EMPIRICAL STUDY

CORPORATE JUSTICE: AN EMPIRICAL STUDY OF PIERCING RATES AND FACTORS COURTS CONSIDER WHEN PIERCING THE CORPORATE VEIL

INTRODUCTION

The most highly litigated issue in corporate law is whether to pierce the corporate veil.[1] The equitable doctrine of piercing the corporate veil is especially relevant in this time of financial crisis. During what many have called "the great recession," banks and corporations collapsed after existing for decades.[2] The failure of financial institutions, widespread company bankruptcies, and acts of corporate tortfeasors have all left those on the other side of the transaction or harm wanting to know if they will be able to recover for the wrongs they have suffered. When the corporate wrongdoer is out of money, plaintiffs often look to related individuals or corporations in an effort to recover. Although the general principle of limited liability protects parent corporations and individuals running corporations from liability in such situations, the equitable doctrine of piercing the corporate veil permits a court to set aside the corporate fiction and hold an individual or corporate shareholder responsible for the acts or debts of the corporation.[3]

A doctrine that resounds in equity, piercing the corporate veil is often criticized as being unpredictable in nature.[4] Courts, sometimes within the same jurisdiction, will consider a host of different factors when deciding if it is appropriate to pierce a corporate veil.[5] In an effort to lend more predictability and

1. *See* Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1036 & n.1 (1991) (comparing the number of cases retrieved in Westlaw with a search for "piercing the corporate veil" and "disregard! the corporate entity" versus the number of cases resulting from searches for "corporate takeover" and "hostile takeover"). Our replication of Professor Thompson's efforts found a similar ratio to the one identified by Professor Thompson.

2. Eli Wald, *Foreword: The Great Recession and the Legal Profession*, 78 FORDHAM L. REV. 2051, 2051 (2010).

3. JAMES D. COX, THOMAS LEE HAZEN & F. HODGE O'NEAL, CORPORATIONS 111 (2d ed. 2003).

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

5. *See* David Millon, *Piercing the Corporate Veil, Financial Responsibility,*

understanding to corporate law, this Study builds on the work of previous research and empirical studies by looking at the frequency with which courts pierce the corporate veil and the factors courts consider when deciding whether to pierce a corporate veil.

It is important to know what courts actually do with veil-piercing claims for numerous reasons. First and foremost, an empirical study of this equitable doctrine could shed light on whether courts are relying on a consistent framework for analyzing these claims, or if the factual severity of a particular case drives the result. Second, without knowledge of the frequency of success these claims have or the factors courts use in analyzing them, corporate attorneys will have difficulty advising clients on the liability risks they face when entering into a commercial transaction. Third, unless there is knowledge about the frequency with which courts pierce the corporate veil and empirical knowledge of the factors that are important to courts, plaintiff's attorneys and defense counsel will have difficulty evaluating the likelihood of success at trial. Accordingly, this Study seeks to contribute to the academic literature in a manner that will benefit both practitioners and scholars in their understanding of piercing the corporate veil.

This Study examines piercing the corporate veil cases between 1996 and 2005 in an attempt to understand the piercing rate and the factors courts use in determining whether it is appropriate to pierce the corporate veil. Part I of this Study conducts a review of the relevant literature on the general principle of limited liability and the exceptions to limited liability, like piercing the corporate veil. Part II discusses the methodology used, the resulting data set, and the limitations of this Study. Part III describes and analyzes the empirical results of the Study with an emphasis on the factors examined first by Thompson and then in a later study by Hodge and Sachs. As a final point, Part IV provides a discussion of trends recognized by the Study, draws conclusions about application of the piercing doctrine, and provides suggestions for further research.

I. A BRIEF REVIEW OF THE GENERAL RULE OF LIMITED LIABILITY AND ITS EXCEPTIONS

A. The General Rule of Limited Liability

A bedrock principle of corporate law is the rule of limited liability.[6] The rule of limited liability protects individuals who run corporations and corporate parents from being held responsible for the acts or debts of a corporation. The concept of limited liability goes back thousands of years.[7] The earliest American proponents of

and the Limits of Limited Liability, 56 EMORY L.J. 1305, 1327–30 (2007).

6. Daniel R. Kahan, *Shareholder Liability for Corporate Torts: A Historical Perspective*, 97 GEO. L.J. 1085, 1086 (2009).

7. *Id.* at 1091.

limited liability argued that without shareholder protection, investments would be too risky for the common person and wealth would end up being concentrated in an elite few.[8] Another fundamental reason for the general rule of limited liability is the concept that a corporation has a separate legal existence from its shareholder owners.[9] On a macro-level, the rule of limited liability shifts some of the risks of failing businesses to creditors.[10]

Most who argue in favor of the rule of limited liability point to its economic justification. Limited liability allows investors to take risks and encourages innovation, creating a market that fosters entrepreneurship and incentivizes capital investments in commercial enterprises.[11] Moreover, the generally passive role of shareholders supports the notion that they should not be liable for a corporation's debts or acts.[12] Limited liability allows shareholders to passively monitor their investments by decreasing the incentive to monitor risks taken by those running the corporation.[13] One scholar even went so far as to argue that limited liability in the corporate form is "the greatest single discovery of modern times" and that "[e]ven steam and electricity are far less important than the limited liability corporation, and they would be reduced to comparative impotence without it."[14]

Yet criticisms of the limited liability rule are not difficult to find. One dominant narrative put forth by critics of limited liability is that the rule is applied in an arbitrary fashion in the context of corporate torts.[15] Furthermore, those opposing the general rule of limited liability argue that it is especially inappropriate in cases when the rule would allow a fraudulent act to go unpunished or when application of the rule would lead to an unjust result.[16] The rule seems especially harsh when creditors of failed corporations are unpaid at the end of the day.[17] Because of these and other criticisms of the general rule, and the notion that limited liability is not absolute, courts and legislatures have created exceptions allowing plaintiffs to recover from individual or corporate shareholders for

8. *Id.* at 1091–92.

9. *See* Robert B. Thompson, *The Limits of Liability in the New Limited Liability Entities*, 32 WAKE FOREST L. REV. 1, 7–8 (1997).

10. Easterbrook & Fischel, *supra* note 4, at 90–91.

11. Daniel J. Morrissey, *Piercing All the Veils: Applying an Established Doctrine to a New Business Order*, 32 J. CORP. L. 529, 531 (2007).

12. *Id.* at 537 (noting that "[s]tockholders typically have the power to elect directors," but that "it is the board that runs the corporation's business").

13. Easterbrook & Fischel, *supra* note 4, at 94.

14. NICHOLAS MURRAY BUTLER, WHY SHOULD WE CHANGE OUR FORM OF GOVERNMENT? 82 (1912).

15. Kahan, *supra* note 6, at 1108.

16. *See* Morrissey, *supra* note 11, at 533 (contending that the piercing doctrine should extend even to limited liability companies and limited liability partnerships "where fraud or injustice would [otherwise] occur").

17. *See id.* at 541.

the acts or debts of a corporation.

B. The Exception: Piercing the Corporate Veil

The primary exception to the general rule of limited liability occurs when courts allow a plaintiff to pierce the corporate veil and hold an individual or corporate shareholder responsible for the acts or debts of a corporation. Piercing the corporate veil is not a separate cause of action. Rather, a plaintiff generally "cannot seek to pierce the corporate veil until the corporation itself is found liable and the judgment against it is returned unsatisfied."[18]

Piercing the corporate veil has a controversial history in American business law.[19] Because courts at common law were never entirely comfortable with the general rule of limited liability, piercing the corporate veil emerged as a way to reach individual assets in order to satisfy corporate debts.[20] The doctrine places an emphasis on accountability and corporate social responsibility, serving to counterbalance the broad shield offered to corporations through the general rule of limited liability.[21]

Even with its widespread use and existence, piercing the corporate veil has been "disparaged as a confusing anomaly."[22] Others have pointed out that "'[p]iercing' seems to happen freakishly."[23] Application of the doctrine, "[l]ike lightning," seems to be "rare, severe, and unprincipled."[24] A common scholarly refrain is the need to decide piercing cases according to an "existing principled doctrine," rather than resorting to "an ill-defined and illegitimate judicial power to do the right thing."[25]

Despite the many criticisms of inconsistent applications of the doctrine, Professor Phillip Blumberg attempted to outline the general guideposts of piercing jurisprudence:

> Traditional "piercing" jurisprudence rests on a demonstration of three fundamental elements: the subsidiary's lack of independent existence; the fraudulent, inequitable, or wrongful use of the corporate form; and a causal relationship to the plaintiff's loss. Unless each of these three elements has

18. Marilyn Blumberg Cane & Robert Burnett, *Piercing the Corporate Veil in Florida: Defining Improper Conduct*, 21 NOVA L. REV. 663, 665 (1997).

19. Morrissey, *supra* note 11, at 530.

20. John H. Matheson, *The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context*, 87 N.C. L. REV. 1091, 1098 (2009).

21. Morrissey, *supra* note 11, at 530.

22. *Id.* at 542; *see also* Eric W. Shu, *Piercing the Veil in California LLCs: Adding Surprise to the Venture Capitalist Equation,* 45 SANTA CLARA L. REV. 1009, 1017 (2005) (noting that the doctrine "has become the most litigated, yet one of the most confusing, issues in corporate law").

23. Easterbrook & Fischel, *supra* note 4, at 89.

24. *Id.*

25. Douglas C. Michael, *To Know a Veil*, 26 J. CORP. L. 41, 59 (2000).

> been shown, courts have traditionally held "piercing" unavailable.[26]

Notwithstanding Professor Blumberg's guidelines, courts have used many factors in analyzing piercing claims and are willing to pierce the veil when one of Professor Blumberg's elements is present to a significant degree, yet the other two elements are lacking. For instance, the Supreme Court of Florida held, in *Dania Jai-Alai Palace, Inc. v. Sykes*, that a corporate veil may not be pierced unless a showing of improper conduct is made.[27] By emphasizing this one factor, the court declined to formulate a factor-based test that lower courts could use to determine when conduct might be considered "improper."[28] Some have argued that this "improper conduct test" is a middle ground between tests requiring actual fraud and those allowing for piercing without proof of any specific wrongdoing.[29] While cases following *Dania* offered some guidance for what constitutes "improper conduct,"[30] such vague standards produce elusive understandings of what is required for a plaintiff to successfully pierce a corporate veil.

Some legal scholars have argued that courts often rely on conclusory terms when making piercing decisions, rather than applying a structured legal framework for analyzing these claims.[31] One example of such a conclusory term referred to in many of the cases included in this Study is the term "alter ego." The term seems to have little meaning outside of signifying that a court deems veil piercing to be proper. Other metaphors, like "mere instrumentality" and "dummy corporation," also do not seem to provide enough concrete guidance for why courts decide to pierce a corporate veil. Rather, it is when courts discuss factors like control, failure to follow corporate formalities, fraud, and lack of substantive separation that courts conduct a meaningful analysis of whether it is proper to pierce a corporate veil.

A cluttered jurisprudence, filled with conclusory terms and incomplete tests, could be part of the reason why there are so many attempts by plaintiffs to pierce the corporate veil. Without a

26. Phillip I. Blumberg, *The Transformation of Modern Corporation Law: The Law of Corporate Groups*, 37 CONN. L. REV. 605, 612 (2005).

27. Dania Jai-Alai Palace, Inc. v. Sykes, 450 So. 2d 1114, 1121 (Fla. 1984).

28. Cane & Burnett, *supra* note 18, at 668.

29. *Id.*

30. *See, e.g.*, Resolution Trust Corp. v. Latham & Watkins, 909 F. Supp. 923, 930–33 (S.D.N.Y. 1995) (applying Florida law to a piercing claim and summarizing numerous decisions in which courts following *Dania* required specific proof of wrongful conduct, rather than simple "domination and control," "undercapitalization," or negligent management).

31. *See, e.g.*, Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479, 513 (2001) (concluding that the "laundry list approach" used by many courts "is simply an *ex post* rationalization of a conclusion reached on grounds that are often unarticulated").

consistent framework for analyzing these cases, attorneys have difficulty evaluating the likelihood that they will be able to successfully meet the requisite elements in a piercing case. Furthermore, judges, especially at the trial level, often have little in the way of concrete precedent to follow in determining whether to pierce the corporate veil.

C. Other Exceptions to Limited Liability

While piercing cases are the most prevalent, there are other ways in which plaintiffs can get around the general rule of limited liability and recover from an individual or corporate shareholder. For instance, jurisdictions like Louisiana have used a new method for imposing liability on corporate structures. In Louisiana, the "single business enterprise" theory imposes liability on parent corporations based upon the degree of control they exercise over subsidiaries, rather than factors like fraud and misuse of the corporate form that are used under a piercing the corporate veil claim.[32]

"Direct participant liability" is another method that is somewhat akin to piercing the corporate veil. In jurisdictions like Illinois, employees who are injured on the job usually are limited to recovering through the workers' compensation system.[33] Recently, however, the Supreme Court of Illinois expanded an employee's ability to recover under direct participant liability.[34] In *Forsythe v. Clark USA, Inc.*, the court adopted this theory of liability and noted that a parent company may be liable for foreseeable injuries where it either "specifically directs an activity" or "mandates an overall course of action and then authorizes the manner in which specific activities contributing to that course of action are undertaken."[35]

Additionally, some states have created statutory mechanisms for recovery in circumstances in which plaintiffs would have traditionally sought recovery under a theory of direct liability or piercing the corporate veil.[36] In cases of defective incorporation,

32. *See* James Dunne, Note, *Taking the* Entergy *Out of Louisiana's Single Business Enterprise Theory*, 69 LA. L. REV. 691, 691–92 (2009) (criticizing the use of single business enterprise theory and the impact it can have on the protection of limited liability).

33. *See, e.g.*, Kotecki v. Cyclops Welding Corp., 585 N.E.2d 1023, 1028 (Ill. 1991) ("The language of the Workers' Compensation Act clearly shows an intent that the employer only be required to pay an employee the statutory benefits.").

34. *See* Forsythe v. Clark USA, Inc., 864 N.E.2d 227, 237 (Ill. 2007).

35. *Id.*; *see also* Matt Schweiger, Note, Forsythe v. Clark USA, Inc.*: Contradictions in Parent Corporation Liability in Illinois*, 58 DEPAUL L. REV. 1083 (2009) (criticizing the use of direct participant liability and arguing that the court should have used a piercing the corporate veil analysis).

36. *See* Cynthia M. Klaus, *Personal Liability of Franchisor Executives and Employees Under State Franchise Laws*, 29 FRANCHISE L.J. 99, 99 (2009) (discussing state statutes that allow franchisees to "hold a franchisor's officers, shareholders, directors, and (in certain cases) employees jointly and severally

courts have found it difficult to walk the line between the rule of limited liability and allowing plaintiffs to recover.[37]

The multiple ways in which plaintiffs may recover from an individual shareholder or parent corporation for the debts or acts of a corporation show that the rule of limited liability is not absolute. Both courts and legislatures are willing to make exceptions to the rule of limited liability in certain circumstances or when particular factors are present. Furthermore, because different mechanisms for recovery emphasize different factors, attorneys advising clients on the risks of liability must be aware of whether these additional exceptions to the limited liability rule exist in their jurisdiction and the jurisdiction in which their clients are doing business. The different exceptions also show that a shareholder may avoid liability under a piercing theory, but be held liable under a different theory. For example, when a court finds no fraud, but does find the requisite level of control, a shareholder may be responsible under a single business enterprise theory.

D. Attempts to Better Understand Piercing the Corporate Veil Through Empirical Research

The jumbled legal landscape of piercing the corporate veil and other exceptions to the rule of limited liability cry out for empirical research. The empirical research on piercing the corporate veil is beginning to grow, helping judges, attorneys, and scholars better understand this doctrine. However, despite advances in understanding the application of piercing the corporate veil, there is still a significant amount to learn about this doctrine.

The foundational empirical study on piercing the corporate veil was conducted by Professor Robert Thompson.[38] Professor Thompson sought to clear the murky waters of the piercing doctrine by looking at what courts actually do in piercing the corporate veil cases. By analyzing the nature of the corporations being pierced, the type of courts doing the piercing, and the reasons given by courts for piercing or not piercing the corporate veil, Professor Thompson sought to test the assertions of academic literature and provide insight into the actual practice of piercing the corporate veil.[39] The study conducted by Professor Thompson was inherently valuable because it began a series of empirical studies that attempted to identify trends in the application of a doctrine that many had

liable for the franchisor's violation" of franchisor regulatory laws).

37. *See generally* Timothy R. Wyatt, Empirical Study, *The Doctrine of Defective Incorporation and Its Tenuous Coexistence with the Model Business Corporation Act*, 44 WAKE FOREST L. REV. 833 (2009) (evaluating the predictability of defective incorporation cases both before and after the adoption of the Model Business Corporation Act).

38. *See* Thompson, *supra* note 1.

39. *Id.* at 1038.

criticized as inconsistent. Furthermore, his study had value because the results suggested that, in some ways, courts were acting differently than what commentators and scholars expected based on what they believed were the most frequent reasons for piercing the corporate veil. For instance, the results from Professor Thompson's study suggested that courts pierce less often in tort than in contract cases and that piercing decisions are less likely when the shareholder is an individual.[40] In other ways, however, Professor Thompson's study confirmed ideas in the academic literature. For instance, when there are more shareholders, there is a decreased likelihood that piercing will take place.[41] One of Professor Thompson's overall conclusions—that piercing the corporate veil is contextual—[42] seems to find confirmation in the empirical studies following Thompson, including the current Study.

The next significant empirical study was conducted by Lee Hodge and Andrew Sachs, who followed Professor Thompson's methodology and analyzed a data set comprised of piercing cases from 1986 until 1995.[43] Following Professor Thompson's methodology, Hodge and Sachs selected a random data sample from 1986 through 1995 and looked at all reported piercing cases that were decided on the merits.[44] Data from the study conducted by Hodge and Sachs revealed some changes in how courts applied the piercing doctrine. For instance, the data indicated that courts pierced more frequently in the tort setting than they did in the contract setting.[45] Additionally, the Hodge and Sachs study found that there was an increase in piercing the corporate veil cases that were litigated in federal court.[46] Despite observing some differences, Hodge and Sachs discovered several trends from their study that supported Professor Thompson's findings. For instance, neither the Thompson study nor the Hodge and Sachs study found a case in which piercing occurred in a way that held shareholders in a publicly held company liable for corporate acts or debts.[47] By updating Thompson's study, Hodge and Sachs provided additional foundation for this Study to identify emerging trends in piercing rates and the factors courts analyze in deciding piercing cases.

Recently, Professor John H. Matheson conducted an empirical study of piercing cases with the hope of being able "to describe statistically the propensities of modern courts for piercing the

40. *Id.*
41. *Id.*
42. *Id.* at 1038–39.
43. Lee C. Hodge & Andrew B. Sachs, Empirical Study, *Piercing the Mist: Bringing the Thompson Study into the 1990s*, 43 WAKE FOREST L. REV. 341 (2008).
44. *Id.* at 347–49.
45. *Id.* at 362.
46. *Id.* at 363.
47. *Id.* at 362; Thompson, *supra* note 1, at 1047.

corporate veil in the parent-subsidiary situation."[48] Professor Matheson's study found what he described as several "startling" findings: courts are less willing to pierce small businesses with one or a few individual owners, appellate courts pierce twice as often as trial courts, entity plaintiffs are more than twice as likely to pierce than are individual plaintiffs, and courts are three times more likely to pierce in a contract cases than in tort cases.[49] Though Professor Matheson's study makes significant contributions to understanding piercing the corporate veil in the parent-subsidiary context, his methodology differs from that used by Professor Thompson, Hodge and Sachs, and the authors of this Study. Moreover, because his study was limited to piercing cases in the parent-subsidiary context, it did not include cases in which plaintiffs attempted to reach individual shareholders, which limits the understanding that individual shareholders could gain about potential liability. Nonetheless, Professor Matheson's study makes a significant contribution to the empirical landscape of piercing cases.

These empirical studies have provided a firm foundation for the current effort. The Thompson study and its follow-up by Hodge and Sachs provide insight into how courts treated piercing cases through 1995. The Matheson study, by focusing on piercing in the parent-subsidiary context from 1990 until 2008, provides a focused look at the directions courts are moving when analyzing piercing cases. By analyzing piercing cases in which both individual and corporate shareholders are defendants, this Study builds on the work of all three empirical studies in order to provide additional insight into what courts are actually doing when plaintiffs attempt to pierce the corporate veil.

II. METHODOLOGY

A. The Data Set

The methodology for this Study seeks to replicate the study conducted by Professor Thompson and the follow-up study conducted by Lee Hodge and Andrew Sachs ("Wake I"). The overarching approach of both empirical studies was to engage in what is known as "content analysis"—an approach in which a scholar collects a set of court opinions and systematically reads them to record pertinent factors about each case and draw inferences about the use and meaning of such factors.[50] While such a method certainly has its limitations, "content analysis makes legal scholarship more consistent with the basic epistemological

48. Matheson, *supra* note 20, at 1091.

49. *Id.* at 1092.

50. *See* Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CAL. L. REV. 63, 64 (2008).

underpinnings of other social science research."[51]

The cases analyzed in this Study are a random sampling of cases reported in Westlaw from January 1, 1996 through December 31, 2005.[52] A search query similar to the one used in Thompson and Wake I returned 3821 cases.[53] A random sample data set was extracted by first arranging the cases in chronological order, and then effectively analyzing every sixth case.[54] This returned a sample size of 638 cases. Not every case in the sample was relevant to our Study. Some did not involve corporate law at all, while others were procedural. Examples of discarded cases include those dealing with whether to pierce the corporate veil for personal jurisdiction purposes, or cases involving "reverse piercing."[55] Additionally, there were numerous cases in which the court denied the defendant's motion for dismissal or summary judgment, and hence a decision on piercing the corporate veil was not reached. For the purposes of our Study, we only included cases in which the court reached an affirmative decision on whether or not to pierce the corporate veil and hold a shareholder liable. Once we discarded those cases that did not deal with piercing the corporate veil, that only used a piercing the corporate veil analysis for jurisdictional purposes, or that did not reach a decision on the merits, a total pool of 236 cases was reviewed for both factual and analytical data.

The goals for this Study are to look at trends in piercing the corporate veil over time and to extend the findings of the Thompson and Wake I studies. Hence, the methodology adopted here is

51. *Id.* at 65.

52. Although Thompson reportedly analyzed each and every case, a similar undertaking was not available in this Study due to time and resource constraints—hence, the rationale for using a random sample of cases in this time period.

53. The exact search query used in Westlaw in the ALLCASES database was: pierc! /2 "corporate veil" 101k1.4 101k1.5 101k1.6 101k1.7 & da(aft 1995 & bef 2006). This search was executed on September 9, 2009, and returned a total of 3821 cases. Similarly, Wake I used the search: pierc! /2 "corporate veil" (aft 1985 & bef 1996). Hodge & Sachs, *supra* note 43, at 347. Professor Thompson used the search terms "piercing the corporate veil" and "disregard! the corporate entity" along with "four Westlaw key numbers." Thompson, *supra* note 1, at 1036 n.1.

54. Initially, every eighth case was analyzed. This resulted in a sample size of 478 cases. However, of these 478 cases, only 188 reached a decision on piercing the corporate veil. Wake I sampled every sixth case, resulting in a sample size of 483 cases, with 232 reaching a decision on piercing the corporate veil. Hodge & Sachs, *supra* note 43, at 347. Thus, the authors decided to increase the sample rate to reach a comparable level of cases analyzed on the merits of piercing the corporate veil. This was achieved by returning to the master list of cases arranged chronologically and additionally sampling every twenty-fourth case. This increased the sample size by 160 cases to 638, which effectively equates to analyzing every sixth case.

55. *See, e.g.*, Chao v. Occupational Safety & Health Review Comm'n, 401 F.3d 355, 364 (5th Cir. 2005) (defining "reverse corporate veil piercing" as holding a corporation liable for the acts of its individual shareholders).

intended to mirror that of the previous studies as closely as possible. Thus, the factual data collected for each case analyzed includes the following: whether the court pieced the veil, the year the case was decided, the level of the court that decided the case, which jurisdiction's law was being applied, the number of shareholders in the corporation that was the object of the piercing, whether a person or an entity was behind the corporate veil, the identity of the party seeking the piercing, and the substance of the claim (contract, tort, or statutory).[56]

In addition to the factual data, substantive data was also collected regarding the presence or absence of factors the court discussed in reaching its decision on whether or not to pierce the corporate veil. While Thompson was originally able to discern eighty-five unique factors,[57] our Study mirrors both Thompson and Wake I by funneling these factors into numerous major categories.[58] The categories we chose are as follows: the use of conclusory terms ("instrumentality,"[59] "alter ego,"[60] and "dummy corporation"[61]); misrepresentation;[62] agency;[63] lack of substantive separation and intertwining;[64] undercapitalization;[65] failure to observe corporate

56. These factors are identical to those analyzed in Wake I and Thompson; however, these two studies also examined "whether or not the claim involved procedure." *See* Hodge & Sachs, *supra* note 43, at 347; Thompson, *supra* note 1, at 1044.

57. Thompson, *supra* note 1, at 1044.

58. *See* Hodge & Sachs, *supra* note 43, at 348; Thompson, *supra* note 1, at 1044–45.

59. "Instrumentality" was recorded as a reason only if the term was explicitly cited by the court. This factor has no subset of characteristics, but rather is a conclusory term that has been historically used by the courts as a reason for piercing the corporate veil. *See* Thompson, *supra* note 1, at 1045 n.57. This term is the subject of much criticism, since its meaning is too uncertain to express a definitive legal test. *Id.* (citing William P. Hackney & Tracey G. Benson, *Shareholder Liability for Inadequate Capital*, 43 U. PITT. L. REV. 837, 843 (1982)).

60. "Alter ego" was recorded only if the term was explicitly cited by the court. This term has also been criticized in a manner similar to "instrumentality." *See* Thompson, *supra* note 1, at 1045 n.56 (citing Elvin R. Latty, *The Corporate Entity as a Solvent of Legal Problems*, 34 MICH. L. REV. 597, 625 (1936)).

61. "Dummy corporation" was recorded only if the term was explicitly cited by the court. This term has also been criticized in a manner similar to "instrumentality" and "alter ego." *See id.* at 1064.

62. "Misrepresentation" includes misrepresentation as to the corporation's assets, financial condition, and the party responsible for payment. *Id.* at 1044 n.53. Thompson notes that while the courts often refer to this type of conduct as "fraud," many courts actually require less than what is usually required for a common law fraud claim. *Id.*

63. "Agency" refers to a discussion of an agency relationship between the shareholder and the corporation.

64. Although Thompson recorded the existence of "lack of substantive separation" and "intertwining" separately, these factors were combined in our Study because the difference between the two, as described by Thompson, is

formalities;[66] domination and control;[67] and overlap between corporations in officers, directors, owners, office space, business activity, employees, or management. In many cases, the court cited numerous factors in reaching its decision. However, in other appellate cases, the court failed to cite any factors in reaching its decision. Regardless, this list of factors encompasses all the reasons articulated by the courts in their determinations of whether or not to pierce the corporate veil.

B. Methodology Questions and Limitations

It is important to note that just as in Thompson and Wake I, this Study ("Wake II") is limited in nature and does not purport to create a record of every piercing case during the relevant time period.[68] The results of this Study are based only on cases reported in Westlaw. It is also important to note that while the search criteria used in Westlaw remained constant throughout the three studies, the amount of cases that Westlaw has collected over the years could have increased. Thus, any changes made by Westlaw, the keeper of our sample, could have contributed to the different findings made by Professor Thompson, Wake I, and Wake II.

Furthermore, this Study cannot capture every instance in which an attempt is made to pierce the corporate veil. Thus, it is important to note the potential for selection bias.[69] When conducting a content analysis of cases that have been reported in Westlaw, the literature on selection bias shows that the disputes that actually make it to litigation are neither a random nor representative sample of all the disputes that occur.[70] Accordingly, there are many disputes over piercing issues that do not make it

minimal. *See* Thompson, *supra* note 1, at 1045 n.55, 1063. These factors were noted when the court observed a commingling of corporate and private funds, a siphoning of funds, a shareholder treating corporate assets as his own, and other intertwining activities.

65. "Undercapitalization" refers to instances in which the corporation was undercapitalized from the beginning of its corporate existence, as well as instances in which the corporation later became undercapitalized.

66. "Failure to observe corporate formalities" refers to when the court noted the lack of formal board meetings, record-keeping, or other corporate formalities.

67. "Domination and control" refers to when the shareholder personally paid or guaranteed corporate debts or owned all the stock of a corporation, when the corporation engaged in no action independent of its shareholder, or simply where the shareholder was said to have "dominated" the corporation.

68. *See* Thompson, *supra* note 1, at 1046 (noting that results based on reported cases may not be a representative sample of all cases considered, filed, or decided).

69. *See* Hall & Wright, *supra* note 50, at 104 (explaining the need to consider selection biases at every stage of a systemic content analysis of judicial opinions).

70. *See* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4 (1984).

into court or that are not reported in Westlaw. Furthermore, parties might be constrained by money or want to avoid bringing their disputes into the judicial arena altogether. Thus, these limitations make it inappropriate to draw any sweeping conclusions about the number of corporations in which the question of piercing the corporate veil arises. However, the limitations faced by this Study are the same as those faced by Thompson and Wake I.[71] Thus, we believe the data and results of this Study are meaningful and important in understanding the doctrine of piercing the corporate veil and how it has changed over time.

The significance of our internal results, and of the results as compared to the previous two studies, will be measured through the use of a mathematical test for statistical significance—the *Z*-test for proportions.[72] Statistical significance refers to the degree of confidence in rejecting the "null hypothesis"—or more simply, that the results observed are not due to chance or attributed to errors in sampling. When comparing piercing rates, the *Z*-test takes into account the differences in sample size to allow for an effective comparison. The null hypothesis of this Study is that piercing rates from different groups of cases (e.g., piercing rate at the trial, appellate, and supreme court levels within Wake II) and piercing rates from the same groups over time (e.g., comparing the piercing for cases at the trial court level between the Thompson, Wake I, and Wake II studies) remain consistent over time.

III. EMPIRICAL RESULTS

A. Frequency Distributions

1. Initial Comparisons

There are many initial observations that can be made based on a review of the entire data set. Just as in Thompson and Wake I, there are no cases in which courts pierced the corporate veil of a public corporation—piercing the corporate veil is limited to close corporations. Despite rising frustration of corporate irresponsibility, the respect for the separateness of the corporate entity in publicly held corporations remains intact.

In our data set, the courts pierced the corporate veil in only 27.12% of cases. This is significantly lower than Thompson's rate of 40.18%[73] and Wake I's rate of 35.53%.[74]

71. *See* Hodge & Sachs, *supra* note 43, at 348–49; Thompson, *supra* note 1, at 1046–47.

72. In this Study, we will utilize a 95% confidence level for statistical significance. A *Z*-value greater than 1.96 indicates that a result is significant at the 0.05 level. In other words, 95 out of 100 times, the results will not have occurred by chance. As a side note, a *Z*-value greater than 1.59 indicates that a result is significant at the 0.10 level (90%).

73. Thompson, *supra* note 1, at 1048 tbl.1. The *Z*-test value when

TABLE 1: OVERALL PIERCING RESULTS

Category	Total Cases	Pierce	No Pierce	% Piercing
#	236	64	172	27.12%

	Thompson	Wake I	Wake II
Pierce Rate	40.18%	35.53%	27.12%

In Thompson's study, he concluded that "[t]here is no trend over time" in the veil-piercing rate.[75] While noting that there were variations from year to year in the piercing rate, he found the rate to remain relatively steady from decade to decade, at about 40% through the 1980s.[76] However, the data from the past two decades directly rebuts this assertion.[77] Wake I shows the beginning of a downward trend,[78] which is confirmed by the results of the current Study. The net effect is a steady drop-off beginning in 1988 that continues through the first half of this decade, but it is not clear if the pierce rate has leveled out at 27–35% (compared to Thompson's 40%) or if it is continuing to fall.[79]

comparing the overall piercing rate between Thompson and Wake II is 3.85, thus signifying that the difference in piercing rates is statistically significant.

74. Hodge & Sachs, *supra* note 43, at 349 tbl.1. The *Z*-test value is 1.82. This is significant at the 90% threshold level, but not at the 95% level.

75. Thompson, *supra* note 1, at 1048.

76. Thompson found the differences from decade to decade to not be statistically significant. *Id.* at 1049 tbl.2 & n.77.

77. The differences in the piercing rate during the 1990s and 2000s are statistically significant as compared to the piercing rate in the previous decades. However, the *Z*-test value for the piercing rate during the 1990s versus the piercing rate from 2000–2005 is 0.71, which is not statistically significant.

78. *See* Hodge & Sachs, *supra* note 43, at 349–50.

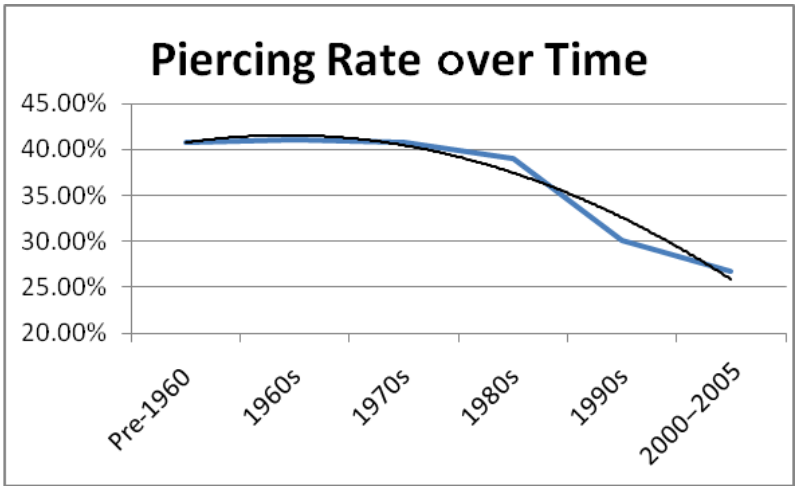
79. A superimposed trendline in Figure 1 shows a downward trend that Thompson's study did not capture because the trend begins at the end of Thompson's study, in the mid-1980s.

TABLE 2: PIERCING OVER THE YEARS

Category	Total Cases	Pierce	No Pierce	% Piercing
1996	23	4	19	17.39%
1997	22	5	17	22.73%
1998	17	8	9	47.06%
1999	21	6	15	28.57%
2000	24	8	16	33.33%
2001	23	7	16	30.43%
2002	24	7	17	29.17%
2003	24	5	19	20.83%
2004	29	6	23	20.69%
2005	29	8	21	27.59%

Category	Total Cases	Pierce	No Pierce	% Piercing
Pre-1960	130	53	77	40.77%
1960s	399	164	235	41.10%
1970s	572	233	339	40.73%
1980s	573	224	349	39.09%
1990s	222	67	115	30.18%
2000–2005	153	41	112	26.80%

FIGURE 1



It has long been hypothesized that federal courts are more willing to pierce the corporate veil, as some believe that federal courts require a lesser burden of proof to disregard the corporate entity.[80] Along with Thompson, we were not able to discern a statistically significant difference in the piercing rate between federal and state courts.[81] Thompson found that state courts pierced the corporate veil in 39.34% of cases, while federal courts pierced 41.42% of the time.[82] Our results are contrary—state courts pierced the corporate veil in 30.33% of the cases,[83] while federal courts only pierced in 23.68% of the cases. However, while not internally significant, the lower federal piercing rate found in this Study is significantly different from that found in Thompson and Wake I.[84]

80. *See, e.g.*, Patricia J. Hartman, Comment, *Piercing the Corporate Veil in Federal Courts: Is Circumvention of a Statute Enough?*, 13 PAC. L.J. 1245, 1255 (1982) (reviewing several federal decisions and concluding that "[t]he federal courts, applying a federal rule of decision, required a lesser burden of proof to disregard the corporate entity than that traditionally demanded by individual states"); Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 HARV. L. REV. 853, 870 (1982) ("The use of federal alter ego standards has generated a trend toward greater willingness to pierce the corporate veil in federal court.").

81. Thompson found no statistically significant differences in the piercing rate for federal and state cases. Thompson, *supra* note 1, at 1049 & n.78. Likewise, our *Z*-test value when comparing federal and state cases is 1.15, also indicating no statistical significance in the different piercing rates.

82. *Id.* at 1049 tbl.3.

83. Our piercing rate for state cases is not statistically significant from that found in Thompson or Wake I. However, compared with Thompson, our state piercing rate is significant at the 90% level—the *Z*-value is 1.93.

84. The *Z*-test value for the federal piercing rate in our Study versus the federal piercing rate in Thompson is 3.58 and versus Wake I is 2.49. Thus, the differences are statistically significant.

Thus, our data shows that the piercing rate in federal courts has decreased over time, but has stayed relatively constant in state courts. Moreover, Wake I supported the theory that federal courts are more willing than state courts to pierce the corporate veil.[85]

TABLE 3: PIERCING BY JURISDICTION

Category	Total Cases	Pierce	No Pierce	% Piercing
Federal	114	27	87	23.68%
State	122	37	85	30.33%

	Thompson	Wake I	Wake II
Federal	41.42%	38.30%	23.68%
State	37.34%	31.03%	30.33%

Thompson found no statistical difference in the rate of piercing at the trial, appellate, and supreme court levels.[86] Wake I found reductions in the piercing rate at the trial and supreme court levels.[87] Our data shows that plaintiffs are less successful in piercing at the trial court level than at the appellate levels.[88] There is also a pronounced reduction in the willingness of trial courts to pierce over time, from 40.15% in Thompson's study to 19.01% in our Study.[89] We also observed very few piercing cases being heard by the highest court in a jurisdiction, but when a case was heard, the piercing rate was approximately 67%. However, due to our limited sample size, we cannot say this rate is statistically significant from the approximately 34% rate at the intermediate level, but our data does show that the appellate courts pierce more often than the trial courts.[90]

85. Hodge & Sachs, *supra* note 43, at 350 tbl.3.

86. Thompson, *supra* note 1, at 1049 n.79, 1050 tbl.4.

87. Hodge & Sachs, *supra* note 43, at 350.

88. The piercing rate at the trial court level is statistically significant compared to the pierce rate at the intermediate and supreme court levels. *Z*-test value for trial versus intermediate is 2.57. *Z*-test value for trial versus supreme court is 2.79. *Z*-test value for intermediate versus supreme court is 1.63.

89. This is a statistically significant difference from Thompson and Wake I. The *Z*-test value for Wake II trial court versus Thompson trial court is 4.27 and versus Wake I trial court is 2.70.

90. *See supra* note 88.

TABLE 4: COURT LEVEL

Category	Total Cases	Pierce	No Pierce	% Piercing
Trial	121	23	98	19.01%
Intermediate	109	37	72	33.94%
Supreme	6	4	2	66.67%

	Thompson	Wake I	Wake II
Trial	40.15%	34.45%	19.01%
Intermediate	39.30%	39.13%	33.94%
Supreme	42.09%	23.53%	66.67%

Moreover, Thompson and Wake I also looked for differences in the piercing rate between individual and corporate plaintiffs. Neither study found a significant difference,[91] but Wake I did find a slightly lower success rate for both types of plaintiffs.[92] Our data reveals a very different picture—individual plaintiffs face a much more difficult task than corporate plaintiffs in convincing the court to pierce the corporate veil.[93] The success rate for individual plaintiffs has also drastically fallen over time as compared with corporate plaintiffs, whose success rate has stayed relatively constant.[94]

TABLE 5: IDENTITY OF PLAINTIFF

Category	Total Cases	Pierce	No Pierce	% Piercing
Individual P	117	15	102	12.82%
Corporate P	103	42	61	40.78%

	Thompson	Wake I	Wake II
Individual P	37.70%	32.35%	12.82%
Corporate P	36.81%	33.66%	40.78%

2. Differences by State

The decision to pierce the corporate veil is largely an issue of

91. *See* Hodge & Sachs, *supra* note 43, at 351; Thompson, *supra* note 1, at 1050 tbl.5.

92. Hodge & Sachs, *supra* note 43, at 351 tbl.5.

93. This difference is statistically significant. The *Z*-test value is 4.72. Also, our piercing rate for individual plaintiffs is statistically significant from that found in Thompson and Wake I. The *Z*-test value for Wake II individual plaintiffs versus Thompson is 5.25 and versus Wake I is 3.49.

94. The difference in rates over time for corporate plaintiffs is not statistically significant.

state corporate law. Among the seven states with the most piercing decisions, the piercing rate ranged from 0% in Connecticut to 55.56% in Ohio. Given the small number of cases in each jurisdiction, and the limited nature of this Study, it is not possible to draw conclusions about the impact of different states' laws on the decision to pierce the corporate veil.

However, a few interesting observations can still be made.[95] New York, the nation's top center of commerce, produced the most piercing cases, just as in Thompson's study.[96] Delaware, a state well-known as corporate-friendly, has continued to produce very few piercing cases.[97] Moreover, the Delaware court refused to pierce the corporate veil in the three reported cases in the current Study. This may be due to a philosophy of protecting Delaware corporations, and may even be another tool for inducing businesses to incorporate in that jurisdiction.

TABLE 6: RESULTS BY STATE

Category	Total Cases	Pierce	No Pierce	% Piercing
CA	9	3	6	33.33%
CT	16	0	16	0.00%
GA	5	1	4	20.00%
MI	5	1	4	20.00%
NY	21	6	15	28.57%
OH	9	5	4	55.56%
TX	10	3	7	30.00%
DE	3	0	3	0.00%

3. Differences Based on Defendant's Identity

In general, courts pierce the corporate veil more often to reach individual defendants than to reach corporate defendants. Thompson found that courts pierced in 43.13% of the cases to reach an individual defendant and in 37.21% to reach a corporate defendant.[98] Wake I found a greater disparity, with figures of 44.36% and 23.75%, respectively.[99] Our data shows this disparity

95. With the exception of Connecticut, we did not find any statistically significant differences in the piercing rate for these states as compared with the rates Thompson found. Within our Study, it is noteworthy that the following differences in piercing rates are statistically significant: California versus Connecticut (*Z*-test value of 2.46); Connecticut versus New York (*Z*-test value of 2.34); Connecticut versus Ohio (*Z*-test value of 3.35); and Connecticut versus Texas (*Z*-test value of 2.33).

96. Thompson, *supra* note 1, at 1052.

97. Professor Thompson found that courts did not pierce in any of the eleven reported cases decided under Delaware law. *Id.* at 1051 tbl.6, 1052–53.

98. Thompson, *supra* note 1, at 1055 tbl.7.

99. Hodge & Sachs, *supra* note 43, at 352 tbl.6.

still exists, albeit at lower levels of 32.45% for individual defendants and 16.46% for corporate defendants.[100] Thus, consistent with our previous conclusion that the piercing rate has fallen over time,[101] the pierce rate for both types of defendants has also fallen over time.

TABLE 7: IDENTITY OF DEFENDANT

Category	Total Cases	Pierce	No Pierce	% Piercing
Individual D	151	49	102	32.45%
Corporate D	79	13	66	16.46%

	Thompson	Wake I	Wake II
Individual D	43.13%	44.36%	32.45%
Corporate D	37.21%	23.75%	16.46%

Examining our sample of corporate defendants, the vast majority of the cases are those in which the plaintiff is attempting to hold a parent corporation liable. Due to the limited instances in our Study in which plaintiffs sought to reach a subsidiary or sibling corporation, no conclusions could be made as to whether courts are more willing to pierce when a plaintiff is going after a sibling, subsidiary, or parent corporation.

The number of shareholders in a corporation, however, had a significant impact on whether a corporation was pierced. Thompson found an inverse relationship between the piercing rate and number of shareholders, with single-shareholder corporations being pierced the most often.[102] While Wake I and our data do not directly support this trend,[103] the data does support the contention that courts are

100. This internal difference between individual and corporate defendants is statistically significant (*Z*-test value of 2.60). With the exception of the piercing rate for corporate defendants found in Wake I, these rates are also statistically significant from those found in Thompson and Wake I. The *Z*-test value for Wake II individual defendants versus Thompson is 2.44 and versus Wake I is 2.06. The *Z*-test value for Wake II corporate defendants versus Thompson is 3.65 and versus Wake I is 1.15.

101. *See supra* note 77 and accompanying text.

102. Thompson, *supra* note 1, at 1054–55.

103. Wake I found a piercing rate of 40.43% for corporations with one shareholder, 49.02% for corporations with two or three shareholders, and 42.11% for close corporations with more than three shareholders. Hodge & Sachs, *supra* note 43, at 352 tbl.6. Thompson found a piercing rate of 49.64% for corporations with one shareholder, 46.22% for corporations with two or three shareholders, and 34.98% for close corporations with more than three shareholders. Thompson, *supra* note 1, at 1055 tbl.7. The piercing rate we found for corporations with one shareholder and with more than three shareholders is statistically significant from the rates found in Thompson. Additionally, the difference between the piercing rate for corporations with more than three shareholders in our Study is also statistically significant from that found in Wake I.

less willing to pierce the corporate veil in corporations with more than three shareholders, as compared to corporations with three or fewer shareholders.[104] Furthermore, our data shows that the pierce rates for corporations with one shareholder and with more than three shareholders have fallen over time, while the pierce rate for corporations with two or three shareholders has not changed over time.[105]

TABLE 8: IDENTITY OF SHAREHOLDERS

Identity of Shareholders	**Total Cases**	**Pierce**	**No Pierce**	**% Pierce**
Individuals:				
One	70	21	49	30.00%
Two or Three	29	16	13	55.17%
Close but:				
More than three	132	27	105	20.45%
Public Shareholders	5	0	5	0.00%
Corporate:				
Parent	49	8	41	16.33%
Subsidiary	4	1	3	25.00%
Sibling	2	1	1	50.00%

Identity of Shareholders	**Thompson**	**Wake I**	**Wake II**
Individuals:			
One	49.64%	40.43%	30.00%
Two or Three	46.22%	49.02%	55.17%
Close but:			
More than three	34.98%	42.11%	20.45%
Public Shareholders	0.00%	0.00%	0.00%
Corporate:			
Parent	36.79%	17.02%	16.33%
Subsidiary	27.94%	33.33%	25.00%
Sibling	41.53%	36.36%	50.00%

104. The difference in piercing rates for single-shareholder corporations versus corporations with two or three shareholders is statistically significant, as is the difference between corporations with two or three shareholders versus those with more than three shareholders. However, the *Z*-test value when comparing the pierce rate between corporations with one shareholder and corporations with more than three shareholders is 1.52, which is not statistically significant.

105. *See supra* note 103.

4. Differences Based on Plaintiff's Identity

While our data showed different rates of success for individual plaintiffs compared to corporate plaintiffs, the sample size was not large enough for this finding to be statistically significant. However, a deeper look at the plaintiff's identity yields several interesting trends. For instance, government plaintiffs continue to enjoy the highest rate of success in piercing the corporate veil.[106] While Thompson and Wake I found suits by a shareholder or the corporation itself to be the least successful,[107] we found private plaintiffs to be the least successful. However, it is important to note that our random sample includes very few cases brought by a shareholder or by the corporation itself. Also, consistent with a decrease in the overall pierce rate from 1996 to 2005, the success rate for both government and private plaintiffs fell from the levels found in Thompson and Wake I.[108]

TABLE 9: IDENTITY OF PLAINTIFF

Category	Total Cases	Pierce	No Pierce	% Piercing
Private	158	44	114	27.85%
Government	15	7	8	46.67%
Corporate (Self)	3	1	2	33.33%
Shareholder	3	1	2	33.33%

	Thompson	Wake I	Wake II
Private	41.39%	33.33%	27.85%
Government	57.80%	54.17%	46.67%
Corporate (Self)	13.41%	12.50%	33.33%
Shareholder	25.42%	0.00%	33.33%

5. Differences Based on the Substantive Context of Plaintiff's Claim

Thompson concluded that courts are more willing to pierce in the contract situation (voluntary contact) than in the tort situation (involuntary contact).[109] Specifically, he found the pierce rate to be

106. Professor Thompson found a piercing rate of 57.8% for government plaintiffs. Thompson, *supra* note 1, at 1057 tbl.8. Wake I found a piercing rate of 54.17% for government plaintiffs. Hodge & Sachs, *supra* note 43, at 353 tbl.7.

107. Hodge & Sachs, *supra* note 43, at 353 tbl.7; Thompson, *supra* note 1, at 1057.

108. *See supra* notes 73–74 and accompanying text. Our Study reveals that the difference in the pierce rate for private plaintiffs from that found in Thompson is statistically significant.

109. Thompson, *supra* note 1, at 1059.

41.98% in contract cases and 30.97% in tort cases.[110] That finding plainly goes against conventional wisdom—one would think that courts would be more sympathetic to an involuntary tort plaintiff because he did not choose to deal with the insolvent corporate enterprise, whereas a voluntary contract plaintiff had the opportunity to evaluate credit risks and contractually allocate those risks as it saw appropriate.

Wake I found a result that was more in line with this conventional wisdom.[111] Tort plaintiffs experienced a success rate of 35.71% and contract plaintiffs had a success rate of 31.11%.[112] Our data changes the picture once again. Tort creditors are once again less successful than contract plaintiffs—the pierce rate for tort plaintiffs has fallen to 15.00%.[113] Also, our data shows that the overall pierce rate for tort and contract creditors has fallen over time. This decreased pierce rate for tort creditors is statistically significant when compared to the rate found in both Thompson and Wake I,[114] and the decreased pierce rate for contract creditors is statistically significant from that found in Thompson.[115] Moreover, the ratio of contract-to-tort disputes has also decreased. Before 1986, the ratio was 3.45:1 and from 1986 through 1995, it was 3.21:1.[116] From 1996 through 2005, this ratio decreased to 2.85:1.

TABLE 10: TYPES OF CLAIMS

Category	Total Cases	Pierce	No Pierce	% Piercing
Contract	114	35	79	30.70%
Tort	40	6	34	15.00%
Criminal	0	0	0	0.00%
Statute	74	19	55	25.68%

	Thompson	Wake I	Wake II
Contract	41.98%	31.11%	30.70%
Tort	30.97%	35.71%	15.00%
Criminal	66.67%	0.00%	0.00%
Statute	40.58%	40.43%	25.68%

110. *Id.* at 1058 tbl.9.

111. *See* Hodge & Sachs, *supra* note 43, at 353–54.

112. *Id.* at 354.

113. The *Z*-test value for the pierce rate for tort claims versus contract claims is 1.93. This is statistically significant at a 94.64% significance level.

114. The *Z*-test value for Wake II tort creditors versus Thompson is 2.06 and versus Wake I is 1.98.

115. The *Z*-test value for Wake II contract creditors versus Thompson is 2.29 and versus Wake I is 0.06.

116. *See* Hodge & Sachs, *supra* note 43, at 354.

6. Differences Based on Statutory Claims

The phenomenon of piercing the corporate veil is not limited solely to the contract and tort scenarios. Over the years, courts have been asked to pierce the corporate veil in the statutory context. An example of statutory piercing is when the plaintiff seeks to hold a parent corporation liable for a subsidiary's violation of a statute, such as the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").[117] Statutory piercing claims had accounted for 34.87% of the cases before 1986,[118] 41.23% of the cases from 1986 through 1995,[119] and 31.36% of the cases from 1996 through 2005. The success rate for statutory plaintiffs has fallen from the Thompson and Wake I rate of approximately 40.5%[120] to a current rate of 25.68%, which is approximately the same rate as in our overall Study. Additionally, similar to Thompson, we found that statutory plaintiffs fare better than tort plaintiffs.[121]

A plaintiff's success rate also varies depending on the particular statute being invoked. For example, bankruptcy plaintiffs in the current Study were successful 20% of the time. This is a decrease from the 46.43% success rate in Wake I,[122] and 47.06% success rate in Thompson.[123] Plaintiffs suing under a discrimination statute did not fare as well, as they failed to convince the court to pierce the corporate veil in this context in every case within the sample. This is consistent with Wake I,[124] but far from the 71.43% success rate in Thompson.[125] Interestingly, before 1986, piercing claims under a discrimination statute were found in only seven reported cases.[126]

117. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (2006); *see also* Thompson, *supra* note 1, at 1061 n.134.

118. Pre-1986 data from Thompson's study shows that 522 cases out of 1583 arose in the statutory context. Thompson, *supra* note 1, at 1048 tbl.1, 1061.

119. The Wake I study revealed 564 cases out of 1583 total that arose from statutory claims. Hodge & Sachs, *supra* note 43, at 355 n.93.

120. *See id.* at 355 & n.94; Thompson, *supra* note 1, at 1058 tbl.9. This decrease in the pierce rate over time for statutory claims is statistically significant (the *Z*-test value for Wake II statutory creditors versus Thompson is 2.47 and versus Wake I is 2.00).

121. *See* Thompson, *supra* note 1, at 1058 tbl.9. However, the difference is not statistically significant—the *Z*-test value is 1.32.

122. Hodge & Sachs, *supra* note 43, at 355, 356 tbl.10. However, due to the limited sample size, this difference cannot be said to be statistically significant at the 95% level—the *Z*-test value is 1.79, which is significant at the 90% level.

123. Thompson, *supra* note 1, at 1062 n.135. However, due to the limited sample size, this difference cannot be said to be statistically significant at the 95% level—the *Z*-test value is 1.71, which is significant at the 90% level.

124. Hodge & Sachs, *supra* note 43, at 356 tbl.10. There is no statistical significance between our rate and that found in Wake I.

125. Thompson, *supra* note 1, at 1062 n.135. This difference is statistically significant—the *Z*-test value is 3.18.

126. *Id.*

However, in the random samples generated by the two Wake studies from 1986 through 2005, piercing was attempted in fourteen cases (which extrapolates to eighty-four cases).[127] ERISA, environmental, and government regulation plaintiffs fared significantly better than the average statutory piercing rate. Respectively, these plaintiffs were successful in 40%, 66.67%, and 50% of the cases.

Thompson observed the importance of statutory policy as a driving factor in piercing in the statutory context compared with traditional piercing factors in contract cases, such as undercapitalization, informalities, and misrepresentation.[128] Before 1986, undercapitalization was present in over 18% of contract cases in which the courts pierced the veil, but only just over 8% of statutory cases.[129] From 1986 through 1995, undercapitalization was present in almost 43% of contract cases in which the veil was pierced, and almost 37% of statutory cases.[130] And from 1996 through 2005, when the veil was pierced, undercapitalization was found in 34.29% of contract cases and in 36.84% of statutory cases. Thompson found misrepresentation and undercapitalization at "nearly double the rate" of contract cases as compared to statutory cases.[131] To the contrary, Wake I did not find a significant difference.[132] Our data echoes the results of Thompson as to misrepresentation. However, with respect to informalities, we found the factor present in 68.4% of statutory cases in which the veil was pierced, but only in 31.42% of contract cases in which the veil was pierced. It appears that courts have reverted to looking at traditional piercing factors in the statutory context.

127. Wake I found four discrimination cases in its sample. Hodge & Sachs, *supra* note 43, at 356 tbl.10. We found ten cases in our sample. Multiplying fourteen cases by the sample rate (one in six), extrapolates this number to eighty-four total cases.

128. Thompson, *supra* note 1, at 1062.

129. *Id.* at 1062 & n.136.

130. Hodge & Sachs, *supra* note 43, at 356.

131. Thompson, *supra* note 1, at 1062.

132. Hodge & Sachs, *supra* note 43, at 356.

TABLE 11: STATUTORY CLAIMS

WAKE II

Category	Total Cases	Pierce	No Pierce	% Piercing
Bankruptcy	15	3	12	20.00%
ERISA	10	4	6	40.00%
Environment	6	4	2	66.67%
Discrimination	10	0	10	0.00%
Fraud	5	1	4	20.00%
Patent	6	1	5	16.67%
Gov't Regulation	2	1	1	50.00%
Corporate	3	1	2	33.33%

THOMPSON

Category	Total Cases	Pierce	No Pierce	% Piercing
Bankruptcy	34	16	18	47.06%
ERISA	2	2	0	100%
Environment	6	5	1	83.33%
Discrimination	7	5	2	71.43%
Fraud	11	9	2	81.82%
Patent	19	14	5	73.68%
Gov't Regulation	40	21	19	52.50%
Corporate	25	7	18	28.00%

WAKE I

Category	Total Cases	Pierce	No Pierce	% Piercing
Bankruptcy	28	13	15	46.43%
ERISA	20	8	12	40.00%
Environment	7	5	2	71.43%
Discrimination	4	0	4	0.00%
Fraud	2	2	0	100%
Patent	4	1	3	25.00%
Gov't Regulation	-	-	-	-
Corporate	-	-	-	-

B. *Reasons Given by the Courts*

Piercing the corporate veil is an evolving doctrine. Courts cite to numerous factors in reaching their decisions on whether to pierce the corporate veil. Piercing jurisprudence is not an exact science, as the same reasons appear in cases in which the veil is pierced as well as those in which the veil is not pierced.[133] This next Subpart presents the empirical results of the reasons given by the courts, including the frequency of a factor being mentioned, whether that factor coincides with a decision to pierce, and a comparison to the empirical results of Thompson and Wake I.

1. *Initial Comparisons*

Three of the factors often associated with a piercing result are "instrumentality," "alter ego," and "dummy corporation."[134] These factors are often criticized for being conclusory in nature.[135] Thus, it should be of no surprise that these factors returned a 100% pierce rate when found to be present. Other factors with a pierce rate of over 90% include "misrepresentation" (92.31%), "undercapitalization" (95.49%), "intertwining" (93.33%), and "domination and control" (93.55%). These results are mostly consistent with Thompson[136] and Wake I,[137] with the exceptions of undercapitalization and domination and control. Pre-1986, a finding of undercapitalization resulted in a pierce rate of 73.33%.[138] It has since become significantly more important, with a finding of undercapitalization resulting in an 89.19% pierce rate from 1986 through 1995[139] and 95.45% from 1996 through 2005.[140] Before 1986, a finding of domination and control resulted in a pierce rate of 56.99%.[141] The pierce rate for this factor increased to 75% from 1986 through 1995,[142] and continued to rise from 1996 through 2005—

133. Thompson, *supra* note 1, at 1063.

134. *See id.* at 1064.

135. *See, e.g.*, *id.*; Bainbridge, *supra* note 31, at 513.

136. Thompson's findings for the same factors were as follows: "misrepresentation" (94.08%); "undercapitalization" (73.33%); "intertwining" (85.71%); and "domination and control" (56.99%). Thompson, *supra*, note 1, at 1063 tbl.11.

137. Wake I's findings for the same factors were as follows: "misrepresentation" (100%); "undercapitalization" (89.19%); "intertwining" (89.36%); and "domination and control" (75.00%). Hodge & Sachs, *supra* note 43, at 358 tbl.11.

138. Thompson, *supra* note 1, at 1063 tbl.11.

139. Hodge & Sachs, *supra* note 43, at 358 tbl.11.

140. The pierce rate we found for cases in which undercapitalization is found is statistically significant from the rate found in Thompson (*Z*-test value of 2.26), but not statistically significant from that found in Wake I (*Z*-test value of 0.84).

141. Thompson, *supra* note 1, at 1063 tbl.11.

142. Hodge & Sachs, *supra* note 43, at 358 tbl.11.

when it was also outcome-determinative—with a finding resulting in a pierce rate of 93.55%.[143]

Factors that seem less important to courts were "agency" and "informalities." Agency was found to be an important factor in determining to pierce in 92.31% of the cases analyzed by Thompson,[144] in 87.50% of the cases in Wake I,[145] and in 75% of the cases in this Study. Due to the limited number of cases involving agency analyzed in our Study, it is not possible to state that this lower pierce rate is significant as compared to the rates found in the two previous studies.[146] In terms of the importance of failing to maintain corporate formalities, Thompson reported a pierce rate of 66.89%,[147] Wake I reported a rate of 79.41%,[148] and Wake II found a rate of 74.29%.[149] Again, however, this finding was not statistically significant when compared across studies due to the limited sample size of this Study.

Courts also looked to areas of overlap between the shareholder and corporation in reaching their determinations of whether or not to pierce the corporate veil. If the court found such an overlap, a piercing result followed in 66.12% of cases. This is up from Wake I's figure of 53.60%[150] and Thompson's figure of 56.53%.[151] Among the various forms of overlap, courts pierced most often when there was overlap in business activity (89.29%) or management (88.67%). Commonality in office space or ownership resulted in piercing in only 46.67% and 59.38% of the cases, respectively. But when overlap existed in officers, directors, or employees, courts pierced the corporate veil in 67.86% of the cases.[152] The importance of sharing office space has decreased, as compared with pre-1986 through 1995

143. The pierce rate we found for cases in which domination and control is determined to exist is statistically significant from the rate found in Thompson (*Z*-test value of 4.03) and from the rate found in Wake I (*Z*-test value of 2.09).

144. Thompson, *supra* note 1, at 1063 tbl.11.

145. Hodge & Sachs, *supra* note 43, at 358 tbl.11.

146. In the cases we analyzed involving agency, the statistical significance when compared to the Thompson study was a *Z*-test value of 1.52 and when compared to the Wake I study was a *Z*-test value of 0.64. Thus, neither comparison yielded a statistically significant result.

147. Thompson, *supra* note 1, at 1063 tbl.11.

148. Hodge & Sachs, *supra* note 43, at 358 tbl.11.

149. However, once again, due to the small sample size of cases in this Study dealing with corporate formalities, it is not possible to state that this lower pierce rate is statistically significant from the rates found in Thompson (*Z*-test value of 0.85) and Wake I (*Z*-test value of 0.50).

150. Hodge & Sachs, *supra* note 43, at 358 tbl.11. This difference is statistically significant—the *Z*-test value is 2.71.

151. Thompson, *supra* note 1, at 1063 tbl.11. This difference is also statistically significant—the *Z*-test value is 2.96.

152. In our Study, there were fifty-six reported cases in which there was some overlap in officers, directors, or employees. The courts pierced the corporate veil in thirty-eight of these cases.

data,[153] whereas the importance of commonality in management or directors has increased.[154]

153. In Thompson, the pierce rate when office space was shared was 58.82%. Thompson, *supra* note 1, at 1063 tbl. 11. In Wake I, the pierce rate was 50%. Hodge & Sachs, *supra* note 43, at 358 tbl.11. Here, it is 46.67%. But, the decrease in the significance of office space is not statistically significant from the rate found in Thompson (*Z*-test value of 0.86) or from that found in Wake I (*Z*-test value of 0.18).

154. As far as common management, before 1986 the piercing rate was 65.12%. Thompson, *supra* note 1, at 1063 tbl.11 From 1986 through 1995, it was 33.33%. Hodge & Sachs, *supra* note 43, at 358 tbl.11. Now, it is up to 88.67%. This rate is not statistically significant from Thompson (*Z*-test value of 1.69), but it is statistically significant from Wake I (*Z*-test value of 2.53). For common directors, before 1986 the rate was 43.42%; from 1986 through 1995 it was 53.13%; and now it is 69.23%. Hodge & Sachs, *supra* note 43, at 358 tbl.11; Thompson, *supra* note 1, at 1063 tbl.11. This rate is statistically significant from Thompson (*Z*-test value of 2.44), but not from Wake I (*Z*-test value of 1.25).

TABLE 12: SUBSTANTIVE FACTORS

Category	**Thompson: Pierce / No Pierce / Rate**	**Wake I: Pierce / No Pierce / Rate**	**Wake II: Pierce / No Pierce / Rate**
Instrumentality	73 / 2 / 97.33%	13 / 0 / 100%	14 / 0 / 100%
Alter Ego	173 / 8 / 95.58%	39 / 1 / 97.50%	24 / 0 / 100%
Misrepresentation	159 / 10 / 94.08%	21 / 0 / 100%	24 / 2 / 92.31%
Agency	48 / 4 / 92.31%	7 / 1 / 87.50%	6 / 2 / 75.00%
Dummy	70 / 8 / 89.74%	4 / 1 / 80.00%	12 / 0 / 100%
Intertwining	174 / 30 / 83.33%	42 / 5 / 89.36%	28 / 2 / 93.33%
Undercapitalization	88 / 32 / 73.33%	33 / 4 / 89.19%	21 / 1 / 95.45%
Informalities	101 / 50 / 66.89%	27 / 7 / 79.41%	26 / 9 / 74.29%
Domination/Control	314 / 237 / 56.99%	33 / 11 / 75.00%	29 / 2 / 93.55%
Overlap:			
Officers	87 / 87 / 50.00%	18 / 22 / 45.00%	18 / 9 / 66.67%
Directors	66 / 86 / 43.42%	17 / 15 /53.13%	18 / 8 / 69.23%
Owners	49 / 52 / 48.51%	15 / 4 / 78.95%	19 / 13 / 59.38%
Office	40 / 28 / 58.82%	7 / 7 / 50.00%	7 / 8 / 46.67%
Business Activity	35 / 8 / 81.40%	4 / 2 / 66.67%	25 / 3 / 89.29%
Employees	36 / 16 / 69.23%	4 / 4 / 50.00%	2 / 1 / 66.67%
Management	28 / 15 / 65.12%	2 / 4 / 33.33%	12 / 25 / 88.67%

TABLE 13: SUBSTANTIVE FACTORS—OVERALL FREQUENCY AND PIERCING RATE

Piercing Factors	Thompson	Wake I	Wake II
Domination & Control	Found 34% PCV 57.0%	Found 19% PCV 75.0%	Found 11% PCV 92.31%
Informalities	Found 10% PCV 66.9%	Found 15% PCV 79.4%	Found 15% PCV 74.3%
Undercapitalization	Found 8% PCV 73.3%	Found 16% PCV 89.2%	Found 9% PCV 95.5%
Intertwining	Found 16% PCV 84.2%	Found 20% PCV 89.4%	Found 13% PCV 93.3%
Misrepresentation	Found 11% PCV 91.6%	Found 9% PCV 100%	Found 11% PCV 92.3%

2. Absent Factors

In a piercing the veil analysis, courts also note the absence of certain factors in their decisions. Consistent with Thompson and Wake I, "misrepresentation" continues to be the factor that, when absent, was most often noted by courts.[155] Our data revealed that a lack of misrepresentation resulted in refusal to pierce in 100% of the cases. This is up from 92.33% in Thompson[156] and 94.44% in Wake I.[157] The absence of "agency," "dummy," "undercapitalization," and "domination and control" also resulted in a refusal to pierce in 100% of the cases. The data over the years show that if the court notes the absence of a factor, it is usually in justification for its decision not to pierce the corporate veil.[158] The lone exception to this is

155. In Thompson, the absence of misrepresentation was cited in 391 cases. Thompson, *supra* note 1, at 1064. In Wake I, its absence was cited in seventy-two cases, which extrapolates to 432 cases based on the random sample size. Hodge & Sachs, *supra* note 43, at 359 tbl.12. In the present Study, the absence of misrepresentation was cited in fifty-six cases, which extrapolates to 336 cases.

156. Thompson, *supra* note 1, at 1064 n.141. This difference is statistically significant—the *Z*-test value is 2.15.

157. Hodge & Sachs, *supra* note 43, at 359 tbl.12. However, this difference is not statistically significant—the *Z*-test value is 1.79, which would be significant at the 90% level.

158. In Thompson, if the court noted the absence of any piercing factor, it refused to pierce in over 92% of the cases. Thompson, *supra* note 1, at 1064 n.141. In Wake I, the figure was slightly lower, with courts refusing to pierce in over 91% of cases if it was noted that a piercing factor was absent. Hodge & Sachs, *supra* note 43, at 359 tbl.12. The lone exception was when the absence of agency was mentioned, which resulted in a refusal to pierce in only 66.67% of

"informalities," as the data shows that it is not as important as it once was. In Thompson and Wake I, when courts noted that there was no evidence of a corporation failing to maintain formalities in records and bookkeeping, they refused to pierce in approximately 95% of cases.[159] From 1996 through 2005, this figure fell significantly, to 81%.[160]

TABLE 14: ABSENCE OF SUBSTANTIVE FACTORS

Category	Thompson: Pierce / No Pierce / Rate	Wake I: Pierce / No Pierce / Rate	Wake II: Pierce / No Pierce / Rate
Instrumentality	0 / 59 / 100%	1 / 18 / 94.74%	1 / 16 / 94.12%
Alter Ego	1 / 165 / 99.40%	0 / 57 / 100%	1 / 49 / 98.00%
Misrepresentation	30 / 361 / 92.33%	4 / 68 / 94.44%	0 / 56 / 100%
Agency	1 / 53 / 98.15%	1 / 2 / 66.67%	0 / 15 / 100%
Dummy	0 / 64 / 100%	1 / 11 / 91.67%	0 / 21 / 100%
Intertwining	1 / 99 / 99.00%	1 / 34 / 97.14%	3 / 41 / 93.18%
Undercapitalization	3 / 48 / 94.12%	1 / 25 / 96.15%	0 / 26 / 100%
Informalities	4 / 71 / 94.67%	1 / 19 / 95.00%	7 / 30 / 81.08%
Domination & Control	2 / 124 / 98.41%	2 / 25 / 92.59%	0 / 39 / 100%

3. Undercapitalization

Undercapitalization is generally considered by commentators to be a significant factor in the piercing analysis.[161] As Thompson noted, some commentators have even suggested that

the cases. *Id.* However, the absence of agency was noted in just three cases in Wake I. *Id.* In the present Study, with the exception of informalities, courts refused to pierce at least 93% of the time when the absence of a factor was noted.

159. Hodge & Sachs, *supra* note 43, at 359 tbl.12; Thompson, *supra* note 1, at 1064 n.141.

160. This decrease is statistically significant from the rate in Thompson (*Z*-test value of 2.27), but not from that in Wake I (*Z*-test value of 1.44).

161. *See* Thompson, *supra* note 1, at 1065.

undercapitalization exists in every piercing case,[162] or that every claim involving undercapitalization should lead to piercing.[163] In light of this commentary, it is appropriate to further study the undercapitalization factor.

Courts pierced the veil in 95.45% of cases in which undercapitalization was present. Of the thirty-six contract cases in which the veil was pierced, undercapitalization was present in twelve (33.33%). Of the six tort cases in which the veil was pierced, undercapitalization was present in only one (16.67%). In the statutory context, of the nineteen cases in which the veil was pierced, undercapitalization was present in seven (36.84%). Thus, just as in Thompson,[164] and in Wake I,[165] undercapitalization is not necessarily an automatic predictive factor for piercing.

Moreover, in cases in which the court pierced the corporate veil, undercapitalization was a factor in 38.1% of cases in which the defendant was the sole shareholder, 37.5% in which the defendant corporation had two or three shareholders, and 25% of cases in which the defendant was a close corporation with more than three shareholders.[166] Thus, courts were more likely to pierce when undercapitalization was involved and when there were only a few shareholders.

Undercapitalization along with misrepresentation in the same setting also does not determine the outcome in a large number of cases. Of the sixty-four cases in which courts pierced the corporate veil, either misrepresentation or undercapitalization was present in thirty-five cases (54.69%), but both were present in only ten cases (15.63%). Misrepresentation was present in 45.45% of all cases in which undercapitalization was present, and 47.61% of cases in which undercapitalization was present and the court pierced.

162. *Id.* (citing Adolf A. Berle, *The Theory of Enterprise Entity*, 47 COLUM. L. REV. 343, 349 n.15 (1947)).

163. *Id.* (citing Rutherford B. Campbell, *Limited Liability for Corporate Shareholders: Myth or Matter-of-Fact*, 63 KY. L.J. 23, 53 (1974)).

164. *See* Thompson, *supra* note 1, at 1066.

165. *See* Hodge & Sachs, *supra* note 43, at 359–60.

166. However, due to the small sample size involved, these differences cannot be said to be statistically significant.

TABLE 15: UNDERCAPITALIZATION ("*UC*")

# of Shareholders	# of Cases When Court Pierced	# of Piercing Cases Citing *UC*	% of Piercing Cases Citing *UC*
One	21	8	38.10%
Two or Three	16	6	37.50%
Close	28	7	25.00%
Parent/Sub	9	4	44.44%
Sibling	1	0	0.00%

# of Shareholders	Thompson	Wake I	Wake II
One	14.60%	40.00%	38.10%
Two or Three	24.55%	53.85%	37.50%
Close	11.96%	25.00%	25.00%
Parent/Sub	11.11%	9.09%	44.44%
Sibling	10.53%	50.00%	0.00%

4. Informalities

As Thompson noted, scholars have also criticized judges for relying on a corporation's failure to adhere to corporate formalities as a basis for piercing the corporate veil.[167] In our Study, failure to follow corporate formalities resulted in courts piercing the corporate veil in 74.29% of cases. This is an increase from Thompson's rate of just under 67%,[168] but a decrease from Wake I's rate of 79.41%.[169] However, when compared with other factors, the lack of corporate formalities is the least important consideration.[170]

When the cases are separated by their substantive context, lack of formalities appears to be most important in statutory cases (68.42%), less important in contract cases (31.43%), and even less important in tort cases (16.67%). These results mirror those for undercapitalization, except that lack of formalities is much more important than undercapitalization in the statutory context.

5. Contract v. Tort

In the piercing context, contract cases far outnumber tort cases.

167. Thompson, *supra* note 1, at 1067 (citing Cathy S. Krendl & James R. Krendl, *Piercing the Corporate Veil: Focusing the Inquiry*, 55 DENV. L.J. 1, 28 n.98 (1978).

168. *See* Thompson, *supra* note 1, at 1067.

169. *See* Hodge & Sachs, *supra* note 43, at 360.

170. In Thompson, failure to observe corporate formalities had the second lowest pierce rate of any major factor, at 66.89%. Thompson, *supra* note 1, at 1067. The same was true in Wake I, but at a rate of 79.41%. Hodge & Sachs, *supra* note 43, at 360. Here, failing to observe corporate formalities resulted in the lowest pierce rate (74.29%) compared with the other factors.

In Thompson, tort cases accounted for 14.28% of all piercing cases,[171] and in Wake I, they accounted for 11.84% of all cases.[172] In our Study, tort cases constituted 16.95% of all cases.

When cases involving misrepresentation are removed from the analysis, the piercing rates also decrease. However, the piercing rate is still higher in the contract context. Courts pierced in about 21.21% of non-misrepresentation contract cases, as opposed to 8.33% of non-misrepresentation tort cases.[173]

TABLE 16: NON-MISREPRESENTATION CASES

Category	Total Cases: Misrepresentation NOT a Factor	Pierce	No Pierce	% Pierced
Contract	99	21	78	21.21%
Tort	36	3	33	8.33%

One last noteworthy point in tort cases involves the identity of the defendant sought to be held liable. Conventional wisdom would lead one to think that plaintiffs would go after corporate defendants (either a sibling, parent, or subsidiary) more often because of deep corporate pockets. However, in our Study, less than one-half of tort cases involved a corporate defendant (45%). This is down significantly from Thompson's figure of 72.68%,[174] but consistent with Wake I.[175] Moreover, corporate defendants were far more successful than their individual counterparts against tort plaintiffs. Corporations were only held liable in 5.56% of tort cases, as opposed to the 18.18% of tort cases in which plaintiffs successfully held individuals liable.

C. Summary of Our Findings

Veil piercing is an evolving doctrine. This Study reaffirms many of the empirical findings in Thompson and Wake I, but also reveals new issues that should be explored. Most importantly, our Study confirms Wake I's finding that the veil piercing rate has not remained constant over time. While it is not clear if the rate is

171. Professor Thompson found that only 226 of the 1583 cases in his study were tort cases. Thompson, *supra* note 1, at 1068.

172. Wake I found only 27 of 228 cases to be tort cases. Hodge & Sachs, *supra* note 43, at 361 n.120.

173. This difference is only statistically significant at the 90% level—the *Z*-test value is 1.73.

174. *See* Thompson, *supra* note 1, at 1069 n.171. This difference is statistically significant—the *Z*-test value is 3.44.

175. *See* Hodge & Sachs, *supra* note 43, at 361 & n.122. The results are consistent since the difference is not statistically significant—the *Z*-test value is 0.09.

continuing to drop or if it has leveled out, there has been a significant drop-off since 1985. A more comprehensive analysis of piercing cases over the past fifteen years would provide additional insight into the piercing rate over time.

A jurisdictional analysis confirms some previous findings and reveals some new trends. Thompson found no statistical difference in the piercing rate in federal or state court, or at the trial or appellate level. Our Study also found no difference in the rate in federal or state court. Our Study, however, did find that the trial court piercing rate has fallen over time while appellate court piercing has remained constant.

Characteristics of the plaintiff and defendant also reveal trends in their respective success rates. Previous studies characterized plaintiffs as either individuals or corporations and found no discernable difference in the rate of success based on the plaintiff's identity. In our Study, we found that corporate plaintiffs are much more successful in bringing piercing cases than are individual plaintiffs. Additionally, the pierce rate for individual plaintiffs has fallen over time, while the rate for corporate plaintiffs has remained relatively constant. Turning to the defendant's identity, our Study confirms prior findings that piercing cases are still more successful against individual defendants than corporate defendants. An analysis of the number of shareholders of the defendant corporation also reveals some interesting trends, but the golden rule still remains in effect—there is no reported case of a public corporation being pierced.

Finally, piercing cases can also be divided between contract and tort cases. Thompson found contract creditors to be more successful, while Wake I found the opposite. Our findings are consistent with Thompson, but as with the overall theme of our Study, we found that the piercing rate for both contract and tort creditors has fallen over time.

CONCLUSION

The principle of limited liability is a deep-seated component of the corporate law landscape in the United States. As this Study shows, however, the principle of limited liability is not absolute. Piercing the corporate veil is but one exception to the general rule of limited liability. While commentators often criticize the unpredictable nature of how courts treat piercing cases,[176] this Study, and the empirical studies it builds on, identify some significant trends that enable law students, scholars, practitioners,

176. *See, e.g.*, PHILLIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS: PROCEDURAL PROBLEMS IN THE LAW OF PARENT AND SUBSIDIARY CORPORATIONS 8–9 (1983); Easterbrook & Fischel, *supra* note 4, at 89; Jonathan M. Landers, *A Unified Approach to Parent, Subsidiary, and Affiliate Questions in Bankruptcy*, 42 U. CHI. L. REV. 589, 620 (1975).

and judges to better understand how and when the corporate veil should be pierced.

Our data confirms findings made by Thompson and Wake I that courts are reluctant to pierce the corporate veil when the corporate defendant is a public corporation. The mere fact that not a single defendant in the 232 cases we analyzed was a public corporation is evidence that the rationale of limited liability is firm when a corporation is publicly traded. If courts were to allow piercing in this context, it would likely result in decreased investments in publicly traded companies and give shareholders incentives to attempt to micromanage corporations. Courts' refusal to pierce in the case of publicly traded corporations could be the most consistently applied rule in piercing jurisprudence.

The overall pierce rate for our Study was 27.12%. This is significant because it disproves Thompson's notion that there is no trend in piercing over time. Taking our data into account with that of the previous two comprehensive studies, a downward logarithmic trend has developed in the piercing rate over the past thirty years. Additionally, after extrapolation, the data shows that the number of piercing cases has been increasing every year. Thus, the number of piercing attempts has been increasing while the actual piercing rate has been decreasing. This could mean any number of things—from a renewed sense of respect for the rule of limited liability, to simply an increase in the number of attempts by plaintiffs' attorneys, or even more cases being reported or less cases being settled.

The data also shows that between 1996 and 2005, courts pierced more frequently in the contract setting than in the tort setting. This finding held for cases involving misrepresentation, as well as for cases in which there was no misrepresentation on the defendant's behalf. This is consistent with Professor Thompson's results, but directly opposite that of Wake I, as well as conventional wisdom. Many commentators have argued that courts should pierce the veil more frequently in tort cases than in contract cases because of the involuntary nature of the transaction between a tort plaintiff and a corporate defendant.[177] A contract creditor has the ability to negotiate his risk premium prior to entering into the contract, and the courts should not interfere with this risk allocation. However, this finding should not be taken as conclusive and it can be attributed to any number of reasons. The number of tort cases brought remains relatively low as compared with the number of contract cases. In the tort context, corporate defendants now realize that piercing is a real possibility and thus may be more inclined to settle cases out of court.

Additionally, courts may be more concerned with the actual conduct of the defendant, rather than the context of the claim. For a

177. *See, e.g.*, Easterbrook & Fischel, *supra* note 4, at 112; Robert W. Hamilton, *The Corporate Entity*, 49 TEX. L. REV. 979, 984–85 (1971).

private plaintiff, the most successful piercing attempts are when the plaintiff is trying to reach individual shareholders. Moreover, plaintiffs are substantially more successful in piercing when the corporation has three or fewer shareholders. The most cited factors in piercing cases are misrepresentation, intertwining, and domination or control. Failure to observe corporate formalities was also cited often, but a finding of informalities resulted in the lowest pierce rate, as compared to the other factors. This shows that the courts are looking to see if there is any separation between the corporate defendant and the shareholder in his conduct. If the shareholder is treating corporate assets as his own personal funds, and others are not able to make a clear distinction between the shareholder's conduct and the corporation's conduct, it logically follows that it is only equitable to pierce in this context.

Our findings show that plaintiffs brought their claims in federal and state courts in roughly the same proportion, but that state court plaintiffs enjoyed a slightly higher pierce rate. However, there is great variation in the pierce rate from state to state. Courts in Ohio actually pierced more than half the time. New York had the most piercing cases, and its piercing rate was the same as the overall rate in this Study. But on the other hand, Connecticut had the next most piercing cases but never once pierced. Additionally, Delaware had very few piercing cases, and also never pierced. These findings may be of some significance to plaintiffs in determining the jurisdiction in which to bring their claims.

Suggestions for Future Research

While this Study has identified several trends in how courts are treating piercing the corporate veil cases, there are still many questions left to be answered by further research. Perhaps chief among the questions is whether the recent financial crisis will have an impact on the limited liability rule and how courts view piercing cases. Will the downward trend in piercing occurrences identified by this Study continue, or will economic conditions exemplified by stories of Bernie Madoff, Lehman Brothers, and Eric Dreier make courts more amenable to piercing claims?

Future empirical studies might also consider how the single business enterprise theory, direct participant liability, and other exceptions to the limited liability rule impact courts' treatment of piercing the corporate veil. Empirical studies focusing on uniformity of piercing the veil cases within particular jurisdictions would also make practical contributions that would help scholars and practitioners better understand the legal landscape. For instance, a future study might look at all piercing cases from the Fourth Circuit to determine whether the doctrine is being applied in a uniform manner and how litigation strategy could be influenced by an empirical understanding of what courts actually do. Moreover,

there is a need for additional comprehensive attempts at studying piercing the corporate veil in the manner of Professor Thompson's study.

Ultimately, the authors hope that an increase in empirical knowledge will lead to a more uniform application of this doctrine and a better understanding of when it is appropriate to make exceptions to the general rule of limited liability.

Richmond McPherson*

Nader Raja**

* J.D. 2010, Wake Forest University School of Law; M.D.R. 2007, Pepperdine University School of Law; B.A. 2004, Pepperdine University. Richmond McPherson would like to thank his wife, Janet, for her constant support, love, and friendship.

** J.D. 2010, Wake Forest University School of Law; B.S. 2007, University of Virginia.

The authors wish to thank Professor Alan R. Palmiter for his assistance in developing this Study and the members of the *Wake Forest Law Review* for their hard work in publishing this Study.