, 388 N.W.2d 39, 43 (Neb. 1986).

203. See *Brock Builders, Inc. v. Dahlbeck*, 391 N.W.2d 110, 115 (Neb. 1986); see also *Wolf v. Walt*, 530 N.W.2d 890, 891 (Neb. 1995).

204. The court wrote “Among the factors relevant in determining whether to disregard the corporate entity are . . .” and then proceeded to list the factors without including the caveat “on the basis of fraud.” *Global Credit Servs., Inc. v. AMISUB (Saint Joseph Hosp.) Inc.*, 508 N.W.2d 836, 842 (Neb. 1993).

205. *Taylor v. Comm’r of Mental Health & Retardation*, 481 A.2d 139, 153 (Me. 1984).

206. *Anthony v. Delarange Remodeling, Inc.*, No. 252644, 2005 WL 602561 (Mich. Ct. App. March 15, 2005).

207. *Id.* at *7 (citing *Foodland Distribs. V. Al-Naimi*, 559 N.W.2d 379, 382 (Mich. 1996)).

208. *Id.* at *7 (citing *Foodland Distribs.*, 559 N.W.2d at 382).

fraud claims according to their elements.²⁰⁹

Conversely, Maryland effectively requires a party seeking to pierce the corporate veil to plead fraud to a heightened standard “clear and specific acts”²¹⁰ and do so through “clear and convincing” proof that all elements of fraud exist.²¹¹ Showing fraud by preponderance of the evidence is explicitly insufficient.²¹² In Maryland, these standards apply to both constructive and actual fraud, for if one type required a lesser degree of proof than the other, the form of fraud alleged would be chosen based upon the burden of proof it carried with it.²¹³ Maryland contrasts with many other jurisdictions which do not require a finding of fraud.²¹⁴

These variations limit the usefulness of studies that bundle together jurisdictions with differing rules of civil procedure and evidence, which account for nearly all studies to date except Boyd's and Hoffman's. Oh notes that “general” versus “specific” evidence of fraud or misrepresentation affect veil-piercing conclusions, but does not control for procedural variables that would make that comparison difficult or impossible.²¹⁵ It may make more sense to sort fraud actions not into contract (fraudulent misrepresentation) or tort (deceit) varieties but rather into the standards of proof parties must meet in order to prevail on veil-piercing fraud claims.

D. Jury Access in Veil-Piercing Cases

Although all studies acknowledge that the circumstances surrounding settlement represent an important variable, none assess the availability of a jury as a factor influencing 1) the willingness of

209. Brent Lee, *Veil Piercing and Actual Fraud Under Article 2.21 of the Texas Business Corporation Act*, 54 BAYLOR L. REV. 427, 429 (2002) (citing *Castleberry v. Branscum*, 721 S.W.2d 270, 271 (Tex. 1986)) (finding that the following causes of action incorporate actual fraud: (1) material misrepresentations; (2) fraudulent inducement; (3) tortious interference with contractual relations; (4) conspiracy; (5) statutory claims).

210. JAMES J. HANKS, JR., § 4.18 PIERCING THE CORPORATE VEIL “A HERCULEAN TASK”; MARYLAND CORPORATION LAW 122.14 (2013).

211. *Residential Warranty Corp. v. Bancroft Homes Greenspring Valley, Inc.*, 728 A.2d 783, 790 (Md. Ct. Spec. App. 1999); *Colandrea v. Colandrea*, 401 A.2d 480, 484 (Md. Ct. Spec. App. 1979); *see also*, *Starfish Condo Ass'n v. Yorkridge Serv. Corp.*, 458 A.2d 805, 816 (Md. 1983).

212. *Dixon v. Process Corp.*, 382 A.2d 893, 893 (Md. Ct. Spec. App. 1978).

213. *Id.* at 901; *see also* *Serio v. Baystate Properties, LLC*, 39 A.3d 131, *cert. denied*, 426 Md. 428 (2012).

214. *Inter-Tel Techs., Inc. v. Linn Station Props., LLC*, 360 S.W.3d 152, 163-65 (Ky. 2012) (“[T]o the extent *White* can be read to require evidence of actual fraud before an entity's veil is pierced, it is overruled.”); *Misik v. D'Arco*, 130 Cal. Rptr. 3d 123, 130 (Cal. Ct. App. 2011) (“Application of the alter ego doctrine does not depend upon pleading or proof of fraud.”) (quoting *Eng'g Serv. Corp. v. Longridge Inv. Co.*, 314 P.2d 563, 570 (Cal. Ct. App. 1957)).

215. Oh, *supra* note 14, at 137-39.

parties to settle or 2) the kinds of veil-piercing claims (contract or tort) that reach a trial (and are therefore reported).²¹⁶ This is important in state jurisdictions because it may mean that aggregate analyses capture a disproportionate number of veil-piercing cases from jurisdictions in which there is no access to a jury. This would be similarly true for federal district courts which do not uniformly give access to juries for veil-piercing claims. While the Seventh Circuit Court of Appeals has squarely addressed the issue of veil-piercing claims for federal district courts located in Wisconsin, Illinois and Indiana (veil-piercing is procedural under *Erie* and equitable under the Seventh Amendment), federal district courts for the most part have little guidance as to whether the U.S. Constitution requires them to allow veil-piercing claimants access to a jury under either *Erie* or the Seventh Amendment. Current studies make little or no effort to estimate where and why veil-piercing claims arise (or are caught in database searches). California and New York courts donate the most veil-piercing cases to current studies, which may be the result of their large populations and commercial activity.²¹⁷ But population and commercial activity do not explain why Louisiana cases represent a large portion of the cases analyzed by both Thompson and Oh.²¹⁸ Access to a jury may not only affect the likelihood that a given case reaches trial, but it may also shape pleadings toward legal forms of relief and away from injunctive and other equitable relief if the right to a jury is tied to the types of claims that prevail in a given dispute.

1. Jury Right Jurisdictions

Several jurisdictions have established that veil-piercing claims are entitled to jury determination.²¹⁹ The reasons for this right vary. The Supreme Court of Texas, for example, has tied the right to a jury

216. See Marc Galanter, *The Civil Jury as Regulator of the Litigation Process*, 1990 U. CHI. LEGAL F. 201, 208 (1990) ("Fear of juries leads defendants to settle suits, whatever their merits."); Jason Solomon, *The Political Puzzle of the Civil Jury*, 61 EMORY L.J. 1331, 1349 (2012) ("It is not clear how the injection of these values affects outcomes, though one might speculate that a jury's willingness to award higher damage awards might increase settlement amounts."); D. Brock Hornby, *The Business of the U.S. District Courts*, 10 GREENBAG 453, 455 (2007) ("But the desire to control costs (among insurers in particular) and a fear of jury unpredictability or break-the-company verdicts provoke greater defense willingness to mediate, arbitrate, or settle rather than bear the risk and extraordinary expense of trial.")

217. Oh, *supra* note 14, at 115; Thompson, *supra* note 12, at 1051-52.

218. *Id.*

219. Mark A. Olthoff, *Beyond the Form—Should the Corporate Veil Be Pierced?*, 64 UMKC L. REV. 311, 331 (1995) ("Several state courts have held that the issue of piercing the corporate veil is one which may be resolved by the jury. These states include Tennessee, Mississippi, North Dakota, North Carolina, Iowa, Florida, Texas, and Georgia, as well as the District of Columbia.")

trial on veil-piercing claims to state constitutional provisions favoring jury determination of fact.²²⁰ Others, like the District of Columbia, validate the availability of a jury after practice undertaken in the lower courts.²²¹ Moreover, jurisdictions like Idaho, Florida, and North Carolina refer explicitly or implicitly to the close relationship between the fact inquiries juries must make on legal claims in contract or tort and the associated inquiries as to whether a controlling shareholder violated legal duties as an individual or through a corporate entity.²²² In *Mike v. Po Group, Inc.*, the Tennessee Supreme Court noted that “[t]he conditions under which the corporate entity will be disregarded vary according to the circumstances present in each case [A] determination of whether or not a corporation is a mere instrumentality of an individual or a parent corporation is ordinarily a question of fact for the jury”.²²³ Similarly, the Utah Supreme Court rejected a trial court’s directed verdict for a veil-piercing defendant, noting that “[t]he . . . evidence raised substantial issues of fact as to the alleged defects that could only be determined by the jury as fact-finder.”²²⁴ The Supreme Court of Oregon implied that its veil-piercing jurisprudence had changed with respect to jury determinations, noting that “[m]any of our previous opinions in this area of the law were written with no view that juries would be involved in the decisionmaking process in such cases” yet establishing the specific charge juries should be given.²²⁵ While the Georgia Supreme Court has not spoken specifically to the

220. *Castleberry v. Branscum*, 721 S.W.2d 270, 277 (Tex. 1986); Brent Lee, *Veil Piercing and Actual Fraud Under Article 2.21 of the Texas Business Corporation Act*, 54 BAYLOR L. REV. 427, 445 (2002) (citing *Tigrett v. Pointer*, 580 S.W.2d 375, 381 (Tex. Civ. App. 1978)); *see also* *Oliver v. Marsh*, 899 S.W.2d 353, 357 (Tex. Ct. App. 1995)).

221. *See, e.g.*, *Vuitch v. Furr*, 482 A.2d 811, 815 (D.C. Cir. 1984); *Drilcon, Inc. v. Roil Energy Corp., Inc* 749 P.2d 1058 (Mont. 1988); *Bakke v. D & A Landscaping Co.*, 820 N.W.2d 357 (N.D. 2012).

222. *VFP VC v. Dakota Co.*, 109 P.3d 714, 723 (Idaho 2005) (“That even though the jury may find Dakota committed the fraudulent act they may still find Durkin personally liable if they believe Dakota and Durkin are the same entity as provided in their instructions”); *Maroun v. Wyreless Sys., Inc.*, 114 P.3d 974, 979 (Idaho 2005); *Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So. 2d 1114, 1121 (Fla. 1984) (“The record here indicates there was evidence which, if accepted by the jury, tended to show that Dania and Carrousel operated independently of each other.”); *Glenn v. Wagner*, 329 S.E.2d 326, 333 (N.C. 1985) (“Since the issue is one of fact, the trial court should take pains to spell out in its instructions the specific factors to be considered in determining whether the corporate entity should be disregarded.”).

223. *Mike v. Po Group, Inc.*, 937 S.W.2d 790, 795 (Penn. 1996) (quoting *Elec. Power Bd. of Chattanooga v. St. Joseph Valley Structural Steel Corp.*, 691 S.W.2d 522, 526 (Tenn. 1985); *see also* *Liberty Fin. Mgmt. Corp. v. Beneficial Data Processing Corp.*, 670 S.W.2d 40 (Mo. Ct. App. 1984).

224. *Mgmt. Comm. of Graystone Pines Homeowners Ass’n v. Graystone Pines, Inc.*, 652 P.2d 896, 899 (Utah 1982).

225. *Amfac Foods, Inc. v. Int’l Sys. & Controls Corp.*, 654 P.2d 1092, 1096 n.3, 1101-02 (Or. 1982).

issue, the consensus in its appellate decisions is that juries should decide veil-piercing claims.²²⁶

2. Jurisdictions Rejecting Jury Rights for Veil-Piercing Claims

While jurisdictions authorizing a jury for veil-piercing claims emphasize fact-specificity and the close relationship between veil-piercing and legal claims, jurisdictions which reject jury trial rights do so uniformly on the basis that veil-piercing is an equitable action and therefore the province of the trial judge.²²⁷ The Kentucky Supreme Court declared unequivocally that “the doctrine of piercing the corporate veil arises in equity” and is therefore the province of the trial court judge and not the jury.²²⁸ The Wyoming Supreme Court was equally emphatic, concluding “that there exists no right to a jury trial on the issue of piercing the corporate veil” because it is an equitable doctrine.²²⁹ Veil-piercing claims may only be heard by Delaware’s chancery courts.²³⁰ Nevada has imposed this rule statutorily, requiring that veil-piercing decisions be made by the trial “court as a matter of law.”²³¹ California’s Supreme Court has not spoken directly to the availability of a jury to decide veil-piercing claims, but there is substantial consensus in the appellate decisions that no such right exists, again because of its status as an “equitable remedy.”²³²

Nebraska’s and Washington’s Supreme Courts have declared that juries may consider veil-piercing claims along with legal claims they must decide, but, given the equitable nature of veil-piercing claims, their pronouncements are merely advisory.²³³

226. See *Gardner v. Marcum*, 665 S.E.2d 336, 339-40 (Ga. Ct. App. 2008); *J & J Materials, Inc. v. Conyers Seafood Co.*, 446 S.E.2d 781, 782-83 (Ga. Ct. App. 1994); *Fla. Shade Tobacco Growers, Inc. v. Duncan*, 256 S.E.2d 644, 645 (Ga. Ct. App. 1979) (“When litigated, the issue of ‘piercing the corporate veil’ is a jury question.”) (citation omitted).

227. See *C.T. Lowndes & Co. v. Suburban Gas & Appliance Co.*, 415 S.E.2d 404, 405 (S.C. Ct. App. 1992) (noting that piercing the corporate veil is an equitable action, and as such “this Court may determine the facts according to its own view of the preponderance of the evidence.” (citing *Sturkie v. Sifly*, 313 S.E.2d 316, 318 (S.C. Ct. App. 1984))).

228. *Schultz v. Gen. Elec. Healthcare Fin. Servs. Inc.*, 360 S.W.3d 171, 175 (Ky. 2012).

229. *Atlas Constr. Co. v. Slater*, 746 P.2d 352, 359 (Wyo. 1987).

230. *Sonne v. Sacks*, 314 A.2d 194, 197 (Del. 1973).

231. NEV. REV. STAT. §78.747(3) (2001).

232. See *Olthoff*, *supra* note 213, at 334-35 & n. 158.

233. See *Wolf v. Walt*, 530 N.W.2d 890, 895 (Neb. 1995); *Thomas V. Harris, Washington’s Doctrine of Corporate Disregard*, 56 WASH. L. REV. 253, 263-64 (1981) (“[I]ssues involving the doctrine [of corporate disregard] must be resolved by the trial judge.” (citing *Sommer v. Yakima*, 26 P.2d 92, 96, 100 (Wash. 1933))) (“[T]he trial court empaneled an advisory jury, but granted judgment notwithstanding its

3. Jurisdictions with Conditional Jury Rights

In many jurisdictions, the issue is unclear.²³⁴ This is attributable to the assertion of a right to a jury trial which goes uncontested; procedural rules which require litigation to proceed either as “legal” and subject to jury determination or “equitable” and subject to judicial determination; simple confusion among the parties and trial judge; or, agreement between the parties to have equitable issues tried by a jury. For example, actions to pierce the corporate veil in Massachusetts may proceed as bench trials in their entirety, jury trials in their entirety, or as trials which are split between jury issues and bench issues.²³⁵ The judge has discretion to order a jury trial in such qualifying cases even if no party has demanded it, and the judge also has discretion to remove equitable issues from the jury even when the claim as a whole has been docketed for a jury trial.²³⁶ A trial judge in a legal action to pierce the veil has “wide discretion” when determining whether to reserve equitable issues for a bench trial.²³⁷

Under New York’s Civil Practice Law and Rules, a party who joins legal and equitable claims arising from the same transaction waives the right to a jury trial on the legal claims.²³⁸ With no guidance from the New York Court of Appeals, trial courts have divided on whether a “claim” to pierce the corporate veil is equitable and therefore destroys the right to a jury trial on the related legal claims. In *Klein v. Loeb Holding Corp.*, a New York trial court determined that veil-piercing actions seeking to enforce a judgment for money damages gave the claimant a right to a jury trial.²³⁹ In *First Keystone Consultants, Inc. v. DDR Construction Services*, a second trial court concluded that “[t]here is no right to a trial by jury

findings.” (citing *J.I. Case Credit Corp. v. Stark*, 392 P.2d 215, 217 (Wash. 1964)).

234. *Compare, e.g.*, *Macaluso v. Jenkins*, 420 N.E.2d 251, 253-58 (Ill. App. Ct. 1981) (upholding jury’s veil-piercing conclusion), *with Fontana v. TLD Builders, Inc.*, 840 N.E.2d 767, 771-72, 782-83 (Ill. App. Ct. 2005) (upholding the trial court’s decision to pierce the corporate veil after a bench trial), *and Ted Harrison Oil Co. v. Dokka*, 617 N.E.2d 898, 900, 902-03 (Ill. App. Ct. 1993) (upholding the trial court’s decision to pierce the corporate veil after a bench trial).

235. *See OMV Assocs., L.P. v. Clearway Acquisition, Inc.*, 976 N.E.2d 185, 189-90 (Mass. App. Ct. 2012) (upholding a jury verdict after a jury trial on veil-piercing); *Cahaly v. Benistar Prop. Exch. Trust Co.*, 885 N.E.2d 800, 806 n.9 (Mass. App. Ct. 2008) (discussing how the procedural posture of the case included a jury trial on liability and “a separate bench trial” on veil-piercing); *Lily Transp. Corp. v. Royal Institutional Servs., Inc.*, 832 N.E.2d 666, 669, 672-75 (Mass. App. Ct. 2005) (affirming in part and reversing in part the lower court’s bench trial which both found liability and pierced the corporate veil).

236. *See MASS. R. CIV. P. 39(b)-(c)*.

237. *See Steele v. Kelley*, 710 N.E.2d 973, 984 (Mass. App. Ct. 1999).

238. *See N.Y. C.P.L.R. 4102(c)* (McKinney 2014).

239. 878 N.Y.S.2d 876, 900-01, 905 (Sup. Ct. 2009).

since piercing the corporate veil is an action that sounds in equity.”²⁴⁰ Oklahoma maintains a similar “paramount-incident” test for equitable and legal claims whereby if equitable claims are paramount in a given dispute, and legal claims only incidental, a claimant enjoys no right to a jury trial.²⁴¹ This is why, even though Oklahoma law acknowledges veil-piercing as equitable,²⁴² a party may still obtain a jury determination for veil-piercing claims with careful pleading. ²⁴³Indeed, that is why a jury determination as to veil-piercing could survive a challenge in one of Oklahoma’s leading veil-piercing cases.²⁴⁴ While Oklahoma courts may not grant a trial by right in actions where the paramount issue is equitable in nature, the court may “impanel[] a jury to advise it on questions of fact”²⁴⁵ although the ultimate decision remains with the trial judge.²⁴⁶

It is certainly true that in many jurisdictions, the law is simply not clear. It is possible to identify cases that, in the same jurisdiction, allow and reject the right to trial by jury, and/or the state’s highest court has not considered the issue.²⁴⁷ In *Advanced Telephone Systems, Inc. v. Com-Net Professional Mobile Radio, LLC*, a Pennsylvania court surveyed the inconsistency in Pennsylvania decisions on the issue, although it concluded in that case that veil-piercing claims did not enjoy a right to a trial by jury.²⁴⁸ The Court of Appeals of Iowa has held that the trial court “did not err [when it]

240. No. 270952005, 2008 WL 5431379, at *3 (N.Y. Sup. Ct. Dec. 15, 2008) (citation omitted) (internal quotation marks omitted).

241. See *Mooney v. Mooney*, 70 P.3d 872, 880 (Okla. 2003); see also *Moschos v. Bayless*, 258 P. 263, 264 (Okla. 1927) (discussing how there was no right to a jury trial where the controlling issue—whether the plaintiff had “a valid subsisting oil and gas lease on” a certain piece of land—was equitable).

242. See *Butcher v. McGinn*, 706 P.2d 878, 879-80 (Okla. 1985).

243. See *Russell v. Freeman*, 214 P.2d 443, 444 (Okla. 1949) (“Where in an action the paramount issue *as formed by the pleadings* is one of equitable cognizance . . . said action is an equitable action.” (emphasis added) (citation omitted) (internal quotation marks omitted)).

244. *Gilbert v. Sec. Fin. Corp. of Okla.*, 152 P.3d 165, 175 (Okla. 2006).

245. *Butcher*, 706 P.2d at 880.

246. See *id.*; see also *Moschos*, 258 P. at 264. (“A jury may, in the discretion of the court, be called upon to pass upon the issues, but in such case the jury could only act in an advisory capacity. This issue as well as the relief sought is purely of equitable cognizance.”).

247. See *supra* notes 215-17 and accompanying text.

248. 846 A.2d 1264, 1275-77 (Pa. Super. Ct. 2004); see also *Pearson v. Component Tech. Corp.*, 247 F.3d 471, 484 (3d Cir. 2001) (“Courts have held veil-piercing to be appropriate ‘when the court must prevent fraud, illegality, or injustice, or when recognition of the corporate entity would defeat public policy or shield someone from liability for a crime[.]’” (quoting *Zubik v. Zubik*, 384 F.2d 267, 273 (3d Cir. 1967))); *Patroski v. Ridge*, No. 2:11-cv-1065, 2011 WL 4955274, at *2-4 (W.D. Pa. Oct. 18, 2011) (noting that, while “Pennsylvania law . . . recognize[s] piercing the corporate veil as an independent cause of action,” it also “features a strong presumption against the propriety of piercing the corporate veil.”).

“instruct[ed] the jury on piercing the corporate veil.”²⁴⁹ A Kansas appellate court has concluded that questions regarding piercing the corporate veil should be submitted to a jury where “there was sufficient evidence contrary to the findings on which reasonable minds might differ.”²⁵⁰

E. Applicable Law

An important but revealing aspect of some empirical studies to date is their preoccupation with the background competition between states as potentially favorable jurisdictions for incorporators. Peter Oh highlighted a Nevada corporate registration firm’s advertisement that Nevada courts were less likely to pierce than California’s (they back it up with a \$100,000 guarantee) based on Thompson’s findings.²⁵¹ Boyd and Hoffman noted a study which found that larger companies avoided incorporating in a jurisdiction identified by Thompson as having unfavorable veil-piercing law.²⁵² These uses of Thompson’s study embed the same assumption that Thompson made as well as Oh and others that followed: that states apply the “internal affairs doctrine” in veil-piercing cases.²⁵³ That is, a court will look to the law of the state of incorporation to determine whether the veil should be pierced. The reality is different.

Robert Thompson and Peter Oh categorized court cases as though the internal affairs doctrine applied.²⁵⁴ That is, if an Illinois court applied Delaware veil-piercing law, that case was sorted as a

249. *Spectrum Prosthetics & Orthotics, Inc. v. Baca Corp.*, 776 N.W.2d 302, at *4 (Iowa Ct. App. 2009). *But see Briggs Transp. Co. v. Starr Sales Co.*, 262 N.W.2d 805, 808 (Iowa 1978) (“Trial was to the court. The court found Robert was a director and officer of Starr Sales at all relevant times and participated in fraudulent activities.”).

250. *Serv. Iron Foundry, Inc. v. M.A. Bell Co.*, 588 P.2d 463, 475 (Kan. Ct. App. 1978). *But see Sturkie v. Sifly*, 313 S.E.2d 316, 318 (S.C. Ct. App. 1984) (“The role of this Court on an appeal from an action in equity tried by a judge without a reference is to determine the facts according to its view of the preponderance of the evidence.”) (citation omitted).

251. Oh, *supra* note 14, at 88 n.42 (citing *Nevada vs. California*, CORPORATE SERV. CTR., INC., <http://www.corporateservicecenter.com/our-services/nevada-incorporation/nevada-vs-california/>); *The \$100,000 Dollar Nevada Corporate Veil Guarantee*, CORPORATE SERV. CTR., INC., <http://www.corporateservicecenter.com/about-us/nevada-guarantee/>.

252. Boyd & Hoffman, *supra* note 13, at 859 n.34 (citing Jens Dammann & Matthias Schündeln, *The Incorporation Choices of Privately Held Corporations* 6-7 (Univ. of Tex. Sch. of Law, Law & Econ. Research Paper No. 119, 2008)), *available at* http://www.utexas.edu/law/wp/wp-content/uploads/centers/clbe/dammann_incorporation_choices_of_privately_held_corporations.pdf.

253. *McDermott, Inc. v. Lewis*, 531 A.2d 206, 215-17 (Del. 1987). The doctrine “does not apply where the rights of third parties external to the corporation are at issue, *e.g.*, contracts and torts.” *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1113 n.14 (Del. 2005).

254. *See* Oh, *supra* note 14, at 114.

“Delaware” case for purposes of analysis.²⁵⁵ Relatedly, it was assumed that the outcome of the case would be the same whether litigated in Illinois or Delaware (or, for that matter, anywhere else).²⁵⁶ McPherson and Raja reported data only for eight states and while the phrasing of their discussion is not entirely clear, appear to also sort cases by the law of the state of incorporation.²⁵⁷ Hodge and Sachs did not break down data by state law or forum,²⁵⁸ and Matheson only distinguished between state and federal courts and between trial and appellate courts.²⁵⁹

To the extent they acknowledge the problem, all researchers concede that not all states apply the internal affairs doctrine. Illinois courts reliably apply the law of the state of incorporation,²⁶⁰ but Tennessee courts mandate application of Tennessee veil-piercing law.²⁶¹ California and New York have asserted their ability to apply their own corporate law to other states’ corporations under certain circumstances.²⁶² In Massachusetts, veil-piercing claims that seek to reach out-of-state corporations, courts should generally apply the substantive law of the state of incorporation to determine rights and obligations related to “internal corporate affairs,” but turn to Massachusetts veil-piercing law to determine whether to reach the corporations.²⁶³ A New Jersey trial court applied New Jersey veil-piercing law to a dispute in which two of three corporations were incorporated elsewhere.²⁶⁴

Given the procedural variables outlined above, it is difficult to justify sorting cases by substantive state law rather than the forum that hosts the dispute. Even if Delaware substantive law applies to a veil-piercing dispute in North Dakota, it is inevitable that the ease

255. *See id.* at 114-16.

256. *See id.*

257. *See* McPherson & Raja, *supra* note 12, at 948-49.

258. *See* Hodge & Sachs, *supra* note 12, at 347.

259. Matheson, *supra* note 12, at 17-18.

260. *Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec*, 529 F.3d 371, 378 (7th Cir. 2008); *Retzler v. Pratt & Whitney Co.*, 723 N.E.2d 345, 354 (Ill. App. Ct. 1999).

261. *Boles v. Nat’l Dev. Co.*, 175 S.W.3d 226, 236 (Tenn. Ct. App. 2005) (citing *Oceanics Schools, Inc. v. Barbour*, 112 S.W.3d 135 (Tenn. Ct. App. 2003)).

262. N.Y. BUS. Corp. LAW § 1317 (Consol. 2014); *Serio v. Ardra Ins. Co.*, 761 N.Y.S.2d 1, 1 (N.Y. App. Div. 2003); Sa’id Vakili, *Corporations in Conflict: The Potential for Conflicts of Interest in Shareholder Derivative Lawsuits Is High, Leading to Complex Issue for Courts and Attorneys to Resolve*, 35 L.A. LAW. 20, 22-23 (2012).

263. *Cahaly v. Benistar Prop. Exch. Trust Co.*, 864 N.E.2d 548, 558 n.16 (Mass. App. Ct. 2007), *aff’d*, 885 N.E.2d 800 (Mass. 2008). *Contra* *Lily Transp. Corp. v. Royal Institutional Servs., Inc.*, 832 N.E.2d 666, 674 (Mass. App. Ct. 2005) (concluding that Pennsylvania law, not Massachusetts, should probably provide the veil piercing test, but there was no basis to pierce under the law of either state).

264. *D.R. Horton Inc.—N.J. v. Dynastar Dev., L.L.C.*, No. MER-L-1808-00, 2005 WL 1939778, at *19 (N.J. Super. Ct. Law Div. Aug. 10, 2005).

with which veil-piercing actions are pled and the access claimants enjoy to a jury would affect the outcome. Indeed, it is as likely that those variables explain liberal veil-piercing in North Dakota as “undercapitalization” as a stand-alone basis of substantive liability.²⁶⁵ The use of substantive state law to identify “easy” versus “difficult” piercing law similarly says nothing about applicable evidentiary standards. Given that evidentiary standards reflect specific social choices about allocating risk, the application of a “clear-and-convincing” standard by a forum where the procedure of the state of incorporation would apply only preponderance legitimately calls into question fundamental democratic principles and public policies.²⁶⁶

III. PROCEDURAL VARIABLES AFFECTING VEIL-PIERCING ACTIONS IN FEDERAL COURTS

The majority of empirical studies of veil-piercing litigation to date have considered not only outcomes in state courts – where the procedural variables discussed above have been largely ignored – but also in federal courts where the Federal Rules of Civil Procedure (FRCP) should theoretically bring uniformity over aspects of veil-piercing like pleading, form of action, and the right to a jury trial.²⁶⁷ Federal courts hear veil-piercing claims in two principal contexts: when they are brought in disputes where state law is applicable (diversity or supplemental jurisdiction) or under federal common law.²⁶⁸

Yet three aspects of federal jurisdiction exacerbate rather than ameliorate veil-piercing's procedural complexity. First, within the FRCP, federal district courts do not agree on which pleading standards apply to veil-piercing claims. Second, under the U.S. Supreme Court's decision in *Erie Railroad Co. v. Tompkins* and its progeny, federal district courts sitting in diversity must apply both the FRCP and substantive state law.²⁶⁹ Federal district courts must therefore make a threshold decision as to whether veil-piercing is “substantive” or “procedural” for purposes of identifying applicable

265. Stephen Presser, *PIERCING THE CORPORATE VEIL* § 2:38 (2014).

266. *Gen. Signal Corp. v. MCI Telecomms. Corp.*, 66 F.3d 1500, 1506 (9th Cir. 1995) (party asserting that New York's clear-and-convincing standard for fraud claims violates California's public policy because California requires only preponderance).

267. FED. R. CIV. P. 8, 38.

268. *See, e.g.*, 28 U.S.C. § 1332 (2012); *United States v. Bestfoods*, 524 U.S. 51, 63 n.9 (1998) (declining to discuss whether the state or federal alter ego doctrine applied to determine derivative liability under CERCLA); *Trustees of the Nat'l Elevator Indus. Pension, Health Benefit & Educ. Funds v. Lutyk*, 332 F.3d 188 (3d Cir. 2003); *Mayes v. Moore*, 419 F. Supp. 2d 775, 780 (M.D.N.C. 2006) (applying federal common law standard of veil piercing in Title VII action); *FDIC v. United States*, 654 F. Supp. 794, 809 (N.D. Ga. 1986).

269. 304 U.S. 64 (1938).

law. Third, under the Seventh Amendment to the U.S. Constitution – which has never been incorporated against the states – parties in federal court enjoy a right to a jury in civil trials where the amount in controversy exceeds twenty dollars.²⁷⁰ The U.S. Supreme Court has determined that the Seventh Amendment’s right to a jury trial attaches for any claim that would have arisen under common law in 1791.²⁷¹ Federal courts have not agreed on whether, if veil-piercing is in fact procedural rather than substantive, parties would have enjoyed a right to a jury trial on veil-piercing claims in 1791. Each of these aspects of federal civil procedure, as well as the unclear content of federal veil-piercing law, potentially affects existing veil-piercing studies in significant ways.

A. Pleading

Federal district courts are divided as to whether a claim for piercing the corporate veil must appear in written pleadings before trial or in the pre-trial conference in order to be properly considered. In *PEMEX Exploracion y Produccion v. BASF Corp.*, a federal district judge concluded that “[veil-piercing] theories must be specifically pleaded or they are waived, unless they are tried by consent.”²⁷² Other federal courts have rejected any standard greater than minimal notice pleading for veil-piercing claims.²⁷³

Boyd and Hoffman assert that pleading of a piercing claim before trial is the “majority rule” although it is not clear whether that is a matter of federal or state procedure (they collect cases from both federal and state courts) nor even how those cases represent one rule or another.²⁷⁴ They cite *Sudamax Industria e Comercia de Cigarros*

270. U.S. CONST. amend. VII. A U.S. District Court in Puerto Rico has recently declared that the Seventh Amendment jury trial right applies in state courts, but for a number of reasons related to the procedural posture of the case, it is not clear whether that declaration will go any further than the parties affected by it. *Gonzalez-Oyarzun v. Caribbean City Builders, Inc.*, No. 14-1101(GAG), 2014 WL 2885027, at *10-12 (D.P.R. June 25, 2014).

271. See *Galloway v. United States*, 319 U.S. 372, 389 (1943).

272. *PEMEX Exploración y Producción v. BASF Corp.*, No. H-10-1997, 2013 WL 5514944, at *65 (S.D. Tex. 2013); see also *Sunny Indus. Inc. v. Rockwell Int’l Corp.*, No. 96-C-1020-C, 2002 WL 32345675, at *8-9 (W.D. Wis. Feb. 5, 2002); *Quinn v. Workforce 2000, Inc.*, 887 F. Supp. 131, 135 (E.D. Tex. 1995); *Levesque v. Kelly Commc’ns, Inc.*, No. 91 Civ. 7045 (CSH), 1993 WL 22113, at *6 (S.D.N.Y. Jan. 25, 1993).

273. *Lounge 22, L.L.C. v. Scales*, 680 F. Supp. 2d 343, 346 (D. Mass. 2010); *Kimsey v. Akstein*, 408 F. Supp. 2d 1281, 1302 n.14 (N.D. Ga. 2005) (“And, while Plaintiff did not expressly include such a theory of liability in her Complaint, she did plead in her Complaint, and Defendants admitted in their Answer and Amended Answer, that Dr. Akstein is the President and CEO of the Eye Center, which is enough to have put Defendants on notice that she may proceed on a theory of direct liability based on Dr. Akstein’s position at the Eye Center.”); see also *Dale v. H.B. Smith Co.*, 910 F. Supp. 14, 17 (D. Mass. 1995).

274. Boyd & Hoffman, *supra* note 13, at 878 n.121.

Ltda. v. Buttes & Ashes, Inc. for the proposition that veil-piercing must be pled²⁷⁵ even though that court considered the merits of veil-piercing allegation.²⁷⁶ They cite the Third Circuit's decision in *Scully v. U.S. Wats, Inc.* for the proposition that veil-piercing is waived when not pled,²⁷⁷ but that decision made no mention of waiver as a sanction for failure to plead.²⁷⁸ Similarly, Boyd and Hoffman cite *Luyster v. Textron* as supporting the majority rule²⁷⁹ even though that court did not require the plaintiff to plead a veil-piercing theory, only facts that supported the New York state veil-piercing standard.²⁸⁰ Conversely, they cite *Gill v. Byers Chevrolet LLC* as representative of the minority rule²⁸¹ even though that court appeared to require the plaintiff to meet the same pleading standard as in *Luyster*.²⁸² The point is that, even if Boyd and Hoffman are correct that specific pleading of veil-piercing is the majority rule, the minority is a significant one. The upshot is, as they correctly note, "there may be two kinds of cases generally missing from our dataset: failed attempts to add veil piercing claims in waiver jurisdictions and successful attempts in lenient jurisdictions."²⁸³

B. Erie

In 1938, the U.S. Supreme Court overruled²⁸⁴ its long-standing precedent, *Swift v. Tyson*, which held that federal courts exercising diversity jurisdiction should apply state substantive law to state claims, but narrowly construed the scope of applicable state law while simultaneously implying broad common law making powers by federal courts.²⁸⁵ In *Erie*, the U.S. Supreme Court decided conclusively that federal courts as courts of limited jurisdiction enjoyed no general common law-making powers, and admonished lower federal courts to apply not only state statutory law, as *Swift v. Tyson* suggested, but also state common law developed by state appellate courts.²⁸⁶ *Erie* was decided the same year that the Federal

275. *Id.*

276. *Sudamax Industria e Comercio de Cigarros, Ltda v. Buttes & Ashes, Inc.*, 516 F. Supp. 2d 841, 847-49 (W.D. Ky. 2007).

277. Boyd & Hoffman, *supra* note 13, at 878 n.121.

278. *Scully v. U.S. Wats, Inc.*, 238 F.3d 497, 515-16 (3d Cir. 2001).

279. Boyd & Hoffman, *supra* note 13, at 878 n.121.

280. *Luyster v. Textron, Inc.*, No. 06 CV 4166(LMM), 2007 WL 1792505, at *2-3 (S.D.N.Y. June 18, 2007).

281. Boyd & Hoffman, *supra* note 13, at 878 n.121.

282. *Gill v. Byers Chevrolet L.L.C.*, No. C2:05-CV-982, 2006 WL 2460873, at *4-5 (S.D. Ohio, Aug. 23, 2006).

283. Boyd & Hoffman, *supra* note 13, at 878 n.121.

284. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78-80 (1938).

285. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18-19 (1842).

286. *Erie*, 304 U.S. at 78-80.

Rules of Civil Procedure displaced the Federal Equity Rules and the Conformity Act,²⁸⁷ resulting in a system under which federal courts applied the FRCP, which were less deferential to state civil procedure, to disputes brought under diversity jurisdiction, which newly required federal courts to take a broader view of applicable state law. This procedure/substance divide continues to shape litigation in federal courts, as their experience with state veil-piercing law amply demonstrates.²⁸⁸

To some extent the pleading discussion above is one aspect of the way state law functions in federal courts. Whether or not a veil-piercing claim is waived if not specifically pled is arguably a function of the law of waiver under either state substantive law or FRCP 8.²⁸⁹ In *Allen v. United Properties & Construction, Inc.*, a Colorado federal district court applied a Tenth Circuit case applying Colorado veil-piercing law, but concluded that “[Allen]’s allegations against Denver Lending satisfy either Rule 8 or the Supreme Court’s test in *Bell Atlantic Corp.*”²⁹⁰ Federal district courts addressing the issue imply rather than explicitly address whether they are deciding as a matter of the state law of waiver or federal pleading rules.²⁹¹ In *Gill v. Byers Chevrolet L.L.C.*, for example, the federal district court applied pre-*Iqbal* liberal pleading standards to a veil-piercing claim brought under Ohio law.²⁹² The court concluded that:

in order to successfully pierce the corporate veil, the plaintiff must prove all of the [Ohio law] factors. However, the courts are not entirely uniform regarding whether a plaintiff must specifically allege in the amended complaint that defendant meets all of the . . . criteria in order to survive a Rule 12(b)(6) motion.²⁹³

The court then reviewed both state and federal court cases

287. 28 U.S.C. app. 741, References to Equity Rules.

288. See generally Kermit Roosevelt III, *Choice of Law in Federal Courts: From Erie and Klaxon to CAFA and Shady Grove*, 106 NW. U. L. REV. 1 (2012); Jay Tidmarsh, *Procedure, Substance, and Erie*, 64 VAND. L. REV. 877 (2011).

289. Boyd & Hoffman, *supra* note 13, at 878 n.121 (“Second, one might imagine that federal courts could, under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), treat the veil piercing waiver rule as procedural, and thus trumped by the Federal Rules of Civil Procedure. However, our research discloses no examples of federal courts ignoring state waiver rules on *Erie* grounds when analyzing state-based veil piercing claims. Generally speaking, the application of *Erie* to state-based waiver standards, and further to the scope of federal common law veil piercing, raises some serious and interesting constitutional issues that are beyond the scope of this Article.”).

290. *Allen v. United Props. & Constr.*, No. 07-cv-00214-LTB-CBS, 2008 WL 4080035, at *12 (D. Colo. Sept. 3, 2008).

291. See, e.g., *Lounge 22, L.L.C. v. Scales*, 680 F. Supp. 2d 343, 346 (D. Mass. 2010).

292. *Gill v. Byers Chevrolet L.L.C.*, No. C2:05-CV-982, 2006 WL 2460873, at *4-5 (S.D. Ohio Aug. 23, 2006).

293. *Id.* at *4.

relevant to veil-piercing pleading.²⁹⁴ Although there is neither clarity nor explication, it may very well be that federal courts are generally concluding that there is no conflict between state and federal pleading requirements and thus no *Erie* problem.

However, there is sufficient reason to doubt that federal courts may reach that conclusion as uniformly as they appear to, or at least, as uniformly as Boyd and Hoffman suggest they do. In the discussion over pleading standards above, it is clear that state jurisdictions vary from liberal notice pleading to heightened pleading standards and even, for jurisdictions that require fraud, pleading with particularity. Does FRCP 9(b) requiring that fraud be pled with particularity apply to a veil-piercing claim where fraud is alleged as the “improper purpose” prong of the typical three-part test? ²⁹⁵ Given that one purpose of *Erie* was to preserve uniformity in the application of state law, federal district courts should at least analyze state law in considering motions brought under FRCP 12. If they are, the result, like studies of state jurisdictions, may result in a disproportionate number of cases (and, therefore “litigation events”) from notice pleading jurisdictions. That affects not only studies undertaken by Thompson, Matheson, Oh and others, but also Boyd’s and Hoffman’s.²⁹⁶ Given that each federal district court case produces multiple “litigation events,” that selection bias may result in more heavily distorted results than studies that focus on outcomes only.

C. The Seventh Amendment and the Right to a Jury on Veil-Piercing Claims

The Seventh Amendment to the U.S. Constitution states that the right to a trial by jury “In Suits at common law . . . shall be preserved.”²⁹⁷ Because of the wording of the amendment, analysis of whether a party enjoys a right to a trial by jury in civil cases generally proceeds from a historical inquiry as to whether that party would have enjoyed a right to a jury trial in 1791.²⁹⁸ Federal district courts sitting in diversity must therefore decide whether parties seeking to pierce the corporate veil 1) obtain the right to a trial by

294. *Id.* at *5.

295. In *Laugh Factory, Inc. v. Basciano*, 608 F. Supp. 2d 549, 558 (S.D.N.Y. 2009), the district court judge applied the FRCP 9(b) pleading standard to the claim brought under state law, but imposed New York’s evidentiary standard.

296. In diversity cases, federal courts are obliged to apply state statutes of limitations and state standards of proof. See *Guaranty Trust Co. of N.Y. v. York* 326 U.S. 99 (1945) (statutes of limitations); *Cities Serv. Oil Co. v. Dunlap*, 308 U.S. 208 (1939) (evidentiary standard).

297. U.S. CONST. amend. VII.

298. *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935) (“The right of trial by jury . . . is the right which existed under the English common law when the Amendment was adopted.”).

jury as a function of *Erie* or of the Seventh Amendment and 2) if the Seventh Amendment, is an action for veil-piercing within the common law suits available in 1791.

Federal courts are divided on these questions.²⁹⁹ In *International Financial Services Corp. v. Chromas Technologies Canada Inc.*, the Seventh Circuit concluded somewhat confusingly that when “a district court is applying the substantive law of a state, federal procedural law controls the question of whether there is a right to a jury trial,”³⁰⁰ but hinged its conclusion – that veil-piercing is equitable and therefore ineligible for a jury trial – on whether veil-piercing was an equitable remedy under Illinois law.³⁰¹ Because Illinois trial courts pierce the corporate veil as a matter of discretion to avoid “injustice or inequity”, the claim, the Seventh Circuit reasoned, was equitable.³⁰² The court asserted that “[p]iercing the corporate veil, after all, is not itself an action; it is merely a procedural means of allowing liability on a substantive claim, here breach of contract.”³⁰³

The Seventh Circuit specifically rejected the Fifth Circuit’s holding in *FMC Financial Corporation v. Murphree*, (applying Illinois law) that the right to trial by jury was strictly an issue of federal procedural law and that U.S. Supreme Court and Fifth Circuit precedent favored jury resolution of veil-piercing claims.³⁰⁴ The *FMC* court emphasized the U.S. Supreme Court’s decision in *Byrd v. Blue Ridge Electric Co-op, Inc.* which ordered an issue of South Carolina statutory law to be decided by a jury in diversity proceedings in a federal district court, even though the Supreme Court of South Carolina had decided the issue should be decided as a matter of law by the state trial court.³⁰⁵ In *Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc.*, the Second Circuit Court of Appeals relied on not only its prior precedent and *FMC*, but also a historical

299. Stephen M. Bainbridge, *Abolishing LLC Veil Piercing*, 2005 U. ILL. L. REV. 77, 79 n.14 (2005) (citing *Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc.*, 933 F.2d 131, 136 (2d Cir. 1991) (veil piercing has roots in both law and equity, so it was proper for trial court to submit issue to jury); *Am. Protein Corp. v. AB Volvo*, 844 F.2d 56, 59 (2d Cir. 1988) (veil piercing is an equitable remedy but issue is normally submitted to a jury); *United States v. Golden Acres, Inc.*, 684 F. Supp. 96, 103 (D. Del. 1988) (veil piercing is equitable remedy and affords no right to jury trial); *Dow Jones Co. v. Avenel*, 198 Cal. Rptr. 457, 460 (Cal. Ct. App. 1984) (same); *Bower v. Bunker Hill Co.*, 675 F. Supp. 1254, 1261-62 (E.D. Wash. 1986) (veil piercing a legal remedy because it seeks a money judgment and thus a right to jury trial exists)).

300. *Int’l Fin. Servs. Corp. v. Chromas Techs. Can., Inc.*, 356 F.3d 731, 737 (7th Cir. 2004) (citing *Simler v. Conner*, 372 U.S. 221, 222 (1963)).

301. *Id.* at 739.

302. *Id.*

303. *Id.* at 736.

304. 632 F.2d 413, 421 & n.5 (5th Cir. 1980).

305. *Byrd v. Blue Ridge Rural Elec. Coop, Inc.*, 356 U.S. 525, 533-40 (1958).

survey of veil-piercing in the English courts of law and equity.³⁰⁶ Under the Second Circuit's historical analysis, veil-piercing was most analogous to actions to enforce a creditor's bill comprised of actions in both the courts of equity and law. While the Second Circuit was not explicit, it appeared to reach its conclusion as though federal procedural law flowing from the Seventh Amendment controlled. However, it made an additional finding not specifically tied to federal or state law:

Moreover, as a practical matter separate from Seventh Amendment considerations, whether or not those factors—discussed later in our analysis—that will justify ignoring the corporate form and imposing liability on affiliated corporations or shareholders are present in a given case is the sort of determination usually made by a jury because it is so fact specific.³⁰⁷

These decisions have splintered the lower federal courts outside the Second, Fifth and Seventh Circuits.³⁰⁸ As with pleading and evidentiary variables outlined above, current studies make no effort to control for whether the existence of a jury right may 1) skew the sample of cases or dockets or 2) correlate (and by extension potentially explain) certain phenomena. Boyd's and Hoffman's predictions as to judicial behavior, for example, make more sense in cases where the district court 1) found veil-piercing to be equitable and therefore within his or her discretion or 2) exercised his or her control over a jury verdict by ordering a new trial or entering a judgment as a matter of law.

306. *Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc.*, 933 F.2d 131, 134-37 (2d Cir. 1991).

307. *Id.* at 137 (citation omitted).

308. *See, e.g., Iantosca v. Benistar Admin. Servs., Inc.*, 843 F. Supp. 2d 148, 154 (D. Mass. 2012) (finding a right to a jury trial in a claim to pierce the corporate veil to enforce a monetary judgment, a legal remedy); *In re Bonds Distrib. Co., Inc.*, No. 97-52130C-7W, 98-6044, 2000 WL 33682815, at *8 (Bankr. M.D.N.C. Nov. 15, 2010) ("The weight of authority appears to recognize a right to jury trial with respect to claims seeking to pierce the corporate veil based upon the theories of alter ego or mere instrumentality. Although not entirely clear from the opinions, the courts in these decisions apparently have concluded that where such claims seek to impose liability upon the defendant for the debts or obligations of another, the remedy sought is monetary damages and, hence, is legal in nature."); *Cantiere DiPortovenere Piesse S.p.A. v. Kerwin*, 739 F. Supp. 231, 236 (E.D. Pa. 1990) ("Moreover, the weight of authority in this area directly contradicts defendants' contention that it was improper to submit the question of corporate disregard to the jury as courts regularly submit this factual issue to the jury.") (citations omitted); *United States v. Golden Acres, Inc.*, 684 F. Supp. 96, 103 (D. Del. 1988) (applying Delaware law) ("Piercing the corporate veil is an action that sounds in equity."). *But see Lee Way Holding Co. v. Banner Indus., Inc.*, 118 B.R. 544, 546-48 (Bankr. S.D. Ohio 1990) (rejecting the right to a jury trial on a veil-piercing claim).

IV. THE INFLUENCE OF PROCEDURE

The rules of civil procedure and evidence inevitably influence the choice as to whether to pursue a veil-piercing claim versus an alternative; the incentives to settle all or part of a lawsuit; and, whether or not a veil-piercing claim proceeds past a preliminary point in litigation. Yet empirical studies to date either speculate as to or explain certain veil-piercing phenomena as a result of substantive state veil-piercing law and its constituent inquiries, especially those related to control and “improper purpose.” Many of those studies also combine cases decided before and after 1938 – when the Federal Rules of Civil Procedure were adopted and then replicated by states – even though those cases would have been adjudicated under drastically different regimes.³⁰⁹

A. Alternative Theories of Recovery

Scholars have always known that veil-piercing claims are litigation alternatives to other strategies which achieve the same result: unification of shareholders and their corporations for a variety of legal purposes. In jurisdictions with liberal pleading rules, preponderance evidentiary standards and access to a jury, there may be little reason to do more in the initial complaint or petition than name both shareholders and their corporations, include general allegations relevant to a state’s veil-piercing elements, and perhaps not even identify the theory by name. This would advance interests in wide discovery requests as well as flexibility for crystallizing issues for trial.

Where jurisdictions start to peel away those procedural advantages, different strategies and causes of action will control the course of litigation. Plaintiffs may pursue other legal theories to hold a corporation’s owners liable, and sometimes plead more than one such theory in the same complaint when facts exist to support another theory. Other legal theories which sometimes overlap with veil piercing actions include agency liability,³¹⁰ direct personal liability for wrongs committed by corporate owners like fraudulent transfer,³¹¹ and joint venture or enterprise liability between the corporation and its corporate or individual shareholders.³¹² The

309. See Carl Tobias, *The Past and Future of the Federal Rules in State Courts*, 3 NEV. L.J. 400, 401-04 (2003) (discussing the deterioration of uniformity between state and federal rules of civil procedure since the adoption of the Federal Rules of Civil Procedure).

310. *E.g.*, *Am. Home Assurance Co. v. Sport Maska, Inc.*, 808 F. Supp. 67, 72-73 (D. Mass. 1992); *Kincaid v. Landing Dev. Corp.*, 344 S.E.2d 869, 874 (S.C. Ct. App. 1986).

311. *E.g.*, *Ray-Tek Servs., Inc. v. Parker*, 831 N.E.2d 948, 957-58 (Mass. App. Ct. 2005).

312. *E.g.*, *Gottlin v. Herzig*, 662 N.E.2d 706, 711 (Mass. App. Ct. 1996); *Green v. Champion Ins. Co.*, 577 So. 2d 249, 257-60 (La. Ct. App. 1991); *see also James Dunne*,

Supreme Court of Oregon, in the same case it required veil-piercing to be specifically pled, noted alternative theories by which corporate creditors might recover from shareholders:

[T]raditional agency and respondeat superior principles[,] . . . a fraud form of action[,] . . . statutory remedies, . . . estoppel, quasi contract, creditors' bill, and, finally, the theory that the shareholder, by the shareholder's own conduct, has acted so as to create direct liability as an actor by virtue of the shareholder's own participation in the conduct which gave rise to the creditor's cause of action.³¹³

In jurisdictions which take a view that veil-piercing is an equitable remedy, claimants may be forced to exhaust other theories before allowing a veil-piercing claim to proceed.³¹⁴ Moreover, in cases where more than one theory is submitted to a jury, an appellate court may affirm if there is sufficient evidence to affirm any theory of recovery.³¹⁵ In their study of veil-piercing cases in Texas, Hamilton, Miller, and Ragazzo found that many cases in which veil-piercing had been invoked were actually pedestrian agency cases.³¹⁶ In *Garrett v. Albright*, for example, a federal district court initially granted summary judgment to a corporate parent under a veil-piercing theory controlled by an Eighth Circuit precedent interpreting federal veil-piercing law, but then later made that parent's assets available to the plaintiffs under a Missouri state statute that made the parent responsible for the subsidiary's actions.³¹⁷

These alternative theories and their use necessarily affect depictions of the "ease" of state veil-piercing laws and the inquiries embedded within those laws even within the cases caught by most database searches. For example, both Thompson and Oh note that Delaware produces few veil-piercing cases given the number of close

Taking the Entergy Out of Louisiana's Single Business Enterprise Theory, 69 LA. L. REV. 691, 697-98 (2009); GLENN G. MORRIS & WENDELL H. HOLMES, 8 LOUISIANA CIVIL LAW TREATISE: BUSINESS ORGANIZATIONS § 32.02 (2014). Since *Green*, it has only been allowed in the First Circuit of Louisiana.

313. *Amfac Foods, Inc. v. Int'l Sys. & Controls Corp.*, 654 P.2d 1092, 1098 (Or. 1982).

314. See, e.g., *Graham v. Mimms*, 444 N.E.2d 549, 561 (Ill. App. Ct. 1982).

315. See, e.g., *Pepsi-Cola Metro. Bottling Co. v. Checker's, Inc.*, 754 F.2d 10, 14 (1st Cir. 1985) ("While the jury's verdict did not disclose the precise theory on which the jury held the defendants other than Checkers liable, we conclude there was sufficient evidence for the jury to have determined that Checkers, Bentley, and Chips were run as a single enterprise for the personal benefit of Patricia and Randolph.").

316. ROBERT W. HAMILTON ET AL., 20 TEXAS PRACTICE: BUSINESS ORGANIZATIONS § 26.12 (2d ed.).

317. *Garrett v. Albright*, No. 4:06-CV-4137-NKL, 2008 WL 268993, at *1-3 (W.D. Mo. Jan. 30, 2008).

corporations that choose it as governing law.³¹⁸ But that is just as easily explained by the special jurisdiction of Delaware Courts of Chancery which would almost always hear veil-piercing claims, even if the related litigation occurred in its courts of law.³¹⁹ The incentive for at least some litigants would be to find alternative theories under which to merge shareholders and corporations.³²⁰ Outside Delaware's courts, there is no obvious reason to believe that procedural variables will not affect outcomes even when courts apply the same veil-piercing test. Lower federal courts, for example, disagree as to whether Delaware requires a preponderance or heightened burden of proof.³²¹

B. Procedural Explanations for Veil-Piercing Phenomena

Current veil-piercing studies overwhelmingly explain phenomena in terms of substantive state veil-piercing law. Thompson writes, for example, that “[k]nowledge of the differences between state approaches will probably be of greater use to prospective plaintiffs, who, given a choice, would rather file in a state whose results are more inclined to piercing.”³²² Peter Oh notes that “Ohio’s 55.87% veil-piercing rate is considerably simpler to explain, as courts apply a fairly liberal standard that does not require proof of actual or constructive fraud.”³²³ He similarly argues that, when applying New York law, the difference between federal courts’ relatively high veil-piercing rates and New York state courts’ relatively low veil-piercing rate is explained by the difference in the tests they use.³²⁴

318. Thompson, *supra* note 12, at 1052-53; Oh, *supra* note 12, at 116.

319. See *Cornell Glasgow, LLC v. LaGrange Props., LLC*, No. N11C-07-160-JRS CCLD, 2012 WL 6840625, at *7 (Del. Super. Ct. Dec. 7, 2012) (“As the litigation progressed, both parties pressed certain equitable claims (e.g. rescission and piercing the corporate veil) and, at various times, requested this judge to seek *pro tem* appointment as a Vice Chancellor so that these claims could be litigated alongside the law claims. The Court declined. Rather, the Court severed the equity claims and stayed them pending resolution of the law claims.”).

320. See, e.g., *Rays Plumbing & Heating Serv., Inc. v. Stover Homes, L.L.C., C.A.* No. K10C-02-022 WLW, 2011 WL 3329384, at *4 (Del. Super. Ct. July 26, 2011) (“A subcontractor may seek an equitable remedy for breach of trust, or breach of contract. Alternatively, a subcontractor may bring an action for fraud against a contractor’s agent—as Plaintiff has done in this case.”).

321. Compare *In re Foxmeyer Corp.*, 290 B.R. 229, 237 (Bankr. D. Del. 2003) (asserting that Delaware law requires more than preponderance of the evidence), with *ASARCO LLC v. Ams. Mining Corp.*, 396 B.R. 278, 317 (Bankr. S.D. Tex. 2008) (applying preponderance standard under Delaware law).

322. Thompson, *Piercing the Corporate Veil: An Empirical Study*, *supra* note 12, at 1054.

323. Oh, *supra* note 12, at 120. This standard was modified in *Dombroski v. WellPoint, Inc.*, 895 N.E.2d 538, 545 (Ohio 2008) (requiring fraud, illegality or a similarly unlawful act to justify piercing the corporate veil).

324. Oh, *supra* note 12, at 120.

Introducing the background to his study, John Matheson predicts that “one would expect that any common law doctrine should be applied by the courts in a neutral manner, that is, evenhandedly except for variations in factors explicitly and specifically identified as part of the applicable test.”³²⁵

But each of these explanations, taken as representative of empirical studies as a whole, is equally explicable by reference to applicable rules of civil procedure. Parties seeking to pierce the corporate veil, especially those represented by shrewd attorneys, are more likely to look for jurisdictions which allow the right mix of notice pleading of veil-piercing claims, flexibility to bring those claims toward the beginning of litigation, application (or not) of the internal affairs doctrine in veil-piercing cases, preponderance of the evidence standard, and access to a jury. These factors may have nothing at all to do with which variation of the Powell or Fletcher test states have adopted. Correspondingly, Ohio’s relatively high veil-piercing rate may have more to do with its notice pleading standards, preponderance standard,³²⁶ and access to a jury.³²⁷ This is all the more likely given that substantive Ohio veil-piercing law has been particularly volatile over the period studied by Thompson, Oh, and others.³²⁸ Federal and state courts applying New York law may be using different tests – although it is not clear that this is so – but substantive law aside, in New York state courts, veil-piercing is not generally available at the beginning of litigation; it is held to a heightened pleading standard, a heightened proof standard, and the right of a claimant to a jury is both uncertain and fragile depending on the other claims to which it is tied. There is therefore nothing about Matheson’s study that necessarily implicates the hypothesis he advances. Two judges applying the same common law test in two different jurisdictions may arrive at different conclusions not because of differences in competence, integrity, or “neutrality,” but simply

325. Matheson, *supra* note 12, at 4.

326. See Byars v. Herman, No. 83496, 2004 WL 1532224, at *3 (Ohio Ct. App. July 8, 2004).

327. Stewart v. R.A. Eberts Co., No. 08CA10, 2009 WL 2684497, at *3 (Ohio Ct. App. Aug. 18, 2009).

328. Ohio veil-piercing doctrine has vacillated between a relatively lenient standard set out in the *Belvedere* case and then changed—although some say “muddied”—by the *Dombroski* case, which resurrected a standard set out by the Supreme Court in *Bucyrus-Erie*. Under current Ohio law, a plaintiff may only pierce the corporate veil where the corporation was used to perpetrate a fraud or illegal act; a lesser legal duty is insufficient. *Dombroski*, 895 N.E.2d at 545 (requiring fraud, illegality or a similarly unlawful act to justify piercing the corporate veil); *Belvedere Condo. Unit Owners’ Ass’n v. R.E. Roark Cos.*, 617 N.E.2d 1075, 1086 (Ohio 1993) (“[T]he corporate form may be disregarded when ‘. . . domination and control was used to commit fraud or wrong or other dishonest or unjust act . . .’” (quoting *Bucyrus-Erie Co. v. Gen. Prods. Corp.*, 643 F.2d 413, 418 (6th Cir. 1981))).

because the rules of procedure and evidence under which they adjudicate lead to those conclusions.

There is a sufficiently large literature doubting the possibility of neutrally applied rules that there is no need to veer into that discussion here.³²⁹ It is enough to say that purely from an empirical perspective, the procedural variables outlined above may independently explain phenomena that researchers tie to substantive state law and constituent inquiries related to control and improper corporate purpose. Boyd and Hoffman are the least guilty of this neglect. By studying only the dockets of federal district courts, they necessarily embed fewer procedural differences than studies which aggregate both state and federal cases. They even go further by examining corporate size and the personal profile of judges. In this respect, theirs is the most skeptical study as to the effect of substantive state or federal common law of veil-piercing. They write: "In summary, legal realism tempers the ambition of empirically based studies of litigation. It discounts the likelihood that the formal rules of law are doing their perceived work in molding the resolution of disputes."³³⁰

But Boyd's and Hoffman's study is not only limited by its scope – it can only tell us about what happens in federal courts where a minority of veil-piercing litigation occurs – but also by procedural variables. They concede that they do not control for the differing pleading standards adopted by federal district courts which may affect their sample size and therefore their outcomes. More significantly, they do not control for the availability of jury trials in the dockets they study which may not only affect the overall course of the litigation, but may also be relevant to whether a judge, rather than a jury, "pierces" for purposes of their analysis of judicial behavior.

V. CONCLUSION

This Article has made two central arguments. The first is that current empirical studies of veil-piercing cases fail to control for procedural and evidentiary variables, and analysts need to do a better job of comparing apples to apples in veil-piercing cases. Cases in which veil-piercing is brought toward the beginning of litigation, subjected to liberal pleading standards, held to a lower or higher evidentiary burden, or submitted to a jury for determination will necessarily affect case outcomes. By bundling together cases across jurisdictions and court levels (trial, appellate, supreme), current

329. See, e.g., Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1975); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

330. Boyd & Hoffman, *supra* note 13, at 875.

studies strip away too much relevant information about what actually happens in veil-piercing litigation.

Second, I have argued that rules of civil procedure and evidence may independently explain phenomena that current studies tie to substantive federal and state law tests. While Stephen Presser and Peter Oh associate North Dakota's high veil-piercing rate with its attitude toward "undercapitalization" as a legal basis to pierce, it may be just as likely that its liberal pleading standards, lower burden of proof, and access to a jury on veil-piercing claims matter more. Researchers should be sensitive to other procedural influences, like statutes of limitations and *res judicata*, which may shape how and why veil-piercing is chosen over alternative theories that unify shareholders and corporations.

The main implication is that empirically-oriented veil-piercing analysts should take more care to define their principal behavior of interest and to ensure that measures of that behavior adequately adhere to the context in which that behavior occurs. Most scholars are generally not focused on veil-piercing because they are interested in Powell's three-part test; they are interested in veil-piercing as a measure of the extent to which state and federal judges respect the separation between shareholders and their corporations. Collecting cases and sorting them or their internal criteria as an index of judicial behavior is not sufficient. Including procedural variables is relevant for the same reasons the rules are always important: they necessarily entail distributive effects. The trend toward more stringent application of veil-piercing, which many scholars acknowledge, may be as much firms playing for the rules as legislators or judges adopting a more sympathetic posture toward limited liability entities.

This Article has not, of course, demonstrated as an empirical matter that the associations drawn by existing empirical studies of veil-piercing might not resurface if researchers controlled for procedural and evidentiary differences. Instead of such a demonstration, which involves a larger research project than may be offered here, there are two research trajectories worth considering. First, within any given jurisdiction, researchers may test the various theories by which shareholders and corporations are unified for purposes of legal liabilities—including agency, joint venture, enterprise liability, civil conspiracy, aiding and abetting—as a better measure of whether judges in a particular state respect shareholder-corporate separation. Second, scholars may eschew the use of admittedly subjective case sorting methods or multivariate regression analyses for the less exciting but arguably more fitting approach of case studies and surveys of how and why veil-piercing law *and procedure* have adapted as they have in response to changes in both state corporation codes and state rules of civil procedure.

Peter Oh has already made one step in this direction; tracing the history of veil-piercing, arguing as a historical matter that it was an equitable remedy, and urging a return to its roots.³³¹ He may be correct as a historical and normative matter. But it is worth considering that as the fundamental bargain for limited liability between society and entrepreneurs has democratized and corporations rapidly assume the character and legal form as all other citizens, it is entirely reasonable that procedure and law adapt to fit that reality.

331. Oh, *Veil Piercing Unbound*, *supra* note 44, at 89.