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DISPUTING LIMITED LIABILITY[†]

Christina L. Boyd[*] *& David A. Hoffman*[**]

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[*] Assistant Professor, Department of Political Science, University at Buffalo, SUNY (http://cLboyd.net).

[**] Associate Professor of Law, Temple University Beasley School of Law.

INTRODUCTION

Veil piercing may not be the "most litigated issue in corporate law,"[1] but it is surely the least loved. In 1985, Frank Easterbrook and Daniel Fischel famously charged that the law of piercing is "freakish[]."[2] "Like lightning, it is rare, severe, and unprincipled."[3] In the years since, the chorus has only swelled in volume. Scholars have described piercing opinions as "awkward,"[4] "vague,"[5] and "jumbled."[6] Excoriating the doctrine as a "notoriously problematic,"[7] "unprincipled hodgepodge of seemingly ad hoc and unpredictable results,"[8] they conclude that it is "highly discretionary and problematic for the business planner."[9] Indeed, the veil's unpredictable security has sparked hundreds of law review articles.[10]

Many legal scholars have sought to tame the veil piercing beast through normative proposals ranging from more efficient rules,[11] to statutory reform,[12] to rethinking what goals courts ought to be maximizing,[13] to ab-

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[1] Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1036 (1991). Thompson compared the incidence of the term "veil piercing" in opinions to the incidence of terms like "hostile takeover," declining to broaden the search to more common terms like "fiduciary duty." *Id.* at 1036 n.1. But, as this Article will show, "litigated" cases begin with complaints. Westlaw's pleadings database contains 2071 federal and state complaints potentially making veil piercing allegations between 2000 and 2005. A similar search for "(loyalty disloyalty) /s (director* officer)" returned 2405 complaints.

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

[3] *Id.*

[4] Lainie Rutkow & Stephen P. Teret, *Limited Liability and the Public's Health*, 35 J.L. MED. & ETHICS 599, 605 (2007).

[5] Frederick Tung, *Limited Liability and Creditors' Rights: The Limits of Risk Shifting to Creditors*, 34 GA. L. REV. 547, 568 (2000).

[6] Daniel J. Morrissey, *Piercing All the Veils: Applying an Established Doctrine to a New Business Order*, 32 J. CORP. L. 529, 542 (2007).

[7] 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, 451 (2004) ("Discerning the precise contours of piercing doctrine is notoriously problematic.").

[8] David Millon, *Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability*, 56 EMORY L.J. 1305, 1311 (2007).

[9] Sandra K. Miller, *Piercing the Corporate Veil Among Affiliated Companies in the European Community and in the U.S.: A Comparative Analysis of U.S., German, and U.K. Veil-Piercing Approaches*, 36 AM. BUS. L.J. 73, 94 (1998).

[10] A search on March 29, 2010 in Westlaw's JLR database for "veil /s pier! & da(aft 01/01/1985)" returned 5,482 results. Robert Thompson's 1991 case-counting article, Thompson, *supra* note 1, itself played a significant role in precipitating the empirical revolution in legal studies. *See, e.g.*, David S. Goldman, *Legal Construct Validation: Expanding Empirical Legal Scholarship to Unobservable Concepts*, 36 CAP. U. L. REV. 79, 122 (2007) (praising Thompson's study and noting its influence).

[11] *See, e.g.*, Steven L. Schwarcz, *Collapsing Corporate Structures: Resolving the Tension Between Form and Substance*, 60 BUS. LAW. 109, 125–36 (2004).

[12] *See, e.g.*, Rebecca J. Huss, *Revamping Veil Piercing for All Limited Liability Entities: Forcing the Common Law Doctrine into the Statutory Age*, 70 U. CIN. L. REV. 95, 123–34 (2001) (proposing statutory reforms to achieve more predictability in veil piercing against LLCs).

olishing the doctrine altogether.[14] Such normative and empirical work has had real-world consequences: consultants and entrepreneurs use rankings of treatment of the piercing problem across jurisdictions in marketing particular states' incorporation regimes.[15] And, surprisingly, the market for corporate control seems to have responded to such piercing-centered rankings.[16]

This Article asserts that current veil piercing scholarship is founded on sand. Scholars, courts, corporations, and their lawyers have all over-relied on judges' ultimate decisions to pierce and, in particular, on how judges *justify* themselves. Such reliance misleads for two principal reasons. *First*, trial court opinions are rare: as few as three percent of all federal trial court judicial decisions are reasoned opinions available for easy study on Westlaw.[17] *Second*, a trial judge's decision to write an opinion—and what explanations she offers in support of her decision—is self-serving and difficult to predict.[18] The resulting sampling errors have produced an incoherent picture of veil piercing doctrine; until now, we have been predicting the iceberg by its odd, biased tip.[19]

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[13] *See, e.g.*, Millon, *supra* note 8; Robert B. Thompson, *Piercing the Veil: Is the Common Law the Problem?*, 37 CONN. L. REV. 619, 627–34 (2005).

[14] *See* Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 IOWA J. CORP. L. 479, 514–34 (2001) [hereinafter Bainbridge, *Abolishing LLC Veil Piercing*]; Stephen M. Bainbridge, *Abolishing LLC Veil Piercing*, 2005 U. ILL. L. REV. 77, 102–05. *Contra* Daniel J. Morrissey, *Piercing All the Veils: Applying an Established Doctrine to a New Business Order*, 32 IOWA J. CORP. L. 529, 558–62 (2007).

[15] *See infra* text accompanying notes 30–34.

[16] *Id.*

[17] *See* David A. Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 710 (2007) ("Overall, of the 5,736 judicial actions we recorded, only 178—3%—came accompanied by opinions."); *see also id.* at 696–98 (reviewing the literature studying opinion generation from district courts); Susan M. Olson, *Studying Federal District Courts Through Published Cases: A Research Note*, 15 JUST. SYS. J. 782, 789–90 (1992) (approximately five percent of cases led to published, reported opinions in a single-district study (excluding single recovery cases)); Margo Schlanger & Denise Lieberman, *Using Court Records for Research, Teaching, and Policymaking: The Civil Rights Litigation Clearinghouse*, 75 UMKC L. REV. 155, 165 (2006) (finding that not even nine percent of case terminations led to accessible opinions and only 2.3 percent led to published opinions, according to a nationwide study).

[18] *See, e.g.*, Hoffman et al., *supra* note 17, at 732–33 (suggesting judges may write to avoid reversal); Ahmed E. Taha, *Publish or Paris? Evidence of How Judges Allocate Their Time*, 6 AM. L. & ECON. REV. 1, 17–25 (2004) (correlating judicial opinion-writing with various self-maximizing motives).

[19] We do not make the claim that doctrinal analysis, especially of appellate decisions, provides no value. To the contrary, as Professor Sisk recently wrote:

> As empiricists work to capture legal doctrine in quantitative terms, and conduct experiments designed to accurately describe the role and operation of legal (and non-legal) factors in judicial decisions, traditional doctrinal scholarship remains vital in identifying the pertinent doctrines and sub-doctrines that apply within a field of law. In addition, doctrine varies across and within areas of law in multiple ways: venerability or novelty; stability or fluidity; extent of integration within a larger coherent system of doctrine; sharpness of definition; mandatory or optional invocation; substantive or procedural character; and reliance on bright-line rules versus discretion in the balancing of factors or standards.

Gregory C. Sisk, *The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making*, 93 CORNELL L. REV. 873, 891 (2008) (reviewing FRANK B. CROSS, DECISION

Our approach in this Article is distinct. We collected a large sample of complaints and counterclaims filed in federal district courts from 2000 to 2005 in which parties asserted that they should be permitted to pierce the veil. Following the principle that in corporate law "what the courts do is of far more importance than what they say,"[20] we examined the litigation events arising from these complaints in detail. We examined the outcomes of motions addressing veil piercing, whether in preliminary motion practice, during discovery, at summary judgment, at trial, or in post-trial practice. We 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.

Our analysis of these data advances a new and robust form of legal realism: the intensive quantitative study of dockets.[21] To our knowledge, ours is one of the first projects that applies this method to a particular area of law, outside of bankruptcy, and connects characteristics of particular complaints to motion practice and ultimate dispositions.[22] Indeed, the Article intends to provoke scholars to rethink what it means to investigate the "law" of veil piercing. By focusing on *disputes* rather than *opinions*, certain patterns emerge:

- Parties generally craft complaints in ways that the conventional wisdom would predict. In particular, plaintiffs allege fraud, informalities, dominion and control, and alter ego as reasons to pierce the veil.

MAKING IN THE U.S. COURTS OF APPEALS (2007)). Our points are merely that: (1) empirical analysis of opinions from the district courts is *especially* likely to mislead; and (2) a doctrine that is said to be irreducibly incoherent may not be quite so bad.

[20] E. Merrick Dodd, Jr., *Partnership Liability of Stockholders in Defective Corporations*, 40 HARV. L. REV. 521, 531 (1927).

[21] There is a growing literature using collections from PACER to reach specific conclusions about, for example, particular kinds of decisions or outcomes that are not otherwise apparent. *See, e.g.*, Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 265–66 (1995) (detailing how various information, including prevailing parties, was collected from dockets); Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 126–27 (2009) (collecting settlement statistics from dockets). Others have used PACER to build better databases of particular kinds of litigation. *See, e.g.*, James D. Cox, Randall S. Thomas, & Lynn Bai, *There Are Plaintiffs and . . . There Are Plaintiffs: An Empirical Analysis of Securities Class Action Settlements*, 61 VAND. L. REV. 355, 367–68 (2008) (using PACER to collect a sample of securities class action disputes); David L. Schwartz, *Practice Makes Perfect? An Empirical Study of Claim Construction Reversal Rates in Patent Cases*, 107 MICH. L. REV. 223, 240–41, 273–75 (2008) (using PACER and other resources to create a database of district court judges that heard claim construction appeals to determine the effect of judge experience on reversal). Our approach is distinct, as we first used Westlaw, not PACER, to collect complaints and then used PACER to develop a true longitudinal study of litigation—coding nondispositive and dispositive motions, not merely final orders or settlements.

[22] *See also* Pauline T. Kim, Margo Schlanger, Christina L. Boyd & Andrew D. Martin, *How Should We Study District Judge Decision-Making?*, 29 WASH. U. J.L. & POL'Y 83, 110–12 (2009) (studying EEOC cases brought in federal district court from filing to conclusion).

Contract causes of action are present in the highest percentage of complaints, followed by tort, fraud, and labor law claims. However, because multiple causes of action are ordinarily present in each complaint, it is not truly accurate to say that there is such a thing as a "contract case" or a "tort case," at least in the beginning of litigation.

- Judicial characteristics appear to have a limited but important influence on plaintiffs' ability to pierce the veil. Surprisingly, conservative judges are more likely to view veil piercing claims favorably than liberal judges. We did not find evidence that a judge's race or gender affected the disposition of these cases.

- Firms with few employees are more likely to lose veil piercing motions than firms with many employees. This finding undermines orthodox understandings of how the corporate liability shield works to promote risk taking, and it raises questions about why early-stage entrepreneurs incorporate.

- We found mixed evidence about factors used in most discussions of veil piercing, including the relationship between plaintiffs and defendants, defendants' legal organizations, and defendants' legal sophistication. Models of veil piercing success at the motions level performed better than models of veil piercing success at the case level. These results highlight the role that selection plays in litigation even before trial.

The Article proceeds in four Parts. First, we lay out a theory of how we expect veil piercing litigation to work. Second, we discuss our data collection and methodology in more detail. Third, we provide the results of our descriptive and inferential statistical analyses. Fourth, and finally, we lay out the main implications of our findings for how jurists ought to think about veil piercing disputes and limited liability more generally.

I. THEORETICAL BACKGROUND AND EXPECTATIONS

To study veil piercing disputes using dockets, rather than judicial opinions, we develop a set of expectations about the content of plaintiffs' complaints, from the causes of action that are present to the types of veil piercing allegations that are made.[23] We derive these expectations largely from existing quantitative studies.[24] Then, we hypothesize about the fac-

[23] *See generally* David Zaring, *Three Models of Constitutional Torts*, 2 J. TORT L. 183, 194 (2008) ("To make sense of the suits of last resort, only a review of complaints will do.").

[24] *See, e.g.*, Nicholas L. Georgakopoulos, *Contract-Centered Veil Piercing*, 13 STAN. J.L. BUS. & FIN. 121, 127–30 (2007) (comparing the incidence of veil piercing references in contract and tort opinions); Lee C. Hodge & Andrew B. Sachs, *Piercing the Mist: Bringing the Thompson Study into the 1990s*, 43 WAKE FOREST L. REV. 341 (2008) (applying Thompson's methodology in order to study judicial veil piercing behavior from 1986 to 1995); Geoffrey Christopher Rapp, *Preserving LLC Veil Piercing: A Response to Bainbridge*, 31 IOWA J. CORP. L. 1063, 1068–77 (2006) (using Thompson's

tors, both entity- and judge-specific, that are likely to influence judicial reactions to veil piercing motions.

A. Veil Piercing Complaints

In structuring their filings, counseled plaintiffs should act strategically,[25] reacting to factors as general as the national economy and as specific as the set of precedent that a lawyer holds in her file drawer.[26] There is little that federal plaintiffs cannot control in the first filed complaint,[27] and they should be guided by the available best practices and evidence.[28] Such

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methodology to study LLC veil piercing trends); Swain & Aguilar, *supra* note 7, at 463–83 (studying jurisdictional veil piercing); Robert B. Thompson, *Piercing the Veil Within Corporate Groups: Corporate Shareholders as Mere Investors*, 13 CONN. J. INT'L L. 379 (1999) (studying veil piercing trends by expanding his original dataset to include cases through 1996 and focusing on corporate groups); Thompson, *supra* note 1 (initial study of veil-piercing trends from 1905 to 1986); *see also* Robert B. Thompson, *The Taming of Limited Liability Companies*, 66 U. COLO. L. REV. 921, 940–42 (1995) (providing a non-quantitative analysis of LLC veil piercing).

[25] We have collected information about representation, and plan to analyze it in future work.

[26] *See, e.g.*, Peter Siegelman & John J. Donohue III, *The Selection of Employment Discrimination Disputes for Litigation: Using Business Cycle Effects to Test the Priest-Klein Hypothesis*, 24 J. LEGAL STUD. 427, 460–61 (1995) (finding that settlement rates and plaintiff-win rates for certain claims vary with the business cycle and economic downturns, and suggesting that plaintiffs account for this in selecting and pleading their cases).

[27] Some might argue that the only factor that a plaintiff cannot control, at least in the first-filed complaint in federal court, is the particular jurisprudential approach of the judge assigned to his case. Even this can be predicted with great, if not perfect, accuracy. And judge shopping can happen, especially in certain districts.

[28] Sources (apart from personal and networked experience) include form complaints, secondary sources, and materials from the Practicing Law Institute (PLI), the American Bar Association (ABA), and state-specific Continuing Legal Education (CLE) programs. To guide actual drafting of the complaint, a few jurisdictions offer bare-bones forms for veil piercing complaints, interrogatories, or defendants' answers, but generally do not cite to any sources. *See, e.g.*, LexisNexis(R) Forms, Complaint in Action Against Parent Corporation Seeking to Pierce Corporate Veil and to Set Aside Fraudulent Conveyance of Assets from Subsidiary to Parent (New York), FORM 70-DC276:3 (covering inadequate capitalization, intercompany transfers, overlapping officers, directors and personnel, lack of independent business discretion, and guaranty of debts as factors supporting veil piercing); LexisNexis(R), Complaint Seeking to Pierce the Corporate Veil (Ohio), Forms: FORM 4336-212.12.3 (covering lack of formalities, control and domination, commingling, undercapitalization, and fraud as factors supporting veil piercing). Given the lack of jurisdiction-specific guidance, lawyers likely look to secondary sources, which are necessarily more general and which emphasize that the particular weight given to any factor might vary from jurisdiction to jurisdiction. *See, e.g.*, 45 AM. JUR. PROOF OF FACTS 3D *Grounds for Disregarding the Corporate Entity and Piercing the Corporate Veil* §§ 12–15 (2008) (describing undercapitalization, diversion of funds by dominant shareholders, and failure to observe corporate formalities in detail, and then listing thirty-one additional factors for veil piercing from Krendle & Krendle's 1978 article, *Piercing the Corporate Veil: Focusing the Inquiry*, 55 DENVER L.J. 1 (1978)); 18 AM. JUR. 2D *Corporate Existence, Franchise, and Charter; Attributes as Legal Entity* §§ 46–57 (2008) (discussing theories of veil piercing, likely beneficiaries, and factors).

Attorneys who rely on these sources are using existing empirical knowledge second-hand to craft their complaints. *See, e.g.*, 45 AM. JUR. PROOF OF FACTS 3D *Grounds for Disregarding the Corporate Entity and Piercing the Corporate Veil* § 6 (2008) (citing Thompson's empirical studies of veil piercing); Mark Cohen & Sierra K. Swearingen, *Cause of Action to Establish Liability of Corporate Director*

sources, considered together, should inform decisions regarding the mix of causes of action and particular factors justifying veil piercing claims.[29]

Notably, there is a sharp "schism" between nonempirical and empirical academic theories on what kinds of causes of action and veil piercing factors will lead to success.[30] That schism has its origins in Robert Thompson's 1991 article on veil piercing.[31] Thompson, analyzing over a thousand veil piercing opinions written over the span of decades, significantly understated his findings when he wrote, "[F]actors affecting the judicial outcome are not necessarily as suggested by previous commentary."[32] The novelty of his findings, combined with the elegant way they were presented, made a lasting impact in the real world. Firms advertising their services as incorporators rely on Thompson's work to try to lure companies to particular states.[33] And incorporation choices reflect (and perhaps are caused by) Thompson's ranking of the probability of veil piercing in particular jurisdictions.[34]

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or Officer for Corporation's Wrongful Conduct, 36 CAUSES OF ACTION 2D 441, § 6 (2008) (same); Shawn M. Flanagan, *Piercing the Corporate Veil in South Carolina*, S.C. LAW. MAG., Nov. 2006, at 35, 40 (citing Thompson's 1999 finding of a forty percent rate of veil piercing nationwide); Carolyn B. Lamm, *Assertion of Jurisdiction over Non-U.S. Defendants*, *in* INTERNATIONAL COMMERCIAL LITIGATION 1999, at 85, 120–22 (PLI Commercial Law & Practice, Course Handbook Series No. A0-003O, 1999) (emphasizing the prevalence of fraud in veil piercing cases); William P. O'Neill, *Advanced Issues in Strategic Alliances*, *in* STRUCTURING, NEGOTIATING & IMPLEMENTING STRATEGIC ALLIANCES 2000, at 351, 395–96 (PLI Corporate Law & Practice, Course Handbook Series No. B0-00OG, 2000) (citing Thompson's study when discussing sufficient capitalization as a factor).

[29] Another factor that plaintiffs might control is the filing forum. We find no statistical evidence that federal question and diversity cases are distinct from one another, or that cases removed from state court are litigated in distinct ways. Although plaintiffs may choose to file in jurisdictions they perceive to be liberal with respect to piercing, the relationship between jurisdiction and choice-of-law rules about piercing would make this strategy risky, and the influence of jurisdiction would be, in any event, quite difficult to test.

[30] Georgakopoulos, *supra* note 24, at 124–30 (describing "schism").

[31] Thompson, *supra* note 1.

[32] *Id.* at 1038.

[33] *See, e.g.*, Corporate Service Center, Inc., Nevada v. California, http://www.corporateservicecenter.com/nevada-california-comparison.html (last visited Sept. 22, 2010) (using Thompson's results to persuade companies to incorporate in Nevada instead of California).

[34] In a recent study, for example, Jens Dammann and Matthias Schündeln analyzed 266,531 privately held corporations and tested whether Thompson's ranking of veil piercing in various states motivated entities to incorporate away from their home states. Jens Dammann & Matthias Schündeln, *The Incorporation Choices of Privately Held Corporations* 6–7 (The Univ. of Tex. Sch. of Law, Law & Econ. Research Paper No. 119, 2008), *available at* http://ssrn.com/abstract=1049581 [hereinafter Dammann & Schündeln, *Incorporation Choices*]. They found that larger companies avoided incorporating in jurisdictions that Thompson had identified as having a common law that was more likely to pierce. *Id.* at 29. The same is apparently not true for limited liability companies. *See* Jens Dammann & Matthias Schündeln, *Where Are Limited Liability Companies Formed? An Empirical Analysis* 21 (The Univ. of Tex. Sch. of Law, Law & Econ. Research Paper No. 126, 2008), *available at* http://ssrn.com/abstract=1126257 (finding no statistically significant relationship between regional veil piercing rules and LLC organization) [hereinafter Dammann & Schündeln, *Where Are Limited Liability Companies Formed?*].

In the next two subsections, we lay out the strategies available to lawyers when crafting their complaints, along with the relevant evidence that might guide their decisions. We will use Thompson's findings as the lodestar for our predictions.

1. Causes of Action.—Plaintiffs can always choose not to file a lawsuit if they think they have no realistic chance of recovery.[35] Less often appreciated is lawyers' flexibility to mold clusters of causes of actions to maximize a lawsuit's value. For example, the distinction between common law contract and tort creditors is often cited in academic work as a major fault line in the law of veil piercing.[36] As plaintiffs retain the ability to bring a similar set of facts as a tort claim, a contract claim, or both,[37] a tactical choice emerges. Most theorists believe that plaintiffs bringing causes of action that sound in tort should be more successful than those bringing contract cases.[38] Tort plaintiffs have not "agreed" to assume the risk that their claims will be defeated by a judgment proof defendant. In contrast, contract plaintiffs were on notice that they were dealing with an entity whose liability was limited, and therefore had the opportunity to demand (in the contract) a premium to compensate for the extra assumed risk.

However, this theory stands in sharp contrast to the extant data, evidencing the schism between doctrinal assumptions and empirical observations. According to Thompson's work, contract plaintiffs successfully pierced at a forty-two percent rate, while tort plaintiffs successfully pierced at a thirty-one percent rate.[39] Although later research has failed to replicate this result,[40] it is still highlighted in academic commentary,[41] casebooks,[42]

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[35] *See* Siegelman & Donohue, *supra* note 26, at 430–31 (showing that, at least in employment discrimination cases, filing rates and perceived case strength vary over time).

[36] *See, e.g.*, Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1916–23 (1991).

[37] For example, parallel theories may include a breach of contract for the failure of a warranty and a product design tort based on strict liability.

[38] *See, e.g.*, Hansmann & Kraakman, *supra* note 36, at 1916–23.

[39] Thompson, *supra* note 1, at 1058–59.

[40] Hodge & Sachs, *supra* note 24, at 353–54 (finding contract plaintiffs successfully pierced at a thirty-one percent rate, while tort plaintiffs successfully pierced at a thirty-six percent rate).

[41] *See, e.g.*, Rapp, *supra* note 24, at 1071.

[42] Thus, for example, many leading casebooks for basic corporate law courses cite Thompson's work. *See, e.g.*, CHARLES R.T. O'KELLY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS 543 (5th ed. 2006) (claiming Thompson's study produced "surprising results"); D. GORDON SMITH & CYNTHIA A. WILLIAMS, BUSINESS ORGANIZATIONS: CASES PROBLEMS, AND CASE STUDIES 209–10 (2004) (contrasting Thompson's study with theoretical predictions).

and caselaw.[43] Lawyers' practice guides, however, are generally neutral about whether tort or contract claims have better chances of success.[44]

Developing expectations about the mix of causes of action in veil piercing complaints is a prohibitively difficult task. We lack data on the typical background mix of causes of action because there are no large-scale surveys of the use of causes of actions in commercial disputes. Moreover, a structural feature of litigation, neglected in the published work to date, makes the problem even more daunting. Parties can, and are encouraged to, bring multiple causes of action in each complaint. Only as litigation develops, and the various causes of action are tested against the facts (Was there really a manufacturing defect?) or the law (Did the contract satisfy the statute of frauds?), can both sides decide which causes of action are worthy of a fact-finder's adjudication. Litigation winnows initial clusters of causes of action to manageable contract, tort, and fraud "cases." Contrary to the conventional wisdom, many plaintiffs can assert claims as *both* involuntary and voluntary creditors, at least in their first-filed complaint. Ultimately, given these factors, the conventional literature offers precious little guidance on the distribution of causes of actions plaintiffs will file.

2. Types of Veil Piercing Allegations in Complaints.—Plaintiffs may craft their piercing claims with strategically relevant veil piercing factors in mind.[45] In theory, plaintiffs ought to assert reasons to pierce that they believe courts will accept. For example, nonempirical scholars assert that undercapitalization and fraud ought to play a particularly prominent role in courts' decisionmaking,[46] while informalities ought to be ignored.[47] Such academic work is largely replicated in popular practice guides and form complaint books.[48]

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[43] *See, e.g.*, Pearson v. Component Tech. Corp., 247 F.3d 471, 485 (3d Cir. 2001); Allied Capital Corp v. GC-Sun Holdings, L.P., No. 1954-N, 2006 WL 4782243, at *14 n.55 (Del. Ch. Nov. 22, 2006); Theberge v. Darbo, Inc., 684 A.2d 1298, 1303 n.1 (Me. 1996); 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).

[44] *See, e.g.*, 18 AM. JUR. 2D *Corporations* § 54 (2008) (omitting from a list of veil piercing factors any mention of a difference between tort and contract claims); *id.* at §§ 46–52 (omitting the same from the broader explanation of veil piercing doctrine). Others follow Thompson in discussing the difference between tort and contract creditors. *See, e.g.*, 45 AM. JUR. PROOF OF FACTS 3D 1 *Grounds for Disregarding the Corporate Entity and Piercing the Corporate Veil* §§ 12–15 (1998); CAL. CIV. PRAC. BUS. LITIG. § 5:18 (citing Thompson's 1991 finding that contract claims are more successful than tort claims).

[45] Whether notice pleading requires that plaintiffs provide such factors is a question on which jurists may disagree. The question is related to whether failure to plead veil piercing *at all* serves as a waiver. On that topic, see *infra* note 121.

[46] *See, e.g.*, ROBERT CHARLES CLARK, CORPORATE LAW 71–81 (1986) (noting that those veil piercing cases that are not simply substitutes for fraudulent conveyance actions often relate to undercapitalization and principles of truth, primacy, and evenhandedness).

[47] *See, e.g.*, Millon, *supra* note 8, at 1335–36.

[48] *See, e.g.*, 45 AM. JUR. PROOF OF FACTS 3D 1 *Grounds for Disregarding the Corporate Entity and Piercing the Corporate Veil* § 9 (2008) (identifying the use of a sham corporation to perpetuate a fraud

Thompson's empirical work on a dataset of opinions highlighted a broader set of particularly important factors that courts used when writing about piercing the veil.[49] Figure 1, adapted directly from a frequently cited chart in Thompson's paper, displays the success rate for each factor in opinions in which the factor was mentioned.

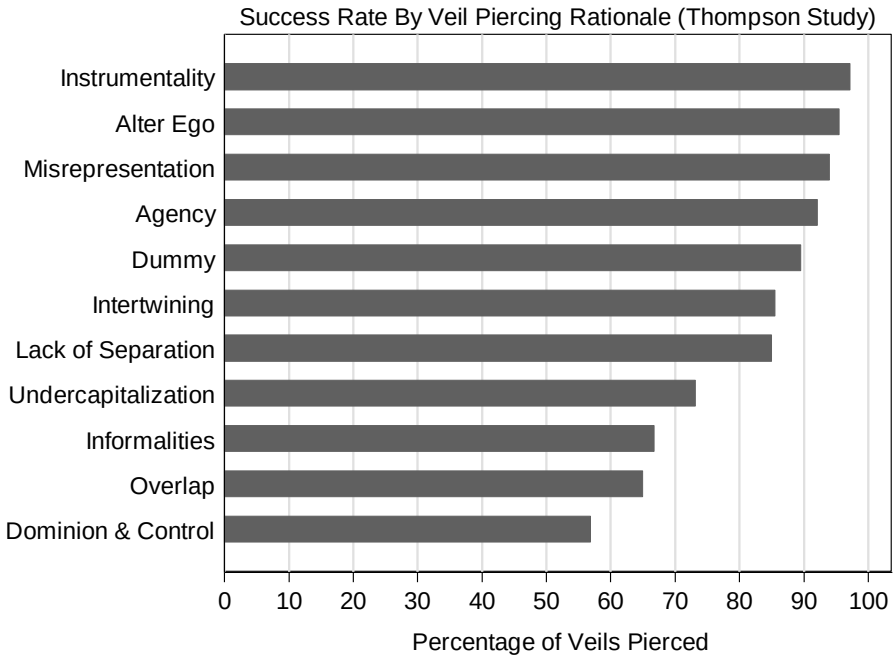

Figure 1: Eleven factors mentioned by courts when discussing veil piercing and the percentage of veils pierced for each, as recorded in the Thompson 1991 study.[50]

as one theory of veil piercing); *id.* § 12 (listing and explaining undercapitalization as a major veil piercing factor); LEWIS D. SOLOMON & LEWIS J. SARET, ASSET PROTECTION STRATEGIES 66–92 (2009) (stating that undercapitalization may increase the likelihood of veil piercing, as may failure to follow corporate formalities and domination and control); Lamm, *supra* note 28, at 120 (citing Thompson's 1991 study which showed findings of fraud in ninety percent of successful veil piercing cases); Richard M. Lipton, *Critical Partnership Tax Issues—An Overview*, *in* ACQUIRING OR SELLING THE PRIVATELY HELD COMPANY 411, 441–42 (PLI Corporate Law and Practice, Course Handbook Series No. B0-01AH, 2002) (finding that a company must be adequately capitalized at the outset, and that some cases require adequate capitalization as business continues); O'Neill, *supra* note 28, at 395 (listing insufficient capitalization as a factor).

[49] Thompson, *supra* note 1, at 1063–65. Others have reached similar findings. *See, e.g.*, Hodge & Sachs, *supra* note 24, at 357–58.

[50] Adapted from Thompson, *supra* note 1, at 1063 tbl.11.

However, a different illustration of these empirical results is available—though it is not one highlighted either by Thompson or other empirical scholars. If, instead of looking at the success rate of each factor where it appears in the opinion, Thompson had considered the likelihood that a particular factor would be used as part of an opinion piercing the veil, measured against the denominator of all cases in Thompson's dataset (N=1583), Figure 2 would have resulted:

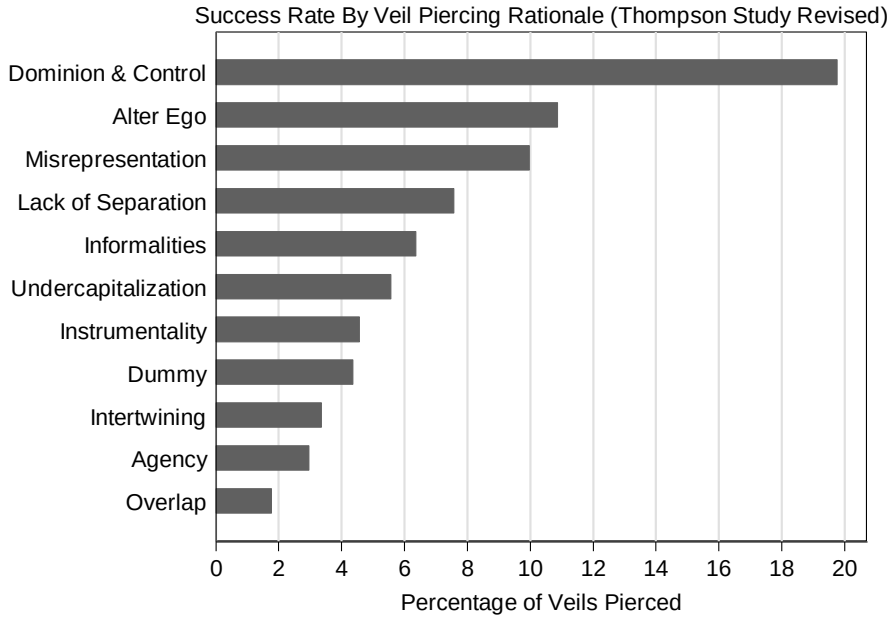

Figure 2: Eleven factors mentioned by courts when discussing veil piercing and their success rate over all cases in the Thompson sample (N=1583).[51]

Simply changing the denominator has dramatic results. While the common interpretation of Thompson's data, for instance, is that dominion and control is a weak claim (because it is the least successful reason in opinions piercing the veil), Figure 2 suggests that it is actually the most common factor relied on by judges when piercing. In nearly twenty percent of the opinions in Thompson's dataset, plaintiffs successfully asserted a dominion and control argument. We assume that plaintiffs' complaints will more closely reflect the underlying distribution in Figure 2 than that in Figure 1.

[51] Adapted from Thompson, *supra* note 1, at 1063 tbl.11.

B. Veil Piercing Success

Litigation containing veil piercing allegations terminates in four typical ways: settlement, success on the merits without veil piercing, veil piercing success on the merits, and dismissal. Scholars have focused exclusively on the third and fourth categories, trying to tease out variables that seem to cause courts to pierce the veil. For instance, two factors said to be important are the kinds of veil piercing factors that courts advance as reasons in their opinions (sham, dominion, etc.) and whether the case generally sounds in contract or tort. Other possibilities, discussed below, include judicial ideology, judicial demographics, and information about the organization, wealth, and sophistication of the firm to be pierced. However, before discussing our hypotheses, we must first explain why veil piercing "success"—or indeed any litigation outcome in district court—is hard to quantify and analyze.

Most cases settle, and the settlement "rate" turns on many factors outside of the case.[52] In our data, sixty-six percent of cases eventually settle. If an analysis only looks at opinions, almost all such cases will be absent, meaning that researchers will know nothing about those cases' veil piercing profiles because they will not appear in their datasets.[53] But by looking at the entirety of the litigation, we can excavate a new kind of veil piercing success: plaintiffs simply *advancing the veil piercing claim in the litigation*. This kind of plaintiff success—which we will call "interstitial"—comes in many forms: 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;[54] and, most importantly, surviving summary judgment.

Interstitial successes matter for three reasons. First, they constitute judicial application of the law of veil piercing to the facts of the case, and reflect a determination that the shareholder's claim of immunity is not so strong as to warrant immediate dismissal. Such successes help define what limited liability means in practice, although motions outside of summary judgment are rarely written up as opinions and thus rarely read by outsid-

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[52] Eisenberg & Lanvers, *supra* note 21, at 131–35 (noting differences between reported causes of action and between districts).

[53] *See* Christina L. Boyd & James F. Spriggs II, *An Examination of Strategic Anticipation of Appellate Court Preferences by Federal District Court Judges*, 29 WASH. U. J.L. & POL'Y 37, 47 (2009) ("After all, cases that are appealed and advance into each higher tier represent a non-random sample of all cases that are litigated.").

[54] *See* Swain & Aguilar, *supra* note 7, at 454 (observing that when a court decides to pierce the veil, it is really saying that "the boundary between the corporation and its shareholders has been dissolved and that they are acting as one.").

ers.[55] Previous work, ignoring the litigated life of veil piercing disputes, has missed an important part of the picture.

Second, interstitial successes teach the parties about their judge's view of the case.[56] The Priest-Klein selection effects hypothesis implies that rational parties settle cases as the probability of winning or losing becomes more certain.[57] Learning through motion practice potentially will increase the likelihood of,[58] and reduce the time to, settlement. Thus, studying interstitial motions might help us understand how to dispose of cases quickly and efficiently.

This learning-centered view of motion practice has troubling implications for analyses of resolutions at the ends of cases, as the universe of *unsettled* cases will contain mostly cases where the parties' views of the merits are far apart.[59] The *outcomes* of such cases at trial or in late-stage motion practice will appear to be randomly distributed, and "the formal structure of the law [will] appear indeterminate to any scientific, empirical method of observing judicial decisions."[60] In other words, quantitative stu-

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[55] Hoffman et al., *supra* note 17, at 715, 719 (noting that motions to dismiss and discovery motions are significantly less likely to result in written opinions than are summary judgment motions).

[56] Our suggestion here draws on a recently advanced real-options theory of litigation. *See* Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267, 1276–79 (2006). Options theory explains how parties' learning during the course of a case will have discontinuous implications for settlement. *Id.* at 1279. It also suggests that parties will settle less often than the selection effects theory predicts, because they are comparing the option value of litigation to their expected costs, instead of their expected benefits. *Id.*

[57] George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4–5 (1984).

[58] *See e.g.*, Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161, 163–64 (1986) (noting that disposition of motions is correlated with case settlement).

[59] Priest & Klein, *supra* note 57, at 6.

[60] *Id.* A broad-ranging empirical literature has grappled with the Priest-Klein hypothesis. *See* Daniel Kessler, Thomas Meites & Geoffrey Miller, *Explaining Deviations from the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation*, 25 J. LEGAL STUD. 233, 238–41 (1996) (reviewing and comparing studies). The theory is also quite well-developed. *See, e.g.*, Steven Shavell, *Any Frequency of Plaintiff Victory at Trial Is Possible*, 25 J. LEGAL. STUD. 493, 500–501 (1996) (pointing out that when different percentages of cases proceed to trial, there are varying plaintiff win rates). Many studies have found that actual win rates do not approach fifty percent at trial, and that this may result from the fact that plaintiffs' initial filing decisions are also subject to selective pressure, or that some types of plaintiffs have different stakes or capabilities in litigation. *See* Theodore Eisenberg & Henry S. Farber, *The Litigious Plaintiff Hypothesis: Case Selection and Resolution*, 28 RAND J. ECON. S92, S107–09 (1997) (controlling for a plaintiff's entity versus individual status); Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J. LEGAL STUD. 337, 340–42 (1990) (refining the fifty percent theory and finding that it applies best to tort cases and less to other types of litigation); Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1576–1602 (1989) (examining the effects of case type, quality of counsel, and region, among other things, on plaintiff win rates in civil rights cases); Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 750–52 (1988) (explaining that plaintiffs in constitutional torts cases may bring weaker cases to trial because they are not repeat players).

dies of the later stages of litigation—often, studies of opinions—should find few relationships between independent variables and outcomes.

However, it is less clear that interstitial motions ought to be subject to the same forces of selection. This leads to the third important role played by studying dockets: we ought to be more confident in our ability to make statistical predictions about the resolution of motions that do not end cases than about the fate of the case itself.[61] As Margo Schlanger observed,

> [T]heoretical models of litigation . . . [assume that] the relevant moments/decisions are the plaintiffs' decision whether to file, the parties' decision whether to settle, and the judge's or jury's decision at trial . . . . [But, i]n nearly every area of litigation, a case's value to the parties is very different before and after adjudication of dispositive motions (usually summary judgment), as are the litigation costs and incentives.[62]

Thus, we suggest that there are two basic kinds of veil piercing "success": success on interstitial *"veil piercing claim advances"* motions, and success at the *case/merits level*.[63] Our arguments below about factors that might lead to success are largely directed at the former—the temporary victories that produce settlement—rather than the latter, as success on the merits may be obscured by selection and settlement.[64] We now detail our exact predictions about what ought to influence the likelihood of veil piercing success.

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[61] *See* Peter J. Hammer & William M. Sage, *Antitrust, Health Care Quality, and the Courts*, 102 COLUM. L. REV. 545, 562 n.45 (2002) ("It is difficult to assess fully the selection bias in our sample. Unlike Priest and Klein's binary distinction between 'litigated' cases (only those cases where a verdict is rendered) and 'settlements' (all other cases), our sample includes a variety of legal disputes: motions to dismiss, motions for summary judgment, new trial motions, and appeals. As such, our sample can be viewed as multiple Priest-Klein clusters around a range of different 'decision standards.'"); Kimberly D. Krawiec & Kathryn Zeiler, *Common-Law Disclosure Duties and the Sin of Omission: Testing the Meta-Theories*, 91 VA. L. REV. 1795, 1877–79 (2005) (explaining why the study of success in smaller parts of a case, like individual motions or elements of a claim, does not suffer the same degree of selection effects as the study of case-level outcomes). *See generally* Kathryn E. Spier, *The Dynamics of Pretrial Negotiation*, 59 REV. ECON. STUD. 93, 95–96 (1992) (developing a dynamic model of settlement choices over time).

[62] Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1595 n.116 (2003).

[63] In one recent study, Kimberly Krawiec and Kathryn Zeiler similarly concluded that courts' decisions about defendants' duty to disclose information, as part of larger causes of action for fraudulent silence, were predicted by a variety of independent variables. *See* Krawiec & Zeiler, *supra* note 61. Despite some selection effects, they argued that this finding was understandable because "even when the plaintiff can easily show that the defendant had a duty to disclose, the case nonetheless might proceed to the litigation and opinion stage due to the parties' uncertainty about another element." *Id.* at 1878.

[64] Thompson claimed that selection would be less likely to affect the plaintiffs in his study because "the law in this area has not crystallized," leading plaintiffs to bring "a large number of cases." Thompson, *supra* note 1, at 1046. He also argued that the lack of changes in the dataset over time, or across jurisdictions, or as a result of procedure "suggested that the sample has stayed within the same broad range." *Id.* at 1046–47. These arguments are fairly typical of how empirical work on opinions handles the selection problem, and have a certain force. Our conservative position in the text highlights the unique advantages of studying motions. *See also* ROBERTA ROMANO, INTERDISCIPLINARY READERS IN

1. Entity-Specific Factors.—Several characteristics of the parties should influence the likelihood of veil piercing success. We provide our general predictions in this section, and later will describe the specific measures we propose to use to test each one.

a. Defendants' size.—Entity size should negatively correlate with the likelihood of veil piercing. Small size is a proxy for being judgment proof: given limited liability, small corporations will often leave plaintiffs without a monetary remedy for their injuries. Judges are trained in a tradition that does not ordinarily separate rights from remedies, meaning judges will be motivated to let plaintiffs proceed further with their veil piercing claims against smaller companies. More importantly, judges are unlikely to perceive very small companies to be independent legal entities, deserving of the special protections afforded by the veil. A company with a handful of employees will look much like a sole proprietorship, while a company with significantly more employees will look much more permanent. Whatever the content of the formal rules, courts will be reluctant to grant immunity to entities that appear to be the mere extensions of individuals. Notably, this factor will often be observable by judges, but is unlikely to show up in formal doctrine, except to the extent that it might interact with formal factors like informalities and entity legal status. We would expect it to play a significant role in judicial decisions on piercing.

b. Defendants' entity choice.—Second, we predict that limited liability companies will be less likely to be subject to piercing motions than corporations. Most LLC statutes provide that LLC members and managers are not liable for the acts, debts, or obligations of the LLC merely by reason of being a member or manager. While there is some variance among the states' statutory approaches to whether to allow LLC veil piercing,[65] previous scholarship, focusing on published opinions, has found that member liability protection is not measurably different from state to state.[66] This work also has found little difference in the liability protections of LLCs

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LAW: FOUNDATIONS OF CORPORATE LAW 83 (1993) (noting the selection bias issue in Thompson's study).

[65] The four main approaches are: (1) no affirmative statement that veil piercing applies, but a note that failure to observe formalities is not grounds for personal liability (followed in Hawaii, Idaho, Illinois, Montana, Oregon, South Carolina, South Dakota, Tennessee, Utah, and West Virginia); (2) a statement that corporate veil piercing applies except for failure to observe formalities (followed in California, Colorado, Georgia, Iowa, Maine, and Washington); (3) a statement that corporate veil piercing applies without explicit limitations (followed in Florida, Minnesota, North Dakota, and Wisconsin); and (4) silence (followed in thirty states).

[66] Bainbridge, *Abolishing LLC Veil Piercing*, *supra* note 14, at 80–81. *See* 2 LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES § 12:3 n.3.50 (West 2008) (listing several dozen LLC veil piercing cases purporting to apply corporate standards); Robert B. Thompson, *The Limits of Liability in the New Limited Liability Entities*, 32 WAKE FOREST L. REV. 1, 7 (1997).

compared to the corporate form.[67] We expect, however, that when veil piercing activity is examined beyond just opinions, this additional statutory protection will translate into an overall lower likelihood of successful piercing for LLCs than for corporations and other business structures. The reason is simple: corporations, unlike LLCs, are ordinarily expected to follow a series of corporate formalities (like the separation of ownership from control) which are more difficult to achieve in smaller firms than in larger ones. Since, as we discuss below, our dataset is dominated by small firms, this difference should cause courts to see relatively more corporations as failing to follow the law.

c. Defendants' shareholder identity.—We also expect that entities owned by individuals (rather than corporations) will be more likely to be pierced. In his work, Thompson found just that.[68] This makes sense on many levels: corporate shareholders are more likely to appear in more sophisticated, wealthier firms; and the test for consolidation among firms, often litigated as a veil piercing claim in disguise, is stricter than that for piercing alone.

d. Defendants' business lawyering.—We predict that firms rich in legal formalities will be less likely to be successfully pierced. Recent opinions seem to indicate that courts are sometimes willing to allow entities "to operate with a minimum of formality."[69] However, the presence of legal formalities, like holding regular meetings, having a complete board book, keeping separate bank accounts, and documenting distributions, is likely to positively influence the disposition of veil piercing cases, particularly when such formalities are pervasive.

e. Plaintiffs' claims.—We hypothesize that cases involving involuntary creditors will be more likely to be successful on veil piercing claims. Conversely, cases with voluntary creditors are less likely to be successful.[70] Here, we follow existing theory which distinguishes between involuntary creditors (like tort victims) who are not on notice about limited liability and voluntary creditors (like disappointed promisees) who are.[71] Because of the cause of action clustering problem we discuss above, we

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[67] Thompson, *supra* note 66, at 7; Rapp, *supra* note 24, at 1063–64.

[68] Thompson, *supra* note 1, at 1054–56.

[69] Harvey Gelb, *Limited Liability Policy and Veil Piercing*, 9 WYO. L. REV. 551, 554–55 (2009); *see also* Millon, *supra* note 8, at 1335 (noting that while "[s]ome courts have held that nonobservance [of corporate formalities] by itself is not enough to warrant veil piercing[,] [o]ther courts treat it as sufficient if the nonobservance is extensive").

[70] Because of the complex clustering of causes of action in complaints, our inquiry into the effects of these types of causes of action is rudimentary in nature, and thus preliminary. In future work, we hope to better understand and model the complex cause of action content of veil piercing complaints.

[71] *See* Hansmann & Kraakman, *supra* note 36, at 1916–23 (describing the differences between involuntary and voluntary creditors, and arguing that their liability should be handled under different bodies of law).

discount empirical data finding (contrary to theory) that contract creditors win more often than tort creditors do.[72] Further, we will expand our analysis beyond the traditional "tort" and "contract" categories by directly identifying "involuntary" and "voluntary" causes of action.

f. *Veil piercing grounds*.—It is our expectation that the strength of the grounds for veil piercing asserted in plaintiffs' complaints will correlate with later veil piercing success. Claims that correlate strong factual records with factors that traditional doctrine deems important will be more likely to lead to success. Thus, undercapitalization, fraud, informalities, misrepresentation, intertwining, and dominion and control ought to correlate with veil piercing success. More conclusory allegations like alter ego, façade, shell, dummy, and agency ought to have no effect or should be negatively correlated with success. Following a well-established theory in the literature, we further hypothesize that the following traditional veil piercing factors should be less important in the LLC context than they are in the corporate context: (1) failure to observe formalities,[73] (2) inadequate capitalization,[74] and (3) dominion and control.[75]

2. Judicial Characteristics (with Some Notes on Motivation).—In an area of law as notoriously indeterminate as that of veil piercing, the identity, background, and views of the trial judge may play an important role in the resolution of any motion as well as in the ultimate disposition. Therefore, we review the possible theoretical functions of judicial ideology, sex, and race. We also discuss the potential hierarchical control that circuit courts wield over district court judges' decisionmaking in these matters.

a. Judicial ideology.—We expect that liberal trial judges will be more likely to pierce the veil than conservative judges. Ideological judging

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[72] *See* discussion *infra* Part I.A.1.

[73] RIBSTEIN & KEATINGE, *supra* note 66, § 12.3.

[74] STEPHEN B. PRESSER, PIERCING THE CORPORATE VEIL § 4.2 (stating that "failure to abide by corporate formalities, domination by an owner, and undercapitalization, might yield inequitable results when applied as tests for the piercing of the veil of limited liability companies"); Bainbridge, *Abolishing LLC Veil Piercing*, *supra* note 14, at 90 (arguing that undercapitalization is an insufficient basis for corporate veil piercing, and should also be considered insufficient in the LLC context).

[75] Scholars argue that because LLC statutes explicitly allow members to manage LLCs, piercing by virtue of manager control is particularly inappropriate. *See* Jeffrey K. Vandervoort, *Piercing the Veil of Limited Liability Companies: The Need for a Better Standard*, 3 DEPAUL BUS. & COMM. L.J. 51, 70–72 (2004). Instead, domination and control, if it is an applicable factor to LLCs, must involve the question of whether the member was using the LLC to accomplish purely personal goals. PRESSER, *supra* note 74, § 4.2. Opinions are split. *Compare* D.R. Horton, Inc.-N. J. v. Dynastar Dev., LLC, No. MER-L-1808-00, 2005 WL 1939778, at *35 (N.J. Super. Ct. Aug. 10, 2005) (finding the dominance and control factor should be given less weight because it conflicts with the underlying policy of flexibility within the LLC statute) *with* Double Constr. Co., LLC v. Advanced Home Builders, LLC, No. CV065003609, 2008 WL 4050864, at *4 (Conn. Super. Aug. 6, 2008) (finding the necessary factor of domination satisfied in two-member LLC because the members controlled all aspects of the transaction with plaintiffs).

theory is based on a very long line of judicial decisionmaking literature.[76] This scholarship has found that judges often make decisions that are consistent with their ideological preferences. These findings have held true across the federal judicial hierarchy, with empirical work finding that district and circuit court judges and Supreme Court Justices make many decisions in an ideologically consistent fashion.[77]

In an important work on ideological voting in the federal appellate courts, Sunstein, Schkade, and Ellman hypothesized that judges would treat veil piercing decisions like other forms of legal analysis and conform their decisions to their ideological inclinations.[78] They found that decisions involving the veil, just like those involving affirmative action, sex discrimination, sexual harassment, race discrimination, and environmental regulations, were motivated by ideological disagreement.[79] Republican appellate judges voted for the plaintiff in veil piercing cases at a lower rate than democratic appointees (twenty-seven percent to forty-one percent).[80] Confirming the effects of judicial panels, sixty-seven percent of all-Democratic panels voted with veil piercing plaintiffs, while only twenty-three percent of all-Republican panels were so generous.[81]

That we assume that judicial ideology will play an important role in decisions about veil piercing does not mean we have resolved the mechanism producing this effect. The political science ideology thesis suggests ideology furnishes judges with *a non-legal basis*—ideological commitments—on which to make legal decisions, and that judges are conscious of that basis. A distinct theory of judicial motivation, developed most notably by Dan Kahan, Don Braman, and their co-authors, is cultural cognition.[82] Cultural cognition theory posits that judges are likely to unconsciously in-

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[76] *See, e.g.*, LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR (1997); LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998); GLENDON SCHUBERT, THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES, 1946–1963 (1965); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

[77] *See, e.g.*, SEGAL & SPAETH, *supra* note 76, at 6–12 (finding that Supreme Court Justices' decisions are ideologically motivated); Virginia A. Hettinger, Stefanie A. Lindquist & Wendy L. Martinek, *Comparing Attitudinal and Strategic Accounts of Dissenting Behavior on the U.S. Courts of Appeals*, 48 AM. J. POL. SCI. 123, 133 (2004) (finding that ideological disagreement among circuit court judges is an important predictor of dissent); C.K. Rowland, Robert A. Carp & Ronald A. Stidham, *Judges' Policy Choices and the Value Basis of Judicial Appointments*, 46 J. POL. 886, 898 (1984) (finding that the party of the appointing president is an important predictor of district court judge decisionmaking).

[78] Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 304 (2004) (predicting ideological voting on veil piercing issues).

[79] *Id.* at 321.

[80] *Id.*

[81] *Id.*

[82] *See* The Cultural Cognition Project, www.culturalcognition.net (last visited Sept. 22, 2010). This general description of the theory of cultural cognition was adapted from Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841–43 (2009).

terpret the facts to fit their cultural evaluations of putatively dangerous behavior.[83]

Cultural cognition theory thus offers a contrasting story about why a judge's ideology might matter in a veil piercing lawsuit. Cultural cognition theorists believe that judges' ideological commitments are unconscious expressions of their cultural makeup, loosely organized around views about private ordering and hierarchy, rather than consciously imposed extra-legal biases. Judges' cultural mindsets, then, will change how judges view the facts themselves. Judges will approach purportedly neutral factual veil piercing inquiries (was there commingling, did the shareholders "dominate" the corporation, and so forth) in light of their underlying values. Those values, in turn, are shaped by distinctive risk judgments, including the entrepreneurial benefits supposedly accruing from limited liability and the risks to the plaintiff and to society resulting from the lack of remedy for legal harms. Individuals of different cultural predispositions will therefore hold different views about the value of limited liability and subconsciously will mold their understandings of relevant veil piercing facts to fit them.

In the experimental world, we might be able to test these competing hypotheses about how and why political attitudes matter by: (1) gathering data about the determinants of cultural world views; and (2) comparing the performance of those determinants to the attitudinal thesis.[84] But given the nature of the data we can collect, proxies must suffice; we cannot ask the judges presiding over our veil piercing cases about their cultural styles, and if we did, we could not necessarily rely on their answers.[85] Similarly, measures of judicial ideology are noisy and imprecise, largely because they rely on presidential preferences and the norm of senatorial courtesy.[86] Of course, as a "subconscious influence on cognition,"[87] cultural cognition may complement, not contradict, ideologically motivated predictions.[88] Thus,

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[83] *See* Dan M. Kahan, Paul Slovic, Donald Braman & John Gastil, *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 HARV. L. REV. 1071, 1083–87 (2006) (book review).

[84] Kahan and Braman have used structural equation modeling in the self-defense context to test these competing hypotheses in nonjudicial experimental subjects, finding support for the cultural cognition (as opposed to values-based decisionmaking) model. *See* Dan M. Kahan & Donald Braman, *The Self-Defensive Cognition of Self-Defense*, 45 AM. CRIM. L. REV. 1, 44–46 (2008). Whether such a result would hold with judicial subjects is unknown.

[85] In a way, this is perhaps just as well, as the authors are not in agreement about the relative superiority of the competing hypotheses. Boyd, a political scientist, prefers attitudinal and strategy-based models; Hoffman, a member of the cultural cognition project, does not.

[86] *See infra* notes 127–132 and accompanying text. Also factoring into this imprecision is the presence of local culture and norms that may influence ideology. *See, e.g.*, James L. Gibson, *Environmental Constraints on the Behavior of Judges: A Representational Model of Judicial Decision Making*, 14 LAW & SOC'Y REV. 343, 358–60 (1980).

[87] Dan M. Kahan, *'Ideology in' vs. 'Cultural Cognition of' Law: What Difference Does It Make?* 5 (Yale Law School, Pub. Law & Legal Theory, Research Paper No. 180, 2008), *available at* http://ssrn.com/abstract=1111865.

[88] *Id.* at 5–8.

our data do not permit us to test either the cultural cognition or the political science ideology models directly. Although we are comfortable predicting that liberal judges will be more likely to advance veil piercing cases than conservative judges, confirmation of this finding will not answer the question of motivation.

b. Judicial gender.—We expect that female judges, all else equal, will be more likely than male judges to be sympathetic to veil piercing plaintiffs. A large body of literature, both empirical and theoretical in nature, argues that female judges bring a unique perspective to the bench that could affect decisionmaking and other behavior.[89] The theoretical groundings for this work are diverse,[90] ranging from the "different voice" that females possess based on their societal upbringing,[91] to their roles as representatives of women as a class,[92] to the unique information they have based on their professional backgrounds.[93] The empirical work in this area has found that female judges sometimes, but not always, reach different merits decisions than their male counterparts,[94] and that female judges sometimes behave differently when it comes to managing their cases and making nonmerits decisions.[95] Applying these theories to veil piercing cases, the conventional accounts that correlate being female with values like egalitarianism and equality,[96] while not a perfect fit, would seem to disfavor defendants asserting the virtues of limited liability. Female judges in

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[89] *See, e.g.*, CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 128–50 (1982); Theresa M. Beiner, *The Elusive (But Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U.C. DAVIS L. REV. 598, 610–15 (2003); Patricia Yancey Martin, John R. Reynolds & Shelley Keith, *Gender Bias and Feminist Consciousness Among Judges and Attorneys: A Standpoint Theory Analysis*, 27 SIGNS 665, 668–69 (2002).

[90] These (often competing) theories are synthesized in greater detail in Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. (forthcoming 2010). We review them only briefly here.

[91] *See* GILLIGAN, *supra* note 89, at 5–23.

[92] *See* Beverly B. Cook, *Will Women Judges Make a Difference in Women's Legal Rights? A Prediction from Attitudes and Simulated Behavior*, *in* WOMEN, POWER AND POLITICAL SYSTEMS 224–25, 227 (Margherita Rendel ed., 1981); Elaine Martin & Barry Pyle, *State High Courts and Divorce: The Impact of Judicial Gender*, 36 U. TOL. L. Rev. 923, 930 (2005).

[93] *See* Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L. J. 1759, 1764, 1774 (2005).

[94] *See* Boyd, Epstein & Martin, *supra* note 90, for a comprehensive review of the empirical studies and their findings in this area.

[95] *See, e.g.*, Darrell Steffensmeier & Chris Herbert, *Women and Men Policymakers: Does the Judge's Gender Affect the Sentencing of Criminal Defendants?*, 77 SOC. FORCES 1163, 1174 (1999) (finding that female judges are more likely to incarcerate offenders and to impose longer prison sentences); Christina L. Boyd, She'll Settle It: Judges, Their Sex, and the Disposition of Cases in Federal District Courts (Jan. 1, 2007) (unpublished manuscript), *available at* http://clboyd.net/shellsettleit.pdf (finding that female district court judges are more likely to have the cases on their dockets settle than their male colleagues).

[96] *See* Melissa L. Finucane, Paul Slovic, C.K. Mertz, James Flynn & Theresa A. Satterfield, *Gender, Race, and Perceived Risk: The 'White Male' Effect*, 2 HEALTH, RISK, AND SOC'Y 159, 170 (2000).

particular, because of their "experiences as relative outsiders in the legal profession[,] [may] have . . . independent or distinctively empathetic perspectives"[97] that could lead to a greater likelihood of veil piercing of entity structures.[98]

c. Judicial race.—We anticipate that minority judges will be more likely to preside over successful veil piercings than their white counterparts. As with judicial gender, theories of the possible effects of race on case management and decisionmaking are plentiful. Those that argue that black judges will rule differently than their white counterparts do so based on black judges' representation interests[99] or different backgrounds and experiences. As Darrell Steffensmeier and Chester L. Britt put it, "[b]ecause they have grown up and lived as 'blacks,' black judges are likely to have some perspectives and are responsive to some constituencies different from those of white judges."[100] Empirically, scholars have found some, but not universal, support for race-based differences.[101] Racial minority judges may have more experience than white judges with the problem of remedy-less rights and abuse of legal formalities. Thus, in the veil piercing context, they may be more likely to believe that individuals have abused the corporate form. As with female judges, the distribution of ideologies of minority

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[97] James J. Brudney, Sara Schiavoni & Deborah J. Merritt, *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675, 1688–89 (1999).

[98] The ideology of female judges in the federal judiciary is unevenly distributed (in the liberal direction), whereas male judges are far more distributed across the ideological spectrum. Because of this, any effect for sex must be parsed out from a possibly confounding ideological effect. For more on this, as well as general theory and empirical work surrounding the sex of judges and its effect on decisionmaking, see generally Boyd, Epstein & Martin, *supra* note 90.

[99] Thomas M. Uhlman, *Black Elite Decision Making: The Case of Trial Judges*, 22 AM. J. POL. SCI. 884, 885 (1978); Susan Welch, Michael Combs & John Gruhl, *Do Black Judges Make a Difference*?, 32 AM. J. POL. SCI. 126, 127 (1988).

[100] Darrell Steffensmeier & Chester L. Britt, *Judges' Race and Judicial Decision Making: Do Black Judges Sentence Differently?*, 82 SOC. SCI. Q. 749, 752 (2001).

[101] *See, e.g.*, Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 42–45 (2008) (finding large racially-based differences in judging remedial provisions of the Voting Rights Act); Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1457–59 (1998) (finding race effects). *But see* Kathryn Abrams, *Black Judges and Ascriptive Group Identification*, *in* NORMS AND THE LAW 208, 214–16 (John N. Drobak ed., 2006) (finding that race is not a reliable determinant); Steffensmeier & Britt, *supra* note 100, at 761–62 (finding only some evidence that black judges' actions were affected by their backgrounds); Uhlman, *supra* note 99, at 888–91 (reporting little race-based difference in judging behavior observed).

judges in the federal judiciary skews to the left,[102] so it remains important to differentiate any race effects from those inherently linked to ideology.[103]

d. Appellate court control.—We expect that district court judges serving under a liberal circuit court will be more likely to pierce the veil than district judges serving in a conservative circuit. While judges bring their preferences to the bench, they do not make decisions in political isolation. For Supreme Court Justices, this means considering external political factors such as pressures exerted by Congress, the President, and the public.[104] For lower court judges, even more constraining forces are in play due to the judicial hierarchy.[105]

Despite these possibly conflicting forces, district court judges should be most compelled to follow the preferences of their immediate superior, the circuit court of appeals. The reasons for this are twofold. First, as Lindquist and Haire note, judicial agents "might be expected to weigh more heavily the preferences of those principals who exercise direct supervisory control over their activities."[106] Second, the modern Supreme Court's appellate supervisory role has diminished. The Supreme Court has been

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[102] *See* Jennifer A. Segal, *The Decision Making of Clinton's Nontraditional Judicial Appointees* 80 JUDICATURE 279 (1997) (noting that many of the minority judges in the federal judiciary were appointed by Presidents Carter and Clinton and support minority issues).

[103] *Cf.* Boyd, Epstein & Martin, *supra* note 90 , at 12–14 (arguing that gender and ideology effects must be statistically disentangled, particularly in the federal judiciary where most female judges are also liberals).

[104] *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 372–89 (1991); James L. Gibson, Gregory A. Caldiera & Lester Kenyatta Spence, *Measuring Attitudes Toward the United States Supreme Court* 47 AM. J. POL. SCI. 354, 364 (2003) (describing the public's "'running tally' about [the Supreme Court]—a sort of historical summary of the good and bad things [it] has done").

[105] District courts face a difficult situation of having multiple principals. As Susan Haire and her co-authors put it,

> District judges may find themselves "trying to please two masters" when the preferences of their circuit superiors are at odds with those of the Supreme Court. And while the Supreme Court generally does not have direct sanctioning authority over the district court, the Supreme Court's judgments influence those of the district court's immediate superior in important ways.

Susan B. Haire, Stefanie A. Lindquist & Donald R. Songer, *Appellate Court Supervision in the Federal Judiciary: A Hierarchical Perspective*, 37 LAW & SOC'Y REV. 143, 148 (2003).

[106] Stefanie A. Lindquist & Susan B. Haire, *Decision Making by an Agent with Multiple Principals: Environmental Policy in the U.S. Courts of Appeals*, *in* INSTITUTIONAL GAMES AND THE U.S. SUPREME COURT 230, 237 (James R. Rogers et al. eds., 2006). When considering courts of appeals as agents of the Supreme Court and Congress, Lindquist and Haire note that they "expect the Supreme Court's effect to be magnified because of its supervisory role over the appeals courts in the federal judicial hierarchy." *Id.* at 238; *see also* James C. Brent, *An Agent and Two Principals: U.S. Court of Appeals Responses to* Employment Division, Department of Human Resources v. Smith *and the Religious Freedom Restoration Act*, 27 AM. POL. Q. 236, 254–55 (1999) (finding support for the claim that courts of appeals act as agents of the Supreme Court and finding limited support for the argument that the courts of appeals also act as agents of Congress).

granting certiorari to fewer than 100 cases each year,[107] so "the U.S. Courts of Appeals have become the de facto (if not the de jure) venue for final appellate review."[108]

When making decisions, although district court judges will want to exercise their ideological preferences and advance their political agendas, they also will "want to know if their opinions and directives are going to be respected and, generally speaking, [will] want to avoid reversal."[109] Kirk Randazzo's 2008 study uncovered empirical evidence that district courts temper their ideological decisionmaking in anticipation of the actions of the supervising courts of appeals.[110] Applied to the veil piercing context, this means that circuit court judges' ideological preferences, which should mirror those discussed above with regard to district court judges, should also be accounted for in any district court decision that is subject to review and possible reversal.

* * *

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. This Article takes a realistic approach to piercing disputes and challenges the suggestion in the existing literature that the reasons that judges *provide in opinions* reflect the underlying reality of veil piercing litigation. Given claim selection and individual judicial characteristics, we expect to find only modest relationships between any independent variables and veil piercing outcomes at the merits level of a veil piercing case. However, we do expect to find that judicial characteristics, case characteristics, and information about the party or parties to be pierced will bear significantly on the likelihood that a plaintiff will achieve interstitial successes.

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[107] *See* Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth & Thomas G. Walker, THE SUPREME COURT COMPENDIUM 68–73 (3d ed. 2003); *see also* Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 402, 403–04 (arguing that Chief Justice Rehnquist's tenure led to a steady decline in the Court's docket size).

[108] VIRGINIA A. HETTINGER, STEFANIE A. LINDQUIST & WENDY L. MARTINEK, JUDGING ON A COLLEGIAL COURT: INFLUENCES ON FEDERAL APPELLATE DECISION MAKING 89 (2006); *see also* JOHN C. HUGHES, THE FEDERAL COURTS, POLITICS, AND THE RULE OF LAW 40 (1995) (arguing that it is appropriate for the intermediate appellate courts to be the major shapers of legal policy).

[109] Boyd & Spriggs, *supra* note 53, at 47. *But see* David E. Klein & Robert J. Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 LAW & SOC'Y REV. 579, 600 (2003) (finding that fear of reversal was not a major influence on the cases examined in their data). District court judges also may be influenced by the prestige of certain circuit judges. *See* David Klein & Darby Morrisroe, *The Prestige and Influence of Individual Judges on the U.S. Courts of Appeals*, 28 J. LEGAL STUD. 371, 390–91 (1999) (finding that some circuit court judges enjoy more prestige than others and therefore may exert more influence over other courts' decisionmaking).

[110] Kirk A. Randazzo, *Strategic Anticipation and the Hierarchy of Justice in the U.S. District Courts*, 36 AM. POL. RES. 669 (2008).

II. A DISTINCT APPROACH TO THE STUDY OF LITIGATION

A. Why Study Dockets?

Many recent articles have analyzed datasets of opinions and drawn statistically-based conclusions about the determinants and effects of legal doctrine.[111] Such studies are illustrative of general doctrinal trends, and, more specifically, shed light on how judges choose to explain themselves in published opinions. They typically proceed by gathering a sample of opinions collected from the Westlaw or Lexis database and engage in content analysis.[112]

This method constitutes the existing work on veil piercing, both in the United States and abroad. However, it is flawed for reasons that we have explored at length in previous work.[113] Opinions do not represent the universe of what trial judges do. One study estimated that collectively judges write opinions for only three percent of the orders they issue in litigation,[114] and for only sixteen percent of the orders in which they apply facts to law.[115] Worse, opinions are systematically biased: they arise later in litigation (discovery orders and denials of motions to dismiss are underrepresented among reported opinions).[116] Moreover, judges may write opinions more often at moments when they fear appellate review—that is, when they are departing from precedent:

> If the law we read from trial courts results from risk aversion, perhaps opinions appear when judges attempt to vary precedent rather than abide by it. In such circumstances, after all, appellate review and reversal is probably more likely than the norm. For example, imagine a court decides to deny discovery when in comparable circumstances she usually grants it. Might she do so through an opinion on the theory that it is the extraordinary case that will face appellate

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[111] *See, e.g.*, John R. Allison & Mark A. Lemley, *The (Unnoticed) Demise of the Doctrine of Equivalents*, 59 STAN. L. REV. 955, 963 (2007) (collecting opinions, including 217 from the district courts, and performing content analysis); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 554 (2008) (analyzing a data set of all reported federal opinions from 1978 to 2005 which substantially invoked Section 107 of the Copyright Act); Sean M. McEldowney, *New Insights on the "Death" of Obviousness: An Empirical Study of District Court Obviousness Opinions*, 2006 STAN. TECH. L. REV. 4, 7, *available at* stlr.stanford.edu/pdf/McEldowney-Obviousness.pdf (analyzing a data set of five years of district court opinions); Wendy Parker, *The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges*, 81 N.C. L. REV. 1623, 1628–29 n.36 (2003) (analyzing school desegregation opinions).

[112] *See* Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CAL. L. REV. 63, 122 (2008) ("[C]ontent analysis forms the basis for a uniquely legal empirical methodology.").

[113] *See* Hoffman et al., *supra* note 17; Christina L. Boyd, The Impact of Courts of Appeals on Substantive and Procedural Success in the Federal District Courts 12 (July 14, 2009) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1434076.

[114] Hoffman et al., *supra* note 17, at 710.

[115] *Id.* at 720. Notably, this work was limited to four districts, picked for their relative typicality.

[116] *Id.* at 720–21.

> scrutiny? Qualitative students of trial court opinions may read a hundred discovery decisions, never realizing that each one runs counter to the larger flowing tide.[117]

This theory remains unproven, but veil piercing litigation provides a good opportunity to test it. Analyzing veil piercing from the perspective of dockets, rather than opinions, permits us to see the interstitial litigation moments that give content to the legal right to limited liability. This technique allows us to answer questions: How long will the litigation take? How much will it cost (measured by how many orders it produces)? Do attorneys' characteristics matter? How will discovery proceed? When will settlement likely occur? How will the court rule on motions in limine? Are transfer motions welcomed? When should the parties move for summary judgment?

B. Data and Measures

1. Data.—To test our hypotheses, we developed a database of 690 federal district court cases involving veil piercing claims, filed in seventy-nine districts from 2000 to 2005.[118] These 690 cases represent an eighty-seven percent simple random sample of all eligible veil piercing cases within this time period. Using Westlaw's Trial Pleadings database,[119] we searched for pleadings involving veil piercing claims from federal district court cases.[120] Through this technique of identifying a body of cases for

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[117] *Id.* at 732.

[118] The districts with no cases represented in the final data are: Central District of Illinois, District of Alaska, District of Guam, District of Idaho, District of Montana, District of New Mexico, District of North Dakota, District of Northern Mariana Islands, District of Puerto Rico, District of Rhode Island, District of the Virgin Islands, Eastern District of Oklahoma, Western District of Arkansas, Western District of Tennessee, and Western District of Texas.

[119] As described by Westlaw, the Trial Pleadings Database has coverage beginning in 2000 and includes "selected pleadings, complaints, and answers filed in state and federal courts." Westlaw, Pleadings database content, http://web2.westlaw.com/scope/default.aspx?db=PLEADING&RP=/scope/default.wl&RS=WLW10.03&VR=2.0&SV=Split&FN=_top&MT=Westlaw&MST= (last visited Oct. 12, 2010). Conversations with Westlaw research representatives indicate that for veil piercing cases, this database covers or nearly covers the universe of federal claims. In particular, although not for specific attribution, a Westlaw representative with supervisory responsibilities over the PLEADINGS database said that it was designed to collect all federal complaints since 2000 that lawyers litigating commercial cases would have a plausible interest in learning about. Thus, PLEADINGS may exclude civil rights cases, or habeas petitions, or family disputes, but attempts to collect every tort, contract, or federal statutory claim brought against corporate defendants. With respect to State complaints, which may or may not be electronically filed, West currently collects material from larger urban centers, and consequently does not have comprehensive records from smaller jurisdictions.

[120] WL Pleadings search: ("alter ego liability" or pier! /s corpor! /s veil or "unity of interest" or (corpor! /s (facade or shell or sham or undercapitalized conduit)) and da(aft 01/01/2000) and da(bef 01/01/2006)). The search yielded some cases that were extraneous to our study, including six cases with a contingency veil piercing pleading, *see, e.g.*, Civil Complaint Jury Trial Demanded, Schuster v. Chattem Inc., No. 04-882, 2004 WL 2976589, *4 (W.D. Wash. 2004) ("In the event any parties are misnamed or not included herein, it is the Plaintiff's contention that such a misnomer and/or such parties

study based on the contents of the pleadings, we were able to capture nearly all cases where piercing is in dispute because, generally speaking, parties must plead veil piercing or waive the right to assert such claims in the litigation.[121]

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are/were 'alter egos' of parties named herein. Alternatively, Plaintiff contends that such 'corporate veils' should be pierced to hold such parties properly included in the interest of justice."), and five cases with reverse piercing claims.

[121] Our research indicates that requiring the pleading of a piercing claim (including in amendments) is the majority rule. *See, e.g.*, Scully v. US Wats, Inc., 238 F.3d 497, 515–16 (3d Cir. 2001) (waiver when not pled); Allen v. United Props. & Const., Inc., No. 07-214, 2008 WL 4080035, at *12–13 (D. Colo. Sept. 3, 2008) (construing a pro se plaintiff's complaint liberally but acknowledging that waiver was usually appropriate when a claim was not made in pleading); Sudamax Industria e Comercio de Cigarros Ltda. v. Buttes & Ashes, Inc., 516 F. Supp. 2d 841, 847 (W.D. Ky. 2007) (acknowledging that veil piercing must be pled in the complaint, but assuming it can be inferred from the complaint and analyzing whether there is an issue of material fact regardless); Luyster v. Textron, Inc., No. 06-4166, 2007 WL 1792505, at *2–3 (S.D.N.Y. June 18, 2007) (requiring amendment before advancing veil piercing argument); CSX Transp., Inc. v. Recovery Express, Inc., 415 F. Supp. 2d 6, 10 n.3 (D. Mass. 2006) (waiver); Wady v. Provident Life & Accident Ins. Co. of Am., 216 F. Supp. 2d 1060, 1067 (C.D. Cal. 2002) (general waiver rule waived due to short time period since filing); Ramirez v. DeCoster, 194 F.R.D. 348, 366 n.33 (D. Me. 2000) (waiver); Koblosh v. Adelsick, No. 95-5209, 1996 WL 745390, at *4 (N.D. Ill. Dec. 30, 1996) (waiver); Quinn v. Workforce 2000, Inc., 887 F. Supp. 131, 135 (E.D. Tex. 1995) (waiver); Forester & Jerue, Inc. v. Daniels, 409 So. 2d 830, 832 (Ala. 1982) (waiver); Devlin v. Ne. Mortgage Corp., No. 0301786705, 2006 WL 1390834, at *6 (Conn. Super. May 2, 2006) (waiver); Palm Bay Towers Corp. v. Brooks, 466 So. 2d 1071, 1073–74 (Fla. Dist. Ct. App. 1984) (waiver) Kansas Comm'n on Civil Rights v. Service Envelope Co., Inc., 660 P.2d 549, 555 (Kan. 1983) (waiver).

The minority rule, however, does seem to allow plaintiffs to first argue piercing claims at trial or in the jury instructions if the defendants have notice. *See, e.g.*, Fountain Lakes Assocs., L.P. v. Red River Roofing & Restoration, Inc., No. 02-2193, 2007 WL 2746702, at *10 n.10 (W.D. La. Sept. 17, 2007) (waiver if not pled in complaint or pre-trial order); Gill v. Byers Chevrolet LLC, No. 05-982, 2006 WL 2460873, at *4 (S.D. Ohio Aug. 23, 2006) (need only allege facts, not the words "veil piercing" or "alter ego," to preserve claim); Kimsey v. Akstein, 408 F. Supp. 2d 1281, 1302 n.14 (N.D. Ga. 2005) (no waiver with notice); McCormick v. City of Dillingham, 16 P.3d 735, 743 (Alaska 2001) (alter ego claim not waived when defendants had notice); Barton v. Moore, 558 N.W.2d 746, 748–50 (Minn. 1997) (no waiver if facts provide notice); Fischer v. Brancato, 147 S.W.3d 794, 800 (Mo. Ct. App. 2004) (no waiver under Missouri UFTA if the statutory cause of action is properly pled). Thus, we expect that 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.

There are two further points to explore regarding waiver and the sources of law. First, with respect to certain federal causes of action, federal courts may be developing a distinct federal common law of veil piercing. *See* United States v. Bestfoods, 524 U.S. 51, 63 n.9 (1998) (holding open the question of whether under CERCLA there ought to be a federal common law of veil piercing). However, we find no statistically significant relationship between federal causes of action and veil piercing success. 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. *See generally* Craig Green, *Repressing* Erie*'s Myth*, 96 CAL. L. REV. 595 (2008) (arguing that *Erie* poses no cognizable constitutional limits to the scope of federal common law making).

Our sample remains imperfect, despite its improvement upon existing empirical studies. First, we did not collect information about cases filed in state court that were not removed to federal court. We are able to control this potential bias in two ways: (1) by comparing diversity and federal question cases, and (2) by controlling for the presence of cases that were removed from a state court prior to the federal court proceedings. We discuss each of these in greater detail below. While no veil piercing study to date has found a difference between state and federal cases, it is at least possible that state court veil piercing cases proceed in a distinct manner. We assume that such state cases are more likely to involve smaller stakes and less sophisticated and less wealthy parties. Only as state courts begin to systematically make their court documents electronically available will docket-based empirical research be able to encompass state litigation. Second, we excluded cases where complaints or dockets are not electronically available[122]—mostly older cases—and cases involving multidistrict litigation.[123]

Despite these exclusions, we feel confident that ours is the most comprehensive and systematic dataset of veil piercing litigation yet assembled. It consists of 690 cases, alleging that the veils of 870 entities ought to be pierced, and involves over 1000 veil piercing and non-veil piercing motions.[124] For each case, we coded from the pleadings, the docket, and any other relevant case documents attached to the docket.[125] After retrieving the

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[122] We dropped fifty-seven cases from our sample because of a lack of a complaint or other key case documents. We also dropped cases that had duplicates or consolidated matches in the data (79) or were really state court cases (9). We also dropped several cases that failed to assert cognizable veil piercing claims. For example, a number of pro se plaintiffs asserted patently frivolous claims seeking to pierce the veil of the United States. Apparently, such complaints follow a form provided by "The Court Watcher" website, http://thecourtwatcher.com. *See* Posting of Dave Hoffman to Concurring Opinions, http://www.concurringopinions.com/archives/2008/07/oddities_from_d_1.html (July 7, 2008, 13:08).

[123] Ninety-three cases involved in multidistrict litigation were dropped from our sample. Because these cases involve numerous judges, parties, districts, and often years of litigation, they pose tremendous coding and analysis challenges. More importantly, because these cases are simply not comparable to the other cases within our data, we believe that our decision to drop them is justifiable.

[124] While previous studies, like Thompson's, were advantaged by longitudinal breadth—(he examined opinions available on Westlaw from 1930 to 1985 and found 1600 corporate law cases with veil piercing issues)—only 647 of his observations are federal cases (trial and appellate combined) and only 401 are trial court cases (state and federal combined). Over this extended period of time, Thompson was able to analyze just a few federal district court piercing cases each year. *See* Thompson, *supra* note 1, at 1044 n.47 ("The earliest date of the cases varied depending on the breadth of the various Westlaw libraries; there were almost no cases prior to 1930 and only a handful each year until the mid-1950s."). In contrast, our study has an average of nearly 200 federal district court cases per year, a tremendous increase no matter the measure one chooses.

[125] Our data collection from these documents focuses on case and party information that is critical to understanding the evolution of piercing claims *and* the outcome of those claims in a case. For example, we coded: judge and magistrate name; district name and office number; causes of action in all complaints and amended complaints; basic case information (nature of suit, type of jurisdiction, jury demand); method by which case terminated; information on every party, including their status and type; where a party is a business defendant, the company's state of incorporation or organization, and its type (e.g., close, family, public); where a party is an individual defendant, whether he or she was a manager;

primary pleading from Westlaw, we turned to PACER (Public Access to Court Electronic Resources) to retrieve the case docket and other case documents. As with Westlaw's Trial Pleadings Database, PACER and many of its federal district court case documents are generally useful only from 2000 onward.[126]

2. Common Measures.—To test our hypotheses, we rely on a number of common covariates:

a. Judge ideology.—Judge ideology, a variable in each of our multivariate models, is measured using the Judicial Common Space (JCS) scores. JCS Scores are coded using the methodology first described by Giles and co-authors,[127] and later implemented, expanded, and made publicly available by Epstein and colleagues.[128] In coding these scores for our data, we relied on the NOMINATE Common Space scores.[129] If an appointed judge has at least one home state senator from the same party as his or her appointing president, the judge receives the NOMINATE score from that senator (or, if both senators are from the president's party, their average score).[130] If, however, both senators are from the opposite party of the president, the judge receives the president's NOMINATE score.[131] JCS scores have a theoretical range from -1 to 1, with -1 being the most liberal and 1 being the most conservative.[132] Within our data, *judge ideology* ranges from -0.625 to 0.702.

For the cases in the dataset where the only assigned judge in the case is a magistrate judge rather than a district court judge (due to the consent of the parties), we took an additional step to capture ideology.[133] Unlike Article III district court judges, magistrates are neither life-tenured nor appointed through the federal political process. Rather, magistrates generally serve eight-year terms after being elected by a majority vote of the judges in their district.[134] Since magistrates are selected in this way, we coded the

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grounds for piercing claims; and, for every piercing activity, stage of case, suing party, opposing party, and resolution.

[126] While many pre-2000 district dockets are available on PACER, other case documents are generally only available (via hyperlinks in the docket) from 2000 onward. Using PACER is also cost prohibitive, with each page costing $0.08 to view.

[127] Micheal W. Giles, Virginia A. Hettinger & Todd Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623, 629–32 (2001).

[128] Lee Epstein, Andrew D. Martin, Jeffrey A. Segal & Chad Westerland, *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303 (2007).

[129] *See* KEITH POOLE & HOWARD ROSENTHAL, COMMON SPACE DW-NOMINATE SCORES 1ST TO 110TH CONGRESSES (2009), http://voteview.com. (Click on NOMINATE Data, Roll Call Data, Software, then click on Common Space DW-NOMINATE Scores 1st to 110th Congresses).

[130] Epstein et al., *supra* note 128, at 306.

[131] *Id.*

[132] *Id.* at 307.

[133] For previous usage of this method, see Boyd, *supra* note 113, at 19.

[134] *Id.*

ideology of these actors using the median district court judge's JCS score for the year that they assumed their position.[135]

b. Ideological distance.—For our models related to case outcomes or terminations, we control for the possible constraining effect of the ideologies of the district court judges' hierarchical superiors, the judges on the circuit court of appeals. Specifically, we measure this effect as the difference between the ideology of the district court judge and that of the median judge on the circuit court immediately superior to that district judge.[136] As with *judge ideology*, the ideology components of these distance scores are based on the judges' JCS scores.[137] Within our data, *ideological distance* ranges from -0.943 to 0.985, where a negative score represents a relatively liberal district court judge serving within a relatively conservative circuit and a positive score represents the opposite.

c. Judge sex and judge race.—In each of our models, we control for the possible influence of the sex and race of the assigned judge. Retrieved from the Federal Judicial Center's Biographical Directory of Federal Judges,[138] each variable is dichotomous. Female judges and non-white judges (Asian-American, African-American, and Hispanic) are both coded as 1. Twenty-three percent of our cases have a female district court judge and just under fourteen percent are assigned to a minority judge.

d. Entity structure.—To code entity structure for parties against whom piercing is sought, we relied on the details provided by the parties in their court documents. On occasion, these documents were ambiguous on the structure of an entity. To supplement our coding, we relied on web-based research and Dunn and Bradstreet's (D&B) Selectory Database.[139] That database contains twenty-three million records, and contains information about total sales, total employees, place of organization and (often) incorporation.[140] In the cases in our sample, approximately eighty-five percent of the entities to be pierced are corporations, thirteen percent are LLCs, and just over two percent are other forms.

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[135] Although a relatively novel and imprecise proxy, this measurement of magistrate ideology captures the political and legal process surrounding magistrate appointments in a way that mirrors JCS scores for district court judges.

[136] Similar measures have been used in the literature. *See, e.g.*, Boyd, Epstein & Martin, *supra* note 90, at 15 n.22; Boyd & Spriggs, *supra* note 53, at 63–73.

[137] *See* Epstein et al., *supra* note 128, at 306–09; Giles et al., *supra* note 127, at 629–32.

[138] Judges of the United States Courts, http://www.fjc.gov/public/home.nsf/hisj (last visited Sept. 22, 2010).

[139] Temple Law School's Law Library generously purchased access to the product. For more information, see Selectory Business Database: Product Overview, http://www.selectoryonline.com (last visited Sept. 22, 2010).

[140] Selectory FAQs, http://www.selectoryonline.com/Selectory/ExternalPages/FAQs.aspx (last visited Sept. 22, 2010).

As illustrated in Figure 3, corporations and LLCs exhibit relatively similar patterns: both are owned largely by individual shareholders (seventy percent for LLCs versus sixty-seven percent for corporations). Other entities, which for our purposes include foreign companies and a handful of nonprofits, do not match this pattern; instead, corporate ownership predominates.

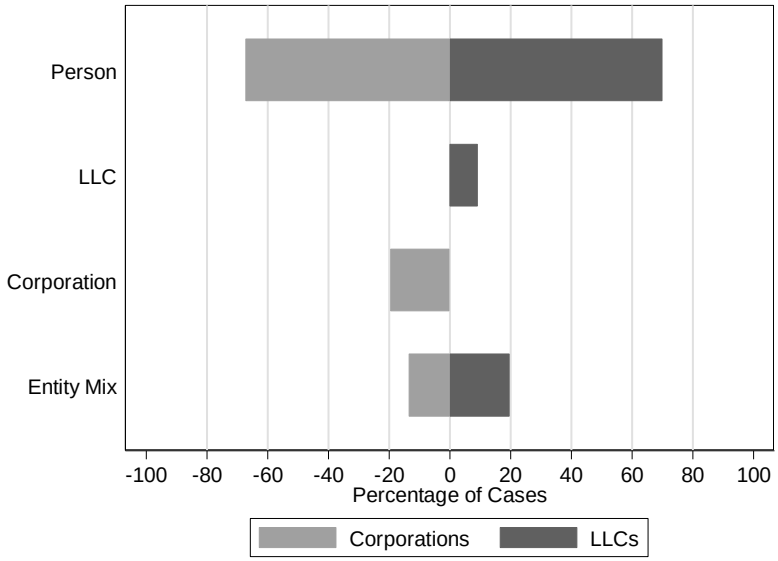
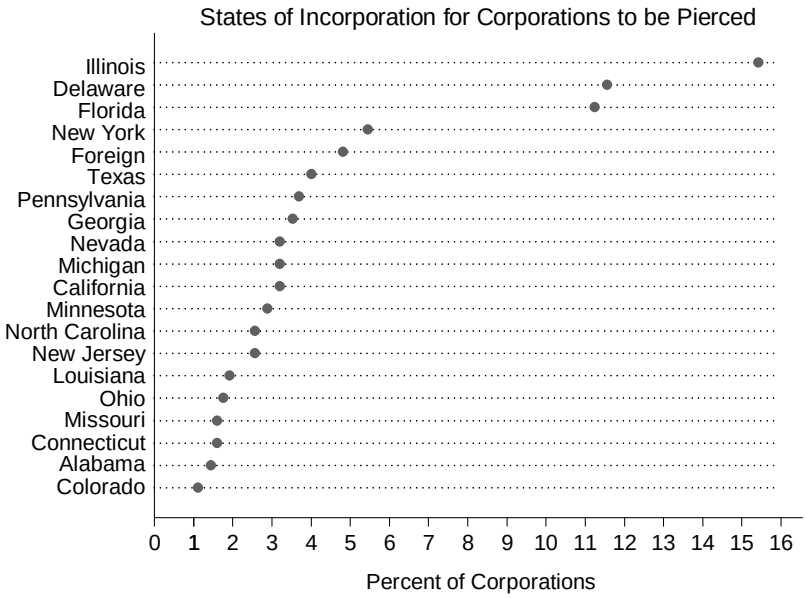
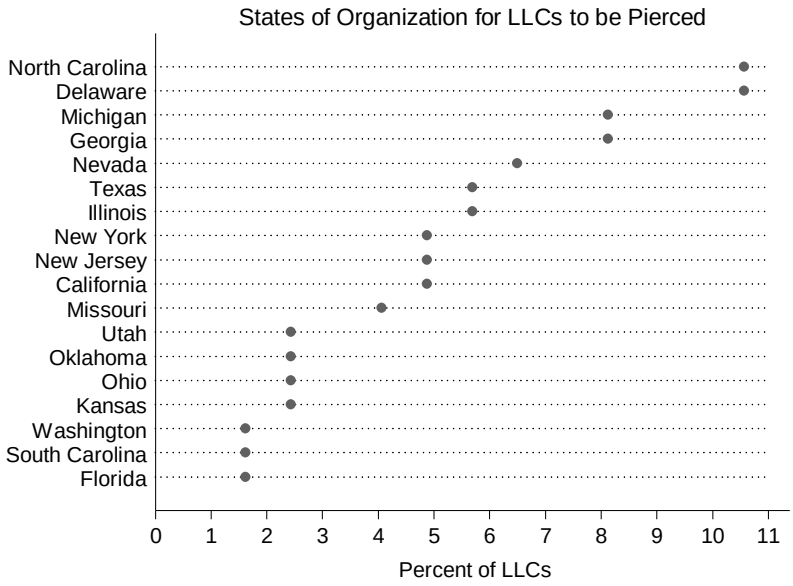


Figure 3: The shareholder makeup of LLCs and corporations sought to be pierced in our cases. This Figure drops other entities (including mostly foreign companies) from the analysis. "Entity Mix" refers to groupings of individual and entity shareholders or LLCs and corporations together as shareholders.

Figures 4 and 5 illustrate that these entities are incorporated and organized in multiple states. The differences between Figures 4 and 5 likely reflect local preferences for one organizational form over another.





Figures 4 (top) and 5 (bottom): States of incorporation and organization for corporations and LLCs to be pierced in our data. The top, Figure 4, shows the percentage of corporations to be pierced that are incorporated in a particular state. The bottom, Figure 5, indicates the percentage of LLCs to be pierced that are organized in a particular state. Both Figures omit states in our data with <1% of total entities to be pierced.

e. Veil piercing grounds.—In each case, coding for failure to observe formalities, undercapitalization, and domination and control came from the document that first explicated a rationale for piercing the corporate veil. This document was nearly always a complaint.[141] For each of these three dichotomous variables, coding is equal to 1 if the piercing ground is present.

f. Defendants' size.—To measure the size of an entity, we develop a variable based on the number of the entity's employees. Coded from the D&B database and other sources, we collected information about entity size for over eighty percent of the firms to be pierced in our data.[142] Of those, fifty-five percent employed ten individuals or less. Twenty-six percent had 11–50 employees; six percent had 51–100 employees; seven percent had 501–1000 employees; and four percent had more than 1000 employees. Because of the high variance in these data, we measure defendants' size by taking the log of the defendant's total number of employees.

g. Defendants' business lawyering.—As noted above, we also consider the care with which the entity observed formal legal requirements. Such formalities, like having a complete board book and holding regular meetings, are quite difficult to observe without insider information about the firms in question, something that is simply not systematically available. We measure this variable by the presence of a distinction between place of incorporation or organization and place of primary operation. As many have observed, firms tend to reincorporate outside of their home state (typically Delaware) as they become larger, have access to more sophisticated business lawyers, and can participate in the market for corporate control.[143] This measure thus functions as an admittedly imperfect proxy for the legal formalities present in a firm and the sophistication of the business lawyers to which the firm has access.

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[141] Rarely, the first mention of veil piercing was in a counterclaim. In such cases, for our purposes we treated the counterclaim plaintiff as the plaintiff and the counterclaim defendant as the defendant.

[142] For example, we also collect information about the number of employees from bankruptcy filings, corporate webpages, Frasers.com newspaper articles, and the complaints themselves. Most of the missing companies are (1) entirely defunct and absent from the historical record, (2) bankrupt but with insufficient information to recover financial and employee data, (3) foreign, or (4) subsidiaries of larger companies in the data. To deal with these missing data, we utilize two techniques. In our primary analyses, we engage in the traditional, albeit less than satisfactory, practice of engaging in list-wise deletion of missing values. *See* Gary King, James Honaker, Anne Joseph & Kenneth Scheve, *Analyzing Incomplete Political Science Data: An Alternative Algorithm for Multiple Imputation*, 95 AM. POL. SCI. REV. 49, 49 (2001) (critiquing the list-wise deletion method of handling missing data). Doing this means that all observations with missing values are dropped from the analyses. In our supplemental analyses, we engage in what is known as multiple imputation, where the missing values are imputed into our data set (along with corresponding statistical uncertainty), thus allowing us to analyze our complete set of data. *See id.* at 53–56. As our regression results in the Appendix indicate, our results from both methods of analysis are very similar.

[143] *See, e.g.*, Dammann & Schündeln, *Incorporation Choices*, *supra* note 34, at 7–8.

Our defendant business lawyering variable is coded as a dichotomous variable, with a value of 1 indicating that an entity is incorporated or organized in a state different from the one in which it primarily operates. As illustrated in Figure 6 below, we observe entities operating in many different states. For each state below, we describe the degree to which we observe entities incorporated or organized in a state different from the one in which they were operating.

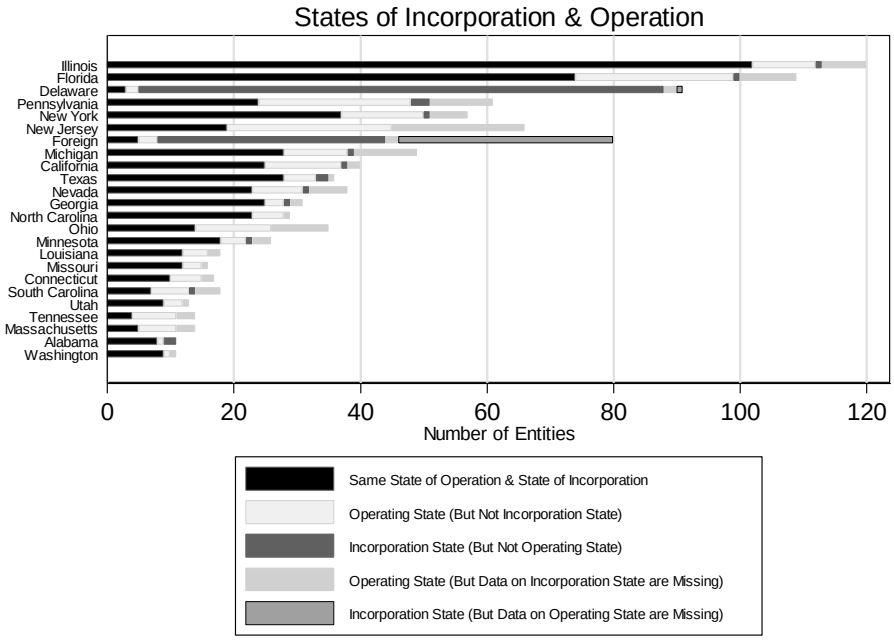

Figure 6: Stacked bar chart of states of operation and incorporation/organization for the entities to be pierced in our data.

h. Causes of action.—To measure the effect of the type of creditor in a veil piercing action, we develop variables for involuntary and voluntary creditors. Seeking to expand this category beyond the ordinary raw focus on contract and tort causes of action so that it matches better with the theory,[144] we define a plaintiff as making an "involuntary creditor" claim if the plaintiff asserted a claim that generally arises out of an unexpected injury. We include any cause of action under a regulatory schema,[145] intellec-

[144] *See* Hansmann & Kraakman, *supra* note 36, at 1880–81.

[145] This includes product tampering in violation of a federal regulation, unauthorized practice, conservation acts, communication acts, and state food and meat quality laws.

tual property,[146] consumer protection,[147] or common law tort.[148] We define a "voluntary creditor" claim, by contrast, as one implying a pre-existing relationship between the parties: any real property,[149] fraud,[150] employment,[151] equitable,[152] agency,[153] fiduciary duty,[154] labor law,[155] contract,[156] misrepresentation,[157] or securities law claim.[158]

III. RESULTS

A. Content of Veil Piercing Complaint

As we have explained, we have certain expectations about the content of veil piercing complaints, which arise mostly from our view that the conventional wisdom will influence filing practice.

While tort and contract claims receive the greatest attention in the veil piercing literature, they are certainly not the only causes of action that signal veil piercing activity. Indeed, as Figure 7 indicates, a variety of other causes of action are well represented in our dataset's complaints. For example, fraud, labor law, and equitable claims like promissory estoppel occur just a little less frequently than contract and tort claims.[159] Figure 8

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[146] This includes patent infringement, copyright infringement, trademark infringement, and dilution.

[147] This includes unfair competition, deceptive trade practices, false advertising, consumer fraud, and false designation of origin.

[148] This includes product liability, failure to warn, tortuous interference, and defective design.

[149] This includes abandonment, restrictive covenants, real estate settlements, liens, replevin, and eviction.

[150] This includes deceit, fraudulent conveyance, fraudulent concealment, fraudulent inducement, fraud, and misrepresentation.

[151] This includes the Americans with Disabilities Act, 42 U.S.C. §§ 12111–17 (2006), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2006), as well as retaliation, wrongful discharge and unpaid wages.

[152] This includes unjust enrichment, quantum meruit, quasi-contract, promissory estoppel, equitable liens, and equitable relief.

[153] This includes agency, respondeat superior, and vicarious liability.

[154] This includes direct or derivative fiduciary causes of action, trust claims, and fiduciary obligations under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1104 (2006).

[155] This includes most ERISA claims, claims under the Consolidated Omnibus Budget Reconciliation Act (COBRA), Pub L. No. 99-272, tit. X, 100 Stat. 82, 222–27 (1986), National Labor Relations Board actions, and breaches of collective bargaining agreements.

[156] This includes breaches of contracts, express and implied warranties, indemnification, and creditors' claims for nonpayment.

[157] This includes intentional, negligent, and fraudulent misrepresentation.

[158] This includes claims under the Securities Act of 1933, 15 U.S.C. § 77 (2006), and the Securities Exchange Act of 1934, 15 U.S.C. § 78 (2006).

[159] To explain the puzzling number of ERISA cases, particularly from the Northern District of Illinois, we spoke on background with a lawyer who works at a union-side labor firm in Chicago, which monthly files "dozens" of ERISA suits in federal court in that district. He explained that a small number of union-side firms routinely plead veil piercing in multi-employer bargained plans. Such cases involve very small defendants who are not expected to appear in court, leading to default. The default enables

displays the areas of intersection of these causes of action, where claims involve both involuntary and voluntary creditors. As the figure indicates, over thirty percent of our cases involve both types of creditors, while an additional eight percent involve neither.

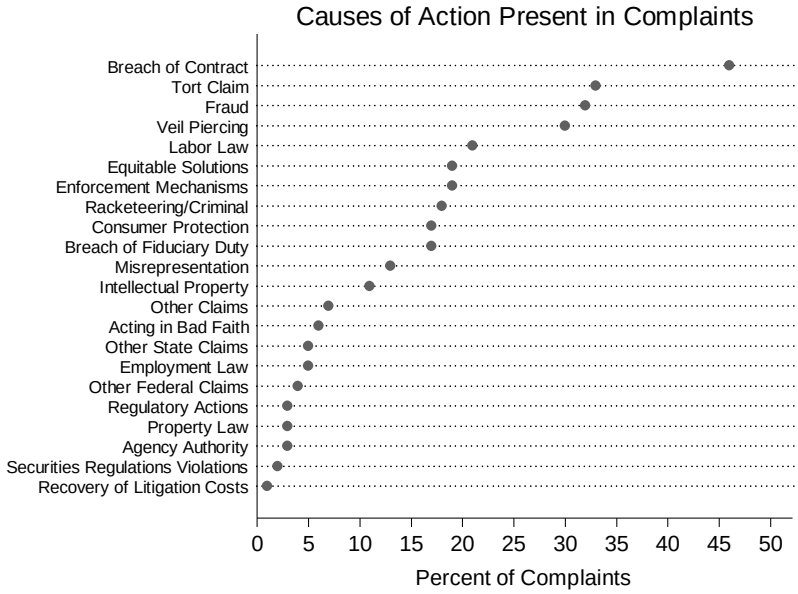

Figure 7: Dot plot of the causes of action present in the complaints in our data.

the plaintiffs to serve a citation to discover assets and garnish wages of the individual owners. Our source believed that defendants are overall more likely to settle once such garnish orders are issued.

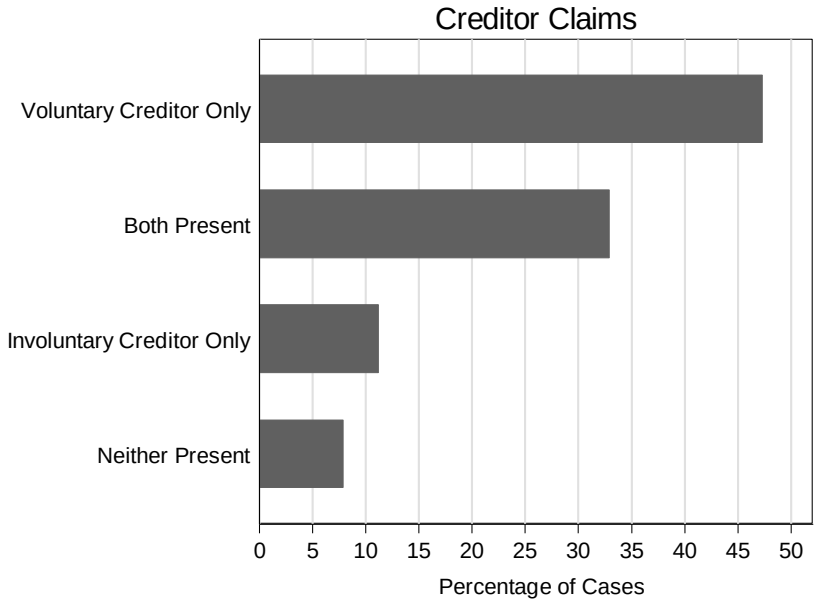

Figure 8: Bar chart of the incidence of voluntary and involuntary creditor claims in the complaints in our data.

Next, we examine how plaintiffs shape the veil piercing factors they bring in their complaints, depicted in Figure 9. As we predicted, complaints advance causes of action that basically replicate the factors incident in published opinions (Figure 2).[160] This is an interesting result. It suggests that

[160] Consider the following table:

Ground	Thompson Original Rank (Figure 1)	Thompson Revised Rank (Figure 2)	Complaint Rank (Figure 9)
ALTER EGO	2	2	1
FRAUD	Not present	Not present	2
DOMINION	11	1	3
INFORMALITIES	9	5	4
LACK OF SEPARATION	7	4	5
UNDERCAPITALIZATION	8	6	6
INSTRUMENTALITY	1	7	7
FAÇADE, SHELL, OR DUMMY	5	8	8
INTERTWINING	6	9	9
UNITY OF INTEREST	Not present	Not present	10
SHAM	Not present	Not present	11
OVERLAP BETWEEN COMPANY & MANAGEMENT	10	11	12
MISREPRESENTATION	3	3	13

the grounds asserted by plaintiffs at the beginning of the case survive to the case's termination. Given how cheap and easy it is to assert a particular ground, the similarity between complaints and opinions suggests in turn that the veil piercing factors instantiate an underlying pattern of facts—they are more than mere surplus words in a particular complaint. Notably, the factors' distribution appears to match with the recommendations of practical publications like form complaint books and attests to the importance of such practitioner materials.[161]

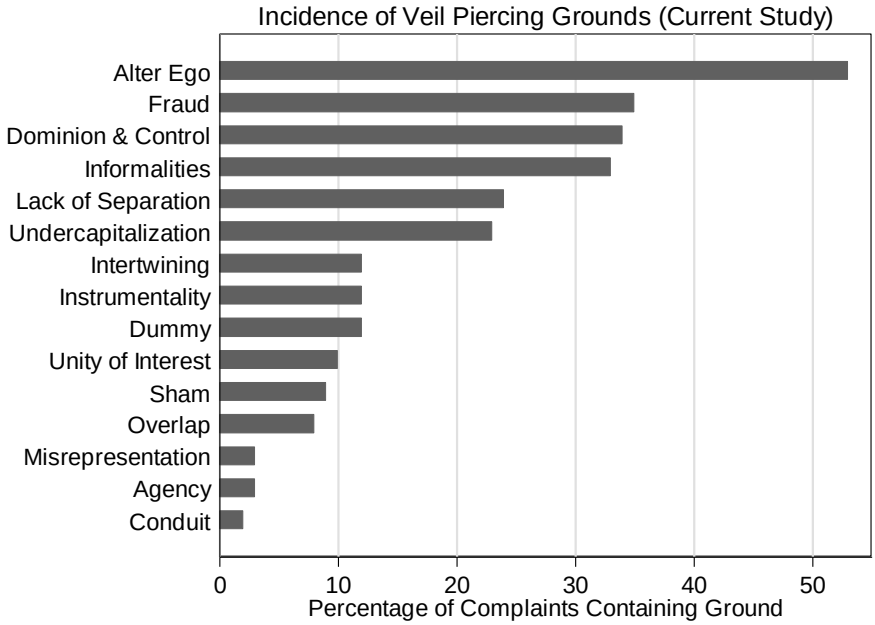

Figure 9: The percentage of complaints in our data that contain a particular veil piercing ground.

AGENCY	4	10	14
CONDUIT	Not present	Not present	15

[161] *See supra* note 28 for a discussion of the content of these form complaint books.

B. Veil Piercing Activity and Success

We coded the results of over 550 veil piercing motions and 580 non-veil piercing motions.[162] Figure 10 illustrates our dataset's veil piercing motions and their disposition.

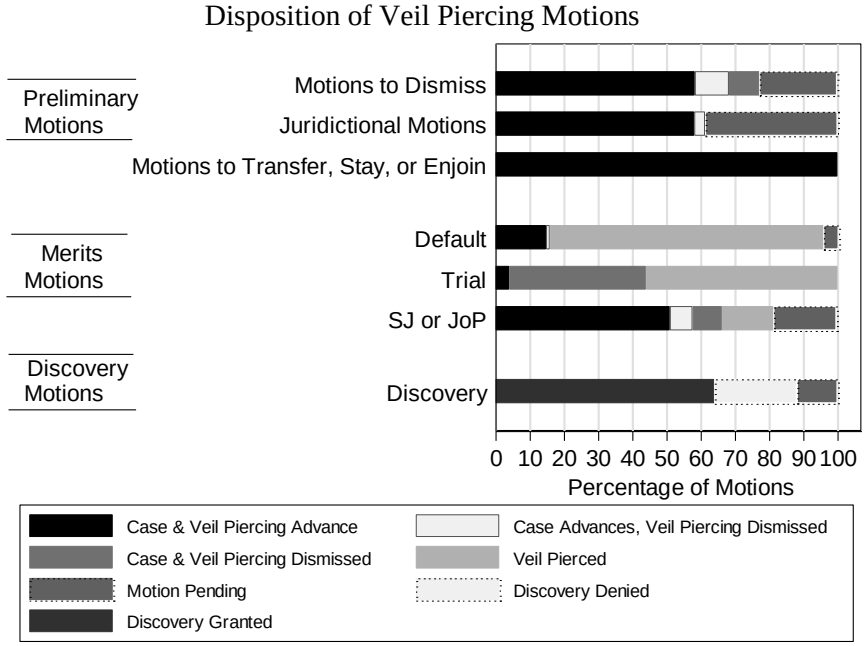

Figure 10: The disposition of veil piercing motions. "SJ" refers to motions for summary judgment, and "JoP" refers to motions for judgment on the pleadings. Trial motions include both jury trial verdict forms, pre-trial motions in limine, and post-trial motions for new trial.

Overall, about half of all veil piercing motions result in interstitial successes; about fifteen percent involve interstitial or terminal losses; ten percent succeed on the merits (twenty percent if default judgments are included); and the remainder were pending at the time of settlement. Looking only at resolved motions, and excluding default judgments, we see a story of disproportionate success: plaintiffs prevailed on approximately eighty-five percent of all veil piercing motions in our dataset. Many *cases*

[162] We coded non-veil piercing motions for control purposes, narrowing our scope to motions where (1) there was no veil piercing issue presented in the motion or resolution; and (2) the motion was significant to the case. That is, we ignored docket-management motions, minor discovery disputes, and motions for reconsideration.

had their veil piercing claims still "alive" at the time of settlement. When these are added to the cases which achieved a default judgment or an actual merits-based veil piercing, one way to think about the success rate is to note that in nearly seventy-eight percent of litigations, plaintiffs ultimately realized some value from their veil piercing claims.

Non-veil piercing motions paint a less dramatic story. Figure 11 displays the three major motion types.

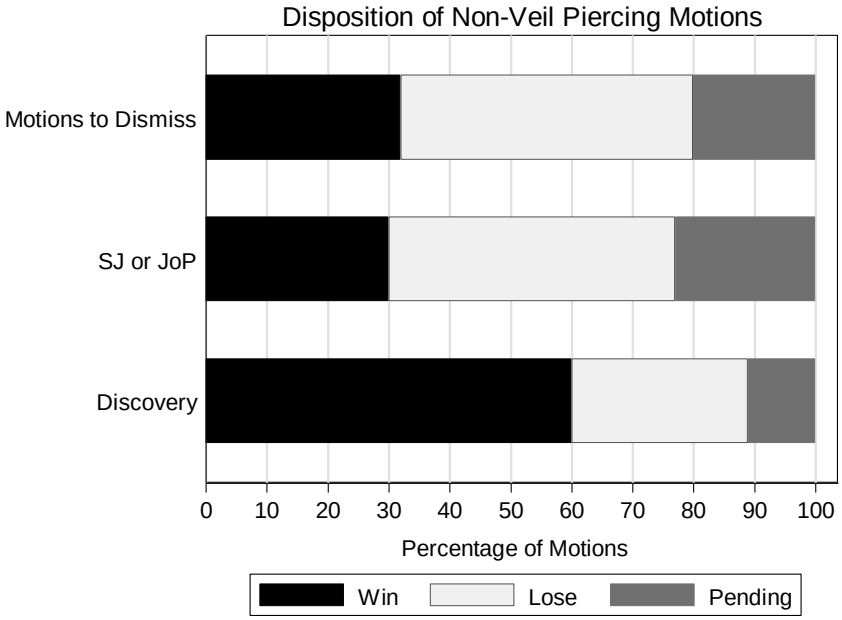

Figure 11: Selected non-veil piercing motions and their success rates. A win here means that the moving party prevailed; in the case of a motion to dismiss, the moving party was always the defendant. "JoP" refers to motions for judgment on the pleadings.

Plaintiffs were somewhat less likely to win non-veil piercing discovery than veil piercing discovery (a sixty-eight percent success rate in the non-veil piercing context versus seventy-three percent in resolved veil piercing discovery motions). These plaintiffs were similarly less likely to be successful at fighting off motions to dismiss (sixty percent plaintiff success rate

versus eighty-eight percent) and summary judgment (sixty-two percent versus ninety percent) outside of the veil piercing context.[163]

We now turn to a more systematic examination of veil piercing success, both in terms of interstitial motions and ultimate case outcomes.

1. Interstitial Veil Piercing Activity.—We first turn to a closer examination of motions relating to veil piercing. We use a logistic regression model. Our dependent variable, the outcome of veil piercing motions, is coded as 1 for motions that are successful from the stance of the party wishing to pierce the corporate veil. From this perspective, we define success to mean either the movant was granted affirmative motions (i.e., those asking for veil piercing relief) or the opposition was denied passive motions (i.e., those asking for veil piercing relief to be denied or dismissed). Motions that fail to obtain affirmative or passive veil piercing relief are coded as 0.[164] Unresolved motions are dropped from the analysis. We cluster our observations by case and compute robust standard errors to account for the lack of observation independence between numerous veil piercing motions arising from the same underlying case.[165]

The results of this regression analysis are reported in the Appendix.[166] Overall, the model performs quite well, reducing error in prediction by nearly twenty-two percent. As these results indicate, a number of our variables reach statistical significance (at $p \leq 0.05$ (two-tailed)), including judge ideology, defendant firm size, voluntary creditor-based causes of action, and the presence of shell, façade, and undercapitalization grounds for piercing in the complaint. We do not find statistical significance, however, for our variables regarding entity choice, shareholder identity, defendants with business lawyering, judge gender or race, or appellate court control. Nor do we find an increased incidence of success when failure to observe formalities, inadequate capitalization, and domination and control were cited as veil piercing grounds against corporations compared to LLCs.[167]

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[163] These quantities treat motions where the veil piercing claims were dismissed but the case proceeded as a plaintiff "victory" for purposes of comparison with non-veil piercing motions. They also exclude pending motions, meaning that those motions must be subtracted out of the denominator shown in the figures to calculate the percentages presented in the text.

[164] For more details on our definition of interstitial veil piercing success, see *supra* text accompanying notes 53–63.

[165] By clustering in this way, we recognize that observations from the same underlying case are not independent, and thus that the standard errors resulting from a model that does not account for this will be inaccurate. By clustering, our models yield robust standard errors (a.k.a. Huber–White standard errors), and thus are appropriate given the violation of independence. *See* J. SCOTT LONG & JEREMY FREESE, REGRESSION MODELS FOR CATEGORICAL DEPENDENT VARIABLES USING STATA 86 (2d ed. 2006).

[166] As noted above, our Appendix also includes the regression results for our multiple imputation modeling.

[167] Because of the necessitated interactive relationship between these piercing grounds and the type of entity, we estimate a separate model with these variables in it. The results from this model are avail-

While a coefficient reported in a logistic regression provides evidence of that variable's statistical significance and the direction of its influence, the coefficient cannot be directly interpreted for its substantive effect on the incidence of a dependent variable.[168] To that end, we simulate the predicted probability that a veil piercing motion will be successful based on the added presence of our statistically significant variables. Thus, while the regression tables are available in the Appendix, our focus for the remainder of our discussion will rest on the substantive effects of our statistically significant variables of interest as reported through our predicted probabilities.

Figure 12 displays the predicted probability that a veil piercing motion will be successful conditioned on the changing values of entity size. As expected, the size of the entity to be pierced has an important effect on the likelihood of a veil piercing motion being successful. In particular, as an entity grows in size (as measured by the number of its employees), it is far less likely to have its veil pierced during interstitial case activity. For example, the figure indicates that the probability of successfully asserting a veil piercing motion against companies with less than 300 employees is around 0.80. For companies with more than 2100 employees, that number drops below 0.20. While the confidence intervals surrounding the estimates on the right side of the figure are quite large (due to the relatively small number of large firms in our data), the downward slope of the results is consistent and the overall effect of entity size remains impressive.

able in the Appendix. It is worth noting that while the interaction of a corporation with undercapitalization piercing grounds is statistically significant compared to LLCs interacted with undercapitalization (the baseline), further investigation reveals that this effect is driven entirely by the undercapitalization ground, not entity structure.

[168] *See* J. SCOTT LONG, REGRESSION MODELS FOR CATEGORICAL AND LIMITED DEPENDENT VARIABLES 34–84 (1997).

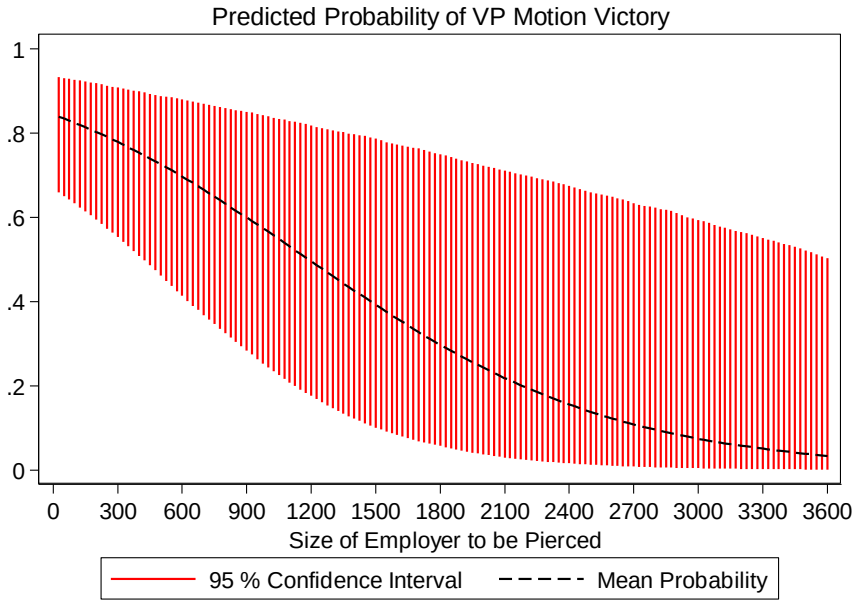

Figure 12: Predicted probability that a veil piercing motion will be successful conditioned on the changing value of the size of the entity to be pierced. Other variables not directly modeled here are held at their respective mean and modal values for purposes of the simulation.[169]

We also find that judge ideology has a significant, but surprising, effect on the likelihood of veil piercing motion success. The substantive effect of this variable is plotted in Figure 13, which depicts judge ideology on the x-axis (moving from most liberal on the left (-0.6) to most conservative on the right (0.7)) and the predicted probability of a veil piercing motion being granted on the y-axis. Figure 13 shows that as a judge's ideology moves in a conservative direction, the mean likelihood of interstitial success increases. Motions in cases with very liberal judges have a mean predicted probability of being successful of under 0.5, while that probability is around 0.75 for moderate district court judges and near 0.95 for conservative district court judges.[170]

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[169] Predicted probabilities were computed using SPost and Clarify in Stata. *See* LONG & FREESE, *supra* note 165, at 75; Gary King, Michael Tomz & Jason Wittenberg, *Making the Most of Statistical Analysis: Improving Interpretation and Presentation*, 44 AM. J. POL. SCI. 347, 351–53 (2000).

[170] The large confidence interval on the left side of the figure is likely due to the large variation in veil piercing motion outcomes in cases with liberal judges. As the presiding judge becomes more con-

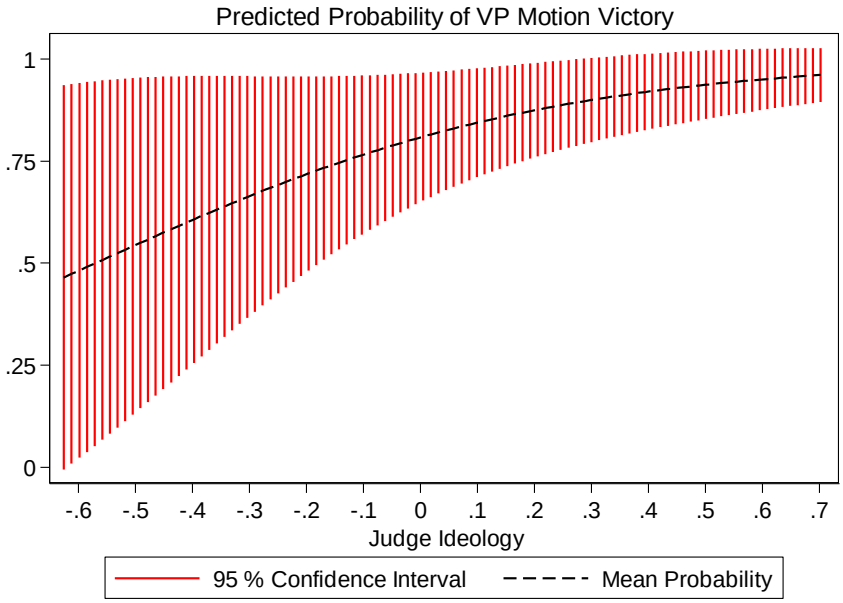

Figure 13: Predicted probability that a veil piercing motion will be successful conditioned on the changing value of the ideology of the case's presiding district court judge. Other variables not directly modeled here are held at their respective mean and modal values for purposes of the simulation.

We turn next to the results plotted in Figure 14.[171] The top portion of the figure plots the effect of adding a voluntary creditor to a veil piercing complaint.[172] On average, a veil piercing motion in a case in which the plaintiff asserted a claim as a voluntary creditor is over seventeen percent more likely to be successful than in a case without a voluntary creditor. The confidence interval plotted around that mean prediction does not intersect with 0, indicating that this effect is indeed distinguishable from 0.

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servative, that variability disappears from our data, and, as a result, we can speak about the predicted judicial behavior with a great deal more confidence.

[171] The value of interest, the difference in the predicted probabilities, has a separate distribution from the individually computed predicted probabilities, with its own mean and confidence interval. *See* Peter C. Austin & Janet E. Hux, *A Brief Note on Overlapping Confidence Intervals*, 36 J. VASCULAR SURGERY 194, 194 (2002); Lee Epstein, Andrew D. Martin & Matthew M. Schneider, *On the Effective Communication of the Results of Empirical Studies, Part I*, 59 VAND. L. REV. 1811, 1815 (2007). Here, the interval for the value of interest is depicted in the figure. Because this interval does not contain 0, we can say that, statistically speaking, the predicted probabilities for the four variables plotted in Figure 16 are different from one another.

[172] The variable for involuntary creditors does not reach statistical significance.

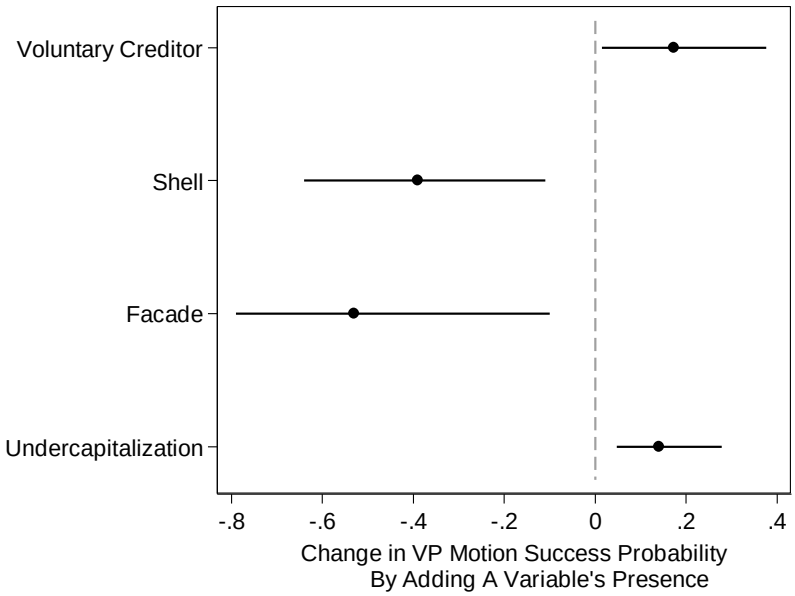

Figure 14: Change in the predicted probability that a veil piercing motion will be successful based on a voluntary creditor, shell, façade, or undercapitalization piercing ground being present. Solid dots in the figure represent the mean change in the predicted probability while the black line around that dot represents the 95% confidence interval on the difference. Other variables not directly modeled here are held at their respective mean and modal values for purposes of the simulation.

The bottom portion of Figure 14 contains the plots for the substantive effect of the three veil piercing grounds that have a statistically significant effect on veil piercing motion success: shell, façade, and failure to adequately capitalize (or undercapitalization). As can be seen, the addition of façade and shell grounds to a veil piercing complaint each provide strong negative effects on the likelihood of successful veil piercing motions in that case. A shell ground decreases the likelihood of veil piercing motion success by over thirty-nine percent, on average, and a façade ground does the same by nearly fifty-three percent, on average. Stating undercapitalization grounds has the opposite effect, albeit more modestly. The addition of an undercapitalization ground to a veil piercing complaint makes an interstitial veil piercing motion fourteen percent more likely to be successful.

To provide an even more intricate test of the potential effect that the type of entity structure to be pierced and the identity of the shareholder ownership have on veil piercing motion success, we developed a series of

variables representing each possible combination of entity–shareholder relationship. The results for the regression with these variables are reported in Model 2 in the veil piercing motion table in the Appendix. While many of these variables are not statistically or substantively different from one another, we do find that corporations owned by artificial shareholders are more likely to be subject to successful veil piercing motions than LLCs owned by artificial shareholders.

2. Outcome-Based Veil Piercing.—For our final inquiry, we examine the likelihood of case-level veil piercing success. As with interstitial veil piercing activity, we expect that our above hypotheses will be important determinants of outcome success. For our purposes, veil piercing is considered a success at the case level under two sets of conditions: (1) when the veil has been affirmatively pierced through veil piercing motion activity and (2) when, after veil piercing has been litigated on the record (through motion activity), the case settles while veil piercing is still "alive" in the case (i.e., having never been dismissed or denied). Given the limited information that exists for the terms of settled cases, we believe this definition strikes a good balance by capturing as veil piercing successes only a conservative set of settlements where veil piercing was likely on the negotiation table. The Appendix includes an alternative set of results based on the coding of veil piercing success both more narrowly (excluding all settlements) and more broadly (including all settlements where veil piercing is still "alive," regardless of the affirmative presence of veil piercing motions in the case) to help mollify concerns that our coding mechanism is driving our results.

Whether a case ends with a veil piercing is our dependent variable, a dichotomous one that is coded as 1 if there is veil piercing success. As in our interstitial veil piercing inquiry, we model the effects of our covariates of interest on success using logistic regression with robust standard errors clustered on individual cases. The regression results for this model, which provide a modest two percent reduction in prediction error, are reported in the Appendix.

The veil piercing outcome model provides some support for our hypotheses.[173] Entity size, defendants with business lawyering, and undercapitalization all reach statistical significance and behave in the expected direction. As we discuss in more detail below, ideological effects, both from the district court judge and the supervising circuit court, have statistical power, but indicate an ideological effect that is opposite from what has been found in previous veil piercing work.

[173] As with our veil piercing motions inquiry, we do not find support here for our conditional hypothesis about entity-type veil piercing grounds. The statistically significant effect reported in the Appendix regression table for this model (the relationship of corporation-undercapitalization to LLC-undercapitalization) is once again driven nearly entirely by the effect of undercapitalization as a piercing ground.

Figure 15 depicts the predicted probability that a case will have ultimate veil piercing success based on the size of the entity to be pierced. Just like in the veil piercing motion context, this probability decreases as the entity to be pierced increases in size. Very small firms have a probability of being pierced of around 0.20; that number quickly approaches 0 as firm size increases.

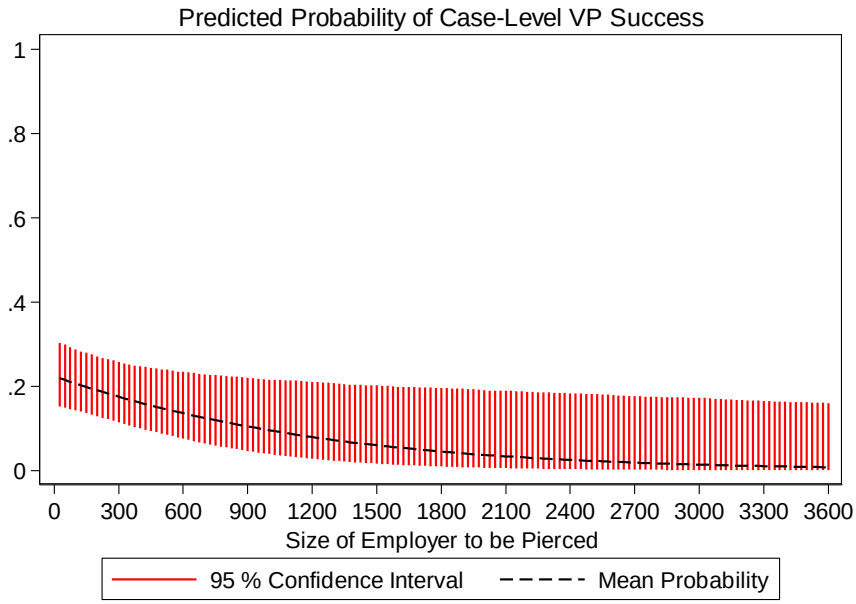

Figure 15: Predicted probability that a veil piercing case will be successful conditioned on the changing value of the size of the firm to be pierced. Other variables not directly modeled here are held at their respective mean and modal values for purposes of the simulation.

Ideological considerations also appear to be operating at the case outcome level. Our variable measuring the ideological constraint of the circuit court on a district court judge (measured as the ideological distance between a district court judge and the median judge in his circuit) is statistically significant (at $p \leq 0.05$ (two-tailed)), and our district court judge ideology variable is marginally significant ($p = 0.077$). The substantive effect of each of these is worth additional discussion.

As Figure 16 clarifies, the more conservative a district court judge is, the more likely the case before him will have case-level veil piercing success. This result, of course, mirrors that in the veil piercing motion context. While the most liberal judge's case has around a 0.15 probability of having ultimate veil piercing success, the most conservative judge's case has around a 0.30 probability.

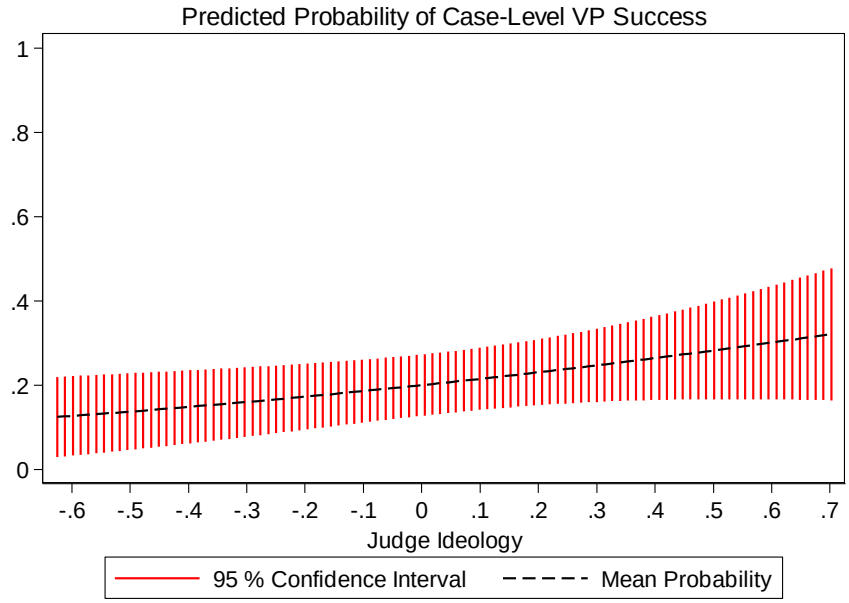

Figure 16: Predicted probability that a veil piercing case will be successful conditioned on the changing value of the ideology of the case's presiding district court judge. Other variables not directly modeled here are held at their respective mean and modal values for purposes of the simulation.

Our findings with regard to the ideological constraint of the governing circuit court are consistent with our district court judge ideology findings. As Figure 17 indicates, when a liberal district court judge serves within a conservative circuit (left side of Figure 17), he is more likely to have his cases end with veil piercing success. Conversely, a conservative judge serving in a liberal circuit is less likely to have his cases end with veil piercing success (right side of Figure 17). These findings, while certainly needing further examination in future projects, seem to confirm that circuit court preferences (with conservatives favoring more veil piercings than liberals) act to constrain district court judges from voting consistently with how they normally might.

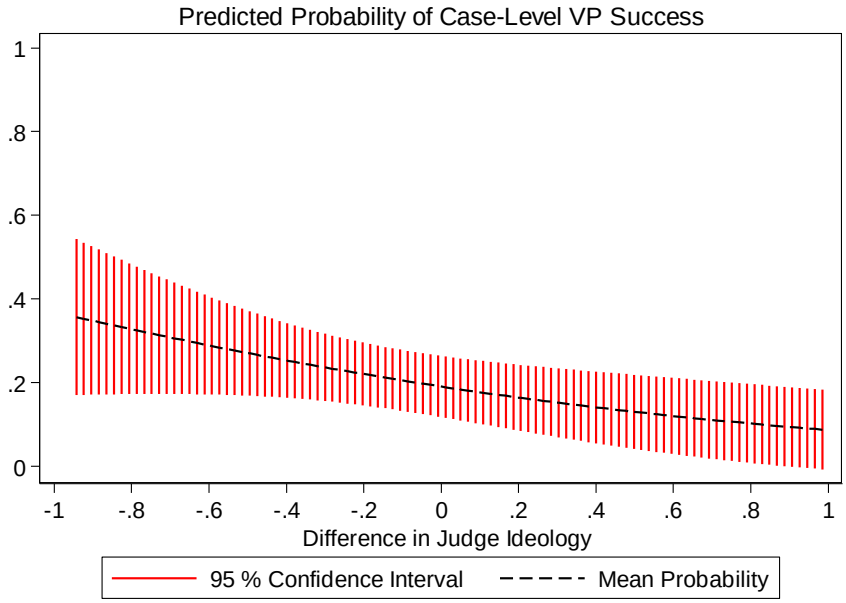

Figure 17: Predicted probability that a veil piercing case will be successful conditioned on the changing value of the difference in ideology between a case's presiding district court judge and the circuit court's median judge ideology. Other variables not directly modeled here are held at their respective mean and modal values for purposes of the simulation.

Figure 18 depicts the substantive effect for the two other variables of interest that reach statistical significance. First, the top half of the figure shows the change in the predicted probability that a case will have veil-piercing success based on the presence of business lawyering. As expected, the presence of such lawyering decreases (by about ten percent) the likelihood that the firm's veil will be pierced. Finally, the inclusion of undercapitalization as a ground for piercing the corporate veil has an average positive effect of about ten percent on the likelihood of a successful case-level veil piercing.

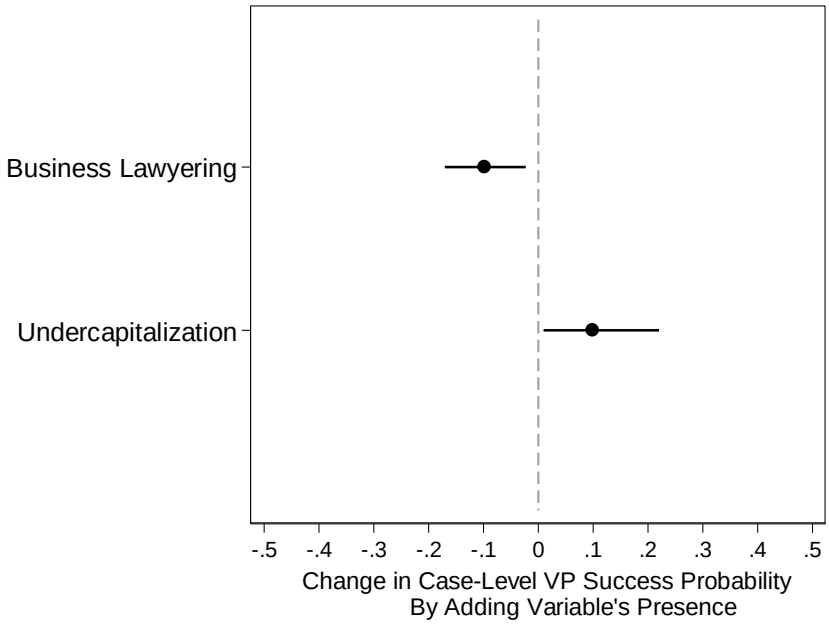

Figure 18: Change in the predicted probability that a veil piercing case will be successful based on business lawyering and the assertion of an undercapitalization piercing ground in the complaint. Solid dots in the figure represent the mean change in the predicted probability while the black line around that dot represents the 95% confidence interval on the difference. Other variables not directly modeled here are held at their respective mean and modal values for purposes of the simulation.

IV. IMPLICATIONS

We begin this section by identifying the primary, sometimes implicit, assumptions in veil piercing scholarship.

Both qualitative and quantitative piercing scholars assume that there is no methodological problem in aggregating appellate and trial court opinions. Jurists conclude that while trial court opinions may be legally subordinate to appellate opinions, they reflect the same general judicial behavior with respect to veil piercing claims.[174] This approach is mistaken in practice and in theory. It implicitly assumes—wrongly—that trial opinions are as

[174] *See* Hodge & Sachs, *supra* note 24, at 349 (discussing selection when explaining that their dataset included both trial and appellate opinions, including ones that might arise in the same case, but noting that "these limitations are the same as those faced by Professor Thompson"); Swain & Aguilar, *supra* note 7, at 472 (noting that trial and appellate decisions were not statistically distinct from one another).

likely to end up in electronic databases as are appellate opinions[175] and discounts the likelihood that trial judges will dispose of many hard, substantive problems with summary orders.[176] Thus, even if trial and appellate judges behaved the same way, their opinions might look different. And our findings about trial court behavior—particularly with respect to judicial ideology, veil piercing factors, causes of action, and defendant entity size—suggest that district court litigation of veil piercing cases produces outcomes through processes which are quite different from those that result in appellate opinions.

Second, limited liability scholarship has focused on the difference between involuntary and voluntary creditors of the entity.[177] As previous work has found, even in judicial opinions, a large percentage of claims appear to have arisen outside of the common law context.[178] More importantly, since plaintiffs can bring multiple causes of action in one complaint, a judge's focus *in an opinion* on one particular kind of liability does not exclude the possibility that a plaintiff's claim originated in multiple ways. Indeed, we found that over thirty percent of our cases asserted *both* voluntary and involuntary creditor claims and nearly nineteen percent contained claims sounding in both tort and contract law.[179] This messy reality is obscured when scholars look at opinions, which usually arise when a case has already been winnowed beyond recognition from its original form.

Finally, scholars have tried to identify factors, or clusters of factors, mentioned in opinions that may correlate with piercing. The implicit goal here seems to be to determine which item in the "laundry list" of reasons expressed by judges as part of veil piercing doctrine really matters—is it informalities? Dominion? Fraud? Such correlations, whether anecdotal or modeled, assume that judicial reasons are strongly related to the underlying facts of the case, and that judges find such facts neutrally. But using the reasons courts give in published opinions to infer the causes of their decisions is at best a dubious undertaking. It assumes, wrongly in our view, that a more satisfying and complete theory would persuade or compel judges to render predictable veil piercing decisions.[180]

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[175] *See* Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC'Y REV. 1133, 1141 (1990) (finding that twenty percent of cases result in a reported opinion); Karen Swenson, *Federal District Court Judges and the Decision to Publish*, 25 JUST. SYS. J. 121, 122 (2004) (revealing that district judges release fewer than twenty percent of their written opinions).

[176] *See* Hoffman et al., *supra* note 17, at 715.

[177] *See, e.g.*, Thompson, *supra* note 13, at 635 (proposing different veil piercing approaches depending on the extent of the creditor's initial opportunity for bargaining and private risk allocation).

[178] Over twenty-five percent of the cases in our dataset do not involve common law causes of action.

[179] In future work, we plan to utilize network theory to analyze the ways that causes of actions are grouped in complaints.

[180] *See* Bainbridge, *Abolishing LLC Veil Piercing*, *supra* note 14, at 97–99.

Our approach challenges these foundational assumptions and provides a distinctive and hopefully reorienting account of veil piercing disputes. We find that a mixed set of legal and extra-legal factors influence the litigation of veil piercing claims. Generally speaking, legal factors—like the defendant's legal structure and location of incorporation—play a less important role, while extra-legal factors—like the defendant's size—play a more important role than previously has been observed. This does not mean that legal formalities are practically insignificant.[181] Rather, the selection of cases obscures the observable effect of "the formal structure of the law."[182] This is true whether litigation is analyzed by the traditional method of reading opinions, the newer method of counting opinions, or an intensive study of docket content.[183] Selection makes hay of inference, whether intuitive or statistical.

Despite selection, veil piercing grounds asserted in complaints are significant in models of litigation success. Undercapitalization allegations are associated with a strongly increased chance of winning both veil piercing motions and cases. This result fits well with normative scholarship defending this factor as central to veil piercing doctrine.[184] Similarly, the negative relationship of façade and shell grounds with veil piercing success is readily understandable: these factors are conclusory allegations that are likely associated with a weak underlying case for disregarding the corporate form.[185] What is important to note here is that the drafting of complaints does not necessarily *cause* success. Rather, complaints reflect the underlying strength of the factual record. Lawyers who can allege undercapitalization do so because they believe that undercapitalization is a factor that courts consider important in deciding whether to respect the veil. But plaintiffs with weaker sets of facts may attempt a different strategy: the kitchen-sink.[186]

This relationship also implies that the particular grounds for relief asserted in complaints generally reflect the underlying facts of the case. This

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[181] For example, it is possible that plaintiffs suing LLCs are less likely to assert veil piercing claims than plaintiffs suing similarly situated corporations. The LLCs remaining in our dataset would then be, for whatever reason, the most vulnerable entities to veil piercing claims—plaintiffs, sensing weakness, sued them. Similarly, highly formalized small firms may be less likely to be sued than less formalized small firms.

[182] Priest & Klein, *supra* note 57, at 6.

[183] *See supra* notes 21–22 and accompanying text.

[184] *See, e.g.*, Millon, *supra* note 8, at 1336–39 (noting and criticizing the importance of undercapitalization allegations). *But see* Thompson, *supra* note 1, at 1064–67 (finding that undercapitalization was not a successful factor).

[185] Of course, either independently or because of the underlying merits, courts may also see these grounds as conclusory and give them little weight. Our data—like all observational data—cannot easily distinguish between weak underlying facts and weak legal claims.

[186] We do find several surprises with respect to veil piercing grounds. In particular, we do not find that allegations of informalities, alter ego, fraud, or dominion and control influence litigation success, though those factors are perceived to be important in scholarship.

result will surprise some because notice pleading rules, together with the expectation that plaintiffs will learn and shape their cases through discovery, might lead scholars to expect that the framing of the complaint functions as mere rhetorical gloss, insignificant in its particulars. We find, by contrast, that plaintiffs' complaints and the opinions that result focus on very similar factors. This, in turn, suggests that complaints themselves are objects worthy of quantitative study beyond the confines of this particular project.

Confirming previous empirical scholarship, we find that voluntary creditors are strong veil piercing plaintiffs: a plaintiff asserting a cause of action associated with being a voluntary creditor is seventeen percent more likely to win its veil piercing motions than a plaintiff which does not assert a voluntary creditor cause of action. This effect is admittedly modest because: (1) it is not bilateral, as plaintiffs asserting involuntary creditor claims are not more likely to lose motions; (2) it does not extend to case-level success; and (3) causes of action overlap broadly. Nevertheless, the surprising persistence of the successful voluntary creditor effect in veil piercing scholarship suggests that theory simply does not reflect how courts actually think about such plaintiffs. Our best explanation, reading over the dockets and considering them impressionistically, is that voluntary creditors simply have stronger cases than involuntary ones. Their complaints allege more tangible and easily provable harms, and the damages at issue are larger and less illusory. This reality swamps any sympathy due the unsuspecting involuntary creditor.

With respect to a third legal factor, defendants' legal structure and sophistication in lawyering, we find that in very limited circumstances, as predicted, LLCs were less likely to be pierced than corporations where we compared the piercing likelihood of both kinds of entities when owned by artificial shareholders. However, we found no evidence that individual shareholders were more likely to be subject to piercing liability than corporate ones. We did observe that more heterogeneous entities—those operating and incorporated in different states—were more likely to preserve their limited liability at the case level, even holding extraneous factors like firm size constant. To a degree, legal complexity and heterogeneous legal operation—attorneys' contributions to the firm—do insulate against veil piercing, but the effect is subtle.

Extra-legal factors play a more extensive role, or at least leave a more tangible residue in the data. The number of employees in a firm strongly predicts interstitial and case-level veil piercing outcomes: this factor moves the predicted probability of an interstitial motion success from about eighty percent for very small firms to effectively zero for firms with several thousand employees. This finding supports our hypothesis that courts think of veil piercing in terms of rough justice: small firms simply do not seem worthy of privileging their owners with immunity from damages. This result holds even when we control for legal factors—formalities, incorporation,

sophistication—that might be expected to make it disappear. Thus, our research implies that the best way to defend prospectively against veil piercing claims is to hire more employees.

This descriptive finding poses a normative problem. What corporate law policy rationale could explain the shifting of the risk of liability from small firm creditors to the entity, where larger firms do not experience this same effect, and where we control for legal factors like formalities and incorporation choice? This effect looks much like a previously unknown tax on small firm development. Given that many commentators have urged that limited liability be seen as a stimulus to entrepreneurship, our data reflect that courts are, perhaps unconsciously, putting their thumb on the other side of the scale.

This entity size effect suggests a need for more research on the motivation of entrepreneurs to incorporate. Scholars have often asserted that incorporation is necessary to motivate individuals to engage in early-stage business activities.[187] However, to the extent the liability shield does not become hardy until an entity has grown to a more stable size, we question whether this assumption reflects reality. The question then becomes: why do entrepreneurs incorporate such micro-firms?

On the one hand, perhaps individual entrepreneurs and their lawyers (mistakenly) believe that an impermeable liability shield will accrue immediately upon filing a charter or signing an organizing document. This would imply that the market for information about legal rules is somewhat inefficient. Lawyers may advise clients that limited liability is determined and strengthened solely by changes in the kinds of paper-based legal engineering at which lawyers themselves excel: maintaining separate bank accounts, holding meetings of the board, and issuing stock certificates. That potentially mistaken view of the world follows from a reliance on opinions, which have the advantage of being cheap to consume, and which play to lawyers' training and expertise. This explanation would provide yet another argument against rules that limit entry into the legal market.[188]

Another possibility is that individual entrepreneurs do not believe that limited liability will become effective immediately but incorporate anyway. For example, incorporation might be motivated by an attempt to access the

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[187] *See, e.g.*, Bainbridge, *Abolishing Veil Piercing*, *supra* note 14, at 495 ("[T]here is a widely shared view that limited liability was, and remains, essential to attracting the enormous amount of investment capital necessary for industrial corporations to arise and flourish."); Stephen B. Presser, *Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics*, 87 NW. U. L. REV. 148, 164 (1992) ("If it is true that the original justification for limited liability was that it encourages investment in the small firm, or investment by entrepreneurs of modest means, and if we are still interested in encouraging individual entrepreneurship through incorporation, this ought to be, perhaps, the most crucial aspect to be considered in veil-piercing doctrine.").

[188] This is perhaps because of a distortion in the market for legal services. *See generally* Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689 (2008).

credit markets, where investors may be unwilling to make loans to individuals who do not exhibit the seriousness of purpose that incorporation signals.[189] Alternatively, of course, entrepreneurs may incorporate to channel the behavior of co-owners with respect to exit and control.[190] Or, in certain sectors of the economy, they may wish to motivate employees with stock option grants.[191] We cannot distinguish between these possibilities. Indeed, we do not directly measure entity *age*, so our results offer an imprecise guide to whether a newly incorporated firm would be more likely to be pierced. Nevertheless, the data suggest that existing work has been too quick to assume that incorporation is necessarily motivated by limited liability.[192] We encourage scholars to focus more clearly on this question.[193]

Judge ideology also plays a significant role, but in an unexpected direction. Contrary to previous scholarship[194] and our expectations, liberal judges are less, not more, likely to be sympathetic to veil piercing plaintiffs. The size of this effect and its confirmation by the appellate judge control factors is puzzling. Further work on the influence of ideology in district

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[189] Ronald Mann's work offers limited support for this hypothesis. Mann, surveying lenders to small businesses, found that there was no relationship between incorporation and the use of secured debt. *See* Ronald J. Mann, *The Role of Secured Credit in Small-Business Lending*, 86 GEO. L.J. 1, 42–43 (1997). This, he argues, means that individuals receiving unsecured loans are not incorporating to avoid personal liability: the "opportunity to become judgment-proof is irrelevant to the decisions of borrowers." *Id.* at 42. Mann further reports that lenders uniformly demand (and receive) personal guarantees from debtors, which helps to explain the relative disuse of secured credit. *Id.* at 23 (reporting qualitative evidence). Another reason that individuals might need to incorporate to access capital may be the ability for lenders to avoid usury laws. *See* Comm'r v. Bollinger, 485 U.S. 340, 342 (1988).

[190] *See* Robert C. Illig, *Minority Investor Protections as Default Norms: Using Price to Illuminate the Deal in Close Corporations*, 56 AM. U. L. REV. 275, 312 (2006) (pointing out that investors may chose the corporate form in order to "make exit more difficult").

[191] We thank Darian Ibrahim for suggesting this possibility.

[192] *Cf. How Some Firms in India Succeed by Bypassing Entrenched Financial and Legal Systems*, KNOWLEDGE@WHARTON, Nov. 1, 2006, http://knowledge.wharton.upenn.edu/article.cfm?articleid=1596 (noting some Indian entrepreneurs expect their personal assets to be protected by ex post negotiations with their lenders, not limited liability).

[193] There is an emerging literature on the motivations of domestic entrepreneurs, but none (that we know of) regarding expectations about liability. Work on entrepreneurs' knowledge of the law suggests a low degree of sophistication. *See* Hayden R. Brainard, *Survey and Study of Technology Development and Transfer Needs in New York*, 9 ALB. L.J. SCI. & TECH. 423, 432 (1999) (pointing out entrepreneurs' ignorance of intellectual property issues). There is also a set of data on entrepreneur overconfidence. *See* Arnold C. Cooper, Carolyn Y. Woo & William C. Dunkelberg, *Entrepreneurs' Perceived Chances for Success*, 3 J. BUS. VENTURING 97, 103 (1988) (describing entrepreneurs' optimistic perceptions of the likelihood of their own success). Finally, there is a large and growing set of data on entrepreneurial behavior more generally. *See* HANDBOOK OF ENTREPRENEURSHIP RESEARCH: AN INTERDISCIPLINARY SURVEY AND INTRODUCTION (Zoltan J. Acs & David B. Audretsch eds., 2003); Aymo Brunetti, Gregory Kisunko & Beatrice Weder, *Institutional Obstacles for Doing Business: Data Description and Methodology of a Worldwide Private Sector Survey* (1997), *available at* http://econ.worldbank.org/external/default/main?pagePK=64165259&theSitePK=469382&piPK=64165421&menuPK=64166322&entityID=000009265_3971110141322 (examining entrepreneurs' attitudes in light of unpredictable lawmaking).

[194] *See* Sunstein et al., *supra* note 78, at 304.

court decisionmaking in commercial cases is necessary. However, we might speculate that conservative judges are more likely to be interested in, and thus pay attention to, the interstices of veil piercing cases than liberal judges. This attention may make these judges more likely to see merit in plaintiffs' claims. An attention-based hypothesis would explain why the ideology effect is so much stronger in the motions-level data than the case-level data. It would not explain why even at the case level, plaintiffs are more likely to be successful when litigating before conservative judges. As we have suggested, further research is necessary.[195]

CONCLUSION

The role that extra-legal influences play in veil piercing cases should caution corporate lawyers and scholars. Although scholars have focused on the influence of law and lawyers' craft on the likelihood of defending the veil, we find that two previously ignored factors—ideology and firm size—play as important a role, if not a more significant one. This finding reminds us that legal rules do not fully constrain judges, even those in the trial courts. We hope that it sparks further work on the motivation of judges in commercial cases—to ask how ideology influences their decisions. Is the effect conscious? Or is it the result of culturally mediated differences in perception of fact? That question remains for further study. Similarly left on the table are questions about why entrepreneurs incorporate, and how they think limited liability works.

We leave these motivational questions unanswered for the same reason that we generally have ignored questions about what trial judges believe. Our purpose here was simply to describe how veil piercing disputes in federal court are resolved. Unlike previous research, our findings do not necessarily unsettle existing theory about how judges *think* about limited liability. Our focus is on what judges actually *do*. We confirm that limited liability disputes are subject to an expected selection pressure, although models of interstitial litigation events are more resistant to selection than models that focus only on case-level dispositions.[196] Overall, the grounds asserted in veil piercing complaints signal the strength of the underlying case. While entity size and sophistication matter in ways that theory would predict, creditor type and ideology provide surprising results.

We contest the conventional wisdom not just in its specifics but in its general theme that veil piercing doctrine is especially random and "frea-

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[195] We do not find evidence for the judicial demographic hypothesis: neither women nor minority judges advance veil piercing cases in a statistically distinguishable way from white men. We do find such effects with respect to non-veil piercing motions and settlement and will be exploring those findings in future work.

[196] As explained above, and as detailed in the Appendix, a model of motions success reduced error in prediction by nearly twenty-two percent, while a model of case success reduced error in prediction by two percent.

kish."[197] We think that the patterns we have observed fit well with a set of cases influenced by selection. Plaintiffs do win far more often during litigation than popular accounts of the doctrine's rare nature would have led us to expect, but their ultimate chance of obtaining relief on the merits is obscured by settlement, which disposes of two out of every three veil piercing cases filed in federal court. Because of settlement and selection, observational data simply cannot definitively resolve how a judge will think about a novel veil piercing case.

Litigation results can tell us nothing more, and nothing less, than the kinds of factors which mattered in previously decided cases. Here, two extra-legal factors appear to be both important and surprising: judge ideology and firm size. Meanwhile, formalities, plaintiffs' tactics, and defendants' legal planning have modest relationships to observed outcomes. To owners of the smallest of businesses, the message coming from this data is unfortunately both clear and unsatisfying: neither reliance on legal formalities nor pat expectations about the pro-business orientation of conservative judges will protect a firm from having to defend its veil in court. Our message to scholars is similarly unsettling: to predict how judges will react to veil piercing allegations and to understand their motivations, observation must yield to experiment.

[197] Easterbrook & Fischel, *supra* note 2, at 89.

APPENDIX

Veil Piercing Motion Logistic Regression Models

	MODEL (1) Main Model	**MODEL (2)** Complex Etity/Shareholder Variables	**MODEL (3)** Entity/VP Grounds Interaction	**MODEL (4)** Imputation (Main Model)
Judge Ideology	2.526*	2.637*	2.444*	1.511
	(1.18)	(1.18)	(1.02)	(1.09)
Appellate Court Control	-0.844	-1.032	-1.129	-0.328
	(0.97)	(1.00)	(0.82)	(0.92)
Female Judge	0.258	0.220	0.121	0.112
	(0.52)	(0.51)	(0.51)	(0.43)
Minority Judge	0.365	0.154	0.453	-0.075
	(0.58)	(0.58)	(0.56)	(0.52)
Entity Size	-0.001*	-0.001*	-0.001*	-0.001*
	(0.00)	(0.00)	(0.00)	(0.00)
Business Lawyering	0.057	0.164	0.485	-0.129
	(0.76)	(0.75)	(0.65)	(0.67)
Other Entity Type	0.597	—	—	-0.192
	(0.90)	—	—	(0.93)
LLC	-0.447	—	—	-0.358
	(0.58)	—	—	(0.54)
Pierced Party Any Entity, Shareholder Any Natural Person	-0.200	—	—	-0.037
	(0.47)	—	—	(0.41)
No Veil Piercing Cause of Action	-0.584	-0.663	-0.496	-0.383
	(0.57)	(0.57)	(0.50)	(0.50)
Voluntary Creditor Claim	0.928*	0.595	0.644	0.563
	(0.44)	(0.48)	(0.40)	(0.44)
Involuntary Creditor Claim	-0.110	-0.022	0.189	-0.146
	(0.39)	(0.38)	(0.39)	(0.35)
Overlap	-0.900	-1.174*	—	-0.976
	(0.60)	(0.60)	—	(0.53)

Unity	0.895	0.725	—	0.694
	(1.17)	(1.12)	—	(0.85)
Shell	-1.887*	-1.889*	—	-1.694*
	(0.63)	(0.63)	—	(0.56)
Fraud	-0.562	-0.621	—	-0.851*
	(0.38)	(0.39)	—	(0.35)
Sham	1.500	1.433	—	1.147
	(0.99)	(0.92)	—	(0.93)
Facade	-2.736*	-2.654*	—	-2.413*
	(1.07)	(1.08)	—	(0.67)
Dominion	0.608	0.830	—	0.573
	(0.46)	(0.47)	—	(0.42)
Formalities	-0.120	-0.132	—	0.226
	(0.56)	(0.51)	—	(0.50)
Undercapitalization	1.693*	1.467*	—	1.223*
	(0.48)	(0.50)	—	(0.43)
Intertwine	-0.238	-0.252	—	-0.070
	(0.58)	(0.62)	—	(0.53)
Separation	-0.134	-0.249	—	-0.412
	(0.52)	(0.47)	—	(0.43)
Alter Ego	0.171	0.207	—	0.089
	(0.53)	(0.51)	—	(0.48)
Instrumentalities	0.833	0.876	—	0.612
	(0.56)	(0.58)	—	(0.48)
Discovery Motion	-0.375	-0.365	-0.050	-0.856
	(0.48)	(0.51)	(0.47)	(0.59)
Fact Motion	-0.142	-0.095	0.041	-0.452
	(0.51)	(0.52)	(0.43)	(0.61)
Diversity Jurisdiction	0.267	0.118	0.177	0.341
	(0.42)	(0.43)	(0.38)	(0.41)
Removed Case	-0.237	-0.130	-0.198	-0.492
	(0.65)	(0.68)	(0.62)	(0.56)
Pierced Party Any LLC, Shareholder Entity Mix	—	-0.443	—	—
	—	(1.29)	—	—
Pierced Party Other Entity, Shareholder Any Natural Person	—	-0.646	—	—
	—	(0.74)	—	—

Pierced Party Any Corporation, Shareholder Entity Mix	—	1.489*	—	—
	—	(0.72)	—	—
Pierced Party Any Corporation, Shareholder Any Natural Person	—	0.460	—	—
	—	(0.48)	—	—
Pierced Party Any LLC, Shareholder Any LLC	—	-0.039	—	—
	—	(0.84)	—	—
Pierced Party Any LLC, Shareholder Any Natural Person	—	-0.168	—	—
	—	(0.65)	—	—
Interaction of LLC and Formalities	—	—	1.628	—
	—	—	(1.45)	—
Interaction of LLC and Dominion	—	—	-0.444	—
	—	—	(0.73)	—
Interaction of Corporation and Formalities	—	—	-0.755	—
	—	—	(0.44)	—
Interaction of Corporation and Undercapitalization	—	—	1.254*	—
	—	—	(0.50)	—
Interaction of Corporation and Dominion	—	—	0.500	—
	—	—	(0.47)	—
Constant	1.164	0.936	0.723	1.885*
	(0.96)	(0.90)	(0.87)	(0.96)
Log Likelihood	-130.64477	-128.717	142.15425	—
Pseudo R2	81.26	0.222	0.1404	—
Observations	325	325	325	385
Percent Reduction in Error (PRE)	21.92%	25.96%	24.60%	10.23%

* $p \leq 0.05$ (two-tailed)
Robust standard errors listed in parentheses

Veil Piercing Case Logistic Regression Models

	MODEL (1) Main Model	**MODEL (2)** DV includes all settlements where veil piercing is still alive	**MODEL (3)** DV includes no settlements	**MODEL (4)** Main DV, Complex Entity/ Shareholder Variables	**MODEL (5)** Main DV, Entity/VP Grounds Interaction	**MODEL (6)** Main DV, Imputation
Judge Ideology	0.906	0.906	-0.867	0.905	0.889	0.713
	(0.51)	(0.51)	(1.03)	(0.50)	(0.50)	(0.49)
Appellate Court Control	-0.907*	-0.907*	0.815	-0.898*	-0.875*	-0.719
	(0.47)	(0.47)	(0.85)	(0.47)	(0.45)	(0.45)
Female Judge	0.007	0.007	-0.174	-0.045	-0.014	0.021
	(0.23)	(0.23)	(0.49)	(0.23)	(0.23)	(0.23)
Minority Judge	0.187	0.187	0.259	0.228	0.232	0.178
	(0.27)	(0.27)	(0.52)	(0.27)	(0.26)	(0.26)
Entity Size	-0.001*	-0.001*	-0.002	-0.001*	-0.001	0.000
	(0.00)	(0.00)	(0.00)	(0.00)	(0.00)	(0.00)
Business Lawyering	-0.785*	-0.785*	-0.485	-0.621	-0.621*	-0.875*
	(0.32)	(0.32)	(0.78)	(0.33)	(0.31)	(0.32)
Other Entity Type	1.198	1.198	1.033	—	—	1.026
	(0.70)	(0.70)	(1.40)	—	—	(0.71)
LLC	-0.218	-0.218	0.118	—	—	-0.206
	(0.31)	(0.31)	(0.66)	—	—	(0.30)
Pierced Party Any Entity, Shareholder Any Person	-0.386	-0.386	1.183	—	—	-0.233
	(0.22)	(0.22)	(0.62)	—	—	(0.22)
No Veil Piercing Cause of Action	-0.426	-0.426	-0.860*	-0.431	-0.473*	-0.398
	(0.23)	(0.23)	(0.43)	(0.23)	(0.22)	(0.23)

Voluntary Creditor Claim	-0.199	-0.199	-0.742	-0.191	-0.226	-0.185
	(0.24)	(0.24)	(0.47)	(0.25)	(0.24)	(0.23)
Involuntary Creditor Claim	-0.026	-0.026	-0.287	0.005	-0.004	-0.054
	(0.21)	(0.21)	(0.47)	(0.21)	(0.20)	(0.20)
Overlap	0.072	0.072	0.030	0.030	—	0.095
	(0.37)	(0.37)	(0.79)	(0.37)	—	(0.36)
Unity	-0.330	-0.330	-1.511	-0.414	—	-0.396
	(0.35)	(0.35)	(1.05)	(0.35)	—	(0.34)
Shell	0.376	0.376	-0.489	0.461	—	0.395
	(0.41)	(0.41)	(0.78)	(0.40)	—	(0.38)
Fraud	0.280	0.280	0.249	0.235	—	0.267
	(0.22)	(0.22)	(0.46)	(0.22)	—	(0.22)
Sham	0.105	0.105	0.448	0.278	—	0.124
	(0.42)	(0.42)	(0.67)	(0.41)	—	(0.39)
Facade	-0.667	-0.667	-0.090	-0.931	—	-0.939
	(0.51)	(0.51)	(1.00)	(0.57)	—	(0.49)
Dominion	0.102	0.102	-0.201	0.116	—	0.035
	(0.22)	(0.22)	(0.47)	(0.22)	—	(0.21)
Formalities	0.068	0.068	-0.295	0.124	—	0.072
	(0.24)	(0.24)	(0.43)	(0.25)	—	(0.24)
Undercapitalization	0.505*	0.505*	0.568	0.560*	—	0.477
	(0.26)	(0.26)	(0.48)	(0.25)	—	(0.25)
Intertwine	0.144	0.144	-0.011	0.115	—	0.097
	(0.31)	(0.31)	(0.58)	(0.31)	—	(0.30)
Separation	-0.481*	-0.481*	-0.144	-0.490*	—	-0.351
	(0.25)	(0.25)	(0.52)	(0.25)	—	(0.24)
Alter Ego	0.007	0.007	0.353	-0.029	—	0.097
	(0.21)	(0.21)	(0.40)	(0.21)	—	(0.20)
Instrumentalities	0.176	0.176	0.747	0.093	—	0.190
	(0.31)	(0.31)	(0.60)	(0.32)	—	(0.31)
Diversity Jurisdiction	-0.004	-0.004	0.602	-0.043	-0.006	-0.052
	(0.21)	(0.21)	(0.46)	(0.22)	(0.21)	(0.21)

Removed Case	0.170	0.170	-1.310	0.169	0.180	0.001
	(0.31)	(0.31)	(1.01)	(0.31)	(0.32)	(0.30)
Pierced Party Any LLC, Shareholder Entity Mix	—	—	—	0.995	—	—
	—	—	—	(0.66)	—	—
Pierced Party Other Entities, Shareholder Person	—	—	—	0.167	—	—
	—	—	—	(1.91)	—	—
Pierced Party Any Corporation, Shareholder Entity mix	—	—	—	0.758	—	—
	—	—	—	(0.41)	—	—
Pierced Party Any Corporation, Shareholder Person	—	—	—	-0.251	—	—
	—	—	—	(0.26)	—	—
Pierced Party Any LLC, Person	—	—	—	-0.380	—	—
	—	—	—	(0.37)	—	—
Interaction of LLC with Formalities	—	—	—	—	-0.105	—
	—	—	—	—	(0.52)	—
Interaction of LLC with Dominion	—	—	—	—	0.108	—
	—	—	—	—	(0.47)	—
Interaction of Corporation with Formalities	—	—	—	—	-0.202	—
	—	—	—	—	(0.25)	—

Interaction of Corporation with Under-capitalization	—	—	—	—	0.542*	—
—	—	—	—	—	(0.27)	—
Interaction of Corporation with Dominion				—	0.114	—
	—	—	—	—	(0.23)	
Constant	-0.405	-0.405	-3.071*	-0.531	-0.534	-0.544
	(0.42)	(0.42)	(0.85)	(0.44)	(0.36)	(0.41)
Log Likelihood	-431.49888	-404.49136	-124.20752	-424.113	-444.61949	—
Pseudo R2	0.0645	0.066	0.123	0.072	0.0361	—
Observations	754	754	754	742	754	810
PRE	2.146	-5.603	-2.228	1.486	-0. 941	0

* $p \leq 0.05$ (two-tailed)
Robust standard errors listed in parentheses