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# DISREGARDING THE CORPORATE FORM: WHY JUDGES, NOT JURIES, SHOULD DECIDE THE QUIDDITS AND QUILLETS OF VEIL PIERCING

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## INTRODUCTION

Corporate entities are generally treated as distinct from their shareholders; a judgment recovered against a corporation cannot be enforced against its shareholders, whether those shareholders are individuals or corporate entities themselves. But *generally* is an important qualifier. In some circumstances, such as when the corporate form has been used to commit fraud and the corporation has no assets to satisfy a judgment, a creditor may "pierce the corporate veil" and hold otherwise immune shareholders personally liable for the corporation's debts. As one notable commentator rather whimsically characterized it, veil piercing is "the refusal of the courts to allow quiddits and quillets to stand in the way of justice."[1]

The nature of a veil-piercing action is vexing. It is not truly a "claim," and not quite a remedy, either. Closer to the latter than to the former, it can perhaps best be described as a legal mechanism that allows a creditor to enforce a judgment against a party able to satisfy it.[2] The historical roots of veil piercing are tangled as well, reaching into the jurisprudence of courts of law and also of courts of equity. As the highest court of the State of New York once observed, the concept of veil piercing is "still enveloped in the mists of metaphor."[3]

This conceptual and historical murkiness has at least one important practical consequence for practicing litigators to-

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1. I. MAURICE WORMSER, DISREGARD OF THE CORPORATE FICTION AND ALLIED CORPORATION PROBLEMS 44 (1927).

2. Piercing the corporate veil is nevertheless frequently referred to as a "claim" in legal vernacular and in many court opinions. For the sake of convenience, we will similarly use the term "claim" in this Article.

3. Berkey v. Third Ave Ry. Co., 155 N.E. 58, 61 (N.Y. 1926); *see also* Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1036 (1991) ("Piercing the corporate veil is the most litigated issue in corporate law and yet it remains among the least understood.").

day: federal and state courts have not been able to settle on *who* should decide veil-piercing actions. Both the federal circuits and the appellate courts of various states have split widely, some determining that judges should decide whether to pierce the corporate veil and others assigning the task to juries.[4]

This Article attempts to make sense of that confusion and proposes a way forward. Part I focuses generally on the circumstances under which a civil plaintiff in federal court is entitled to a trial by jury, as opposed to by judge—an inquiry that requires an examination of English legal history and a comparison of the relative capacity of each type of fact-finder. Part II explains the function of veil piercing and examines its historical roots. Next, Part III analyzes the existing case law and the reasoning various courts have applied in determining who should adjudicate veil-piercing actions. Finally, Part IV argues that, because the corporate person is, itself, a legal fiction, judges, not juries, are best suited to decide whether the corporate veil should be pierced in a particular case.

## I.
## The Right to Trial by Jury

Not every civil litigant in the United States is entitled to have her claims heard and decided by a jury. Some claims, instead, may only be brought before a judge sitting as the fact-finder.[5] The distinction lies in a combination of statutory language, eighteenth century English legal history, more recent American precedent, and sometimes a court's practical evaluation of which fact-finder is better suited to decide a given issue.

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4. *See, e.g.*, *In re* G-I Holdings, Inc., 380 F. Supp. 2d 469, 476 (D.N.J. 2005) ("A circuit split exists as to whether the nature of the relief in an action to pierce the corporate veil is legal or equitable.").

5. Every criminal defendant, by contrast, is entitled to a trial by jury. U.S. Const. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.").

### A. *Statutory Jury Rights*

There is one threshold matter: a court must look first to whether a statutory right to jury trial is implicated.[6] Some federal and state statutes explicitly guarantee the right to trial by jury for any claims brought pursuant to certain provisions. Examples in federal law include claims brought by seamen pursuant to the Jones Act,[7] actions on bonds and special instruments,[8] admiralty and maritime cases,[9] and original actions at law brought in the Supreme Court against citizens of the United States.[10] Examples in state law include New York divorce actions,[11] New Jersey worker's compensation claims,[12] Maryland real property actions,[13] and Wisconsin disputes re-

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6. *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 707 (1999).

7. 46 U.S.C. § 30104 ("A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer.").

8. 28 U.S.C. § 1874 ("In all actions to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty, wherein the forfeiture, breach, or nonperformance appears by default or confession of the defendant, the court shall render judgment for the plaintiff for such amount as is due. If the sum is uncertain, it shall, upon request of either party, be assessed by a jury.").

9. 28 U.S.C. § 1873 ("In any case of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons or upward, enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation between places in different states upon the lakes and navigable waters connecting said lakes, the trial of all issues of fact shall be by jury if either party demands it.").

10. 28 U.S.C. § 1872 ("In all original actions at law in the Supreme Court against citizens of the United States, issues of fact shall be tried by a jury.").

11. N.Y. DOM. REL. § 173 ("In an action for divorce there is a right to trial by jury of the issues of the grounds for granting the divorce.").

12. N.J. STAT. ANN. § 34: 19-5 ("Upon a violation of any of the provisions of this act, an aggrieved employee or former employee may, within one year, institute a civil action in a court of competent jurisdiction. Upon the application of any party, a jury trial shall be directed to try the validity of any claim under this act specified in the suit.").

13. M.D. CODE ANN., REAL PROP. § 8-332(b) ("On appeal [from any final order or judgment in an action of distress to the circuit court of the county] the case shall be tried de novo. On the application of any party to the action for a prompt hearing of the appeal, it shall be set for trial as soon as possible. Any party has the right to a jury trial on application in accordance with the rules adopted by the appellate court.").

garding motor vehicle accidents.[14] Other statutes, such as the Fair Labor Standards Act[15] and the Age Discrimination in Employment Act,[16] are less explicit but have been found, on grounds of statutory context or stare decisis, to carry a right to a jury as well. In such cases, the court will avoid any constitutional inquiry and simply enforce the statutory right to a jury.[17]

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14. WIS. STAT. § 345.425 ("The defendant shall be informed of his or her right to a jury trial in circuit court on payment of fees required by § 345.43(1). If both parties, in a court of record, request a trial by the court or if neither demands a trial jury, the right to a trial by jury is waived.").

15. 29 U.S.C. § 217, discussed in Lorillard v. Pons, 434 U.S. 575, 580, n.7 (1978) (citing, *inter alia*, Wirtz v. Jones, 340 F.2d 901, 904 (5th Cir. 1965) ("[I]t was well established that there was a right to a jury trial in private actions pursuant to the FLSA. Indeed, every court to consider the issue has so held.").

16. 29 U.S.C. § 621, discussed in *Lorillard*, 434 U.S. at 580 ("Looking first to the procedural provisions of the statute, we find a significant indication of Congress' intent in its directive that the ADEA be enforced in accordance with the 'powers, remedies and procedures' of the Fair Labor Standards Act. 29 U.S.C. § 7(b). Long before Congress enacted the ADEA, it was well established that there was a right to a jury trial in private actions pursuant to the FLSA. Indeed, every court to consider the issue has so held.").

17. *See, e.g.*, Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 345 (1998) (reaching the Seventh Amendment question only after determining that there existed no statutory right to have the jury assess the amount of statutory damages); Bentley v. Arlee Home Fashions, Inc., 861 F. Supp. 65, 68 (E.D. Ark. 1994) (avoiding the Seventh Amendment question based on the court's finding that the right to jury trial is guaranteed under the Worker Adjustment and Retraining Notification Act). The authors have not been able to find a case in which a court has enforced a *contractual* guarantee of a right to trial by jury; judicial determination of such a right is likely unnecessary in most cases because breach of contract claims were historically heard by juries and therefore subject to the Seventh Amendment preservation of the right to jury trial, as explained below. On the other hand, there is a more substantial body of law on the enforceability of *waivers* by contract of the right to trial by jury. The federal courts generally enforce such waivers. *See, e.g.*, Leasing Serv. Corp. v. Crane, 804 F.2d 828, 832 (4th Cir. 1986) ("The Seventh Amendment right is of course a fundamental one, but it is one that can be knowingly and intentionally waived by contract."); Nat'l Equip. Rental, Ltd. v. Hendrix, 565 F.2d 255, 258 (2d Cir. 1977) ("It is elementary that the Seventh Amendment right to a jury is fundamental and that its protection can only be relinquished knowingly and intentionally.").

But there are exceptions—waivers are not enforced unless they are made voluntarily, knowingly, or intentionally. *See generally* Brian D. Weber, Note, *Contractual Waivers of a Right to Jury Trial—Another Opinion*, 53 CLEV. ST. L. REV. 717, 720 (2005–06); Amanda Szuch, Note, *Reconsidering Contractual Waivers of the Right to a Jury Trial in Federal Court*, 79 U. CIN. L. REV. 435, 438 (2011) (addressing the "ambiguous federal standard"). The Second Circuit,

Where there is no such statutory guarantee of a right to trial by jury—either because the relevant statute is silent or because the cause of action derives from the common law or another non-statutory source—a court will look to the Seventh Amendment to determine whether the claimant has a constitutional right to a jury trial.

### B. *The Seventh Amendment*

The Seventh Amendment to the United States Constitution preserves the right to jury trial "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars."[18] It does not "create" a right to a jury; rather, it preserves that right as it "existed under the English common law when the Amendment was adopted."[19] Actions brought at English common law were "suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered."[20] Thus, the Seventh Amendment "may . . . be well construed to embrace all suits which are not of equity and admiralty jurisdiction."[21]

In other words, the Seventh Amendment protects a litigant's right to a trial by jury for those matters traditionally brought before eighteenth century English courts of law that resolved legal (as opposed to equitable) issues, or for those that seek legal—i.e., not injunctive or declaratory—relief. Eighteenth century English juries were permitted to decide matters of fact in cases involving money damages, as well as some "extraordinary" remedies such as writs of habeas

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for example, found that it would be against public policy to enforce a "provision literally buried in the eleventh paragraph of a fine print, sixteen clause agreement, [e]mbedded [with] the crucial words: 'Lessee hereby waives a trial by jury,' and deny the claimant a trial by jury." *Nat'l Equip. Rental*, 565 F.2d at 258.

And state courts vary in their view of the enforceability of jury trial waivers. The Supreme Court of Georgia, for example, holds contractual jury waivers generally unenforceable. *See* Bank S., N.A. v. Howard, 444 S.E. 2d 799, 800 (Ga. 1994) (barring the contractual waiver of the "valuable rights" to jury trial to prevent "the probability of abuse that exists").

18. U.S. CONST. amend. VII.

19. Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935).

20. Parsons v. Bedford, Breedlove & Robeson, 28 U.S. (3 Pet.) 433, 447 (1830).

21. *Id.*

corpus.[22] English courts of equity "handled nearly everything else, including injunctions, accountings, trusts, reformation of contracts, and some forms of restitution."[23] Several decades ago, the United States Supreme Court clarified that "[t]he Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action."[24] Thus, the Seventh Amendment requires that a jury "be available if the action involves rights and remedies of the sort typically enforced in an action at law," regardless of whether the overall cause of action was traditionally heard in English courts of law or of equity.[25]

To determine whether the right to a jury attaches to a given issue, the Supreme Court has applied a two-part historical test. First, a court must assess whether the issue was tried at law or equity at the time the Seventh Amendment was adopted in 1791.[26] To that end, the court must examine the nature of the claim and the nature of the relief sought. Second, if the issue is legal in nature and thus potentially susceptible to trial by jury, the court must determine whether the issue was historically considered fundamental enough to require determination by a jury. This second inquiry involves, if necessary, an examination of the relative capabilities of judges and juries.[27]

1. *Nature of the Issue*

Under the first inquiry, a court must determine whether the action is more analogous to a common-law cause of action,

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22. *See* Ellen E. Sward, *The Seventh Amendment and the Alchemy of Fact and Law*, 33 SETON HALL L. REV. 573, 577–78 & n.25 (2003).

23. *Id.* at 577–78.

24. Ross v. Bernhard, 396 U.S. 531, 538 (1970) (holding that, even though the plaintiff's cause of action, a shareholder's derivative suit, was traditionally brought in courts of equity, the Seventh Amendment preserved the plaintiff's right to jury trial with respect to the legal issues presented).

25. Curtis v. Loether, 415 U.S. 189, 195 (1974).

26. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 708 (1999) ("[W]e ask, first, whether we are dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was." (quoting Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996)).

27. *Id.* ("If the action in question belongs in the law category, we . . . ask whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791.") (quoting *Markman*, 517 U.S. at 376).

as opposed to an action in equity, by examining the nature of the cause of action and the nature of the remedy sought.[28] With respect to the cause of action, the Supreme Court has maintained that the Seventh Amendment "applies not only to common-law causes of action, but also to 'actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century.'"[29] This means that the Court does not limit its definition of "actions at law" in the jury context only to those causes of action that existed at English common law. Instead, courts are instructed to look to the underlying nature of the right being asserted—particularly those rights created by statutory regimes not contemplated by the English courts—to determine whether it is more similar than not to legal actions in the English system. Of course, this "rule" is not a paradigm of clarity and there is no strict guidance on *how* courts should determine whether to find that a right is more similar to an English legal remedy rather than an equitable one. Two Supreme Court decisions demonstrate the Court's willingness to find an analogy between English common law and a newly created statutory right.

To illustrate, the Supreme Court early on rejected the argument that the Seventh Amendment was inapplicable to an action brought under the Civil Rights Act of 1968 on the ground that it was a "new cause[ ] of action created by congressional enactment."[30] Where the statutory claim was unknown at common law, the right to jury trial nonetheless inures "so long as the claims can be said to 'soun[d] basically in tort,' and seek legal relief."[31] A claim sounds in tort if it "provide[s] redress for interference with protected personal or property interests."[32] Relying on this precedent, the Supreme Court determined that a real estate developer's suit for money damages under 28 U.S.C. § 1983—based on a constitutional violation of the developer's due process and equal protection rights by the municipality, which repeatedly rejected the developer's proposals for a parcel of land—is an action at law. The

28. Tull v. United States, 481 U.S. 412, 417–18 (1987).

29. Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 348 (1998) (quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42 (1989)).

30. *Curtis*, 415 U.S. at 193–94.

31. *City of Monterey*, 526 U.S. at 709 (quoting *Curtis*, 415 U.S. at 195–96).

32. *Id.* at 709.

Supreme Court reached this conclusion, even though there existed no precise equivalent at English common law to a statutory claim for damages based on a constitutional violation, because, the Court found, section 1983 "provides relief for invasions of rights protected under federal law."[33]

The Court reached a similar conclusion with respect to the Labor Management Reporting and Disclosure Act (LMRDA).[34] In *Woodell v. International Brotherhood of Electrical Workers Local 71*,[35] a union member made claims against the local union and its officers for violation of the LMRDA. To answer the question of whether such claims were subject to a jury trial right, the Court reiterated the general principle that "we examine the remedy sought and determine whether it is legal or equitable in nature."[36] In this particular case, the Court found that "actions under the LMRDA are closely analogous to personal injury actions . . . [which] is of course a prototypical example of an action at law, to which the Seventh Amendment applies."[37] The Court therefore permitted the action to proceed to a jury trial.

However, the Supreme Court has refused to "rest [its] conclusion on what has been called an 'abstruse historical' search for the nearest 18th-century analog,"[38] and has repeatedly emphasized that characterizing the remedy sought is more important to the analysis than locating a "precisely analogous common-law cause of action."[39] For example, the *Tull* Court based its Seventh Amendment ruling on the nature of the relief sought, finding that although the Government's suit under the Clean Water Act was analogous to both equitable and legal claims, the defendant was entitled to a jury trial because a "civil penalty was a type of remedy at common law that could only be enforced in courts of law."[40] This premise holds

33. *Id.*
34. 29 U.S.C. § 401.
35. 502 U.S. 93 (1991).
36. *Id.* at 97.
37. *Id.* at 98 (finding that a union member's claim against local union and its officers for violation of LMRDA was entitled to jury trial).
38. Tull v. United States, 481 U.S. 412, 421–22 (1987).
39. *Id.* at 421.
40. *Id.* at 422; *see also* Wm. Passalacqua Builders, Inc., v. Resnick Developers S., Inc., 933 F.2d 131, 136 (2d Cir. 1991).

true even where the Supreme Court has found that the cause of action is more analogous to an equitable claim.[41]

In characterizing the relief sought, the Supreme Court has adopted the general rule that "monetary relief is legal."[42] Historically, actual and punitive damages were the form of relief issued by English law courts.[43] Damages were traditionally equitable only if they were restitutionary, "such as in action[s] for disgorgement of improper profits."[44] Where a party seeks both legal and equitable remedies, "[t]he right to jury trial is not eliminated . . . by virtue of the fact that, under our modern unified system," an equitable remedy is also sought.[45]

2. *The Second Inquiry*

Although an action may be a "Suit at common law," such that the plaintiff is entitled to a jury trial, the Seventh Amendment right does not extend to *every* issue presented by the suit. The Seventh Amendment guarantees a jury "'[o]nly [for] those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury.'"[46] Accordingly, the Supreme Court has determined that, if an action falls into the legal category, the trial court must then determine "whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791."[47] This second inquiry demands that the court look to "history to determine whether the particular issues, or analogous ones, were decided by judge or by jury in suits at common law at the time the Seventh Amendment was

41. *See, e.g.*, Chaffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558, 569–71 (1990) (regarding the first stage of the analysis as only preliminary, even though the Court found that the respondent's duty of fair representation claim was more analogous to an eighteenth century equitable cause of action).

42. Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 352 (1998).

43. Curtis v. Loether, 415 U.S. 189, 196 (1974); *see Tull*, 481 U.S. at 422 ("Remedies intended to punish culpable individuals . . . were issued by courts of law, not courts of equity.").

44. *Teamsters*, 494 U.S. at 570.

45. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 730 (1999) (Scalia, J., concurring).

46. *Tull*, 481 U.S. at 426 (quoting Colgrove v. Battin, 413 U.S. 149, 157 (1973)).

47. Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996).

adopted."[48] And where an analysis of history "does not provide a clear answer," the court must look to "precedent and functional considerations."[49]

a. Historical Practice

Component issues within a legal claim are properly submitted to the judge or jury if those particular issues were traditionally heard by the judge or jury prior to the adoption of the Seventh Amendment. For example, the Supreme Court has held that determining liability in a regulatory takings case requires complex factual inquiries and that "[i]n actions at law predominantly factual issues are in most cases allocated to the jury."[50] Although the overall action is legal, not every issue presented is proper for the jury to decide. The historical analysis may reveal that an issue was traditionally heard by a judge, even in a suit in which the jury must determine liability. In *Tull*, for example, the Court held that the jury must determine liability, but found no Seventh Amendment guarantee to having a jury fix the amount of civil penalties to the government under the Clean Water Act because the calculation of civil penalties is highly discretionary and was traditionally performed by judges.[51]

Conversely, bringing a traditionally equitable claim does not defeat the Seventh Amendment's guarantee to have a jury resolve the underlying legal issues. For example, in *Ross*, the Court held that although a shareholder's derivative suit was traditionally brought in courts of equity, the claim comprised legal issues, including breach of contract and gross negligence, for which a jury trial was guaranteed.[52] Where legal claims have been joined with equitable claims, "the right to jury trial on the legal claim, including all issues common to both claims, remains intact."[53] In the same vein, the U.S. Court of Appeals for the Third Circuit has held that "if the

48. *City of Monterey*, 526 U.S. at 718.

49. *Id.*

50. *Id.* at 720; *see also* Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 355 (1998) (finding direct historical evidence that juries set the amount of damages awarded to successful plaintiffs in copyright cases).

51. *Tull*, 481 U.S. at 427.

52. Ross v. Bernhard, 396 U.S. 531, 542 (1970).

53. *Tull*, 481 U.S. at 425 (quoting Curtis v. Loether, 415 U.S. 189, 196 n.11 (1974)).

issues related to both the legal and equitable claims can be resolved in one lawsuit, then the right to a jury trial attendant to the legal claims will prevail."[54]

b. Practical Considerations

Where neither history nor existing precedent provides a clear answer, the Supreme Court has determined that a court must look to practical considerations in deciding whether "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question."[55] To make this determination, a court must "consider both the relative interpretive skills of judges and juries and the statutory policies that ought to be furthered by the allocation."[56] For example, the Supreme Court has found that judges are better suited to construe patent claims because of their greater training and expertise and because "[t]he construction of written instruments is one of those things that judges often do and are likely to do better than jurors unburdened by training in exegesis."[57]

At bottom, the analysis tends to focus on whether resolving the issue requires an intensive factual inquiry.[58] For example, the U.S. District Court for the Southern District of Alabama has held that juries are better suited to fix the amount of punitive damages because that assessment requires a "fact-sensitive undertaking," which tends to include a determination of the amount of harm suffered and the mental state of the defendant.[59] In another case, the U.S. Court of Appeals for the Tenth Circuit held that a jury would be better suited to determine a reasonable price for medical imaging devices under Colorado's version of the Uniform Commercial Code because that determination required the weighing of numerous facts, as evidence going toward a reasonable price "may include the

54. Newfound Mgmt. Corp. v. Lewis, 131 F.3d 108, 116 (3d Cir. 1997).
55. Markman v. Westview Instruments, Inc., 517 U.S. 370, 388 (1996).
56. *Id.* at 384.
57. *Id.* at 388–90.
58. *See* Hartford Fire Ins. v. First Nat'l Bank of Atmore, 198 F. Supp. 2d 1308, 1312 (S.D. Ala. 2002).
59. *Id.*

parties' course of dealing, course of performance, usage of trade, or the fair market value of the goods."[60]

But the need for factual inquiry alone does not guarantee that a jury is better suited to decide an issue. The patent context is instructive here. For example, a federal magistrate judge in the Northern District of Illinois concluded that, "[f]rom a functional perspective," a judge is "better suited to find the acquired meaning of patent terms" because judges "construe written instruments all the time, while jurors do not," and because "patent specifications are specialized documents, which require special training and practice to construe."[61] In an older decision from the Eastern District of Pennsylvania, the judge concluded that, because patents are specialized documents whose construction requires technical training and experience, a "judge, from his training and discipline, is more likely to give a proper interpretation of such instruments than a jury; and he is, therefore, more likely to be right, in performing such a duty, than a jury can be expected to be."[62] In such cases, even where the resolution of a matter turns on a fact-intensive inquiry, judges are often better suited to decide the claims at issue.

## II.
## Piercing the Corporate Veil

Before proceeding, in Part III, to analyze the existing decisions in which courts have determined whether a judge or a jury should decide veil-piercing actions, this Article will pause to examine the nature of veil piercing in a bit more detail.

Typically, corporate entities are treated as distinct from their shareholders such that any claims against the corporation will not result in liability for individual shareholders.[63] This holds true even for majority or sole shareholders of a corporation, which provides an important measure of security.

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60. Fischer Imaging Corp. v. Gen. Elec. Co., 187 F.3d 1165, 1173 (10th Cir. 1999).

61. Midtronics, Inc. v. World Energy Labs (2), Inc., No. 06 C 1685, 2008 WL 6137126, at *6 (N.D. Ill. Feb. 4, 2008).

62. *Markman*, 517 U.S. at 388–89 (quoting Parker v. Hulme, 18 F. Cas. 1138, 1140 (C.C.E.D. Pa. 1849) (No. 10,740)).

63. *See* Walkovszky v. Carlton, 18 N.Y.2d 414, 417 (1966) ("The law permits the incorporation of a business for the very purpose of enabling its proprietors to escape personal liability.").

Unless a member of a corporate entity is liable on some independent legal basis, he or she will traditionally be protected from liability for any corporate debts or obligations.[64] This concept is quite old; "[i]ncarnations of limited liability can be found in early Byzantine, Islamic, and Roman law."[65]

The principle of corporate separateness is fundamental to a capitalist, free-market economy; it reduces shareholders' potential risks and liabilities and thereby encourages investment.[66] When an individual knows that she will not be personally liable for the failures of a business, she will be more likely to participate freely in new business endeavors.

However, in certain circumstances when a corporation is unable to fully meet its creditors' demands for payment, a creditor may seek to "pierce the corporate veil" and hold otherwise immune corporate shareholders personally liable for the corporation's debts.[67] There is a long history of litigation surrounding the circumstances under which the principle of corporate separateness should be discarded and a shareholder or shareholders should be held liable for the corporation's actions.[68] When veil piercing is sought, the onus is on the plaintiff to prove that the corporation has been used, as various courts have written, as a "dry shell," a "puppet," a "stooge," a

64. *See* Elizabeth S. Miller, *Are There Limits on Limited Liability? Owner Liability Protection and Piercing the Veil of Texas Business Entities*, 43 TEX. J. BUS. L. 405, 405–06 (2009).

65. Peter B. Oh, *Veil-Piercing Unbound*, 93 B.U. L. REV. 89, 90 n.1 (2013) (citing Timothy P. Glynn, *Beyond "Unlimiting" Shareholder Liability: Vicarious Tort Liability for Corporate Officers*, 57 VAND. L. REV. 329, 336–37 & nn.20–24 (2004) (delineating origins and citing sources)).

66. *See, e.g.*, Stephen B. Presser, *Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics*, 87 NW. U. L. REV. 148, 160 n.43 (1992) (citing David H. Barber, *Piercing the Corporate Veil*, 17 WILLAMETTE L. REV. 371, 371 (1981)) ("The purpose of limited liability is to promote commerce and industrial growth by encouraging shareholders to make capital contributions to corporations without subjecting all of their personal wealth to the risks of the business.") (additional citation omitted).

67. *See* BLACK'S LAW DICTIONARY (9th ed. 2009) (defining piercing the corporate veil as the "judicial act of imposing personal liability on otherwise immune corporate officers, directors, or shareholders for the corporation's wrongful acts"); Jonathan Macey & Joshua Mitts, *Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil*, 100 CORNELL L. REV. 99, 105 (2014).

68. *See* Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036 (1991).

"conduit," or perhaps a "marionette."[69] More prosaically, a plaintiff must show that the corporation and its shareholder(s) have functioned as one and the same entity; that is, that the legal fiction of the corporation ought to be set aside so as to unmask the true actors responsible for the corporation's alleged wrongs, who should correspondingly be held responsible for the corporation's debts.

The exact origins of corporate veil piercing are difficult to pin down.[70] During his time as a sitting judge on New York's Court of Appeals, future U.S. Supreme Court Justice Benjamin Cardozo wrote that veil piercing is "enveloped in the mists of metaphor."[71]

The concept made its first appearance in American jurisprudence in 1809 with the U.S. Supreme Court's decision in *Bank of the United States v. Deveaux*.[72] And indeed, the United States is the historical "cradle of veil-piercing."[73] Yet despite its deep domestic historical reach, American courts and commentators "rarely address the historic origins of the piercing doctrine at length."[74]

As a result, there is no consensus on the question of whether the doctrine's roots are primarily legal or equitable.[75] The best answer from the case law seems to be a bit of both. After all, enforcement of shareholder liability for corporate obligations began as "a crude system in which any creditor with an unsatisfied judgment against the corporation sued any shareholder at common law."[76] This system developed into an

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69. Peter B. Oh, *Veil-Piercing*, 89 TEX. L. REV. 81, 83 n.7 (2010) (quoting several cases).

70. *Id.* at 83 n.1 (2010) (quoting STEPHEN B. PRESSER, PIERCING THE CORPORATE VEIL § 1:3 (2004) ("The precise reach of corporate shareholder limited liability in the early United States is . . . uncertain.").

71. Berkey v. Third Avenue Ry. Co., 244 N.Y. 84, 94 (1926).

72. Bank of the United States v. Deveaux, 9 U.S. 61, 75 (1809) ("[I]t is said that you may raise the veil which the corporate name interposes and see who stand behind it.").

73. KAREN VANDEKERCKHOVE, PIERCING THE CORPORATE VEIL 76 (2007).

74. Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc., 933 F.2d 131, 135 (2d Cir. 1991).

75. *See, e.g.*, *In re* G-I Holdings, Inc., 380 F. Supp. 2d 469, 476 (D.N.J. 2005) ("[A] circuit split exists as to whether the nature of the relief in an action to pierce the corporate veil is legal or equitable.").

76. PHILLIP BLUMBERG, THE LAW OF CORPORATE GROUPS: TORT, CONTRACT, AND OTHER COMMON LAW PROBLEMS IN THE SUBSTANTIVE LAW OF PARENT AND SUBSIDIARY CORPORATIONS § 2.02 (1987).

equitable procedure known as a "creditor's bill," which involved both a proceeding in equity "instituted by any creditor with an unsatisfied judgment, usually on behalf of all creditors, against the corporate debtor" and then an action "at common law against the shareholders individually to collect the amount owed."[77] This process allowed for liability to be properly apportioned among the outstanding shares through the action in equity and then imposed on each of the shares' owners through individual actions at law.[78]

In more modern days, some courts have emphasized the doctrine's equitable roots.[79] Others have focused on its legal origins.[80] Regardless of the precise source of the remedy, veil piercing has roots in, and has been applied by, courts of both law *and* equity.[81] One poetic commentator has somewhat aptly dubbed it "Our Lady of the Common Law."[82]

In any event, there is still no single uniform test for determining when a corporate veil should be pierced. The most common veil-piercing analysis requires a plaintiff to demonstrate that a corporation is an "alter ego" or "mere instrumen-

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77. Passalacqua, 933 F.2d at 136 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 308 cmt. e (AM. LAW INST. 1971); BLUMBERG, *supra* note 76, § 2.02; Edwin H. Abbot, Jr., *Conflict of Laws and the Enforcement of the Statutory Liability of Stockholders in a Foreign Corporation*, 23 HARV. L. REV. 37, 43–45 (1909)).

78. Abbot, *supra* note 77, at 45.

79. *Passalacqua*, 933 F.2d at 135 (citing Bangor Punta Operations, Inc. v. Bangor & A.R. Co., 417 U.S. 703, 713 (1974); Int'l Fin. Servs. Corp. v. Chromas Techs. Can., Inc., 356 F.3d 731, 737 (7th Cir. 2004); Golden Acres, Inc. v. Sutton Place Corp., 879 F.2d 857 (3d Cir.1989); United States v. Golden Acres, Inc., 684 F. Supp. 96, 103 (D. Del. 1988), *aff'd sub nom*; Schultz v. Gen. Elec. Healthcare Fin. Servs. Inc., 360 S.W.3d 171, 175–76 (Ky. 2012); 1 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41 (perm. ed. 1990)).

80. *Id.* (citing Am. Protein v. A.B. Volvo, 844 F.2d 56, 59 (2d Cir. 1988); FMC Fin. Corp. v. Murphree, 632 F.2d 413, 421 n.5 (5th Cir. 1980); Iantosca v. Benistar Admin. Servs., Inc., 843 F. Supp. 2d 148, 152–54 (D. Mass. 2012); United States v. Vacante, No. 1:08-CV-1349, 2010 WL 2219405, at *4 (E.D. Cal. June 2, 2010); *In re G-I Holdings, Inc.*, 380 F. Supp. 2d at 476; *In re* Kollel Mateh Efraim, LLC, 406 B.R. 24, 29 (Bankr. S.D.N.Y. 2009); Magers v. Bonds (*In re* Bonds Dist. Co.), No. 98-6044, 2000 WL 33682815, at *8 (Bankr. M.D.N.C. Nov. 15, 2000)).

81. *Id.* at 135–36 (citing I. Maurice Wormser, *Piercing the Veil of the Corporate Entity*, 12 COLUM. L. REV. 496, 497–99, 513–14 (1912)).

82. WORMSER, *supra* note 1, at 84.

tality" of its shareholder(s).[83] This is evidenced by complete control and domination of a corporate entity by a shareholder to perpetuate a fraud, wrong, or injustice that proximately caused unjust loss or injury to the plaintiff.[84] In addition, courts will entertain "reverse piercing" actions, where a party seeks to hold a corporation liable for the debts of its owners.[85] However, the precise factors that courts weigh in any piercing analysis—whether reverse or standard—vary across U.S. jurisdictions.[86]

In what one federal district court referred to as the "leading case"[87] on the issue of veil piercing, *William Passalacqua Builders, Inc. v. Resnick Developers South, Inc.*, the U.S. Court of Appeals for the Second Circuit, applying New York law, held that liability through veil piercing may be predicated upon *either* (1) a showing of fraud *or* (2) upon complete control of the corporation that led to a wrong against a third party.[88] Importantly, the New York Court of Appeals later clarified in *Morris v. New York State Department of Taxation and Finance*[89] that under New York law, veil piercing requires *both* a showing of "complete domination" as well as "some showing of a wrongful or

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83. Oh, *supra* note 69, at 84.

84. *Id.* (citing FREDERICK J. POWELL, PARENT AND SUBSIDIARY CORPORATIONS: LIABILITY OF A PARENT CORPORATION FOR THE OBLIGATIONS OF ITS SUBSIDIARY § 3 (1931)).

85. *E.g.*, State v. Easton, 647 N.Y.S.2d 904, 909 (Sup. Ct. 1995). "Reverse piercing" claims also arise where a corporation seeks to pierce its own corporate veil in order to disregard the corporate form. *See, e.g.*, Michael J. Gaertner, *Reverse Piercing the Corporate Veil: Should Corporation Owners Have It Both Ways?*, 30 WM. & MARY L. REV. 667, 667 (1989) ("A reverse pierce of the corporate veil refers to an attempt by shareholders, or the corporation itself, to pierce the corporate veil existing between the corporation and its shareholders. This definition encompasses all shareholder claims that a court should treat the corporation and its shareholders as a single, identical being.").

86. Oh, *supra* note 65, at 90 (There is "no uniform test for veil-piercing").

87. Thrift Drug v. Prescription Plan Serv. Corp., 890 F. Supp. 319, 320 (S.D.N.Y. 1995), *aff'd in part, vacated in part sub nom.* Thrift Drug, Inc. v. Universal Prescription Adm'rs, 131 F.3d 95 (2d Cir. 1997).

88. Wm. Passalacqua Builders, Inc., v. Resnick Developers S., Inc., 933 F.2d 131, 138 (2d Cir. 1991) (emphasis added) (citing Itel Containers Int'l Corp. v. Atlanttrafik Exp. Serv. Ltd., 909 F.2d 698, 703 (2d Cir. 1990); Gartner v. Snyder, 607 F.2d 582, 586 (2d Cir. 1979)).

89. *In re* Morris v. N.Y. State Dept. of Taxation & Fin., 82 N.Y.2d 135, 141–42 (1993).

unjust act toward the plaintiff."[90] The Court of Appeals thus made clear in *Morris* that equity considerations—that is, a showing of fraud or wrong—are key to the piercing analysis. *Passalacqua*'s conclusion that juries are better suited to handle piercing claims therefore holds less weight in a post-*Morris* world, particularly considering *Morris*'s holding that "[t]he party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that *a court in equity will intervene*."[91]

As to the question of complete domination and control leading to a wrong against a third party, the Second Circuit in *Passalacqua* offered ten factors for evaluation.[92] These factors are as follows:

1. the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, i.e., issuance of stock, election of directors, keeping of corporate records and the like;
2. inadequate capitalization;
3. whether funds are put in and taken out of the corporation for personal rather than corporate purposes;
4. overlap in ownership, officers, directors, and personnel;
5. common office space, address and telephone numbers of corporate entities;
6. the amount of business discretion displayed by the allegedly dominated corporation;
7. whether the related corporations deal with the dominated corporation at arms length;
8. whether the corporations are treated as independent profit centers;

90. *Id.*

91. *Id.* at 142 (emphasis added).

92. *Passalacqua*, 933 F.2d 131, 139 (citing Director's Guild of Am. v. Garrison Prod., 733 F. Supp. 755, 760–61 (S.D.N.Y. 1990); U.S. Barite Corp. v. M.V. Haris, 534 F. Supp. 328, 330 (S.D.N.Y. 1982); Barber, *supra* note 66, at 398).

9. the payment or guarantee of debts of the dominated corporation by other corporations in the group; and
10. whether the corporation in question had property that was used by other of the corporations as if it were its own.

Courts across the country have compiled various lists of similar considerations to be weighed in actions to pierce a corporate veil.[93] Indeed, at least one state appellate court settled on *twenty* relevant factors to be weighed in evaluating whether or not the shareholder exerted complete domination and control of the corporation.[94]

Yet even with just ten factors, the Second Circuit acknowledged that piercing demands are not easy to adjudicate because whether or not to disregard corporate separateness is a fact-specific inquiry that "differs with the circumstances of each case."[95] Specifically, when presented with a piercing demand, the fact-finder must determine if, based on the "totality of the evidence" in a specific case, the "policy behind the presumption of corporate independence and limited shareholder liability—encouragement of business development—is outweighed by the policy justifying disregarding the corporate form—the need to protect those who deal with the corporation."[96]

## III.
## To Jury or Not To Jury?

As discussed in Part II, veil piercing can be a complex issue. The test for veil piercing varies widely depending on the jurisdiction. As Jonathan R. Macey and Joshua Mitts noted in a

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93. *See* Oh, *supra* note 65, at 90 (citing Associated Vendors, Inc. v. Oakland Meat Co., 26 Cal. Rptr. 806, 813–15 (Ct. App. 1962) (twenty factors); Cathy S. Krendl & James R. Krendl, *Piercing the Corporate Veil: Focusing the Inquiry*, 55 Denver L.J. 1, 52–55 (1978) (thirty-one factors)); *see also* Keffer v. H.K. Porter Co., 872 F.2d 60, 65 (4th Cir. 1989) (six factors).

94. *See Associated Vendors*, 210 Cal. App. 2d at 838–40 (citing Automotriz etc. De California v. Resnick, 47 Cal. 2d 792, 796 (1957); H.A.S. Loan Serv., Inc. v. McColgan, 21 Cal. 2d 518, 523 (1943); Stark v. Coker, 20 Cal. 2d 839, 846 (1942)).

95. Am. Protein v. A.B. Volvo, 844 F.2d 56, 60 (2d Cir. 1988).

96. *Passalacqua*, 933 F.2d at 139 (citing William Wrigley, Jr. Co. v. Waters, 890 F.2d 594, 601 (2d Cir. 1989); Blumberg, *supra* note 76, § 6.01).

recent article, "courts are inarticulate to the point of incoherent in their reasoning in particular 'piercing' cases."[97] This Article takes a step back from the myriad theories and rationales for veil piercing and asks a more fundamental question: who is best suited to evaluate piercing demands brought under any theory—judges or juries?

As with many other aspects of veil piercing, courts are split on the judge/jury question. In order to fully flesh out our answer, we first review the major decisions that address whether juries or judges are best suited to hear and decide piercing demands. This Part begins with an analysis of those federal court opinions that have followed the "jury" rule and then proceeds to an analysis of their "judge" rule counterparts before concluding with an examination of a similarly wide split among state court decisions.

### A. *Juries: The Second Circuit Rule*

The Second Circuit's *Passalacqua* decision is the leading case finding that juries should decide veil-piercing claims. In *Passalacqua*, the plaintiffs—the Passalacqua entities—brought suit in the Southern District of New York against various Resnick entities to recover the balance of a partially satisfied arbitration award that had previously been rendered against the Resnick defendants and enforced in the courts of Florida.[98] Two claims in the federal suit in New York sought equitable relief in the form of veil piercing and alleged that certain Resnick entities should be pierced and held liable for another Resnick corporation's debt under either an "equitable instrumentality" or "alter ego" theory.[99]

After consolidating the two claims seeking equitable relief into a new amended complaint and dismissing the remaining counts against the defendants, the district court next rejected the Resnick defendants' motion to strike the plaintiffs' jury demand. A trial was held, at the conclusion of which the district judge charged the jury with using a special form with questions drafted by the court. In essence, the jury was charged with de-

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97. Jonathan R. Macey & Joshua Mitts, *Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil*, 100 CORNELL L. REV. 99, 100 (2014).

98. Passalacqua, 933 F.2d at 131.

99. *Id.* at 134.

termining whether the entity "Jack Resnick & Sons" was the alter ego of the entity "Resnick Developers South." The jury returned judgment in favor of the defendants, "rendering the balance due on the [ ] judgment uncollectable."[100]

On appeal, the Resnick entities argued that the piercing question should not have been submitted to the jury, but instead determined by the district judge. Their single argument was that the entirety of the piercing question was equitable in nature—that is, the claim involved only a challenge to the Resnick entities' corporate structure, with no attendant claim for money damages. Accordingly, they argued that the claim should never have been submitted to a jury. The Second Circuit engaged in a rather lengthy discussion of the jury trial right before holding that piercing is an action that involves a mix of equity and law and, under the facts of this case, the law elements were significant enough to justify a jury determination. Moreover, because the issue of whether corporate veil-piercing claims should be decided by a jury had never been raised in the Second Circuit, the court chose to engage in a lengthy de novo review.[101]

The *Passalacqua* court fleshed out its reasoning by looking first to the history of the right to a jury trial in civil actions.[102] After citing the Seventh Amendment directly, the court explained that the key to answering the judge/jury question is to follow the Supreme Court's two-step formulation: "'First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature."[103]

The court focused on the second prong of this test, noting the difficulty in applying it considering the lack of case law analyzing the history of the piercing remedy. Nevertheless, the *Passalacqua* court cited several authorities that each parsed the

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100. *Id.*

101. *Id.* at 134–35 ("Because we have never addressed whether a right to a jury trial exists in a case where a judgment-creditor seeks to pierce the corporate veil and enforce a judgment—obtained against a subsidiary—against the parent corporation or individual shareholders alleged to have controlled the subsidiary, we revisit this area.").

102. *Id.* at 134–37.

103. *Id.* at 135 (quoting Tull v. United States, 481 U.S. 412, 417–18 (1987)).

veil-piercing remedy to determine whether it is primarily equitable or legal in nature.[104]

The court concluded that there is no clear consensus on whether the piercing remedy is equitable or legal, but that the origin of the remedy as a legal one best suited for jury determination "appears to have the greatest historical support."[105] The Second Circuit referenced the fact that "shareholder liability for corporate obligations began as 'a crude system in which any creditor with an unsatisfied judgment against the corporation sued any shareholder at common law.'"[106] As such claims evolved, the courts created an equitable remedy known as a creditor's bill. The creditor's bill involved both an action in equity instituted by the creditor against the corporate debtor as well as an action in law for damages against each individual shareholder. In light of this backdrop, the court was particularly interested in the precise nature of the remedy sought under the facts of the case before it. In *Passalacqua*, the plaintiffs sought "enforcement of a money judgment"[107] already obtained against the defendants, which the court found "indicates a legal action."[108] The court went on to reject the plaintiffs' argument that because they had already secured the monetary award, "their claim for money is merely incidental to their equitable piercing claim and . . . does not require a jury trial."[109]

Rather, the key was that the relief sought—enforcement of a money judgment—was of the kind usually "achieved in an action at law."[110] Since there was nothing in the court's survey

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104. To support the contention that piercing is an equitable remedy, the court cited Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R. Co., 417 U.S. 703 (1974); United States v. Golden Acres, Inc., 684 F. Supp. 96 (D. Del. 1988); and FLETCHER, *supra* note 79, at § 41. For the proposition that piercing is of legal origin "or so touches on the determination of legal issues that it is for the jury to decide," *Passalacqua*, 933 F.2d at 135, the court cited another Second Circuit case, Am. Protein Corp. v. AB Volvo, 844 F.2d 56 (2d Cir. 1988), discussed *infra*, as well as FMC Fin. Corp. v. Murphree, 632 F.2d 413 (5th Cir. 1980), discussed *infra*, and I. Maurice Wormser, *Piercing the Veil of the Corporate Entity*, 12 COLUM. L. REV. 6, 496–518 (1912).

105. *Passalacqua*, 933 F.2d at 135.

106. *Id.* at 135–36.

107. *Id.* at 136.

108. *Id.*

109. *Id.*

110. *Id.*

of the history of the piercing remedy to suggest that it was only an equitable remedy, the Second Circuit ruled that the district court had properly submitted the piercing issue to the jury.

Despite the *Passalacqua* court's relatively lengthy analysis of the history of veil piercing and the nature of the remedy as sounding in equity or law, it is the final paragraph of the piercing discussion that is frequently cited by lower courts to support sending piercing issues to the jury:

> [A]s a practical matter separate from Seventh Amendment considerations, whether or not those factors—discussed later in our analysis—that will justify ignoring the corporate form and imposing liability on affiliated corporations or shareholders are present in a given case is the sort of determination usually made by a jury because it is so fact specific.[111]

This "practical" consideration underlies many of the decisions that follow *Passalacqua* and was even quoted by a bankruptcy court in the Southern District of New York to support its holding that a party is entitled to a jury on the piercing question even if that party seeks only declaratory (i.e., equitable) relief. *In re Kollel Mateh Efraim, LLC* involved the bankruptcy proceedings of a debtor, Mateh Efraim LLC, and the relationship between the debtor and a religious corporation styled as "Kolel Mateh Efraim."[112] During the course of the bankruptcy proceedings, a debtor in possession account was established, in part to fund "[c]ourt-ordered adequate protection to"[113] the plaintiff in *In re Kollel*. The plaintiff subsequently filed a complaint seeking a declaration that Kollel Mateh Efraim was the alter ego of Mateh Ephraim LLC and therefore liable for the latter's debts.[114] The religious corporation demanded a jury trial on the alter-ego issue, and the plaintiff moved to strike that demand, arguing "that because he is seeking declaratory relief, the claim is equitable in nature and not triable by a jury."[115]

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111. *Id.* at 137.

112. Geltzer v. Kollell Mateh Efraim, LLC (*In re* Kollel Mateh Efraim, LLC), 406 B.R. 24 (S.D.N.Y. Bankr. 2009).

113. *Id.* at 26.

114. *Id.* at 27.

115. *Id.*

The *Kollel* court examined the Seventh Amendment jury trial right in detail, beginning with the two-step analysis set forth in *Tull* and *Passalacqua*. After noting *Passalacqua*'s analysis in detail, the *Kollel* court rejected the plaintiff's argument that *Passalacqua* was distinguishable on the grounds that the relief sought in *Kollel* was declaratory in nature.[116]

Following the *Tull* framework, the *Kollel* court examined the history of declaratory judgments, beginning with the Declaratory Judgment Act, which does not explicitly provide for a jury trial right but which courts have interpreted to provide for such a right.[117] Quoting *Gulfstream Aerospace Corp. v. Mayacamas Corp.*,[118] the *Kollel* court found that "[a]ctions for declaratory judgments are neither legal nor equitable, and courts have therefore had to look to the kind of action that would have been brought had Congress not provided the declaratory judgment remedy."[119]

Following this analysis, the *Kollel* court determined that the declaratory judgment action at issue was "legal in nature" and therefore triable by jury. If the plaintiff had not sought declaratory relief, it would have instead needed to file an action against the religious corporation to recover the amounts needed to satisfy the balance of the damages awarded against the estate in bankruptcy. Were the plaintiff to prevail in its alter ego action, the court reasoned, the defendant would "be limited to contesting the amount of the deficiency in the estate's assets, i.e., the amount of the money judgment."[120]

The *Kollel* court then reiterated the "practical" consideration leading to its decision to send the alter ego theory to the jury: it is an issue that is so fact-specific that the determination is generally made by a jury.[121]

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116. *Id.*

117. *Id.* at 28; *see also* Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).

118. 485 U.S. 271 (1988).

119. *In re Kollel*, 406 B.R. at 28.

120. *Id.*

121. *Id.* at 29 (quoting Wm. Passalacqua Builders, Inc., v. Resnick Developers S., Inc., 933 F.2d 131, 137 (2d Cir. 1991)).

### B. *Juries: The Fifth (and Eleventh) Circuits' Contradictory Applications of Legal Standards*

The Fifth Circuit has addressed the veil-piercing judge/jury issue twice, including once prior to the 1981 split of the former Fifth Circuit into the new Fifth and Eleventh Circuits,[122] finding in both cases that the right to a jury exists, albeit following different theories. In *FMC Finance Corp. v. Murphree*,[123] a closely held company primarily owned by the defendant Murphree entered into a lease agreement with a subsidiary of FMC Finance, which covered six buses that Murphree's company intended to be used for a shuttle service. At some point during the lease, Murphree's company returned the buses and filed for bankruptcy. FMC Finance attempted to collect on Murphree's personal guaranty. Murphree then counterclaimed, seeking, in part, to show that FMC Finance and its parent company were one and the same entity.

After the parties presented their evidence, the district court granted a directed verdict in FMC Finance's favor, finding that it was separate from its parent company under the "piercing the corporate veil" doctrine.[124] On appeal, the Fifth Circuit reversed, holding that "because there was sufficient evidence to create a jury question on this issue, the district court erred in granting FMC Finance's directed verdict."[125]

The Fifth Circuit applied federal law to the issue, noting in a footnote that despite sitting in diversity and therefore being obligated to follow the *Erie* doctrine, the question of whether to allow a jury decision implicated Federal Rule of Civil Procedure 39(a)(2).[126] Under the Supreme Court's decision in *Hanna v. Plumer*,[127] if a valid Federal Rule of Civil Procedure applies, that Rule controls despite contrary state law.[128]

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122. In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the new U.S. Court of Appeals for the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

123. 632 F.2d 413 (5th Cir. 1980).

124. *Id.* at 416.

125. *Id.* at 421.

126. *Id.* at 421 n.5.

127. 380 U.S. 460 (1965).

128. FMC Fin. Corp. v. Murphree, 632 F.2d 413, 421 n.5 (5th Cir. 1980); *see also Hanna*, 380 U.S. 460 at 473 ("Erie and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for

The *FMC Finance* court noted that Rule 39(a)(2) states that after a jury demand has been made, "[t]he trial on all issues so demanded must be by jury unless . . . (2) the court, on motion or on its own, finds that on some or all of those issues there is no federal right to a jury trial."[129] Accordingly, the court found that the issue of whether the jury right exists is governed by federal and not state law, "with no *Erie* analysis problems."[130] Citing to a string of older Fifth Circuit cases, but without engaging in its own Seventh Amendment analysis, the *FMC Finance* court decided that "the issue of corporate entity disregard is one for the jury."[131]

The Fifth Circuit subsequently sent a piercing case arising under Mississippi law to a jury in *General Motors Acceptance Corp. v. Bates* (hereinafter *GMAC*), making its decision against the backdrop of *Erie* on the basis that the substantive law of Mississippi applied to the doctrine of piercing the corporate veil.[132] The court looked to the Mississippi Supreme Court's decision in *Gray v. Edgewater Landing*[133] to articulate a three-pronged piercing analysis.[134] Finally, the Fifth Circuit in *GMAC* quoted the *Gray* decision's mandate regarding a jury decision: "'[A] party must present some credible evidence on each of these points' before the issue of whether to pierce the corporate veil may go to the jury."[135]

The *GMAC* court went on to survey the evidence presented to the trial court regarding the piercing issue, ultimately deciding that enough evidence existed to bring the is-

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federal courts even though some of those rules will inevitably differ from comparable state rules.").

129. FED. R. CIV. P. 39(a)(2).

130. *FMC Fin.*, 632 F.2d at 421 n.5.

131. *Id.*

132. Gen. Motors Acceptance Corp. v. Bates, 954 F.2d 1081, 1085 (5th Cir. 1992).

133. Gray v. Edgewater Landing, 541 So. 2d 1044 (Miss. 1989).

134. The Mississippi court held that "[t]o cause a court to disregard the corporate entity and justify shareholder liability, the complaining party must demonstrate: (a) some frustration of contractual expectations regarding the party to whom he looked for performance; (b) the flagrant disregard of corporate formalities by the defendant corporation and its principals; (c) a demonstration of fraud or other equivalent misfeasance on the part of the corporate shareholder." *GMAC*, 954 F.2d at 1085 (citing *Gray*, 541 So. 2d at 1047).

135. *GMAC*, 954 F.2d at 1085 (quoting *Gray*, 541 So. 2d at 1047).

sue before the jury. Interestingly, the court quoted *FMC Finance* to support its decision, albeit without noting that court's decision to apply federal law. The *GMAC* court instead bolstered its decision by citing to another Mississippi case and finding that "under Mississippi law the issue of piercing the corporate veil is for the jury to decide."[136] Despite these conflicting analyses, in each of these cases the Fifth Circuit concluded that veil piercing is a jury question.

### C. *Juries: The First Circuit*

In the Employee Retirement Income Security Act (ERISA) context, the First Circuit cited in *Crane v. Green & Freedman Baking Co.*[137] to *Passalacqua*'s "fact-specific" rationale in holding that piercing is a jury determination.[138] In *Crane*, a dispute arose over a collective bargaining agreement and payments that were supposed to have been made to a fund related to the agreement. The corporations charged with making the payments conceded liability; however, the corporations' principals denied personal liability for the corporate debts and the issue of corporate disregard was tried before a jury.[139] After presentation of the evidence, the district court entered judgment as a matter of law, finding that the corporate principals were not the alter egos of the defendant corporations.[140]

On appeal, the First Circuit addressed the judge/jury question in the context of the ERISA action being brought, in this case 29 U.S.C. §§ 1132(a)(1), (3). The sections authorize "only injunctive or 'other appropriate *equitable* relief,'"[141] and the *Crane* court confirmed that "[c]ourts have interpreted this cause of action as providing no right to a jury trial, even when the relief sought is monetary."[142] Accordingly, none of the ERISA precedents contained an explanation regarding the "separate responsibilities of judge and jury in the applying of veil-piercing criteria."[143]

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136. *Id.* (citing T.C.L., Inc. v. Lacoste, 431 So. 2d 918 (Miss. 1983)).
137. Crane v. Green & Freedman Baking Co., 134 F.3d 17 (1st Cir. 1998).
138. *Id.* at 22 (citing Wm. Passalacqua Builders, Inc., v. Resnick Developers S., Inc., 933 F.2d 131, 137 (2d Cir. 1991)).
139. *Crane*, 134 F.3d at 19–21.
140. *Id.* at 21.
141. *Id.* at 22 (quoting 29 U.S.C. § 1132(a)(1), (3)).
142. *Crane*, 134 F.3d at 22.
143. *Id.*

The *Crane* court decided that "it is principally the jury's function, and not the court's, to decide whether or not the . . . veil-piercing standards were met."[144] The court reasoned that veil piercing is "fact-intensive," citing *Passalacqua* and *FMC Finance* as well as Massachusetts and Texas state court decisions, and that such factual determinations should be sent to the jury, even if they stem from "equitable" remedies.[145]

The court was also influenced by the fact that the parties jointly agreed to proceed before a jury pursuant to Federal Rule of Civil Procedure 39(c). That choice, the court concluded, would be utterly meaningless were the court to allow the only contested claim to be decided by a judge. "The point of Rule 39(c)'s jury-by-consent provision has been said to be to allow parties who so wish to have disputed facts, including ultimate facts, resolved by a jury."[146]

In the summary judgment context, a district court in Puerto Rico cited *Crane* for the proposition that veil piercing, which "requires an extremely fact-sensitive analysis, [ ] is a question best suited for a jury."[147]

### D. *Judges: The Seventh Circuit Rule*

The leading "pro-judge" case comes out of the Seventh Circuit, where the panel in *International Financial Services Corp. v. Chromas Technologies Canada, Inc.* (hereinafter *IFSC*) issued a lengthy opinion that ultimately vacated a jury determination on the piercing issue.[148] In *IFSC*, the underlying dispute involved a breach of contract claim regarding printing presses as well as a fraud claim. The plaintiff alleged that it was misled into making payments to a manufacturer called Didde Web Press when it had believed that it was doing business with Chromas Technologies Canada.

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144. *Id.*

145. *Id.* ("Even where veil-piercing is decided by judge rather than jury, the courts have held that the question, while equitable, is one of fact.").

146. *Id.* at 23.

147. Rivera v. Reed, No. 09-cv-1160(GAG), 2010 WL 683406, at *3 (D.P.R. Feb. 22, 2010). After the defendant moved for summary judgment on the veil-piercing issue, the court denied the motion on the basis that the plaintiffs "have created a triable issue of material fact" as to whether the corporate entity was misused to the point where it should be disregarded. *Id.*

148. Int'l Fin. Servs. Corp. v. Chromas Techs. Can., Inc., 356 F.3d 731, 737 (7th Cir. 2004).

Both Didde Web Press and Chromas Technologies Canada were owned by the same parent corporation and, as part of its claim, International Financial Services alleged that "the separate corporate status between Chromas and Didde Web Press was invalid."[149] At the trial level, the piercing issue was submitted to the jury, which found that Chromas was the alter ego of Didde Web Press and that Chromas was liable for breach of contract, but not fraud.[150] On appeal, the court took up the question of whether the judge or jury should decide the veil-piercing issue.

The *IFSC* court first noted that the question was controlled by "federal procedural law" even though it would apply substantive Illinois law regarding the contours of veil piercing itself. Accordingly, the court looked to the Seventh Amendment to find that International Financial Services "was entitled to demand a jury trial on its breach of contract claim."[151] However, the district court was still required to "make an independent judgment as to any equitable issue."[152] The *IFSC* court therefore turned to veil piercing to assess whether it was equitable or legal in nature.

As *Passalacqua* did, the *IFSC* court began with the two-pronged analysis outlined in *Tull* and *Granfinanciera*. At the outset, the court addressed the futility of comparing veil piercing to eighteenth-century actions brought prior to the merger of courts of law and equity because "[p]iercing the corporate veil, after all, is not itself an action; it is merely a procedural means of allowing liability on a substantive claim, here a breach of contract."[153] Despite the problematic approach of the first prong of *Tull* in the piercing context, the court went on to agree with the Second Circuit that because piercing has roots in both law and equity, the second prong of *Tull* would be the deciding factor.

Turning to an examination of whether piercing is an equitable or legal remedy, the *IFSC* court examined the piercing doctrine under Illinois law to determine whether it was more like a legal remedy, which "traditionally involve[s] money

149. *Id.* at 734.
150. *Id.*
151. *Id.* at 735.
152. *Id.*
153. *Id.* at 736.

damages,"[154] or more like an equitable remedy, which is "typically coercive, and enforceable directly on the person or thing to which [it is] directed."[155]

In Illinois, the piercing test involves a two-pronged analysis that requires a showing that: "(1) there is such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist; and (2) circumstances are such that adhering to the fiction of a separate corporate existence would promote injustice or inequity."[156] The fact that piercing in Illinois requires a showing of injustice or inequity led the *IFSC* court to conclude that "veil-piercing must be an exercise of equitable power."[157]

Turning directly to *Passalacqua*, the *IFSC* court disagreed with the Second Circuit that the fact that the underlying action is one for a monetary remedy automatically entitles the plaintiff to a jury trial on both the merits and the question of veil piercing. "A jury trial does not have to include all or nothing."[158] The *IFSC* court went on to provide examples of various ways that a plaintiff's Seventh Amendment right could be preserved, while still allowing the judge to "decide independently the equitable question of whether to disregard the corporate entity."[159]

Such possibilities include: a post-judgment motion to pierce pursuant to Rule 69(a)[160] and treating the jury's piercing determination as advisory.[161] Although the *IFSC* court admitted that veil-piercing analysis requires grappling with questions of fact, the court held that it was still primarily an equitable remedy. Moreover, any factual findings resolved by the jury that implicated the judge's equitable finding would remain binding on the court.

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154. *Id.*

155. *Id.*

156. *Id.* (quoting Melko v. Dionisio, 582 N.E.2d 586, 594 (Ill. App. Ct. 1991)).

157. *Id.* at 737.

158. *Id.*

159. *Id.*

160. Aioi Seiki, Inc. v. JIT Automation, Inc., 11 F. Supp. 2d 950, 954 (E.D. Mich. 1998).

161. 11 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2887 (3d ed. 2016).

### E. *The Split in Other Circuits*

More recently, the U.S. Court of Appeals for the Sixth Circuit likewise found that, as a matter of Kentucky state law, "the doctrine of piercing the corporate veil arises in equity."[162]

And lower courts outside of the First, Second, Fifth, and Seventh Circuits have cited both *Passalacqua* and *IFSC* and come out on both sides of the issue. A district court in the Third Circuit, for example, acknowledged the "circuit split" between *Passalacqua* and *IFSC*, while holding that because the plaintiff ultimately sought to recover damages and because New Jersey law does not specify that piercing is discretionary, piercing "is a legal remedy entitling Defendants to a jury trial."[163] One district court in the Ninth Circuit agreed with *IFSC* and held that there is no right to a jury trial of a veil-piercing claim because "whether a corporation is an alter ego of its corporate sibling rests, in the end, on an exercise of *discretion*, not of compulsion."[164] But just two years later, another district court in the Ninth Circuit found "the reasoning of *Passalacqua* persuasive" and held that the plaintiff was entitled to a jury trial because its ultimate goal was to recover a money judgment.[165]

The panoply of recent federal court decisions reaching contrary conclusions on this issue underscores that the question of whether juries or judges should decide veil-piercing claims is ripe for resolution by the U.S. Supreme Court.

### F. *The Split Among the States*

Furthermore, state courts are split no less widely than the federal courts on whether the decision to pierce a corporate veil should be made by judges or juries.

The most thoroughly reasoned recent opinion was issued by the Supreme Court of Kentucky in 2012 in *Schultz v. General*

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162. CNH Capital Am. LLC v. Hunt Tractor, Inc., 568 F. App'x 461, 467 (6th Cir. 2014) (citing Schultz v. Gen. Elec. Healthcare Fin. Servs. Inc., 360 S.W.3d 171, 175 (Ky. 2012)).

163. *In re* G-I Holdings, Inc., 380 F. Supp. 2d 469, 475–78 (D.N.J. 2005); *see also* Iantosca v. Benistar Admin. Servs., Inc., 843 F. Supp. 2d 148, 153–54 (D. Mass. 2012).

164. Siegel v. Warner Bros. Entm't Inc., 581 F. Supp. 2d 1067, 1075 (C.D. Cal. 2008).

165. United States v. Vacante, No. 1:08cv1349 OWW DLB, 2010 WL 2219405, at *4 (E.D. Cal. June 2, 2010).

*Electric Healthcare Financial Services Inc.*[166] There, in a decision already cited by the highest courts of at least two other states, the Kentucky court came down squarely in favor of judges. Thomas Schultz had served as the president and sole shareholder of Intra–Med, a Kentucky corporation that entered into a contract to lease medical equipment from General Electric and subsequently defaulted on the contract by failing to make required payments.[167] General Electric filed a complaint against Intra–Med in circuit court and although a judgment on the pleadings was entered in favor of General Electric for over $4.7 million, it was only able to collect approximately $700,000 of that judgment.[168] When General Electric learned of documents produced in another lawsuit demonstrating that Schultz had used Intra–Med for his own private purposes, General Electric intervened and filed a third-party complaint against Schultz seeking to pierce the corporate veil and hold him personally liable for the judgment against Intra–Med.[169] The trial court entered judgment on the pleadings in favor of General Electric, and the court of appeals affirmed.[170]

While the Kentucky Supreme Court ultimately remanded the decision because it felt that the circumstances of the case did not warrant a decision to pierce the veil solely on the pleadings, it found that the doctrine of piercing the corporate veil arises in equity.[171] As a result, the court concluded that "because the very act of piercing the corporate veil requires the decision-maker to set aside a legal fiction based upon notions of fairness and hardship, we would have to stretch the boundaries of common sense and engage in linguistic gymnastics to describe veil piercing as anything but an equitable action."[172] In a companion decision issued the same day as *Sch-*

166. *Schultz*,, 360 S.W.3d 171.
167. *Id.* at 173.
168. *Id.*
169. *Id.*
170. *Id.* at 173–74.
171. *Id.* at 175 (citing Daniels v. CDB Bell, LLC, 300 S.W.3d 204, 213 (Ky. Ct. App. 2009)). The U.S. Court of Appeals for the Sixth Circuit recently relied on *Schultz* while finding that, as a matter of Kentucky state law, "the doctrine of piercing the corporate veil arises in equity." CNH Capital Am. LLC v. Hunt Tractor, Inc., 568 F. App'x 461, 467 (6th Cir. 2014) (citing *Schultz*, 360 S.W.3d at 175).
172. *Id.* at 176.

*ultz*, the court reaffirmed that piercing "remains an equitable doctrine to be applied by the courts."[173]

The highest court of two other states took notice, relying on *Schultz* in reaching the conclusion that judges, not juries, should hear veil-piercing demands. In 2013, the Supreme Court of Alaska, citing *Schultz*, held that "[v]eil-piercing is an equitable doctrine, premised on the court's ability to look past the 'legal fiction' to do equity."[174] The Supreme Court of Idaho followed suit a year later, as it recently resolved a confusing split in authority and reversed two of its older decisions while holding that "issues of alter ego and veil-piercing claims are equitable questions. . . . In these cases, the trial court is responsible for determining factual issues that exist with respect to this equitable remedy and for fashioning the equitable remedy."[175]

Numerous appellate courts in various states have reached the same conclusion, finding that the decision to pierce the corporate veil belongs in the hands of a judge, rather than a jury.[176] But several appellate courts in other states have concluded just the opposite. The Tennessee Supreme Court, relying on authority from the highest courts of California and Georgia, found that:

> The conditions under which the corporate entity will be disregarded vary according to the circumstances present in each case and the matter is particularly within the province of the trial court. Moreover, a determination of whether or not a corporation is a

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173. Inter-Tel Techs., Inc. v. Linn Station Props., LLC, 360 S.W.3d 152, 165 (Ky. 2012) (citing *Schultz*, 360 S.W.3d at 171).

174. Brown v. Knowles, 307 P.3d 915, 928 & n.43 (Alaska 2013) (citing *Schultz*, 360 S.W.3d at 176).

175. Wandering Trails, LLC v. Big Bite Excavation, Inc., 329 P.3d 368, 373 (Idaho 2014).

176. *See, e.g.*, Peetoom v. Swanson, 778 N.E.2d 291, 295 (Ill. App. Ct. 2002) ("The doctrine of piercing the corporate veil is an equitable remedy. . . .") (citing *In re* Rehab. of Centaur Ins. Co, 606 N.E.2d 291, 296 (Ill. App. Ct.), *aff'd*, 632 N.E.2d 1015 (Ill. 1994); Reed v. Reid, 980 N.E.2d 277, 301 (Ind. 2012) (referring to piercing as an "equitable doctrine")). The Pennsylvania Superior Court went so far as to reject a party's assertion, based on *Passalacqua*, that it had a federal constitutional right to a jury trial and held that the Pennsylvania Constitution does not guarantee a jury on a veil-piercing claim. Advanced Tel. Sys., Inc. v. Com-Net Prof'l Mobile Radio, LLC, 846 A.2d 1264, 1275–76 (Pa. Super. Ct. 2004).

> mere instrumentality of an individual or a parent corporation is ordinarily a question of fact for the jury.[177]

Tennessee is not alone: in 2002, the Georgia Court of Appeals reaffirmed that the decision to pierce the corporate veil is "normally a question for jury determination."[178] The Texas Court of Appeals agreed, stating that determining whether a corporate fiction should be disregarded is a question of fact which, except in "very special circumstances," should be determined by the jury.[179] When paired with the split between the federal circuits, this disparity among the states with regard to the issue of who should decide whether a corporate veil should be pierced further demonstrates the need for guidance from the U.S. Supreme Court on this question.

## IV.
## Judges, Not Juries, Should Decide Veil-Piercing Claims

As Parts I through III make clear, the state of the law on the veil-piercing remedy—and particularly the question of who should award it, judge or jury—is muddled. This is due, at least in part, to the as-yet unresolved circuit split that was created over a decade ago by the Second Circuit's decision in *Passalacqua* (shared by the First and Fifth Circuits) and the Seventh Circuit's decision in *IFSC*. A Supreme Court resolution of that split would certainly provide clarity, particularly from the standpoint of the Seventh Amendment right to a jury trial and its application in federal court. Regardless of whether or how the question is ultimately resolved by the Court, the authors' position is that in any venue—state or federal—piercing demands should be decided by a judge, rather than a jury.

This Part details the four main rationales underscoring that position. First, despite its roots in both law and equity,[180] veil piercing remains an inherently equitable remedy. As such,

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177. Elec. Power Bd. v. St. Joseph Valley Structural Steel Corp., 691 S.W.2d 522, 526 (Tenn. 1985) (citing Alexander v. Abbey of the Chimes, 163 Cal. Rptr. 377 (Ct. App. 1980); Trans-Am. Commc'ns v. Nolle, 214 S.E.2d 717 (Ga. Ct. App. 1975)).

178. Hayes v. Collins, 538 S.E.2d 785, 787 (Ga. Ct. App. 2000).

179. Howell v. Hilton Hotels Corp., 84 S.W.3d 708, 714 (Tex. App. 2002) (citing Castleberry v. Branscum, 721 S.W.2d 270, 277 (Tex. 1986); Coleman Cattle Co. v. Carpentier, 10 S.W.3d 430, 435 (Tex. App. 2000, no pet.)).

180. *See supra* Part II.

there is no danger of running afoul of the Seventh Amendment by confining piercing claims to the realm of bench decisions. Second, while it is commonly believed that juries are best suited to decide fact-intensive issues, this principle does not apply with equal force in the veil-piercing context. Unlike, say, personal injury claims, ordinary citizens are not as well-equipped as trained lawyers and judges to examine and weigh the policy, legal, and business considerations that accompany the concept of corporate separateness and any attendant facts.[181] Third, permitting judges rather than juries to decide whether to disregard the corporate veil should lead to greater consistency in any resulting decisions. Lastly, placing the veil-piercing question squarely in the hands of judges should lead to increased efficiency. Each of these considerations is discussed in more depth below.

### A. *Veil Piercing Is an Equitable Remedy*

To be sure, the doctrine of piercing the corporate veil has some legal roots and is at times used to further recovery on claims of an otherwise legal nature, such as the breach of contract claims at issue in *IFSC*. Indeed, as the history of the remedy discussed in Part II indicates, veil piercing may implicate both law and equity. But piercing itself is an inherently equitable mechanism. For example, the creditor's bill mechanism

181. This is not to say that judges are infallible, or that all judges possess the business acumen necessary to decide piercing claims. Nevertheless, the authors submit that, in the absence of special masters or other specially appointed adjudicators to decide these complex "veil-piercing" claims, it is better on balance to place such claims in front of practiced judges with extensive legal experience with legal fictions such as corporate separateness, rather than ordinary laypeople without such background or knowledge. This is in accord with certain studies that have shown, for example, that "judges are less prone [than jurors] to suffering from various forms of hindsight bias." Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform* (John M. Olin Ctr. for Law, Econ. & Bus., Harvard Law Sch., Discussion Paper No. 362, 2002). Another study demonstrated that jurors' "damages assessments were also more prone to error than were responses by a sample of state judges. Judges were less prone to erroneous risk beliefs [than jurors] and less subject to the zero-risk mentality." W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. LEGAL STUD. 107 (2001). These kinds of differences are likely attributable to the difference in legal training received by judges as opposed to lay jury members, and further suggests that judges are better equipped, on balance, to handle issues such as veil piercing than lay juries.

was used to provide those plaintiffs who had secured a judgment against a corporate entity a means of proceeding in equity against the insolvent corporation and in law against its shareholders or directors to recover sums from the individuals responsible for the corporate wrong. But this two-part system for recovery itself originally sounded purely in equity, with a judgment creditor permitted to proceed in equity against *both* the corporation and its shareholders.[182]

Moreover, numerous commentators have suggested that the remedy is "equitable in nature."[183] And despite some court commentary to the contrary, the equitable "guts" of the veil-piercing mechanism are reflected in the fact that nearly every state universally requires a showing of "fraud" or "injustice"[184] or "inequity"—all themselves terms of equity and, in fact, equitable claims in the case of fraud—to justify piercing the corpo-

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182. *See, e.g.*, Edwin H. Abbot, *Conflict of Laws and the Enforcement of the Statutory Liability of Stockholders in a Foreign Corporation*, 23 HARV. L. REV. 37, 42–43 (1909).

183. Int'l Fin. Servs. Corp. v. Chromas Techs. Can., Inc., 356 F.3d 731, 737 (7th Cir. 2004) ("[U]nder Illinois law, piercing the corporate veil is an equitable remedy to be determined by the court."); Baillie Lumber Co. v. Thompson, 391 F.3d 1315, 1321 (11th Cir. 2004) ("In Georgia, alter ego and veil-piercing actions are based on equitable principals."); AG Servs. of Am., Inc. v. Nielsen, 231 F.3d 726, 729 (10th Cir. 2000) (noting trial court's bifurcation of legal and equitable—including piercing—claims, though ultimately overturning lower court decision for failure to abide by jury findings of fact common to both legal and equitable claims); Institut Pasteur v. Cambridge Biotech Corp., 186 F.3d 1356, 1376 (Fed. Cir. 1999) ("The concept of piercing the corporate veil is equitable in nature . . . .") (internal quotations omitted); Kinney Shoe Corp. v. Polan, 939 F.2d 209, 211 (4th Cir. 1991) ("Piercing the corporate veil is an equitable remedy . . . ."); Comm'r of Envtl. Prot. v. State Five Indus. Park, Inc., 304 Conn. 128, 141 (2012) ("Finally, because veil piercing is an equitable remedy, it should be granted only in the absence of adequate remedies at law."); Inter-Tel Techs., Inc. v. Linn Sta. Props., LLC, 360 S.W.3d 152, 155 (Ky. 2012) ("Piercing the corporate veil is an equitable doctrine invoked by courts . . . ."); Daniels v. CDB Bell, LLC, 300 S.W.3d 204, 213 (Ky. Ct. App. 2009) ("We believe that the decision as to whether to pierce the corporate veil is an equitable one to be decided by the trial court and not the jury."); *see also In re* Morris v. N.Y. State Dept. of Taxation & Fin., 82 N.Y.2d 135, 142 (1993).

184. There is some authority to suggest that juries are meant to decide the question of whether "an injustice would result if the corporate form were left intact." 1 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41.25 (revised ed. 2015). However, as noted above, such determinations are typically made by a judge while legal fact issues are typically made by a jury.

rate veil and imposing liability on shareholders.[185] Thus, no matter how much courts may dress up the veil-piercing mechanism in legal clothes, equity has always been, and continues to be, the sine qua non of veil piercing.

This, of course, makes logical sense when the many layers of the veil-piercing doctrine are stripped bare and the ultimate goal of piercing is exposed: the mechanism exists to prevent shareholders from abusing the corporate form. There is no question that this is an equitable endeavor.[186]

Because veil piercing is plainly an equitable remedy, there is no convincing historical basis for claiming that juries, instead of judges, should be the ones deciding it. Accordingly, the Supreme Court need not upset existing Seventh Amendment precedent to resolve the existing circuit split in favor of the Seventh Circuit's decision in *IFSC*. Nor do state courts need to violate any historical norms to find that judges should properly be deciding whether to pierce the corporate veil. If anything, taking the decision to pierce the corporate veil out of jurors' hands will be consistent with, not run afoul of, historical conceptions of veil piercing dating back to the creditor's bill as an equitable remedy determined by judges, not juries.

### B. *Juries Are Ill-Equipped to Parse Veil-Piercing Facts*

While most decisions finding that a jury should decide a veil-piercing claim rely on the fact that juries are generally

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185. *See* Wachovia Sec., LLC v. Banco Panamericano, Inc., 674 F.3d 743, 751–52 (7th Cir. 2012) ("Illinois law permits veil piercing when two separate prongs are met . . . (2) 'circumstances must be such that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice.'") (citations omitted); NetJets Aviation, Inc. v. LHC Commc'ns, LLC, 537 F.3d 168, 176 (2d Cir. 2008) ("To prevail under the alter-ego theory of piercing the veil, a plaintiff need not prove that there was actual fraud but must show a mingling of the operations of the entity and its owner plus an 'overall element of injustice or unfairness.'") (citations omitted); Southeast Tex. Inns, Inc. v. Prime Hosp. Corp., 462 F.3d 666, 679 (6th Cir. 2006) ("More importantly, these conclusory allegations, couched in terms of a contractual breach, are not tantamount to the fraud or injustice required to pierce the corporate veil."); NLRB v. Greater Kan. City Roofing, 2 F.3d 1047, 1052 (10th Cir. 1993) ("We require an element of unfairness, injustice, fraud, or other inequitable conduct as a prerequisite to piercing the corporate veil.").

186. *See supra* Part II.

considered to be better suited to resolving "fact-intensive" inquiries, the authors submit that this reliance is misplaced in the veil-piercing context. To be sure, there are contexts where juries are essential to determining the credibility of eyewitnesses and weeding through potentially conflicting accounts of everyday occurrences. In personal injury claims involving vehicles, for instance, juries are often asked to decide the proverbial "was the light green, yellow, or red?" Indeed, many jurors conduct their own "investigations" in these types of cases[187]—visiting accident sites, for example.[188] Still other jurors rely on personal experience with their own driving patterns to make factual judgment calls in these types of cases.[189]

But this is simply not so in the veil-piercing context, which is not as intuitive or straightforward as other civil claims sounding in tort or breach of contract. The potentially conflicting evidence often involves matters far beyond the everyday knowledge of a lay juror. After all, "[t]he issue of corporate governance is complicated."[190] And, more critically, all of the conflicting evidence revolves around one core legal issue: the legal fiction of corporate separateness. Similarly, in patent validity cases, judges are tasked with making a determination, which—while it may also be fact-intensive—remains at its core a legal issue. While jurors may have experience that renders them invaluable in determining witness credibility in a breach of contract or personal injury setting, it is judges—not jurors—who have the training and experience necessary to answer the only

187. *See, e.g.*, Simmons v. Christus Schumpert Med. Ctr., 71 So. 3d 407, 426 (La. Ct. App. 2011) (determining that a juror conducted his own internet research, printed some of the results, and shared it with other jurors); Stebner v. Assoc. Materials, Inc., 234 P.3d 94, 96 (Mont. 2010) (concluding that a juror researched the definition of "preponderance" on the internet).

188. *See, e.g.*, Campbell v. Hankins, 324 S.W.3d 358, 361 (Ark. Ct. App. 2009) (finding that a juror had visited the scene of car accident during a lunch break and "reported the results of his investigation and his opinions regarding the same to the other jurors during deliberations"); Franzen v. Buseman, No. 02-0378, 2003 WL 1524509, at *2 (Iowa Ct. App. Mar. 26, 2003) (determining that a juror drove by scene of car accident "because he was curious," and then "relayed his observations to the jury").

189. *See, e.g.*, *Franzen*, 2003 WL 1524509, at *2 (describing that a juror driving by scene of accident "wanted to refresh his recollection of the stretch of highway upon which he traveled numerous times before").

190. Minger Constr., Inc. v. Clark Farms, Ltd., No. 14–1404, 2015 WL 7019046, at *6–7 (Iowa Ct. App. Nov. 12, 2015) (McDonald, J., concurring) (arguing that veil-piercing claims should be decided by judges, not juries).

question that matters on a veil-piercing claim: whether the legal fiction of corporate separateness should be honored or disregarded.

To take but one example, judges are trained from the start of law school to understand that legal fictions exist for specific policy reasons, and, similarly, to recognize when the policies underlying those legal fictions would be flouted by applying those fictions in a particular case. Jurors have no such training and often do not understand the policy rationale for the existence of legal fictions such as corporate separateness. This makes jurors ill-equipped to make these kinds of determinations, particularly where, as in the veil-piercing context, the determinations require analysis of other, secondary legal fictions, such as the observance of corporate formalities. Judges, on the other hand, are trained to understand such legal fictions and make these kinds of determinations from the start.

In this regard, the case law's overzealous focus on the "fact-intensive" nature of a veil-piercing claim is a bit of a red herring. Certainly, veil piercing may require an assessment of a variety of facts relevant to a corporation's day-to-day business and its relationship to its shareholders. But those facts are only relevant to a veil-piercing analysis insofar as they speak to whether the legal fiction of corporate separateness—and secondary legal fictions like corporate formalities—should be honored or, instead, disregarded. Judges understand that; jurors generally do not (unless they themselves happen to be lawyers).

### C. *Consistency in Decisions*

While there is no way to predict the future, consistently placing veil-piercing determinations in the hands of judges rather than juries should lead to more consistency in veil-piercing law, at both the state and federal levels. It is "exceedingly difficult to craft instructions that provide meaningful guidance to the jury" tasked with assessing a veil-piercing claim.[191] And at least one scholar has recently argued that veil-piercing procedure, including the question of whether claims are resolved by judges or juries, may affect the variance in the aggre-

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191. *Id.* at *17. The *Minger* court also noted that the factors juries are instructed to consider in deciding whether to pierce the corporate veil vary widely from court to court and "are not exclusive" in any event. *Id.* at *18.

gate results of veil-piercing claims across various jurisdictions as much as, if not more than, variations in the states' substantive law of piercing.[192]

At the appellate level, inconsistency in jury decision-making on piercing claims is readily apparent. Courts of appeal are regularly tasked with evaluating piercing decisions rendered by juries and often overturn such decisions. While there exist innumerable reasons why an appellate court might overturn a jury verdict in the piercing context, several cases focus on the fact that the jury failed to grapple with a particular aspect of the admittedly complex tests involved in such claims. For example, while a jury might make a factual determination regarding corporate domination or control, that same jury might fail to fully consider the fraudulent or equitable impact of such control.[193] Allowing judges to make those determinations should, over time, lead to more consistent results that will permit businesses (and lawyers) to have greater certainty as to what kinds of conduct will—or will not—lead to a piercing of the corporate veil.

### D. *Efficiency Considerations*

Placing the veil-piercing determination in the hands of judges should also be more efficient than having those same claims tried before a jury. As a general matter, bench trials tend to be more efficient than jury trials, as both courts and commentators have recognized.[194] Moreover, jury trials on the

192. Sam F. Halabi, *Veil-Piercing's Procedure*, 67 RUTGERS L. REV. 1001, 1058–59 (2015) ("While [other scholars] associate North Dakota's high veil-piercing rate with its attitude toward 'undercapitalization' as a legal basis to pierce, it may be just as likely that its liberal pleading standards, lower burden of proof, and access to a jury on veil-piercing claims matter more.").

193. *See, e.g.*, Connolly v. Malkamaki, No. 2001-L-124, 2002 WL 31813040, at *6 (Ohio Ct. App. Dec. 13, 2002) (setting aside jury verdict where jury failed to grapple with facts related to inequitable conduct or harm to plaintiff); Sloan v. Thornton, 249 Va. 492, 499 (1995) (setting aside jury verdict where, despite evidence of corporate disregard, there was no evidence demonstrating that shareholder had used the corporation "to disguise a wrong or obscure a fraud he committed").

194. *See, e.g.*, Data Compass Corp. v. Datafast, Inc. (*In re* Data Compass Corp.), 92 B.R. 575, 583 (Bankr. E.D.N.Y. 1988) ("The Court does not suggest that it is too busy to conduct jury trials, but jury trials are, by nature, more time consuming than bench trials, and one could conclude that the Court's docket and case pace demands do not accommodate jury trials.")

issue of veil piercing often need to focus on every aspect of the corporation's operations and relationship to shareholders in order to give the jury as much information as possible to make a decision. A judge, by contrast, is far more likely to know, by virtue of having managed a case since its inception and through the discovery process, what facts are critical, or irrelevant, to the veil-piercing determination. This should ultimately lead to a more streamlined and efficient trial process on veil-piercing issues than would be possible with juries making the determination.

## CONCLUSION

This Article has traced the historical roots of veil piercing in courts of both law and equity, which helps to explain the wide variety of conclusions reached by modern courts on the question of whether veil-piercing claims should be decided by judges or juries. In addressing that question, both the federal circuit courts and the state appellate courts have diverged into several distinct lines of reasoning and arrived at disparate results. The result is a clear and irreconcilable split in authority between the federal circuits and the highest appellate courts in several states, a muddled mess of precedent from which it is very difficult to draw clear guidance, and a controversy ripe for resolution by the U.S. Supreme Court.

This Article has attempted to make sense of that confusion and to propose a common sense solution. Part I addressed the circumstances under which a civil plaintiff in federal court is entitled to a trial by jury, without focusing specifically on veil piercing. Part II examined the historical roots of veil piercing in an attempt to explain why courts have reached such widely divergent results on the judge/jury question. Part III analyzed the existing case law and the reasoning various federal and state courts have applied in determining who should adjudicate veil-piercing claims. Finally, Part IV argued

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(quoting Weeks v. Kramer (*In re* G. Weeks Sec., Inc.), 89 B.R. 697, 710 (Bankr. W.D. Tenn. 1988)); Christian N. Elloie, *Are Pre-Dispute Jury Trial Waivers a Bargain for Employers over Arbitration? It Depends on the Employee*, 76 DEF. COUNS. J. 91, 95 (2009) ("Compared to jury trials, bench trials are less costly and less time consuming."); *see also* THOMAS H. COHEN & STEVEN K. SMITH, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NJC 202803, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 2001 (2004), http://www.bjs.gov/content/ pub/pdf/ctcvlc01.pdf.

that judges, not juries, are best suited to decide in each case whether the corporate veil should be pierced, for four reasons: (1) veil piercing is an inherently equitable remedy that judges are better equipped to decide; (2) veil-piercing inquiries require a weighing of legal fictions and concepts that lay jurors simply are not trained to perform; (3) decisions by judges are likely to produce more consistent results in similar cases; and finally (4) judges can likely make veil-piercing decisions more efficiently than juries can. For these reasons, the authors respectfully submit that, if it is so inclined, the U.S. Supreme Court should resolve the existing circuit split and muddied waters surrounding this issue by conclusively deciding that there is no Seventh Amendment right to a jury trial on a veil-piercing claim, and that judges, not juries, are the proper decision-makers to resolve such claims.