The Interdependence of Conflict of Laws and
Piercing the Corporate Veil

by

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ABSTRACT

This thesis explores the relationship between piercing the corporate veil and conflict of laws through an empirical research of judicial decisions rendered by U.S. courts for a three-year period between 1 January 2012 and 31 December 2014. Through analyzing the empirical findings, this thesis proves (i) the interdependence between piercing the corporate veil and each of the three important conflict of laws issues, namely, choice of law, jurisdiction and enforcement of foreign judgment; and (ii) the interdependence between each of the three conflict of laws issues to each other as relating to piercing the corporate veil.

Why is this important?

Piercing the corporate veil litigations account for a sizeable amount of corporate litigations. It is an integral part of the corporate law in the United States. For the litigants, successful piercing the corporate veil will mean disregarding limited liability and have the dramatic effect of holding shareholders liable for the debts of the corporations. For the legal system, it is the means of the judiciary in doing equity for aggrieved parties who are harmed by abusive use of the corporate entity.

The three conflict of laws issues are determinative to the success of piercing in the modern society where most big corporations are incorporated in states like Delaware while doing business across the country. On the other hand, piercing the corporate veil also shapes the conflict of laws rules. Understanding the interdependence of the two sides is therefore essential for the regulation of modern corporations.
What are the issues?

(i) Choice of law – What are the contemporary choice of law approaches on piercing the corporate veil in the U.S.? What should be the better approach?

(ii) Jurisdiction– How could piercing the corporate veil be utilized for the purpose of acquiring jurisdiction (jurisdictional piercing)? What are the contemporary jurisdictional piercing approaches of the U.S.? What should be the proper approach?

(iii) Enforcement–How could plaintiff acquire advantage on favorable applicable law through pursuing piercing against the shareholder in the enforcement proceeding (enforcement piercing)? What are the contemporary enforcement piercing approaches of the U.S. in terms of choice of law and jurisdictional limitation? What should be the proper approach?

(iv) Finally, how the findings of the above issues interact with each other?

How to prove them?

The field of piercing the corporate veil has long been blessed with rich literature on empirical research, particularly since the seminal article by Professor Robert Thompson. Adopting the general methodology of Professor Thompson, this thesis seeks to obtain findings on the contemporary judicial practices and therefore frames the issues squarely. The empirical findings will thereafter be used to prove the best solutions to the issues.
Summary of findings and recommendations

Empirical findings show that courts have generally paid very little attention to conflict of laws issues. No matter the piercing issue arises from straightforward liability piercing, jurisdictional piercing or enforcement piercing, courts routinely ignore the choice of law issue, and often goes straight to the law of forum. This leads to forum shopping (a choice of law issue), a potentially inappropriate test for jurisdictional piercing (a jurisdiction issue), and potential abuse of enforcement piercing (enforcement issue). As will be discussed herein, it is suggested that courts must understand the interdependence between the piercing the corporate doctrine and the three conflict of laws issue in order for there to be a level playing field for litigants on both sides. It is only in this way could equity be done and for the society to be benefited from the piercing doctrine.
CHAPTER 1

INTRODUCTION

“The average judge, when confronted by a problem in the conflict of laws, feels almost completely lost, and, like a drowning man, will grasp at a straw.”1

“The whole problem of the relation between parent and subsidiary corporations is one that is still enveloped in the mists of metaphor. Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.”2

- Benjamin Cardozo

In the United States, the issue of piercing the corporate veil has been described by the great Justice Cardozo as “enveloped in the mists of metaphor,”3 while dealing with the issue of conflict of laws has been likened by him to the experience of drowning.4 It is hardly surprising then that the combination of the two issues creates a misty swamp that few people venture into.5

3 Id.
4 See supra n 1.
Piercing the corporate veil has long been an important corporate law topic. It is important because it serves as the exception to the limited liability doctrine of corporate law, the very foundation of modern corporate law in the world. While the depth of and attention to piercing the corporate veil as a corporate law concept are certainly warranted, a key aspect in the doctrine has received little attention over the years, namely the various conflict of laws issues. This thesis strives to bridge this gap between the important piercing the corporate veil doctrine and three conflict of laws issues, choice of law, jurisdiction, and enforcement of foreign judgment by an extensive empirical research on recent piercing cases decided in the United States. In the end, it is hoped that the thesis will illustrate the interdependence of piercing the corporate veil and conflict of laws. They cannot be considered without the other in the modern day of commerce.

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6 Piercing the corporate veil “is a limitation on the accepted principles that a corporation exists independently of its owners, as a separate legal entity, that the owners are normally not liable for the debts of the corporation, and that it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners” (Matter of Morris v. New York State Dept. of Taxation & Fin., 82 N.Y.2d at 140–141).

7 See Consumer's Co-op. of Walworth Cnty. v. Olsen, 142 Wis.2d 465, 419 N.W.2d 211, 214 (1988) (“This incentive to business investment has been called the most important legal development of the nineteenth century.”). This is agreed by Richard Posner in On Command Video Corp. v. Rati, 705 F.3d 267 (7thOr.2013) (“Limiting liability, which is to say shielding the personal assets of shareholders (or their equivalent, “members” of a limited liability company) from the creditors of their corporation, provides an important incentive for making equity investments.”).

Piercing the corporate veil derives its significance from its dramatic impacts on limited corporations. Through piercing the corporate veil doctrine, judges could hold shareholders responsible for the liability of the corporations beyond the amount they pay for their shares. This is the opposite of the norm for limited company which stipulates that shareholders of limited corporations are not responsible for the liability of the corporations. This limited liability manages to become the norm because it encourages people in our society to engage in business adventures which in turn, powers the development of our modern economy. From the early days of industrial revolution in England, the limited liability doctrine has been boldly pronounced by the highest court in England. In the United States, it is also enshrined by the Supreme Court. In *Bestfood*.

It was noted that “it is hornbook law that the exercise of the control which stock

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9 See Kraft Power Corp. v. Merrill, 981 N.E.2d 671, 678 (Mass. 2013) (“Once the corporate veil is pierced, the individual defendant and the corporation become “one for all purposes.”).

10 See Adams v. Raintree Vacation Exchange, LLC, 702 F.3d 436, 441 (7th Cir. 2012) (“Piercing the corporate veil means disregarding the limited liability of a corporation's owner or owners (whether corporate or individual), and thus merging the owner's assets—which it had sought to insulate by adopting the corporate form—with those of its subsidiary.”).

11 See Inter-Tel Techs., Inc. v. Linn Station Props., LLC, 360 S.W.3d 152, 155 (Ky. 2012) (“Piercing the corporate veil is an equitable doctrine invoked by courts to allow a creditor recourse against the shareholders of a corporation. In short, the limited liability which is the hallmark of a corporation is disregarded and the debt of the pierced entity becomes enforceable against those who have exercised dominion over the corporation to the point that it has no real separate existence.”).


13 See Saloman v. Saloman [1896] UKHL 1 (“The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act.”).

ownership gives to the stockholders ... will not create liability beyond the assets of the subsidiary.”  

Despite its long recognized status, limited liability is not without its exceptions. An equally fundamental doctrine is piercing the corporate veil which allows the courts to ignore limited liability when situations warrant it. It has generally been accepted that when the shareholder’s control over the business of the company is so excessive that it causes inequitable results to the plaintiff, the court can provide an equitable remedy to the plaintiff by piercing the corporate veil. Under this formulation, courts therefore usually look at three relevant factors, namely, control, fraud and proximity. When these factors are present to the satisfaction of the courts, shareholders will be liable for the debt of the limited corporation that they will not be held liable otherwise.

Despite this dramatic effect of shareholders’ liability, courts have been consistent in emphasizing the exceptional nature of the remedy. Not only it is an exception, it is an

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15 Id., 61–62.

16 Id. 62 (“But there is an equally fundamental principle of corporate law, applicable to the parent-subsidiary relationship as well as generally, that the corporate veil may be pierced and the shareholder held liable for the corporation’s conduct when, inter alia, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder’s behalf.”).

17 See Morris v. New York State Dept. of Taxation and Fin., 82 N.Y.2d 135, 141 [1993] (stating that piercing the corporate veil requires that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury”).

18 See infra Chapter 3, note 66.

19 Id.

20 See Las Palmas Associates v. Las Palmas Center Associates (1992) 235 Cal.App.3d 1220, 1249, 1 Cal.Rptr.2d 301 (“Because society recognizes the benefits of allowing persons and organizations to limit
“exceptional” exception. However, at least as far as the United States is concerned, piercing of the corporate veil is not as exceptional as the courts have been describing. In the seminal article by Professor Robert Thompson, piercing the corporate veil is the most litigated type of corporate cases in the United States. As will be further confirmed by the empirical research of this thesis, there is no question that United States has been the largest manufacturer of piercing cases in the world. There have been constantly more piercing cases since Professor Thompson’s research, amounting to 1,044 such cases in the three-year survey period (2012-2014) of this research. The contrast is obvious against the rest of the world. For example, the latest decision on piercing the corporate veil by the UK Supreme Court seems to have reduced the circumstances that the piercing the corporate veil could be applicable. Other countries also seem to be more conservative in the utilization of the doctrine. For example, in a recent research on their business risks through incorporation, sound public policy dictates that imposition of alter ego liability be approached with caution.”


22 See Thompson Study, supra note 8, 1036.

23 See Chapter 3, tb 3.1.

24 Id.

25 See Palmer paras 2.1544.1 – 2.1544.7 (“The Judgment of the Supreme Court in Petrodel Resouces Ltd v Prest takes a considerably more restrictive approach to the question of veil-piercing than some of [the older authorities] and limits its proper application to, arguably, one specific example of the ‘abuse’ of the privilege of limited liability… It would appear from the above that the circumstances in which the courts a) are entitled to pierce the corporate veil, and b) to find it necessary to do so, are likely to be extremely limited, indeed Lord Mance suggested that such circumstances are likely to be “novel and very rare.”59 In this respect the veil-piercing doctrine, as pronounced by the Supreme Court, is of exceptionally narrow scope and, on Lord Neuberger’s analysis at least, has never been necessarily applied by the courts.”).
piercing the corporate veil of Chinese companies, there were only 99 piercing cases in
China during the period between 2006 and 2010.\footnote{See Hui Huang, “Piercing the Corporate Veil in China: Where is It Now and Where is It Heading?” (2012) 60 American Journal of Comparative Law 743, 749.} That is less than one-third of the
piercing cases in the United States in 2012.\footnote{See Chapter 3, tb 3.1.} Accordingly, piercing the corporate veil
cases in the United States afford a rich data base for the academics. Following the lead of
Professor Thompson, huge amount of empirical researches have been conducted on
author, is a huge omission.

There are 5.7 million corporations in the United States,\footnote{United States Census Bureau, 2012 historical annual tabulations, available at http://www.census.gov/econ/susb/about_the_data.html (last visit 28 Feb 2016).} but Delaware is the state
of incorporation of more than 1 million corporations.\footnote{See Delaware Division of Incorporation, About Agency, available at http://www.corp.delaware.gov/aboutagency.shtml (last visit 28 Feb 2016).} More than 50\% of all public
companies in the United States and 64\% of the Fortune 500 have incorporated there.\footnote{See United States Census Bureau, 2012 historical annual tabulations, available at http://www.census.gov/econ/susb/about_the_data.html (last visit 28 Feb 2016).} It
is also believed that New York, California and Illinois, all states with significant financial
importance of the United States, account for the lion shares of the remaining companies
of the United States. The dominance of Delaware as the favorite state of incorporation is widely regarded as the consequence of favorable corporate law to shareholders and directors.

However, Delaware corporations mostly do not have any large amount of business in Delaware. Just 0.33% of the corporations of the United States located in Delaware. For large corporations, they have business operations across 50 states and even around the globe. The result of Delaware corporations, or more generally, out-of-state corporations conducting national business is the potential application of different corporate laws. This is the choice of law issue. Particularly on the doctrine of piercing the corporate veil, courts inevitably will be called on to decide which state’s law is applicable to the piercing the corporate doctrine. This choice of law issue of piercing the corporate veil is the first conflict of laws issue to be discussed in this thesis.

Just as Delaware may have more favorable law on director’s duty, states all have their own law on piercing the corporate veil respectively. This difference in potential shareholder’s liabilities could certainly be a factor influencing the choice of the state of incorporation. In fact, one of the most important works on piercing the corporate veil is Piercing the Corporate Veil by Professor Stephen Presser. Understanding the importance of the difference of piercing laws among the states, Professor Presser has put

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33 See id.


35 See supra note 32.

36 See infra Chapter 3, Section 4.

37 See Presser, supra note 8.
forth huge effort in updating and restating the piercing law of each of the state.\textsuperscript{38} If the piercing law of a more favorable law is to be applied by the court, plaintiff’s chance of successful recovery could be boosted substantially. This assumption is proven by numerous researches, including that of Professor Thompson.\textsuperscript{39} He found that some states’ successful piercing rate could be substantially higher than that of the others (e.g. 68.75% under the law of Indiana than 0% under Delaware law).\textsuperscript{40} This difference in piercing rates continues as subsequent researches have proved.\textsuperscript{41} However, despite the result of the application of a different law could make, little has been written on how the decision of which law is to be applied is made.\textsuperscript{42} Perhaps it is because of the conventional wisdom that the law of the state of incorporation will invariably apply.\textsuperscript{43} While there has been attempt to challenge whether that should be the proper basis,\textsuperscript{44} no one has made the effort of verifying whether the law of the state of incorporation is in fact the chosen choice of law approach by the courts in the first place. This factual question forms one of the bases of this thesis. Inspired by the pioneering empirical research of Professor Thompson, this

\begin{itemize}
\item \textsuperscript{38} Id.
\item \textsuperscript{39} See Chapter 3, tb 3.6.
\item \textsuperscript{40} Id.
\item \textsuperscript{41} See id. (under data of Oh Study, e.g. 61.54% piercing rate under Indiana law and 34.29% under Delaware law).
\item \textsuperscript{43} See Tyson Fresh Meats, Inc. v. Laver Ltd., L.L.C., 918 F. Supp. 2d 835, 855 (N.D. Iowa 2013) (“Most jurisdictions recognize the internal affairs doctrine whereby “‘the law of the state of incorporation” is used to determine “issues relating to the internal affairs of a corporation.””)
\item \textsuperscript{44} See supra note 42.
\end{itemize}
thesis strives to identify the contemporary choice of law approaches of the courts. It is believed that only after such factual basis is sorted out, one could then start discussing the best possible choice of law approach, which in turn significantly influences the result of a given piercing case. Thus, this thesis seeks to serve as a link between the well-researched areas of piercing the corporate veil (e.g. its justifications as an exception to limited liability) and the reality that different state laws have different thresholds on piercing the corporate veil.

On the other hand, the choice of law rules are also shaped by piercing the corporate veil. It is naïve to think that there is a one-size-fit-all choice of law rule that could be applied to all branches of substantive law. Quite the opposite, choice of law rules must adapt to different branches of substantive law. The choice of law on tort apparently involves different considerations from that on contract. The same also applies to the choice of law on piercing the corporate veil. Additionally, the choice of law rules, like all branches of law, evolves over time to fit with the development of our society. In this light, piercing the corporate veil also shape choice of law. It is therefore essential to understand the purpose, nature and effect of piercing the corporate veil to develop the proper choice of law rules. The key features of the piercing the corporate veil will be introduced in Chapter 3, followed by in depth discussion on choice of law in Chapter 4.

45 See H Hansmann & R Kraakman, “A Procedural Focus on Unlimited Shareholder Liability” (1992) 106 Harvard Law Review 446, 458 (Responding to criticism based on choice of law and jurisdiction regarding Professors Hansmann and Kraakman’s suggestion for an alternative rule of pro rata shareholder liability for tort damages, they argued that “[conflict of laws] rules should not be viewed in isolation from the underlying substantive law”).

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This choice of law issues however is not the only focus of the thesis. Choice of law issues could not exist in vacuum. Whenever a foreign element is present in a private law matters, one must consider the three traditional conflict of laws questions, choice of law, jurisdiction and enforcement of foreign judgment.\(^{46}\) Thus, in order to make proper choice of law analysis on piercing the corporate veil cases, it is essential that the interrelated issues of jurisdiction and enforcement be considered as well. That said, this is not the only reason to research on jurisdiction and enforcement. Each demands attention on itself.

For jurisdiction, it is as much about how conflict of laws impact on piercing the corporate veil as how piercing the corporate veil impacts on jurisdiction. Clearly, if a state does not have jurisdiction over the defendants in the first place, there will not be any need to discuss choice of law issues on piercing the corporate veil. However, what is more interesting is the possibility of using the piercing the corporate veil doctrine to create jurisdiction basis that will not otherwise be available, a process known as jurisdictional piercing.\(^{47}\) Generally, courts may not assume adjudicative power over a defendant without satisfying the due process requirement of the U.S. Constitution. Since *International Shoe v. State of Washington*,\(^{48}\) the due process clause dictates that the defendant must have minimum contacts with the forum such that the assumption of

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\(^{46}\) See Russell J. Weintraub, Commentary on the Conflict of Laws, 1 (6th ed. 2010) (“In interstate and international transactions, there are three major topics that lawyers must address either in the planning or dispute-resolution stage. (1) Where can the parties resolve a dispute by suit or other means, such as arbitration? (2) What law will a judge or arbitrator apply to resolve the dispute? (3) What will be the effect of any judgment or award?).

\(^{47}\) See discussion in Chapter 5.

jurisdiction does not contravene “traditional notions of fair play and substantial justice.”

Accordingly, unless the defendant company itself has conducted the complained action in the forum (known as specific jurisdiction) or despite not having conducted the complained conduct, has substantial general business operations in the forum (known as general jurisdiction), the defendant will not be haled into the forum to defend itself in the litigation.

The challenge brought by modern corporate structure however is the emergence of large corporate groups. Not only do they incorporate in states with favorable corporate law, they will often try to ring-fence liabilities of different divisions of the group by incorporating various subsidiaries. With this group structure, local plaintiffs often find that they could only sue the local subsidiary that might not have the assets to satisfy the judgment despite being subject to jurisdiction of the forum. As to the assets rich holding company at the top of the corporate structure, they are *prima facie* not subject to the jurisdiction by the forum. In this sense, the concept of company is not just to ring-fence the liabilities of the company, it is also to ring-fence the susceptibility of the company jurisdictionally. In other words, while most people equate separate identity of company with limited liability, separate identity of company could do more than that by preventing shareholders from being sued in the first place.

The safety halve against such strategic behavior is the adaptation of piercing the corporate veil in the jurisdictional context. The effect of the jurisdictional piercing

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49 *Id.* 316.

50 See Rayner (Mincing Lane) Ltd v. Department of Trade [1989] Ch. 72 at 176 (“It follows from the fact that a corporation is a separate person that its members are not as such liable for its debts.”).
doctrine is to impute the jurisdictional contact of the company to the shareholder, thereby making it susceptible to the jurisdiction of a state that it will not otherwise be subject to.

It must be noted that jurisdictional piercing might not always overlap with the traditional use of piercing the corporate veil in the liability context (“liability piercing”). As will be seen, while both doctrines could be applicable in the same case, there are also occasions that they can go without one another.⁵¹

Having introduced the concept, there are still a lot of uncertainties as to its applicability in light of recent Supreme Court decisions.⁵² Without guidance from the top, this thesis tries to analyze the proper approach of the doctrine by conducting a survey of jurisdictional piercing cases. As much as research on choice of law approaches of piercing the corporate veil could enhance the understanding of corporate law, research on jurisdictional piercing could also enhance the understanding of the law on jurisdiction. In other words, jurisdictional piercing, being the exception to the jurisdictional separateness of corporation, is essential in our understanding of what constitutes a corporation. The two questions are not mutually exclusive, but rather complementary with each other. The understanding of one is interdependent on understanding the other. For example, choice of law issue will be present in jurisdictional piercing. In deciding whether to impute the jurisdictional contacts of a subsidiary to its parent, the court must determine which jurisdiction’s law is going to apply. Conversely, jurisdictional piercing might serve as the jurisdictional basis of the court to adjudicate liability piercing which in turn will involve

⁵¹ See Chapter 5, tb 5.3.

choice of law issues. Thus, this thesis will both analysis the relationships between piercing the corporate veil and each of the three conflict of laws issues, as well as how these three relationships interact with one another.

The last leg of the tripod comes in the form of enforcement of foreign judgment. This relates to the conflict of laws issues involved when plaintiff makes the piercing claim, not in the same trial with the underlying cause of action, but after receiving the judgment on the underlying cause of action. Thus, piercing the corporate veil is used as a mean against the shareholder to collect the underlying judgment against the defendant company. Here, issues on both choice of law and jurisdiction will be involved. First, the assumption of this thesis is that such enforcement piercing will bring strategic advantage to the plaintiff in the form of favorable choice of law. By breaking the underlying cause of action and piercing the corporate veil into two separate trials (and often in two different states), the plaintiff will have two opportunities to ask the court (or even two different courts) to decide on the applicable law to the legal issues, one for the underlying cause of action, and the other for piercing the corporate veil. Thus, the plaintiff may get the best of both worlds by shopping for the most favorable laws for the underlying cause of action and piercing the corporate veil respectively in a conflict case. If this theory holds, enforcement piercing cases with conflict element shall yield a higher piercing rate.

On the other hand, this assumption is subject to certain control measures in the form of jurisdiction. In order for the aforementioned double forum shopping to happen, plaintiff must pass the various hurdles imposed by the law on jurisdiction, including personal jurisdiction, subject matter jurisdiction and the notice requirement. With these
potential jurisdictional limitations in mind, the revised theory is that enforcement piercing will yield a higher piercing rate if the choice of law rules are favorable to forum shopping while the limitations imposed by jurisdictional rules are relatively less stringent. This theory will be tested by the empirical research. Thus, enforcement piercing introduces an additional layer of complexity that involves both choice of law and jurisdictional issues.

While each of the three conflict of laws issues yields specific questions on piercing the corporate veil and will be discussed in separate chapters, the ultimate goal of this thesis is to prove the following:

1. The interdependence of the three conflict issues and piercing the corporate veil (“Horizontal Interdependence”). After setting out the specific features of piercing the corporate veil doctrine in Chapter 3, how each conflict issue interacts with piercing the corporate veil will be discussed separately in Chapters 4 to 6. Each of these chapters will discuss the importance (why?), specific issues (what?), the empirical findings (how?) and make suggestions for improvements of the current regime.

2. The interdependence of each conflict issue to one another (“Vertical Interdependence”). In Chapters 4 to 6, each chapter will highlight how other conflict issues impacting one another.

To prove the above, this thesis utilizes an empirical research on cases involving piercing the corporate veil over a three-year period between January 1, 2012 and December 31, 2014. Building on the methodology of Professor Thompson’s research, this empirical research aims at creating a data base which serves as providing the
factual basis to assess the interactions of the three conflict issues with the piercing the corporate veil doctrine. It is only after understanding the contemporary practices of the courts on these interactions could detailed analysis and suggestions be made. The specific methodologies are set out in the following Chapter 2. Chapter 3 identifies eight unique features that shape the various conflict of laws rules. Chapters 4 to 6 each discusses the interaction of a specific branch of conflict of laws with piercing, and are written as if they are each a separate article.
CHAPTER 2

METHODOLOGY

1. Introduction

Empirical research has been a mainstay in analysis of piercing the corporate veil since the highly insightful empirical research by Professor Thompson (hereinafter “Thompson Study”).\(^1\) His methodology has been widely adopted in subsequent empirical researches on piercing the corporate veil, including the work of two Wake Forest law students that extended Thompson’s research to 1995 (hereinafter “Wake Forest Study”),\(^2\) piercing studies in England and other jurisdictions.\(^3\) It also served as the basis for a subsequent large scaled research by Professor Peter Oh (hereinafter, the “Oh Study”).\(^4\) In an effort to extend the empirical research into the area of conflict of laws, this thesis generally adopts a methodology closely resembling that of the Thompson Study, subject to appropriate adjustments for its different focus.

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\(^4\) See Peter Oh, “Veil-Piercing”, 89 (2010) *Texas Law Review* 81, 99-100, expanding the cases covered in Westlaw from 1958 up to 2006 and used combinations of two wider search phrases, “pierc! /s veil” and “disregard! /s (entity entities).”
2. **Purpose of the empirical research**

The empirical research seeks to analyze all cases decided by the courts in the United States for the three years beginning on January 1, 2012 and ending on December 31, 2014. The purpose of the research is to survey the actual practices of the courts in order to observe trends and tendencies that could shed light on the answers to the three questions stated in Chapter 1. It is only after the factual practices of the courts are identified could one see the true legal issues, thereby setting table for the finding of solutions. The full analyses will be set out in Chapters 3 to 6. Each of the chapter follows this format: issues, findings, recommended resolutions.

3. **Time period of the research**

The survey period begins from January 1, 2012 to December 31, 2014. This period is chosen for two main reasons. First, the survey intends to cover the recent cases decided on the contemporary practices of piercing among U.S. courts. In this sense, it is not a full historical account of enforcement piercing in the United States, but a snapshot of recent developments of the doctrine. Whilst this time period admittedly does not account for the full history of development of jurisdictional piercing, it does track the contemporary developments of the doctrine more closely. In this sense, the research will reflect the current practices more closely and block out unwanted noise from outdated cases. As we will see, the survey period yields 1,044 piercing cases, 810 conflict cases, 105
jurisdiction piercing cases and 90 enforcement piercing cases, sizeable samples that shall provide reasonable basis for in-depth discussion.

Second, the beginning of the research period, January 1, 2012, also happens to be the first full calendar year after the latest Supreme Court cases of McIntyre and Goodyear. These cases substantially changed the jurisdictional regime of the United States. As will be examined in details in Chapter 5, the jurisdictional regime has entered another stage of development, albeit a transitional one, since the Supreme Court handed down these two judgments in June 2011. As personal jurisdiction is a big part of the analysis of this thesis, both in itself and to other relevant topics, starting from 2012 allows the survey to capture the latest phase of the development of conflict of laws of the country. The end of the research period, December 31, 2014, stands for the last full calendar year at the time the writing of this thesis begins.

4. Identification of relevant cases

In his article, Professor Thompson uses the search phrases: “piercing the corporate veil” and “disregard! corporate entity,” to identify piercing cases. To build on the success of the Thompson Study, this thesis also adopts the same search phrases in

5 See Chapter 3, tb 3.11.


8 See Chapter 5.1 on the relevance of personal jurisdiction to piercing.

9 See supra note 1, 1036 & n 1. Thompson also used four undisclosed key numbers.
identifying piercing cases in the Westlaw database.\textsuperscript{10} This should make this research more amenable to the “market standard” of the majority of the aforementioned researches and provide a more user-friendly database for future researchers on the topic. In total, 1,587 raw cases were derived from these searches. Each of these raw cases was then reviewed one by one. To ensure the consistency of the review process, all cases were reviewed and processed by the author alone.

4.1 Piercing Cases

There are three basic types of cases in this empirical research, namely, piercing cases, conflict cases, international cases. Piercing cases are the most general type of cases in the research and embody the two other types of piercing cases. These are cases that involve a form of piercing. To qualify as a piercing case, the court has to have been asked to decide on whether to pierce the corporate veil in question. The only exceptions are the rare cases where the courts decided on an important question relating to piercing yet were not asked to make a decision at that stage of the proceedings. For example, a case where the court simply decides the applicable law for piercing, i.e. choice of law question, for

\textsuperscript{10} It is noted that other commentators have adopted broader search phrases, e.g. those of the Oh study, supra note 4. However, it is not clear to what extent such search phrases have improved the quality of the research. The most obvious advantage of the broader search phrases is their apparent ability to uncover relevant cases. However, over the same time period, Oh actually uncovered less cases (1,415) than Thompson did (1,583) and Oh offered no explanation for this. See Oh Study, supra note 4, 109. Having regard to the above, it is decided that the familiarity of the proven Thompson methodology outweighs any marginal benefits brought by the broader search phrases.
later proceedings is highly relevant to this research and will be considered as a piercing case.\textsuperscript{11}

\textbf{4.2 Conflict cases}

Conflict cases refer to those piercing cases that have a significant relationship to more than one state.\textsuperscript{12} In other words, a conflict case must be a piercing case. Common conflict cases include those involving an out-of-state corporation and/or an out-of-state parent corporation. These are generally diversity cases. Another common type is “federal question” cases which mean those cases that involve federal law.\textsuperscript{13} Other cases include, for example, contract cases involving foreign governing law, foreign place of performance or foreign laws and regulations. However, the list is not exhaustive. The conflict cases are more important for the analysis than non-conflict piercing cases because they necessarily include the choice of law issue. As will be seen below, they may also incur jurisdictional piercing and/or enforcement piercing issues. In contrast, “non-conflict cases” do not involve any foreign element and are therefore purely domestic. They are nonetheless still relevant as they provide data to contrast the findings derived from conflict cases.

\textsuperscript{11} \textit{E.g.}, in a case the court was only asked to decide the governing law of the piercing issue without deciding on whether the veil is to be pierced. That issue was left for trial. See Pacific Cycle, Inc. v. PowerGroup Intern., LLC 2013 WL 5745692 (“[the defendant] has moved for an order clarifying whether this court will apply Wisconsin or Georgia law in analyzing the question of alter ego liability.”).

\textsuperscript{12} This definition is derived from § 2 of the Second Restatement (“Conflict of Laws is that part of the law of each state which determines what effect is given to the fact that the case may have a significant relationship to more than one state”).

\textsuperscript{13} Note that while “diversity cases” and “federal question cases” used herein for the most parts match with the respective definitions under the Federal Rules of Civil Procedures, they are not necessarily identical.
4.3 International cases

Another important term in this thesis is “international cases.” These refer to those “conflict cases” with international, or more precisely non-U.S., elements.\(^{14}\) For example, instead of a Delaware corporation being sued in New York, an international case might involve a Bermuda corporation being sued in Iowa instead.\(^{15}\) These cases are for example significant in illustrating the need for better choice of law rules in international piercing cases. Similarly, effort will be made to explore how the international settings could impact on jurisdictional piercing and enforcement piercing in Chapters 5 and 6.

5. Tort vs. Contract

One of the biggest findings of the Thompson Study is that the success rate of veil piercing is higher in contract cases than in tort cases.\(^{16}\) While this substantive aspect of piercing will not be examined in this thesis, the categorisation of contract and tort cases is still important to illustrate the opportunity for pre-transaction bargaining between the parties\(^{17}\) and the rarity of tort cases.\(^{18}\) Thus, the article adopts the same categorisation as in the Thompson Study.\(^{19}\) In this thesis, “contract case” refers to a case arising from a

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\(^{14}\) Thus, “international cases” are always “conflict cases,” but not *vice versa*.

\(^{15}\) *See e.g.* Schultz v. Ability Ins. Co., No. C11-1020, 2012 WL 5285777 (N.D. Iowa Oct. 25, 2012) (the defendant company and two of the shareholders were all incorporated in Bermuda).

\(^{16}\) *See* Thompson Study, *supra* note 1, 1058. This finding is disputed by Oh, *see* Oh Study, *supra* note 4, 127.

\(^{17}\) *See* Chapter 4, Section 4.3.1.

\(^{18}\) *Id.*

\(^{19}\) It is noted that Oh has created another category in his study: “fraud.” However, since Oh created that category mainly to cater to the explanation of the substantive tort/contract asymmetry, this thesis does not
voluntary transaction, while “tort case” refers to a case arising from an involuntary transaction. It is possible that a plaintiff can raise both contract and tort claims in certain cases. When that happens, such cases will be categorised based on the nature of the underlying transaction. If the underlying transaction is voluntary, it will be categorised as a contract case despite involving a tort claim, and vice versa. These two categories are subject to the category of “statute” cases, which involve different statutory policies.\(^{20}\)

6. Covered Jurisdiction

This thesis focuses on conflict issues relating to piercing inter-state within the United States. The focus on the United States is obvious. Of all jurisdictions of the world, the United States is definitely the jurisdiction that truly embraces the concept of piercing the corporate veil. This is indicated by the sheer number of piercing cases, the consistent rise of such numbers and the surprisingly high piercing rate.\(^{21}\) Other countries on the other hand may not have the piercing concept at all or rarely applying it despite the existence of

\(\textit{adopt it ("[I\text{\textregistered\texttimes}\text{\textregistered} indeed, the extent to which [veil-piercing] is permeated by Fraud is manifest… by spurring… as a claim by expanding the disparity in litigant success in Tort over Contract." See Oh Study, }^{\textit{supra}}\textit{ note 17, 145). Instead, in the applicable law context, fraud does not form its own category and has been handled traditionally by first characterising it as either a tort or contract matter. ("The tort/contract characterisation should be made with an understanding of how each type of action is treated in both versions of the Restatement. It could, conceivably, favor one party or the other to characterise the action as tort and the jurisdiction as First Restatement or the action as contract and the jurisdiction as Second Restatement. The appropriate combination of these four variables will depend on the facts of the case and the litigation posture of the client and the client's adversary." See P Alces, }^{\textit{Law of Fraudulent Transactions,}}\textit{ (Warren, Gorham & Lamont, first published in 1989 and in its current incarnation a regularly-updated looseleaf) § 2:28).}

\(^{20}\) For “fraud” cases, if it is codified as a statutory claim, it will be under the category of statute. Otherwise, the common law “fraud” claim will be categorised as tort or contract depending on whether or not the underlying transaction is voluntary.

\(^{21}\) See Chapter 3, tb 3.1.
the theory. For the latter, a recent UK Supreme Court judgment, *Petrodel Resources Ltd v Prest*,\(^{22}\) indicates that the piercing’s application is going to be further narrowed.\(^{23}\) As such, the empirical research simply does not have the pool of raw data to conduct corresponding research on these other jurisdictions.

### 7. Limitations

The last note on methodology relates to its limitation. It is important to treat this thesis for what it is. Apart from its limited scope to cases decided in the three year periods between 2012 and 2014, like the empirical researches by Thompson and Oh,\(^{24}\) this study is subject to selection bias, that is, “disputes selected for litigation (as opposed to settlement) will constitute neither a random nor a representative sample of the set of all disputes.”\(^{25}\) However, as will be shown below in the findings, the choice of law rules adopted by the courts are far from clear.\(^{26}\) Like Professor Thompson’s response to selection bias in his research on the substantive law, this uncertainty on relevant conflict of laws rules should mitigate the selection bias to some extent as it limits litigants’

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\(^{22}\) [2013] UKSC 34.

\(^{23}\) See Palmer paras 2.1544.1 – 2.1544.7 (“The Judgment of the Supreme Court in Petrodel Resoucces Ltd v Prest takes a considerably more restrictive approach to the question of veil-piercing than some of [the older authorities] and limits its proper application to, arguably, one specific example of the ‘abuse’ of the privilege of limited liability… It would appear from the above that the circumstances in which the courts a) are entitled to pierce the corporate veil, and b) to find it necessary to do so, are likely to be extremely limited, indeed Lord Mance suggested that such circumstances are likely to be “novel and very rare.”\(^{59}\) In this respect the veil-piercing doctrine, as pronounced by the Supreme Court, is of exceptionally narrow scope and, on Lord Neuberger’s analysis at least, has never been necessarily applied by the courts.”).


\(^{26}\) See Chapter 4, tb 4.1.
knowledge from prior cases and their ability to apply “that knowledge to decide which cases to file, to continue on appeal, or to settle.”27

8. Specific considerations for Jurisdictional Piercing

8.1 Additional Searches

It is acknowledged that some key jurisdictional piercing cases in the past, for example Cannon,28 might not have used the aforementioned key phrases in their judgments. Additional searches on Westlaw were then conducted to identify cases that had cited the following key cases over the three-year period:

- Cannon29
- Energy Reserve Group, Inc. v. Superior Oil Co.30
- In re Teletronics Pacing Sys., Inc.31

8.2 Jurisdictional cases

These are conflict cases that involve jurisdictional piercing. Due to the involvement of an out-of-state parent or subsidiary, jurisdictional cases are necessarily conflict cases. All jurisdictional cases are therefore conflict cases as well as piercing cases. Needless to say, they constitute the most important cases for Chapter 5.

27 See Thompson Study, supra note 1, 1046.
29 Id.
31 137 F.Supp.2d 985.
9. Specific Considerations for Enforcement Piercing

9.1 Enforcement piercing cases

In connection with the analysis on enforcement piercing, piercing cases will be further categorized into enforcement piercing cases and non-enforcement piercing cases. As will be seen in Chapter 6, enforcement piercing cases will be further divided into Scenario 3 cases (where underlying cause of action and piercing happened in two separate proceedings yet without conflict elements) and Scenario 4 cases (where enforcement piercing involves conflict elements).
CHAPTER 3

PIERCING THE CORPORATE VEIL: THE UNIQUE EIGHT

The main theme of this thesis is to prove the interdependence of piercing the corporate veil and three conflict of laws questions. It is however not about how the general, ready made, conflict of laws rules will apply to piercing the corporate veil. In fact, as much as conflict of laws rules impact piercing the corporate veil, the piercing doctrine also shapes the conflict rules. Thus, it is important to understand the nature of piercing the corporate veil before we could discuss the specific conflict related topics in subsequent chapters. There are numerous outstanding hornbooks and articles discussing piercing the corporate veil generally,\(^1\) this chapter therefore only highlights eight unique features of piercing the corporate veil as a legal doctrine. Each of the following features will have significant impact on the discussion of the subsequent conflict specific chapters:

1. Piercing is significant
2. It is an exception, but not as many as one thought
3. Conflict is common
4. Different states, different laws
5. Difference is not subtle
6. Discretionary nature

\(^1\) See Chapter 1, note 8.
7. Ancillary nature
8. Versatility

Each of these features will now be examined in details below.

1. **Piercing is Significant**

Piercing the corporate veil is a judicial process whereby the court declares the shareholder to be liable for the debt incurred by the corporation. It is an exception to limited liability. As much as the significance of limited liability is recognised,\(^2\) it goes without saying that the significance of this exception should also be recognised. A success in piercing the corporate veil will lead to the shareholders shouldering the liability of the company which is a grievous situation for any shareholder.

A great number of prominent scholars have looked at the piercing issue, ranging from discussing the justifications for piercing,\(^3\) identifying the common formula,\(^4\) suggesting a substitute,\(^5\) summarizing the various state laws,\(^6\) to arguing for its abolition.\(^7\)

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\(^2\) As Nicholas Murray Butler, the President of Columbia University once famously said “the limited liability corporation is the greatest single discovery of modern times.” Quoted in W P Hackney & T G Benson, “Shareholder Liability for Inadequate Capital” (1982) 43 *University of Pittsburgh Law Review* 837, 841 (footnotes omitted).

\(^3\) *E.g.*, it was argued by one early scholar that since corporation is an “extraordinary privilege,” it “must be used for legitimate business purposes and must not be perverted... and, just as night follows day, so the courts should and will disregard this fiction ‘when it is urged for an intent or purpose not within its reason and policy’.” M Wormser, *Disregard of the Corporate Fiction and Allied Corporation Problems* (New York, Baker, Voorhis and Co., 1927) 8-9, quoted in Stephen B Presser, *Piercing the Corporate Veil* 35 (Eagan, MN, West, 2011).

\(^4\) Frederick Powell formulated the famous three-prong test. *See* Chapter 3, note 66.

\(^5\) *E.g.*, Professor Robert Clark argued that piercing the corporate veil can be dealt with as a form of fraudulent conveyance. *See* Robert Clark, “The Duties of the Corporate Debtor to its Creditors” (1977) 90 *Harvard Law Review* 38.
In Professor Robert Thompson’s seminal article on veil piercing (hereinafter “Thompson Study”), he claims that piercing the corporate veil is “the most litigated issue in corporate law”\(^8\) in the U.S. In his article, he identifies 1,583 piercing cases up to 1985 in the Westlaw database.\(^9\) In a subsequent article by Peter Oh in 2008 (the “Oh Study”), the number of piercing cases increased to 2,929.\(^10\) Comparatively, in another recent empirical piece of research on outside director’s liabilities, there were only 37 securities law cases that sought damages between 1980 and 2005 that were tried to judgment in the U.S. against public companies, and their directors and officers.\(^11\) In the same way as limited liability, while there are still calls for its abolition,\(^12\) it is unlikely that veil piercing will disappear any time soon.

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\(^6\) See Presser, supra note 3.


\(^9\) Id 1044.


\(^12\) See H Hansmann & R Kraakman, “Toward Unlimited Shareholder Liability for Corporate Torts” (1991) 100 Yale Law Journal 1879, calling for the abolition of limited liability in tort cases. See supra n 15 for suggestion to abolish veil piercing.
Table 3.1 - Continued Significance of Piercing the Corporate Veil

<table>
<thead>
<tr>
<th></th>
<th>No. of piercing cases</th>
<th>% of overall piercing cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012</td>
<td>340</td>
<td>32.57%</td>
</tr>
<tr>
<td>2013</td>
<td>348</td>
<td>33.33%</td>
</tr>
<tr>
<td>2014</td>
<td>356</td>
<td>34.10%</td>
</tr>
<tr>
<td>Total</td>
<td>1,044</td>
<td>100%</td>
</tr>
</tbody>
</table>

In the empirical research of this thesis, the initial search in Westlaw yielded 1,587 cases of which 1,044 were piercing cases. The 1,044 piercing cases compare favourably with previous empirical studies. In fact, the 356 piercing cases overall in 2014 are the most recorded in a single year. In the ten years covered by the Wake Forest Study, no single year exceeds 29 cases.\(^\text{13}\) While there is no annual breakdown of piercing cases in the Thompson and Oh Studies, the highest yearly averages in the two articles are 57.40\(^\text{14}\) and 71.80 cases\(^\text{15}\) respectively. As a whole, the 1,044 piercing cases are close to two-third of the piercing cases identified in the Thompson Study up until 1985, despite using just


\(^\text{14}\) See Thompson Study, supra note 8, 1049 & tbl.2.

\(^\text{15}\) See Oh Study, supra note 10, 109 & tbl.2.
three years to get to the number.\textsuperscript{16} Thus, the data continue to show the significance of piercing the corporate veil. The annual number of piercing cases remained stable, with a slight increase for each of the past two years.

Although this thesis does not make normative arguments over the value of piercing the corporate veil, the above data certainly show that piercing the corporate veil is an integral part of corporate veil law. It is on this basis that this thesis explores the conflict of laws questions regarding piercing the corporate veil.

2. Conflict is common

Since the early stage of corporate history in the U.S., corporations have been the products of state legislation.\textsuperscript{17} Corporations were granted corporate charters by the legislature of the state where they were expected to operate.\textsuperscript{18} With the emergence of national corporations, even the headquarters of the big corporations might not be located in the state of incorporation as they seek to benefit from favourable corporate laws from certain corporate-friendly states,\textsuperscript{19} most notably, Delaware. Another significant development is the rise of the parent-subsidiary structure. Taking advantage of limited liability, corporations have created subsidiaries to conduct business in different states.

\textsuperscript{16} See supra note 8, 1044.

\textsuperscript{17} See S B Presser, \textit{An Introduction to the Law of Business Organizations} (West, 3rd ed, 2010) 79 (“After the American Revolution, it was commonly understood that the power to grant corporate charters… was possessed in America solely by the state legislature”).

\textsuperscript{18} Id.

\textsuperscript{19} See Presser, supra note 3, 80-81.
The corollary of this common practice of out-of-state holding corporations utilising subsidiaries (whether incorporated domestically or out-of-state) is the potential choice of law issue in piercing the corporate veil. The case of *National Gear & Piston, Inc. v. Cummins Power Systems, LLC* 20 provides a good example. In this case, a federal court sitting in New York faced a contract dispute between a New York incorporated plaintiff and a Delaware incorporated defendant. The contract in question was governed by New York law. The New York plaintiff sought to pierce the corporate veil of the Delaware defendant in order to make the Indiana incorporated parent liable. 21 This case therefore involved the law of three jurisdictions, namely New York (being the law of the forum, the law of the state of incorporation of the plaintiff as well as the governing law of the contract), Delaware (the law of the state of incorporation of the defendant) and Indiana (the law of the state of incorporation of the parent). The court applied Delaware law for the piercing issue in the end. 22

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21 *Id.*

22 *Id.*
Table 3.2 - Composition of Piercing Cases

<table>
<thead>
<tr>
<th></th>
<th>No. of Piercing Cases</th>
<th>No. of Conflict Cases</th>
<th>% of Conflict Cases in Piercing Cases</th>
<th>No. of International Cases</th>
<th>% of International Cases in Conflict Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012</td>
<td>340</td>
<td>253</td>
<td>74.41%</td>
<td>51</td>
<td>20.16%</td>
</tr>
<tr>
<td>2013</td>
<td>348</td>
<td>266</td>
<td>76.44%</td>
<td>97</td>
<td>36.47%</td>
</tr>
<tr>
<td>2014</td>
<td>356</td>
<td>291</td>
<td>81.74%</td>
<td>97</td>
<td>33.33%</td>
</tr>
<tr>
<td>Total</td>
<td>1,044</td>
<td>810</td>
<td>77.59%</td>
<td>245</td>
<td>30.25%</td>
</tr>
</tbody>
</table>

The table above indicates the high percentage of conflict cases and international cases among piercing cases. Close to 80% of piercing cases (77.59%) are conflict cases, involving either an out-of-state party or non-forum law. There is also growth in both the number and share of conflict cases during the survey period, rising from 253 conflict cases (74.41%) in 2012, to 266 conflict cases (76.44%) in 2013, and to 291 conflict cases (81.74%) in 2014. Among these conflict cases, more than 30% of them are international cases, involving a non-US party or a non-US law. This is a clear indication of the need to study choice of law, as well as other conflict of laws aspects, in relation to piercing the corporate veil.
Table 3.3 Composition of Conflict Cases

<table>
<thead>
<tr>
<th></th>
<th>No. of diversity cases</th>
<th>% of diversity cases</th>
<th>No. of federal question cases</th>
<th>% of federal question cases</th>
<th>No. of both federal question &amp; diversity</th>
<th>% of both federal question &amp; diversity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal</td>
<td>369</td>
<td>85.61%</td>
<td>248</td>
<td>96.88%</td>
<td>122</td>
<td>99.19%</td>
</tr>
<tr>
<td>State</td>
<td>62</td>
<td>14.39%</td>
<td>8</td>
<td>3.13%</td>
<td>1</td>
<td>0.81%</td>
</tr>
<tr>
<td>Total</td>
<td>431</td>
<td>100%</td>
<td>256</td>
<td>100%</td>
<td>123</td>
<td>100%</td>
</tr>
</tbody>
</table>

Among the 810 conflict cases, 739 of them are decided by federal courts and the 71 remaining cases are decided in state courts. While it is not surprisingly that conflict cases are predominantly federal cases (accounting for 91.23% of all conflict cases), this shall be at least partly due to the difficulty in identifying conflict cases from state cases.23

Table 3.3 breaks down the conflict cases. In terms of the types of conflict cases, 431 of them (53.21%) are diversity cases where one or more of the parties are from a non-forum jurisdiction. 31.60% of conflict cases are federal question cases involving a claim based on federal statutes. Finally, 15.19% of conflict cases involve both federal

---

23 As courts often fail to specify the domicile of the parties, it is difficult to tell if the case is a diversity case in state courts. On the other hand, since federal cases involve either diversity or a federal question, they are therefore always conflict cases.
question and diversity. Since neither Thompson nor Oh tracked conflict cases, it is not clear how the ratio of conflict cases in the survey period compared with previous years.  

3. **Limited Exception to Limited Liability**

Limited liability has been regarded as the foundation behind modern capitalism. But it is not an absolute rule and piercing the corporate veil provides a limited exception to limited liability. Success in piercing the corporate veil will have the effect of ignoring the corporate separate legal existence. In this sense, the extent of this exception will define the extent of limited liability. Accordingly, piercing corporate veil is important because it defines what a company is.

Courts have always emphasized the rarity of a successful piercing. For example, it was said that piercing is “the rare exception rather than the rule, and is usually determined on a case-by-case basis.” Accordingly, the doctrine must be “applied with

<table>
<thead>
<tr>
<th></th>
<th>Thompson</th>
<th>Oh</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No. of cases</td>
<td>% of all cases</td>
</tr>
<tr>
<td>Federal cases</td>
<td>647</td>
<td>40.82%</td>
</tr>
<tr>
<td>State cases</td>
<td>938</td>
<td>59.18%</td>
</tr>
</tbody>
</table>

24 However, just by the number of federal cases identified in the Thompson and Oh Studies, there seem to be a large number of conflict cases (see Thompson Study, supra n 15, 1049; Oh Study, supra n 17, 109):

25 See supra note 2.

great caution and not precipitately, since there is a presumption of corporate regularity.”

This is in line with the public expectation “[b]ecause society recognizes the benefits of allowing persons and organizations to limit their business risks through incorporation, sound public policy dictates that imposition of alter ego liability be approached with caution.” However, Table 3.1 has shown that piercing the corporate veil has been one of the most litigated types of cases on corporate law. Table 3.4 below further shows that success in piercing might not be as difficult as the courts suggest.

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27 Schlater, 833 S.W.2d at 925; Emergicare Consultants, Inc., 2000 WL 1897350, at *2. See also Humphries v. Bray, 271 Ark. 962, 611 S.W.2d 791 (Ark.Ct.App.1981) (“the rule of piercing the fiction of a corporate entity should be applied with great caution.”).

Table 3.4 – Piercing Rate

<table>
<thead>
<tr>
<th></th>
<th>Piercing cases</th>
<th>Conflict cases</th>
<th>International cases</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No. of cases</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2012</td>
<td>340</td>
<td>253</td>
<td>51</td>
</tr>
<tr>
<td></td>
<td>113 (33.24%)</td>
<td>93 (36.76%)</td>
<td>15 (29.41%)</td>
</tr>
<tr>
<td>2013</td>
<td>348</td>
<td>266</td>
<td>49</td>
</tr>
<tr>
<td></td>
<td>133 (38.22%)</td>
<td>106 (39.85%)</td>
<td>18 (36.73%)</td>
</tr>
<tr>
<td>2014</td>
<td>356</td>
<td>291</td>
<td>46</td>
</tr>
<tr>
<td></td>
<td>122 (34.27%)</td>
<td>102 (35.05%)</td>
<td>18 (39.13%)</td>
</tr>
<tr>
<td>Total</td>
<td>1,044</td>
<td>810</td>
<td>116</td>
</tr>
<tr>
<td></td>
<td>368 (35.25%)</td>
<td>301 (37.10%)</td>
<td>51 (43.97%)</td>
</tr>
</tbody>
</table>

Apart from the sheer number of piercing cases, the 35.25% success rate of piercing challenges the proclaimed rarity of piercing the corporate veil. This piercing rate
is lower than, but still in line with, the piercing rate previously measured by Professor Thompson, of about 40%. However, it is substantially lower than the 48% piercing rate in Oh’s research. This seems to suggest that courts in general are growing more cautious in piercing the corporate veil just as more plaintiffs are seeking to utilise this judicial remedy. The piercing rate of the conflict cases at 37.10% is slightly higher than the overall piercing rate, while international cases have an even higher piercing rate at 43.97%.

Even though only about one-third of the piercing cases resulted in successful piercing, it is still a rather high figure considering how piercing the corporate veil has been consistently described as a “rare exception.” Limited liability has always been the norm. As Justice Breyer of the US Supreme Court said in United States v. Bestfoods:

“[i]t is a general principle of corporate law deeply ‘ingrained in our economic and legal systems’ that a parent corporation … is not liable for the acts of its subsidiaries.” The prevailing rationale for the existence of limited liability is its alleged impact in promoting investment. Thus, even if the law has long recognised the need to create a “safety

29 See Thompson Study, supra note 8, 1048.
30 See Oh Study, supra note 10, 115 & tbl.6.
31 Due to jurisdictional piercing that will be discussed below, see Chapter 5.
34 Id, 61.
35 Nash Plumbing, Inc. v. Shasco Wholesale Supply, Inc., 875 So.2d 1077, 1082 (Miss.2004) (“Courts do not take piercing of the corporate veil lightly because of the chilling effect it has on corporate risk-taking”).
valve” to reduce the abuse, “[o]rdinarily the corporate veil is pierced only under exceptional circumstances.”36

One way to explain the anomaly of the rather high piercing rate is selection bias.37 However, it is possible that the success rates described above might not convey the meaning of what one might think. Neither the Thompson Study nor the Oh Study explains how they treat a piercing case as being successful. The following table sets forth the different stages of the piercing cases in this study and the respective success rates of the plaintiffs and defendants at those stages.

Table 3.5 - Veil piercing by procedural stage

<table>
<thead>
<tr>
<th>No. of pierced cases</th>
<th>Motion to dismiss</th>
<th>Summary judgment by Defendant</th>
<th>Summary judgment by Plaintiff</th>
<th>Trial</th>
<th>Appeal</th>
<th>Others</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>144</td>
<td>66</td>
<td>35</td>
<td>22</td>
<td>52</td>
<td>49</td>
<td>368</td>
<td></td>
</tr>
<tr>
<td>Percentag e of Pierced Cases</td>
<td>39.13%</td>
<td>17.93%</td>
<td>9.51%</td>
<td>5.98%</td>
<td>14.13%</td>
<td>13.32%</td>
<td>100%</td>
</tr>
</tbody>
</table>

As is common in litigation practice in the U.S., the defendants’ first line of defence is usually in the form of motion to dismiss38 and summary judgment.39 The


37 See Thompson Study, supra n 8, 1046-7.

38 FED. R. CIV. P. 12(b)(5).
number of cases actually getting to trial is relatively small. Should we define successful piercing as only including those cases where the court has made a final order for shareholder to pay to the plaintiff, the successful cases will be much fewer as indicated in Table 3.5. If we were to include only successful piercing cases in summary judgment (by the plaintiff), trial and appeal stages and others, the piercing rate would fall from 35.25% to 15.13%. Such a piercing rate is more in line with the general perception of piercing the corporate veil as a rare exception. This suggests that both the Thompson and Oh Studies adopted the broader definition for successful piercing. However, the narrower definition of successful piercing is probably what most readers had in mind when they first read the Thompson and Oh Studies. With this in mind, it can be argued that piercing the corporate veil is still a limited exception to limited liability, and more in line with the courts’ presentation of the doctrine as a rare exception.

4. Different States, Different Rules

The substantive law on piercing the corporate veil is a matter for state corporate law and each forum state therefore applies their respective piercing rules on piercing the

39 Id. 56(c).

40 The latest research shows as few as 1.7% of federal civil cases went to trial in 2009. See M Galanter & A Frozena, “‘A grin without a cat’: Civil Trials in the Federal Courts”, Jud. Conf. Advisory Comm. on Civ. Rules, Figure 3 (1 May 2010).

41 For appeal cases, these only include appeal cases from trial. Appeals on motion to dismiss and summary judgments are counted into those categories respectively.

42 Note however that a successful defense of motion to dismiss or motion for summary judgment by the defendant could also lead to favorable settlement, a form of success from the angle of the defendant.

43 Professor Thompson admitted in a private consultation with the author that this was indeed his methodology.
corporate veil. Table 3.6 reproduces part of the results of the Thompson Study and Oh Study on the piercing rate under different state laws.

44 See Kalb, Voorhis & Co. v. American Financial Corp., 8 F.3d 130, 132 (2d Cir.1993) (“The state law to be applied [to piercing corporate veil] is determined by the choice of law principles of the forum state”). For a comprehensive and up-to-date account of the different piercing rules of the states, see Presser, supra note 3.
Table 3.6 - Veil piercing rate under Thompson and Oh Studies

<table>
<thead>
<tr>
<th>State</th>
<th>Thompson&lt;sup&gt;45&lt;/sup&gt; No. of cases (piercing rate)</th>
<th>Oh&lt;sup&gt;46&lt;/sup&gt; No. of cases (piercing rate)</th>
</tr>
</thead>
<tbody>
<tr>
<td>New York</td>
<td>212 (34.91%)</td>
<td>269 (49.81%)</td>
</tr>
<tr>
<td>Illinois</td>
<td>78 (42.31%)</td>
<td>80 (52.5%)</td>
</tr>
<tr>
<td>Texas</td>
<td>106 (34.91%)</td>
<td>211 (40.76%)</td>
</tr>
<tr>
<td>California</td>
<td>89 (44.94%)</td>
<td>232 (50.86%)</td>
</tr>
<tr>
<td>Federal</td>
<td>302 (39.40%)</td>
<td>105 (41.14%)</td>
</tr>
<tr>
<td>Louisiana</td>
<td>67 (35.82%)</td>
<td>112 (38.39%)</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>65 (30.77%)</td>
<td>162 (44.44%)</td>
</tr>
<tr>
<td>Georgia</td>
<td>47 (38.30%)</td>
<td>86 (59.30%)</td>
</tr>
<tr>
<td>Florida</td>
<td>46 (41.30%)</td>
<td>105 (40.95%)</td>
</tr>
<tr>
<td>Delaware</td>
<td>11 (0.00%)</td>
<td>35 (34.29%)</td>
</tr>
<tr>
<td>Indiana</td>
<td>16 (68.75%)</td>
<td>39 (61.54%)</td>
</tr>
<tr>
<td>Average</td>
<td>40.18%</td>
<td>48.51%</td>
</tr>
</tbody>
</table>

<sup>45</sup> See Thompson Study, supra note 8, 1051.

<sup>46</sup> See Oh Study, supra note 10, 115.
As Table 3.6 shows, the fact that a piercing case is governed by a particular state law seems to have a significant bearing on the chances of success of the plaintiff. According to the data from both studies, the plaintiff in National Gear v. Cummins (described in Section 3.2) had a higher chance of success in piercing the corporate veil with the issue being governed by Indiana law (over 60%) than New York law or Delaware law.

Both Thompson and Oh identify this variation among the laws of different jurisdictions; however, Thompson states that it is not certain whether the difference is statistically significant given the small number of cases in some of the states. It is, however, difficult to ignore the large number of cases in the key commercial states, such as New York (212 cases in the Thompson Study). He is also of the opinion that the competing laws are “essentially the same.”

Oh does not directly address these points and this indicates a different view on both the issues. He tries to explain the significance by highlighting the difference in the substantive laws of states with a significantly polarised piercing rate. For example, he

---

47 See Thompson Study, supra note 8, 1050-1052 (“Given the small number of cases in each jurisdiction, the differences between the states are not statistically significant. Therefore, it is not possible to say with certainty that these results are due to different views of the law”).

48 In fact, the table above included the results of 8 states highlighted by Professor Thompson himself, see Thompson Study, supra note 8, 1050, note 82.

49 Id.

50 See Thompson Study, supra note 8, 1054, n 99 (citing Japan Petroleum Co. (Nigeria) v. Ashland Oil, Inc., 456 F.Supp. 831, 840 n.17 (D. Del. 1978) (“[M]ost standards are essentially the same despite slight variations”).

51
tries to explain the high piercing rates under North Dakota law (85.71%) and South Dakota law (83.33%) due to both of these laws not requiring proof of fraud in order to pierce the veil.\textsuperscript{51} Even though North Dakota law and South Dakota law applied in only seven and six piercing cases respectively, Oh thinks the data are still of some significance to merit discussion.\textsuperscript{52}

Whatever the reason, neither of the two empirical studies provides detailed analysis on the choice of law issue.\textsuperscript{53} However, analysis of the state choice of law approaches is essential in the analysis of the aforementioned variation in state substantive laws. Using the example of \textit{National Gear v. Cummins} again, if the plaintiff had wanted to take advantage of the less stringent substantive law of Indiana, she would have needed to understand the circumstances in which a court would apply Indiana law. If the Indiana courts always applied Indiana law, the law of the forum, in a piercing issue, the plaintiff would have then tried to file her claim in Indiana. On the other hand, if New York always applied the law of the state of incorporation (Delaware law in this case), the plaintiff would have tried her best to avoid suing in New York.

The table below shows that the different piercing rates of different states during the survey period. It is clear that the variation in state substantive law continues.

\textsuperscript{51} See Oh Study, \textit{supra} note 10, 116.

\textsuperscript{52} \textit{Id.}

\textsuperscript{53} Thompson probably thought that it was not necessary due to the small number of piercing cases in some states as well as the similarities of the substantive laws.
<table>
<thead>
<tr>
<th>States</th>
<th>Number of cases</th>
<th>% of overall cases</th>
<th>Pierced cases</th>
<th>Piercing rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>15</td>
<td>1.44%</td>
<td>7</td>
<td>46.67%</td>
</tr>
<tr>
<td>Alaska</td>
<td>3</td>
<td>0.29%</td>
<td>2</td>
<td>66.67%</td>
</tr>
<tr>
<td>Arizona</td>
<td>12</td>
<td>1.15%</td>
<td>3</td>
<td>25.00%</td>
</tr>
<tr>
<td>Arkansas</td>
<td>2</td>
<td>0.19%</td>
<td>1</td>
<td>50.00%</td>
</tr>
<tr>
<td>California</td>
<td>44</td>
<td>4.21%</td>
<td>15</td>
<td>34.09%</td>
</tr>
<tr>
<td>Colorado</td>
<td>6</td>
<td>0.57%</td>
<td>4</td>
<td>66.67%</td>
</tr>
<tr>
<td>Connecticut</td>
<td>31</td>
<td>2.97%</td>
<td>7</td>
<td>22.58%</td>
</tr>
<tr>
<td>Delaware</td>
<td>49</td>
<td>4.69%</td>
<td>17</td>
<td>34.69%</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>17</td>
<td>1.63%</td>
<td>6</td>
<td>35.29%</td>
</tr>
<tr>
<td>Federal</td>
<td>113</td>
<td>10.81%</td>
<td>43</td>
<td>38.05%</td>
</tr>
<tr>
<td>Florida</td>
<td>30</td>
<td>2.87%</td>
<td>7</td>
<td>23.33%</td>
</tr>
<tr>
<td>Georgia</td>
<td>20</td>
<td>1.91%</td>
<td>5</td>
<td>25.00%</td>
</tr>
<tr>
<td>Hawaii</td>
<td>4</td>
<td>0.38%</td>
<td>1</td>
<td>25.00%</td>
</tr>
<tr>
<td>Idaho</td>
<td>6</td>
<td>0.57%</td>
<td>3</td>
<td>50.00%</td>
</tr>
<tr>
<td>Illinois</td>
<td>51</td>
<td>4.89%</td>
<td>14</td>
<td>27.45%</td>
</tr>
<tr>
<td>Indiana</td>
<td>15</td>
<td>1.44%</td>
<td>8</td>
<td>53.33%</td>
</tr>
<tr>
<td>Iowa</td>
<td>6</td>
<td>0.57%</td>
<td>2</td>
<td>33.33%</td>
</tr>
<tr>
<td>Kansas</td>
<td>7</td>
<td>0.67%</td>
<td>3</td>
<td>42.86%</td>
</tr>
<tr>
<td>Kentucky</td>
<td>20</td>
<td>1.92%</td>
<td>8</td>
<td>40.00%</td>
</tr>
<tr>
<td>Louisiana</td>
<td>22</td>
<td>2.11%</td>
<td>7</td>
<td>31.82%</td>
</tr>
<tr>
<td>Maine</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Maryland</td>
<td>14</td>
<td>1.34%</td>
<td>3</td>
<td>21.43%</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>19</td>
<td>1.82%</td>
<td>7</td>
<td>36.84%</td>
</tr>
<tr>
<td>State</td>
<td>Total</td>
<td>% Total</td>
<td>% Positive</td>
<td>% Overall</td>
</tr>
<tr>
<td>---------------</td>
<td>-------</td>
<td>---------</td>
<td>------------</td>
<td>-----------</td>
</tr>
<tr>
<td>Michigan</td>
<td>26</td>
<td>2.49%</td>
<td>10</td>
<td>38.46%</td>
</tr>
<tr>
<td>Minnesota</td>
<td>21</td>
<td>2.01%</td>
<td>7</td>
<td>33.33%</td>
</tr>
<tr>
<td>Mississippi</td>
<td>12</td>
<td>1.15%</td>
<td>0</td>
<td>0.00%</td>
</tr>
<tr>
<td>Missouri</td>
<td>12</td>
<td>1.15%</td>
<td>6</td>
<td>50.00%</td>
</tr>
<tr>
<td>Montana</td>
<td>2</td>
<td>0.19%</td>
<td>0</td>
<td>0.00%</td>
</tr>
<tr>
<td>Nebraska</td>
<td>5</td>
<td>0.48%</td>
<td>3</td>
<td>60.00%</td>
</tr>
<tr>
<td>Nevada</td>
<td>10</td>
<td>0.96%</td>
<td>5</td>
<td>50.00%</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>5</td>
<td>0.48%</td>
<td>3</td>
<td>60.00%</td>
</tr>
<tr>
<td>New Jersey</td>
<td>43</td>
<td>4.11%</td>
<td>16</td>
<td>37.21%</td>
</tr>
<tr>
<td>New Mexico</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>New York</td>
<td>143</td>
<td>13.68%</td>
<td>63</td>
<td>44.06%</td>
</tr>
<tr>
<td>North Carolina</td>
<td>29</td>
<td>2.78%</td>
<td>7</td>
<td>24.14%</td>
</tr>
<tr>
<td>North Dakota</td>
<td>4</td>
<td>0.38%</td>
<td>1</td>
<td>25.00%</td>
</tr>
<tr>
<td>Ohio</td>
<td>48</td>
<td>4.60%</td>
<td>19</td>
<td>39.58%</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>4</td>
<td>0.38%</td>
<td>1</td>
<td>25.00%</td>
</tr>
<tr>
<td>Oregon</td>
<td>3</td>
<td>0.29%</td>
<td>1</td>
<td>33.33%</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>28</td>
<td>2.68%</td>
<td>7</td>
<td>25.00%</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>1</td>
<td>0.10%</td>
<td>1</td>
<td>100%</td>
</tr>
<tr>
<td>South Carolina</td>
<td>7</td>
<td>0.67%</td>
<td>0</td>
<td>0.00%</td>
</tr>
<tr>
<td>South Dakota</td>
<td>2</td>
<td>0.19%</td>
<td>2</td>
<td>100%</td>
</tr>
<tr>
<td>Tennessee</td>
<td>22</td>
<td>2.11%</td>
<td>8</td>
<td>36.36%</td>
</tr>
<tr>
<td>Texas</td>
<td>46</td>
<td>4.41%</td>
<td>11</td>
<td>23.91%</td>
</tr>
<tr>
<td>Utah</td>
<td>6</td>
<td>0.57%</td>
<td>1</td>
<td>16.67%</td>
</tr>
<tr>
<td>Vermont</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Virginia</td>
<td>11</td>
<td>1.05%</td>
<td>6</td>
<td>54.55%</td>
</tr>
<tr>
<td>State</td>
<td>Cases</td>
<td>Piercing Rate</td>
<td>Non-Piercing</td>
<td>Total</td>
</tr>
<tr>
<td>------------------------------</td>
<td>-------</td>
<td>---------------</td>
<td>--------------</td>
<td>-------</td>
</tr>
<tr>
<td>Washington</td>
<td>12</td>
<td>1.15%</td>
<td>8</td>
<td>66.67%</td>
</tr>
<tr>
<td>West Virginia</td>
<td>7</td>
<td>0.67%</td>
<td>0</td>
<td>0.00%</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>10</td>
<td>0.96%</td>
<td>4</td>
<td>40.00%</td>
</tr>
<tr>
<td>Wyoming</td>
<td>4</td>
<td>0.38%</td>
<td>1</td>
<td>25.00%</td>
</tr>
<tr>
<td>Not decided/ Unclear</td>
<td>7</td>
<td>0.67%</td>
<td>2</td>
<td>28.57%</td>
</tr>
<tr>
<td>Puerto Rico</td>
<td>2</td>
<td>0.19%</td>
<td>0</td>
<td>0.00%</td>
</tr>
<tr>
<td>Virgin island</td>
<td>1</td>
<td>0.10%</td>
<td>0</td>
<td>0.00%</td>
</tr>
<tr>
<td>International</td>
<td>6</td>
<td>0.57%</td>
<td>2</td>
<td>33.33%</td>
</tr>
<tr>
<td>Nova scotia</td>
<td>1</td>
<td>0.10%</td>
<td>0</td>
<td>0.00%</td>
</tr>
<tr>
<td>Panama</td>
<td>1</td>
<td>0.10%</td>
<td>1</td>
<td>100%</td>
</tr>
<tr>
<td>England</td>
<td>3</td>
<td>0.29%</td>
<td>1</td>
<td>33.33%</td>
</tr>
<tr>
<td>Cayman island</td>
<td>1</td>
<td>0.10%</td>
<td>0</td>
<td>0.00%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>1044</td>
<td>100%</td>
<td>368</td>
<td>35.25%</td>
</tr>
</tbody>
</table>

As some of the states have very few cases decided under their laws, the piercing rates thereof might not be statistically significant. However, the top eight legal systems (highlighted in bold) account for a combined 537 piercing cases, more than 50% of all piercing cases, with none of them having less than 43 cases (more than 4% of the overall piercing cases).

The first point to make on this table is the variation of piercing rates between states. New York remains the state with the most piercing cases decided under its law, accounting for 13.68% of all piercing cases. This is hardly surprising considering that it was also the
case for the Thompson and Oh Studies.\textsuperscript{54} However, what is surprising about New York law is its high piercing rate (44.06\%) compared with the average piercing rate (35.25\%). Not only is that piercing rate the highest among the top eight legal systems, it is also higher than the piercing rates in New York recorded in the Thompson (34.91\%)\textsuperscript{55} and close to that of Oh Studies (49.81\%).\textsuperscript{56}

The most surprising state law is Delaware both for the amount of piercing cases decided under that law and the piercing rate. Traditionally, it has been thought that Delaware, as a state with favourable corporate law, would be reluctant to pierce the corporate veil,\textsuperscript{57} thus leading to a strict piercing law and few piercing litigations thereunder. However, in terms of both percentage of piercing cases and piercing rate, Delaware law is higher than average. In fact, of the top eight legal systems in this study Delaware has the fifth highest piercing rate (34.69\%) and on par with the average piercing rate. This is a big contrast to the finding of the Thompson Study where no piercing case had ever been successful under Delaware law.\textsuperscript{58} In contrast to the 49

\textsuperscript{54} New York law is the state law with the most cases in both the Thompson Study (accounting for 13.39\% of all cases) see Thompson Study, \textit{supra} note 8, 1051 & tlb.6 and the Oh Study (accounting for 9.18\% of all cases), see Oh Study, \textit{supra} note 10, 115 & tlb.6.

\textsuperscript{55} \textit{See} Thompson Study, \textit{supra} note 8, 1051 & tlb.6.

\textsuperscript{56} \textit{See} Oh Study, \textit{supra} note 10, 115 & tlb.6. The New York piercing rate is just right around the average piercing rate of all jurisdictions (48.51\%). See Oh Study, \textit{supra} note 10, 107.

\textsuperscript{57} \textit{Wallace ex rel. Cencom Cable Income Partners II, Inc., L.P. v. Wood}, 752 A.2d 1175, 1183 (Del.Ch.1999) (“Persuading a Delaware court to disregard the corporate entity is a difficult task”).

\textsuperscript{58} \textit{See} Thompson Study, \textit{supra} note 8, 1051 & tlb.6. The Delaware law piercing rate is 34.29\% in the Oh Study, though it is still substantially lower than the average piercing rate in that study. \textit{See} Oh Study, \textit{supra} note 10, 115 & tlb.6.
piercing cases litigated under Delaware law during the survey period with 2014 having 19 cases, there were only 11 such cases through 1985 reported in the Thompson Study.\textsuperscript{59}

There has not been any ground breaking change in the tests adopted under either New York or Delaware law in the survey period or in recent years so the underlying reason for this increase in piercing rate remains unclear. This may suggest that the laws of these prominent corporate states are now more likely to lead to the piercing of the corporate veil than other U.S. legal systems. In addition, it is noted that the increase in piercing rate coincides with an increase in piercing cases litigated under these states laws. Perhaps, this is a result of forum shopping as plaintiffs have started to take advantage of the higher rate of success. It will be interesting to see if this trend of a higher rate of piercing continues under both states laws.

Cases decided under federal common law are not technically “state law,” however it is every bit as important. Not only does it account for 10.81\% of all piercing cases, it is substantially different in nature according to some commentators. They have argued that federal common law should look to federal statutory policy in piercing rather than apply factors under traditional state law tests mechanically, particularly the requirement for fraud.\textsuperscript{60} The corollary of this view is that it may be easier to pierce the veil if the case is governed by federal common law.\textsuperscript{61} However, this view is not strongly supported by the

\textsuperscript{59} Id. The Oh Study has 35 cases though they represent all cases decided under Delaware law between 1866 and 2006. See Oh Study, \textit{supra} note 10, 115 & tlb.6.


\textsuperscript{61} See Presser, \textit{supra} note 3, 1011, n 5.
data in this study as the piercing rate for federal common law is not substantially higher than the average piercing rate. In addition, this allegedly lower standard of federal piercing has been seriously challenged by Presser as not being supported by the U.S. Supreme Court’s authorities.62 While this thesis does not intend to resolve the controversy surrounding this substantive aspect of the federal common law, it does show the potential for forum shopping.

Another important finding is the lack of application of non-U.S. law. With 245 international cases, it is shocking that there were only six cases applying any non-U.S. law, accounting for only 2.45% of all international cases. This is consistent with the Thompson and Oh Studies where there was no category made for any non-U.S. law.63 This suggests that the U.S. courts have been extremely reluctant to apply foreign law to piercing issues.64

5. Similarities Between State Laws are Limited

Despite the differences in substantive piercing law between states, efforts have been made to identify their similarities. In particular, Powell identifies a common three-prong test65 which is restated by Presser as follows:

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62 Presser reviewed a number of Supreme Court authorities to illustrate the lack of support for the lower standard. *Id*, 1010-1043.

63 See Thompson Study, supra note 8, at 1051 & tbl.6; Oh Study, supra note 10, 115 & tbl.6.

64 While few piercing cases applying foreign law have been unearthed in this survey, the author is aware of other older cases applying foreign law. See e.g., *United States v. Funds Held in the Name or for the Benefit of Wetterer*, 210 F.3d 96, 106 (2d Cir.2000) (where the court applied Guatemalan law as the law of the state of incorporation).

65 See Presser, supra note 3, 41.
“(1) [T]he “alter ego,” or “mere instrumentality” test, requiring that the subsidiary be completely under the control and domination of the parent, (2) the “fraud or wrong” or “injustice” test, requiring that the defendant parent’s conduct in using the subsidiary have been somehow unjust, fraudulent, or wrongful towards the plaintiff, and (3) the “unjust loss or injury” test, requiring that the plaintiff actually have suffered some harm as a result of the conduct of the defendant parent.”66

First, the control exerted by the shareholders must be so excessive that it amounts to the total domination of the corporation.67 One court described the level of control as such that “the controlled corporation acted robot or puppet-like in mechanical response to the controller's tugs on its strings or pressure on its buttons.”68 Second, the plaintiff in a piercing case must articulate how “the observance of the corporate form would sanction a fraud, promote injustice, or an inequitable result would follow.”69 Finally, the said fraud or injustice must be proximately caused by the excessive control.70 Only when all three prongs are present would a court pierce the corporate veil.

At first glance, many jurisdictions have formulated their piercing laws based on this common test.71 If the tests adopted by different jurisdictions are substantially the

66 Id.

67 Id.


70 Id.

same, then there is probably no need to examine the applicable law rules.\textsuperscript{72} In conflict of laws term, this is known as a “false conflict.”\textsuperscript{73} In fact, it is not uncommon for courts to decline choice of law analysis on the piercing issue on this basis.\textsuperscript{74} If there is a general uniformity in the substantive tests adopted under states laws, it may be questioned that the variation of piercing rates highlighted in Table 3.6 above should be attributed to states having their own piercing rules. However, the actual tests adopted by state courts indeed show substantial variations. The following table shows the popular formulations of the piercing test as observed from piercing cases during the survey period:

\begin{table}
\centering
\begin{tabular}{|c|c|}
\hline
Test & Description \\
\hline
\hline
\end{tabular}
\end{table}

\textsuperscript{72} Professor Thompson is probably of this view, see supra note 8.


\textsuperscript{74} See e.g. Hotels Nevada v. L.A. Pacific Center, Inc. 203 Cal. App. 4th 336 (Cal. Ct. App. 2012) (tests under Nevada law and California law were the same.).
<table>
<thead>
<tr>
<th><strong>Formula</strong></th>
<th><strong>No. of cases</strong></th>
<th><strong>Percentage</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Classic three-prong test</td>
<td>156</td>
<td>14.94%</td>
</tr>
<tr>
<td>Two-prong test with just control and fraud</td>
<td>424</td>
<td>40.61%</td>
</tr>
<tr>
<td>Two-prong test but with third prong (proximity) implied</td>
<td>65</td>
<td>6.23%</td>
</tr>
<tr>
<td>Test with only control</td>
<td>51</td>
<td>4.89%</td>
</tr>
<tr>
<td>Test with only fraud</td>
<td>66</td>
<td>6.32%</td>
</tr>
<tr>
<td>Test with only fraud and proximity</td>
<td>4</td>
<td>0.38%</td>
</tr>
<tr>
<td>Test with either control or fraud</td>
<td>3</td>
<td>0.29%</td>
</tr>
<tr>
<td>Laundry list with fraud factor</td>
<td>92</td>
<td>8.81%</td>
</tr>
<tr>
<td>Laundry list without fraud factor</td>
<td>23</td>
<td>2.20%</td>
</tr>
<tr>
<td>Laundry list without control factor</td>
<td>1</td>
<td>0.10%</td>
</tr>
<tr>
<td>Non-applicable / none</td>
<td>159</td>
<td>15.23%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>1,044</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>

The classic three-prong test with all control, fraud and proximity prongs accounts for only 14.94% of all formulas. However, it must be noted that the third prong on
proximity is often implicitly included in the test.\textsuperscript{75} If we include these “implied third prong” cases, the traditional three-prong test represents 21.17% of all formulas. Further, the practical difference between the two-prong control and fraud test and the traditional three-prong test is small. If both excessive control and fraud are found, they are usually proximately related (or at least not regarded as important to raise in the litigation). Thus, it is extremely rare for a court to reject piercing simply based on the lack of proximity.\textsuperscript{76} If we are to combine these three aforementioned formulas, they account for the majority of formulations (61.78%).

However, the “outliers” still combine to make up 38.22% and so cannot be overlooked. The key difference in these outliers is the omission of either one of the control or fraud factors. 4.89% of cases just require control, while 6.32% of cases just require fraud. Together, 11.21% of cases only require either one of the two elements. Thus, while Powell’s observation on the common elements is indeed correct, courts have not been consistent in requiring all three elements.\textsuperscript{77} Further complicating the matter is the type of cases that just refer to a laundry list of factors and say the court will look at these factors in making the decision on piercing. These laundry cases combine to make up 11.11% of all cases. For example, in \textit{Att'y Gen. v. M.C.K., Inc.}, the court listed the following 12 factors:\textsuperscript{78}

\textsuperscript{75} \textit{Morris v. New York State Dep't. of Taxation & Fin.}, 603 N.Y.S.2d 807, 811 (1993).

\textsuperscript{76} Only one case in this survey, \textit{CBR Event Decorators, Inc. v. Gates}, 962 N.E.2d 1276 (Ind. Ct. App.), denied piercing solely on the basis of proximity.

\textsuperscript{77} Obviously, no court requires just proximity.

“(1) common ownership; (2) pervasive control; (3) confused intermingling of business assets; (4) thin capitalization; (5) non-observance of corporate formalities; (6) absence of corporate records; (7) no payment of dividends; (8) insolvency at the time of the litigated transaction; (9) siphoning away of corporation's funds by dominant shareholder; (10) non-functioning of officers and directors; (11) use of the corporation for transactions of the dominant shareholders; and (12) use of the corporation in promoting fraud.”

In addition, the court would usually add that the factors on the list were not exclusive and it was not necessary for all the factors to be present. Among the factors listed, most factors deal with the control element, such as factors 1 to 11 in *Att'y Gen. v. M.C.K., Inc.* above. However, the listing of fraud factors has not been consistent. 8.81% of all formulas adopt laundry lists with both control and fraud elements, while 2.20% adopt laundry lists with only control but not the fraud element. One case even adopts a laundry list with only fraud elements! Some may claim that at least the laundry list with both control and fraud fit into the traditional three-prong test. However, in most cases,

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79 Bank of Montreal v. SK Foods, LLC, 476 B.R. 588, 597 (N.D. Cal. 2012) (“This list is not exhaustive, and no one factor is determinative”).

80 See MEE Direct LLC v. Tran Source Logistics, Inc., No. JKB-13 55, 2014 WL 585637 at *5 (D.Md. Feb. 14, 2014) (setting forth a laundry list of “(1) that the defendant made a false representation to the plaintiff, (2) that its falsity was either known to the defendant or that the representation was made with reckless indifference as to its truth, (3) that the misrepresentation was made for the purpose of defrauding the plaintiff, (4) that the plaintiff relied on the misrepresentation and had the right to rely on it, and (5) that the plaintiff suffered compensable injury resulting from the misrepresentation.”).

81 See Jones & Trevor Marketing, Inc. v. Lowry, 2012 WL 2478391 637 (Utah June 29, 2012), (“We clarify that the first seven Colman factors are relevant to the formalities element of the Norman test, while the eighth factor merely reiterates the fairness element of the Norman test”).
courts adopting the laundry list do not make clear whether both the control and fraud elements are required.

Further, 15.23% of all cases do not even set forth a test or the piercing scenarios make it inappropriate to adopt the traditional three-prong test. For the latter cases, the prime example is the reverse piercing cases where the plaintiff tried to pierce the parent corporation’s veil in order to make the subsidiary liable. In some jurisdictions, they do not allow reverse piercing at all. In short, due to the different views on the necessity of control and fraud among different courts, the uncertainty of laundry lists and the lack of any test in some cases, the differences in the formulas are great enough to make applicable law significant.

The international cases are also powerful evidence that the courts could not afford to treat all piercing laws as the same. The closest piercing law to that of the U.S. is probably the English piercing law. However, even the U.S. judges agree that the English law is not that similar if one is to look at it more closely. Accordingly, considering the

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83 See In re Tyson 433 B.R. 68, 93 (S.D.N.Y. 2010). For a recent analysis of the law in England and Wales on piercing the corporate veil by the UK Supreme Court see Prest v Petrodel Resources Ltd and Others [2013] UKSC 34; [2013] 2 AC 415. Lord Sumption summarizes the law at para 35 as follows: “I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil.” The principles he has established for piercing the corporate veil are clearly very different from the “three-pronged” test widely used in the U.S.
significant number of international cases, it is impossible for the courts not to establish a proper choice of law approach.

6. **Discretionary Nature**

Inconsistent formula is one thing but variation of piercing rates could also be attributed to the highly discretionary nature of the application of those formulas. The following table shows which elements the courts actually analysed in deciding piercing cases.
Table 3.9 - Application of Piercing Formula

<table>
<thead>
<tr>
<th></th>
<th>Success (%)</th>
<th>Failed (%)</th>
<th>Combined (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Control, Fraud and Proximity</td>
<td>27 (7.34%)</td>
<td>17 (2.51%)</td>
<td>44 (4.21%)</td>
</tr>
<tr>
<td>Control and Fraud</td>
<td>181 (49.18%)</td>
<td>221 (32.69%)</td>
<td>402 (38.51%)</td>
</tr>
<tr>
<td>Proximity and Fraud</td>
<td>2 (0.54%)</td>
<td>7 (1.04%)</td>
<td>9 (0.86%)</td>
</tr>
<tr>
<td>Just Fraud</td>
<td>38 (10.33%)</td>
<td>113 (16.72%)</td>
<td>151 (14.46%)</td>
</tr>
<tr>
<td><strong>Fraud-related Subtotal</strong></td>
<td>248 (67.39%)</td>
<td>358 (52.96%)</td>
<td>606 (58.06%)</td>
</tr>
<tr>
<td>Just Control</td>
<td>64 (17.39%)</td>
<td>126 (18.64%)</td>
<td>190 (18.20%)</td>
</tr>
<tr>
<td>Just Proximity</td>
<td>-</td>
<td>3 (0.44%)</td>
<td>3 (0.29%)</td>
</tr>
<tr>
<td>Proximity and Control</td>
<td>-</td>
<td>1 (0.15%)</td>
<td>1 (0.10%)</td>
</tr>
<tr>
<td>Insufficient Fact</td>
<td>-</td>
<td>62 (9.17%)</td>
<td>62 (5.94%)</td>
</tr>
<tr>
<td>No application/irrelevant</td>
<td>56 (15.22%)</td>
<td>126 (18.64%)</td>
<td>182 (17.43%)</td>
</tr>
<tr>
<td><strong>Others Subtotal</strong></td>
<td>120 (32.61%)</td>
<td>318 (47.04%)</td>
<td>438 (41.95%)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>368 (100%)</td>
<td>676 (100%)</td>
<td>1,044 (100%)</td>
</tr>
</tbody>
</table>

As mentioned above, 14.94% of cases adopted the traditional three-prong test. However, only 4.22% of cases examined all three factors in deciding cases. Even if we include cases that just examine control and fraud due to the insignificance of proximity, the combined percentage is still just 42.72%, comparing with 61.78% of court adopting a
formula modelled on the classic three-prong test or its modified forms. Instead, courts often look solely at either just control or fraud in deciding cases. The combined 32.66% for those cases is higher than 11.21% for cases formally adopting a one factor test. The closest numbers between the two tables are those relating to the “no application” cases, being 15.23% for the formula and 17.43% for the applied formula. This analysis shows that, despite adopting a particular test, the courts do not consistently apply the test to the facts of the case.

It is true that, in some cases, particularly when the court is rejecting a piercing claim, it is unnecessary to apply the full three-prong test. This is because failing one element will automatically doom the plaintiff’s case. However, the reverse cannot be true when courts pierce the corporate veil under a three-prong test simply on the basis of either control or fraud. Perhaps one explanation for such cases is that some courts equate excessive control with fraud,84 or that courts simply imply that there is excessive control when they find fraud. This brings us to the next point, i.e., the wide discretion available to courts in interpreting what constitutes excessive control or fraud.

For the control prong, some courts demand a very high level of control, so high that it takes a “complete domination, not only of the finances, but of policy and business practice in respect to the transaction so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own,”85 while some only require a

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84 Eg, Cobalt Partners, L.P. v. GSC Capital Corp. 97 A.D.3d 35, 37, 944 N.Y.S.2d 30, 34 (1st Dep't 2012) (“To use domination and control to cause another entity to breach a contractual obligation for personal gain is certainly misuse of the corporate form to commit a wrong”).

85 Joe Hand Promotions, Inc. v. Jacobson 874 F. Supp. 2d 1010, 1014 (D. Or. 2012) (“[C]ontrol, not merely majority or complete stock control, but complete domination, not only of the finances, but of policy
“degree of control … greater than that normally associated with ownership and
directorship.”66 This indicates the potential disparity among different states in deciding
this prong. More specifically, observing corporate formality as a factor for the control
prong might be a serious factor for some states87 but not a factor at all in others.88
The interpretation of the “fraud” prong might be even more troublesome. For many
jurisdictions, the requirement of fraud has been lowered to some form of injustice without
requiring “actual fraud.”89 However, courts have plenty of room to draw the line on what
this injustice could be beyond “actual fraud.” For example, undercapitalisation has been
regarded as sufficient in some90 but not others,91 while some simply treat it as one factor

86 In re Chinese Manufactured Drywall Products Liability Litigation 2012 WL 3815669, at 868 (E.D. La.
Sept. 4, 2012).

87 In Politte v. U.S., 2012 WL 965996 (S.D.Cal. Mar. 2012), the court pierced the veil of the defendant on
the basis of failure in observing corporate formalities.

2012) (“In any event, failure to comply with corporate formalities is no longer a factor in considering
whether alter ego exists.”).

89 See Colman v. Colman 743 P.2d 782, 786 (Utah Ct. App. 1987) (“It is not necessary that the plaintiff
prove actual fraud, but must only show that failure to pierce the corporate veil would result in an
injustice.”).

(N.D.Cal.2012) (“Courts have found [the injustice] prong satisfied when ‘a corporation is so
undercapitalized that it is unable to meet debts that may reasonably be expected to arise in the normal
course of business’”).

91 See Oldendorff Carriers GmbH & Co., KG v. Grand China Shipping (Hong Kong) Co., Ltd. 2012 WL
3260233, 5 (“But undercapitalization, by itself, cannot justify piercing, because limited shareholder liability
is a license to undercapitalize”).
to consider. These variations in the interpretation of the control and fraud prongs further show how difference among state laws could be created despite similarly worded tests. The high level of discretion given to the court is simply by design reflecting core equitable nature of piercing the corporate veil. It has been declared repeatedly that “[v]eil piercing is an equitable remedy.” As a result, the court “takes a flexible fact-specific approach focusing on equity” in deciding piercing cases and the related analysis is therefore is “an intensively fact specific activity, and highly dependent upon the equities of the situation.” That said, it is one thing for the court to exercise discretion within the structure of the law but it is quite another thing to be arbitrary, such as to bypass specifying the proper test or to pierce the corporate veil without carefully weighing each of the required components. As we have seen the courts routinely do behave arbitrarily in piercing cases.

7. Ancillary Nature

What makes piercing the corporate veil a particular challenge for the court is the seemingly unlimited types of cases in which piercing is involved. Piercing the corporate

96 See supra tbl.3.9 and accompanying discussion.
97 Id.
veil is not by itself a cause of action. Instead, “it is established when the facts and circumstances compel a court to impose the corporate obligation on its owners, who are otherwise shielded from liability.” Derived from equity, it is a type of remedy available to the successful plaintiff under equity. The underlying liability must be created by the cause of action brought by the plaintiff, be it contract, tort or any other statutory creations. Technically, the plaintiff must succeed in the underlying cause of action, such as proof of breach of contract by the defendant corporation, before the court needs to examine whether it should pierce the veil. Table 3.9 shows the underlying causes of actions of the piercing cases.

98 See In re Grothues, 226 F.3d 334, 337–38 (5th Cir.2000) (“An alter ego theory is a remedy, not a claim per se…”).


100 See supra note 93.

101 See Oh Study, supra note 10, 106 (“[A] veil-piercing request is thus among the last things courts tend to hear within a dispute”).
Table 3.10 - Underlying Claim

<table>
<thead>
<tr>
<th></th>
<th>Contract</th>
<th>Tort</th>
<th>Statute</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number of cases</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2012</td>
<td>184 (54.12%)</td>
<td>30 (8.82%)</td>
<td>126 (37.06%)</td>
<td>340 (100.00%)</td>
</tr>
<tr>
<td></td>
<td>63 (34.34%)</td>
<td>7 (23.3%)</td>
<td>43 (34.13%)</td>
<td>113 (33.24%)</td>
</tr>
<tr>
<td>2013</td>
<td>195 (56.03%)</td>
<td>42 (12.07%)</td>
<td>105 (30.17%)</td>
<td>348 (100.00%)</td>
</tr>
<tr>
<td></td>
<td>77 (39.49%)</td>
<td>20 (47.62%)</td>
<td>36 (32.38%)</td>
<td>133 (38.22%)</td>
</tr>
<tr>
<td>2014</td>
<td>185 (51.97%)</td>
<td>49 (13.76%)</td>
<td>121 (33.99%)</td>
<td>356 (100.00%)</td>
</tr>
<tr>
<td></td>
<td>65 (35.14%)</td>
<td>13 (26.53%)</td>
<td>43 (35.54%)</td>
<td>122 (34.27%)</td>
</tr>
<tr>
<td></td>
<td>564 (54.02%)</td>
<td>121 (11.59%)</td>
<td>352 (33.72%)</td>
<td>1,044 (100.00%)</td>
</tr>
<tr>
<td></td>
<td>205 (36.35%)</td>
<td>40 (33.56%)</td>
<td>122 (34.66%)</td>
<td>368 (35.25%)</td>
</tr>
</tbody>
</table>

Number of cases / Piercing rate
Tort cases remain rarely litigated on the issue of piercing the corporate veil, accounting for just 11.59% of the piercing cases. In addition, similar to the findings of Thompson, tort cases are paradoxically more difficult to pierce compared with contract cases. While the piercing rates are close for the three types of cases, the piercing rate for tort cases is the lowest comparing the other types, while contract cases have the highest piercing rate.

It has long been argued that the lack of opportunity for tort victims to deal with the corporation *ex ante* should make the courts more willing to pierce the corporate veil. Although it is not the purpose of this thesis to explain the paradox, the tort-contract relationship will similarly have a bearing in formulating the proper choice of law rules. The paradox will be examined in the context of the following chapters on conflict of laws questions.

8. **Versatility**

Piercing the corporate veil as a concept has been used beyond the context of liability. Traditionally, piercing is just a way to make shareholders liable for the debt of the corporation (hereinafter “liability piercing”). However, piercing has also been used in a jurisdictional context, a situation whereby the court acquires jurisdiction over a shareholder of the defendant corporation through veil piercing. For example, many big corporations do business in states other than the one where its headquarters are situated


103 *Id.*

104 See Chapter 4, Section 4.3.1.
by setting up subsidiaries incorporated locally. Given that most of these parents do not do business directly in the forum state, the only formal connection with the state is its shareholding over the local subsidiary. In order to acquire jurisdiction over the out-of-state parent, the plaintiff could try to pierce the corporate veil of the local subsidiary and impute the connections of the subsidiary with the state to the parent. This is sometimes called “jurisdictional veil-piercing,” or “procedural piercing.” This aspect of piercing will be examined in details in Chapter 5.

Another possible way to apply the piercing concept beyond the standard piercing cases is in the context of enforcement. For example, the plaintiff has secured a judgment over a subsidiary in State A. However, instead of trying to sue the parent in State A through piercing the corporate veil, the plaintiff tries to enforce State A’s judgment against the parent corporation in its state of incorporation by piercing the corporate veil. Thus, the distinction from the traditional liability piercing is the stage at which piercing is used. It is not at the trial stage but at the enforcement stage. Accordingly, while enforcement piercing is still technically a type of liability piercing, it contains separate conflict elements that could be regarded as a separate category. This aspect of piercing will be examined in details in Chapter 6.

Both jurisdictional piercing and enforcement piercing bring in rather different considerations to those found in the traditional liability piercing. As being emphasized throughout this thesis, it is important to note the existence of these different piercing cases in order to properly address the conflict of laws issues relating to piercing the

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106 See Thompson Study, supra n 8, 1059.
The following table shows the piercing rates among jurisdictional piercing, enforcement piercing and liability piercing.

**Table 3.11 - Veil piercing by Type**

<table>
<thead>
<tr>
<th></th>
<th>Liability Piercing</th>
<th>Jurisdictional Piercing</th>
<th>Enforcement Piercing</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>No. of cases</td>
<td>849</td>
<td>105</td>
<td>90</td>
<td>1,044</td>
</tr>
<tr>
<td>Percentage</td>
<td>81.32%</td>
<td>10.06%</td>
<td>8.62%</td>
<td>100%</td>
</tr>
</tbody>
</table>

While it is clear that the “normal” liability piercing cases account for the majority of piercing cases, each of jurisdictional piercing and enforcement piercing are substantial enough to warrant separate examinations.

This chapter has highlighted the eight features of piercing the corporate veil. Each of the eight features above will have significant impacts on the conflict of laws questions discussed from Chapters 4 to 6. Some factors have relevance in more than one chapter.
CHAPTER 4

CHOICE OF LAW: A CHOICE WITH NO CHOICE

1. Introduction

From Chapter 3, we learned that the majority of piercing cases are conflict cases\(^1\) and that different states have different piercing laws\(^2\) which yield different piercing rates.\(^3\) The corollary is that the potential application of different substantive laws, i.e., the choice of law issue in veil piercing lawsuits, is one that litigants can ill afford to overlook as it could mean a different result for them.

Traditionally, the law of the state of incorporation has been regarded as the orthodox choice for the piercing of the corporate veil issue.\(^4\) The rationale is that piercing the corporate veil is an “internal affair” of the corporation.\(^5\) However, with more and

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\(^1\) See Chapter 3, Section 1

\(^2\) See Chapter 3, Section 4

\(^3\) Id.

\(^4\) Section 187 of First Restatement of Conflict of Laws (1934) [hereinafter “First Restatement”] provides that “the existence and extent of the liability of shareholders, officers or directors of a corporation to a creditor of the corporation for a violation of law by them, is determined by the law of the state of incorporation.” Restatement, Conflict of Laws § 187 (1934). This is also the view held by leading commenters on veil piercing, see S B Presser, *Piercing the Corporate Veil* (Eagan, MN, West, 2011), v (“Generally speaking, the law regarding piercing the corporate veil questions is the law of the state of incorporation...”). For examples of cases adopting the law of the place of incorporation, see *Jefferson Pilot Broadcasting Co. v. Hilary & Hogan, Inc.*, 617 F. 2d 133 (5th Cir. 1980).

\(^5\) See Kalb, Voorhis & Co. v. *American Financial Corp.*, 8 F.3d 130, 132 (2d Cir.1993) (“The law of the state of incorporation determines when the corporate form will be disregarded and liability will be imposed on shareholders: Because a corporation is a creature of state law whose primary purpose is to insulate
more corporations choosing to be incorporated in corporate-friendly states, such as Delaware, as a result of the regulatory arbitrage,\(^6\) it may be argued that the law of the state of incorporation might in reality have few connections with the litigation. This chapter will explore the choice of law aspect of piercing the corporate veil. It is however important to note at the outset that choice of law rules shall be tailored to the needs of the corresponding substantive law in order for them to be effective.\(^7\)

Section 2 introduces the four common choice of law approaches for piercing the corporate veil. Section 3 sets out the results of the empirical research on the choice of law perspective, showing that most of the conflict cases were decided with no choice of law rules applied and the law of the forum was applied by default, thus rendering the applicable law exercise “a choice with no choice.” In Section 4, a three-step approach is suggested to improve the law: (1) distinguish piercing for the traditional liability purpose from jurisdictional purpose; (2) apply the law of the state of incorporation as the default rule on liability piercing; and (3) apply the law with the most significant relationship as an exception to certain limited cases, such as tort cases.

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\(^6\) Delaware remains the favourite state of incorporation in the United States, see L Wayne, How Delaware Thrives as a Corporate Tax Haven, 30 June 2012 (“Nearly half of all public corporations in the United States are incorporated in Delaware”). For details of Delaware law regarding regulatory arbitrage, see R Romano, “The State Competition Debate in Corporate Law” (1987) 8 Cardozo Law Review 709.

\(^7\) See H Hansmann & R Kraakman, “A Procedural Focus on Unlimited Shareholder Liability” (1992) 106 Harvard Law Review 446, 458 (Responding to criticism based on choice of law and jurisdiction regarding Professors Hansmann and Kraakman’s suggestion for an alternative rule of pro rata shareholder liability for tort damages, they argued that “[conflict of laws] rules should not be viewed in isolation from the underlying substantive law”).
2. The Four Choice of Law Approaches

While the basic findings of the empirical research have been fully displayed in Chapter 3, it worth repeating that piercing rates among different states can range from 0% in South Carolina to 100% in South Dakota. Even among the eight states with the most cases, piercing rates still range from 44.06% in New York to 23.91% in Texas. Again, this means that the choice of law issue is significant in the success of piercing cases. By surveying the choice of law approaches among different states on piercing the corporate veil, it is clear that there are four commonly used approaches. This Section will briefly introduce each of these approaches and the empirical findings will then be presented and discussed in Section 3.

2.1 The Law of the Place of Incorporation

The “internal affairs” rule is the approach most thought to be the proper approach to follow by the courts and academics. In essence, the internal affairs rule requires that a state court should as a general rule defer to the state of incorporation on matters relating to the management of the internal affairs of a corporation. Perhaps the most cited authority in support of this approach is Section 307 of the Second Restatement which states that:

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8 See Chapter 3, tbl 3.7.
9 Id.
10 See supra note 3.
“The local law of the state of incorporation will be applied to determine the existence and extent of a shareholder's liability to the corporation for assessments or contributions and to its creditors for corporate debts.”

At first glance, Section 307 seems to cover piercing the corporate veil. However, it is important to fully understand the rationale behind the Second Restatement position. In *Dassault Falcon Jet Corp. v. Oberflex, Inc.*, when dealing with the choice of law issue on piercing for the first time in North Carolina, the federal court explained why Section 307 was supported by “sound policy reasons.” First, it looked at the piercing issue as part of the concept of limited liability. Thus, it would be reasonable to adopt the law of the state of incorporation due to its “greater interest in determining when and if that insulation is to be stripped away.” Second, the court highlighted the benefits of “consistency and predictability to the corporation and its shareholders.” Finally, the court cited cases from other states as evidence that the internal affairs rule was one adopted by “most, if not all, jurisdictions.”

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12 Restatement (Second) of Conflict of Laws [hereinafter “Second Restatement”], § 307. Section 187 of First Restatement mirrors this section and provides that “the existence and extent of the liability of shareholders… of a corporation to a creditor of the corporation for a violation of law by them, is determined by the law of the state of incorporation.” First Restatement, *supra* n 6, § 187.


14 *Id.*

15 *Id.*, 349. This fits with section 297 of the Second Restatement. Second Restatement, *supra* note 12, § 297.

16 *Id.*

17 *Id.*
That said, the use of this approach is not without challenges. The first argument against the internal affairs rule as an choice of law rule relates to corporate issues in general. The lack of connections between the law of the place of incorporation and the issue being litigated in the modern business world suggest the need for a better approach.\textsuperscript{18} Secondly, it has been argued that the Second Restatement does not actually support the application of the internal affairs rule to veil piercing. The argument is that Section 307 and its comments do not define the phrase “corporate debts” clearly and, having regard to the context of Section 307, it only covers those circumstances where a shareholder has not fully satisfied his assessment responsibilities or contribution to corporate capital obligations.\textsuperscript{19} Finally, there is also a challenge as to whether the internal affairs rule is appropriate in regard to piercing the corporate veil due, in particular, to the involvement of a non-corporate insider.\textsuperscript{20} In short, it is an choice of law approach that presumably applies but comes with a lot of uncertainties.

\subsection*{2.2 The Law of the Forum}

The second potential approach is the law of the forum. However, it is difficult to see much official support for this approach in traditional liability piercing. For example,

\begin{flushright}
\footnotesize
\textsuperscript{18} In \textit{Weede v. Iowa Southern Utilities Co. of Delaware} 231 Iowa 784, 807, 2 N.W.2d 372, 386, the Supreme Court of Iowa declined to apply Delaware law, the law of the state of incorporation, on the “stock watering” issue (“[The corporation’s] creation in Delaware was purely one of convenience, or other hoped for advantage… Its existence in Delaware is an illusory mirage, more atmospheric, than real”).


\end{flushright}
in *S.E.C. v. Vassallo*, despite the court recognising that the proper approach was the law of the forum, this same approach was doubted by the court later in the same judgment, saying that “although [the precedents] state the rule without reservations, it appears that in both cases the forum state was also the state of incorporation. It is not clear that the same rule would apply if the states were different.”

The apparent advantage of applying the law of the forum is convenience. The court certainly knows its own law the best. In addition, like the law of the state of incorporation, it also comes with certainty. However, the disadvantage is also as apparent. Like the law of the state of incorporation, the connection between the law of the forum and the issue might be rather weak. Further, one automatic response to applying the law of the forum is the potential for forum shopping. One could also argue that a rule on remedy is a procedural rule and should therefore be governed by the law of the forum. However, it does not seem to be a strong argument. Firstly, the First Restatement sets forth an exhaustive list of procedural matters but that does not include piercing the corporate veil. Secondly, the Second Restatement takes a more liberal approach and states that courts usually apply the *lex fori* which prescribes “how litigation shall be conducted.” However, despite being termed a “remedy,” the rule of piercing the

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21 2012 WL 1868559.

22 *Id.*, 3 ("We apply the law of the forum state in determining whether a corporation is an alter ego’ of an individual").

23 *Id*.


corporate veil in fact looks at the parent’s conduct outside the court prior to the litigation. By analogy, heads of damages are regarded as substantive by the Second Restatement.26

2.3 The Law of the Underlying Claim

As mentioned in Chapter 3, piercing the corporate veil is ancillary to the underlying claim being litigated. The conflict of laws concept of dépeçage is usually applied in this case, i.e., the rules of different states are applied in order to determine different issues.27 This means that the court will conduct separate choice of law analyses on the underlying claim and the piercing issue.28 However, applying the governing law of the underlying transaction to the piercing issue seems to guarantee a connection between the governing law and the issue being litigated. In addition, if the underlying cause is a statutory claim, it may well involve specific considerations particular to federal statute that would mandate applying federal common law instead.

A counter-argument to this approach is that it creates inconsistency in the choice of law issue for piercing the corporate veil. Thus, if a corporation is sued on both tort and contract claims, the veil piercing issue might be subject to two different substantive laws assuming the choice of law rules for the tort and contract issues are different.

26 Id, § 178.


28 In fact, this is the basis upon which the law of the state of incorporation and the law of the forum are discussed above.
2.4 The Law with the Most Significant Relationship

This approach is the general approach to choice of law under the Second Restatement. Its advantage is that, at least theoretically, the applicable law will have the most significant relationship with the parties and the dispute. As a result, it prevents *ex ante* forum shopping by founders of the corporations. It is for this reason that some commentators have argued that this approach should replace the law of the state of incorporation as the prevailing rule.

On the other hand, while it looks good on paper, it is the most difficult one to apply in practice due to its uncertainty. As we have seen in Chapter 3, courts have had uneven, or at times arbitrary, application in the piercing formula, the same uneven application could also appear, or even amplified, in the determination of the choice of law process if this approach were to be adopted.

With these four approaches in mind, the next section discusses the extent to which the aforementioned approaches have been adopted by the courts.


3.1 Empirical Findings

Table 4.1 below displays the choice of law approaches adopted by the courts in conflict cases during the three-year survey period.

---


30 *Id*, 104.

31 See Crespi, *supra* note 19, 125.
The number that stands out is the large number of cases without a specified approach. There are 533 such cases, accounting for 65.80% of all conflict cases. Thus, most courts in a conflict case did not conduct a choice of law analysis for the piercing issue.

---

32 Since non-conflict cases do not require any applicable law analysis, they are excluded from the discussion.
The category “others” includes cases in which the courts specified an approach but did not then apply it due to other reasons, such as the parties failing to plead the substantive law, positively waiving the conflict point, or simply avoiding the question by declaring the two potential governing laws as the same. If these cases are included on top of the cases with no specified approach, then the cases with no approach applied increases to 74.69%.

Of the remaining 25.31% of conflict cases, the approaches adopted varied. 106 cases adopted the law of the state of incorporation, accounting for 13.09% of all conflict cases. 44 cases adopted the law of the forum, accounting for 5.43% of all conflict cases. 41 cases adopted the law of the underlying claim, accounting for 5.06%. Finally, there are very few cases adopting the law of the most significant relationship, accounting for only 1.73% of the conflict cases. Therefore, while we may still claim that the law of incorporation is the most selected approach in cases that have applied an approach (106 of the 205 cases), it is hardly the dominating approach as has been presumed traditionally.

Having regard to the different choice of law approaches above, is it possible to identify different states with different choice of law approaches? The answer is clearly negative. Instead of Delaware strictly adopting the law of the state of incorporation and California strictly adopting the law of forum, the picture is in fact much messier. From the empirical research, it is hard to pinpoint any choice of law approach as the designated approach of a particular state. In addition, some states simply do not have enough piercing cases to make such analysis meaningful.
The inconsistent application of choice of law approaches within the states can be displayed by New York courts. With New York having the most piercing cases and judges with more experience on corporate matters, it might be expected that there will be a consistent choice of law approach on piercing, but the truth could not be further from the truth. Table 4.2 summarizes the choice of law approaches of the New York courts during the survey period:

Table 4.2 – Choice of Law Approaches of New York

<table>
<thead>
<tr>
<th>Approaches</th>
<th>No. of Cases</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Law of Incorporation of Subsidiary</td>
<td>42</td>
<td>28.19%</td>
</tr>
<tr>
<td>Law of Incorporation of Parent</td>
<td>3</td>
<td>2.01%</td>
</tr>
<tr>
<td>Law of Forum</td>
<td>2</td>
<td>1.34%</td>
</tr>
<tr>
<td>Law of Underlying Claim</td>
<td>5</td>
<td>3.36%</td>
</tr>
<tr>
<td>Law with the Most Significant Relationship</td>
<td>2</td>
<td>1.34%</td>
</tr>
<tr>
<td>No Specified Approaches</td>
<td>78</td>
<td>52.35%</td>
</tr>
<tr>
<td>Others</td>
<td>17</td>
<td>11.41%</td>
</tr>
<tr>
<td><strong>Total No. of New York Conflict Cases</strong></td>
<td><strong>149</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>
In total, there were 149 conflict cases decided by New York courts during the survey period. Looking at the choice of law approaches of New York, there are at least 7 different choice of law approaches. Like the national observation in Table 4.1, most courts in New York simply did not apply a choice of law analysis on piercing, accounting for 52.35% of all conflict cases handled by New York courts. Among the specified approaches of the New York courts, again like the national observation, law of the state of incorporation is the most chosen approach, accounting for 30.20% of all conflict cases. However, it is still difficult to proclaim that New York’s choice of law rule is the law of the place of incorporation with less than a third of the conflict cases applying that approach. Additionally, it is not entirely clear whether the New York courts should apply the law of the state of incorporation of the subsidiary or that of the parent. While the cases seem to point to the law of incorporation of the subsidiary (42 out of 45 such cases), this just shows the lack of consistency of the courts.33 Considering New York is one of the states that is expected to have a better handle on international commercial matters, and that it has a higher percentage of conflict cases that have undertaken the choice of law analysis as well as choosing law of the place of incorporation as the choice of law approach, comparing with the rest of the country, one may imagine how much more uncertain the rest of the states are in terms of their choice of law approaches. Thus, it is clear that no state has a clear approach on choice of law.

3.2 Issues Based on Empirical Findings

From the empirical findings above, we can therefore derive three key questions:

33 Bainbridge and Blumberg both used the same Delaware example.
a. Why are courts so reluctant in specifying an applicable law approach?

b. For courts which specify a choice of law approach, why opt for approaches other than the law of the state of incorporation?

c. Why did the law of most significant relationship receive so little support in practice?

(a) Reluctance in specifying an choice of law approach

The fact that a court does not specify an approach in the judgment does not mean that it did not choose a substantive law in practice. In fact, it would have to apply a substantive law in any event to decide the piercing issue. Table 12 shows the substantive law applied by courts in practice:

Table 4.3 - Actual Law Applied

<table>
<thead>
<tr>
<th></th>
<th>Conflict cases</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Applied forum law</td>
<td>687</td>
<td>84.81%</td>
</tr>
<tr>
<td>Applied non-forum law</td>
<td>123</td>
<td>15.19%</td>
</tr>
<tr>
<td>Total conflict cases</td>
<td>810</td>
<td>100%</td>
</tr>
</tbody>
</table>
Unlike Table 4.1 which shows only 5.43% of cases specifying the law of the forum as the applicable law approach, the law of the forum is clearly the dominant approach in reality, accounting for 84.81% of the actual law being applied. With close to 75% of conflict cases not specifying a choice of law approach but have the law of the forum being applied implicitly to more than 80% of conflict cases, the determination of the applicable law on piercing the corporate veil is really a choice with no choice. Law of the forum is effectively the designated applicable law to piercing of corporate veil issue in the United States.

Table 4.3 compares the piercing rates of the different state laws set out in Table 3.7 against the piercing rates of the corresponding state courts.

**Table 4.3 - Piercing Rate by State Court**

<table>
<thead>
<tr>
<th>States</th>
<th>Piercing Rate of State Law</th>
<th>Piercing Rate of State Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>46.67%</td>
<td>46.67%</td>
</tr>
<tr>
<td>Alaska</td>
<td>66.67%</td>
<td>66.67%</td>
</tr>
<tr>
<td>Arizona</td>
<td>25.00%</td>
<td>30.77%</td>
</tr>
<tr>
<td>Arkansas</td>
<td>50.00%</td>
<td>0.00%</td>
</tr>
<tr>
<td>California</td>
<td>34.09%</td>
<td>36.00%</td>
</tr>
<tr>
<td>Colorado</td>
<td>66.67%</td>
<td>44.44%</td>
</tr>
<tr>
<td>Connecticut</td>
<td>22.58%</td>
<td>24.24%</td>
</tr>
<tr>
<td>Delaware</td>
<td>34.69%</td>
<td>28.57%</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>35.29%</td>
<td>38.89%</td>
</tr>
<tr>
<td>State</td>
<td>34%</td>
<td>33.33%</td>
</tr>
<tr>
<td>----------</td>
<td>-------</td>
<td>--------</td>
</tr>
<tr>
<td>Federal</td>
<td>38.05%</td>
<td>33.33%</td>
</tr>
<tr>
<td>Florida</td>
<td>23.33%</td>
<td>16.13%</td>
</tr>
<tr>
<td>Georgia</td>
<td>25.00%</td>
<td>26.09%</td>
</tr>
<tr>
<td>Hawaii</td>
<td>25.00%</td>
<td>50.00%</td>
</tr>
<tr>
<td>Idaho</td>
<td>50.00%</td>
<td>37.50%</td>
</tr>
<tr>
<td>Illinois</td>
<td>27.45%</td>
<td>32.81%</td>
</tr>
<tr>
<td>Indiana</td>
<td>53.33%</td>
<td>59.09%</td>
</tr>
<tr>
<td>Iowa</td>
<td>33.33%</td>
<td>33.33%</td>
</tr>
<tr>
<td>Kansas</td>
<td>42.86%</td>
<td>50%</td>
</tr>
<tr>
<td>Kentucky</td>
<td>40.00%</td>
<td>36.36%</td>
</tr>
<tr>
<td>Louisiana</td>
<td>31.82%</td>
<td>27.59%</td>
</tr>
<tr>
<td>Maine</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Maryland</td>
<td>21.43%</td>
<td>15.00%</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>36.84%</td>
<td>33.33%</td>
</tr>
<tr>
<td>Michigan</td>
<td>38.46%</td>
<td>31.03%</td>
</tr>
<tr>
<td>Minnesota</td>
<td>33.33%</td>
<td>36.36%</td>
</tr>
<tr>
<td>Mississippi</td>
<td>0.00%</td>
<td>0.00%</td>
</tr>
<tr>
<td>Missouri</td>
<td>50.00%</td>
<td>50.00%</td>
</tr>
<tr>
<td>Montana</td>
<td>0.00%</td>
<td>75.00%</td>
</tr>
<tr>
<td>Nebraska</td>
<td>60.00%</td>
<td>50.00%</td>
</tr>
<tr>
<td>Nevada</td>
<td>50.00%</td>
<td>70.00%</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>60.00%</td>
<td>40.00%</td>
</tr>
<tr>
<td>New Jersey</td>
<td>37.21%</td>
<td>34.21%</td>
</tr>
</tbody>
</table>

34 This refers only to the Federal Court of Appeal. Other federal courts are analyzed based on the state where they are situated.
<table>
<thead>
<tr>
<th>State</th>
<th>Predicted</th>
<th>Actual</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Mexico</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td><strong>New York</strong></td>
<td>44.06%</td>
<td>46.46%</td>
</tr>
<tr>
<td>North Carolina</td>
<td>24.14%</td>
<td>15.15%</td>
</tr>
<tr>
<td>North Dakota</td>
<td>25.00%</td>
<td>25.00%</td>
</tr>
<tr>
<td><strong>Ohio</strong></td>
<td>39.58%</td>
<td>35.42%</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>25.00%</td>
<td>50.00%</td>
</tr>
<tr>
<td>Oregon</td>
<td>33.33%</td>
<td>16.67%</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>25.00%</td>
<td>23.08%</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>100%</td>
<td>66.67%</td>
</tr>
<tr>
<td>South Carolina</td>
<td>0.00%</td>
<td>18.18%</td>
</tr>
<tr>
<td>South Dakota</td>
<td>100%</td>
<td>66.67%</td>
</tr>
<tr>
<td>Tennessee</td>
<td>36.36%</td>
<td>42.86%</td>
</tr>
<tr>
<td><strong>Texas</strong></td>
<td>23.91%</td>
<td>21.43%</td>
</tr>
<tr>
<td>Utah</td>
<td>16.67%</td>
<td>16.67%</td>
</tr>
<tr>
<td>Vermont</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Virginia</td>
<td>54.55%</td>
<td>53.85%</td>
</tr>
<tr>
<td>Washington</td>
<td>66.67%</td>
<td>61.54%</td>
</tr>
<tr>
<td>West Virginia</td>
<td>0.00%</td>
<td>0.00%</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>40.00%</td>
<td>28.57%</td>
</tr>
<tr>
<td>Wyoming</td>
<td>25.00%</td>
<td>0.00%</td>
</tr>
<tr>
<td>Puerto Rico</td>
<td>0.00%</td>
<td>33.33%</td>
</tr>
<tr>
<td><strong>International</strong></td>
<td>33.33%</td>
<td>N.A.</td>
</tr>
<tr>
<td>Not decided</td>
<td>28.57%</td>
<td>N.A.</td>
</tr>
</tbody>
</table>
Not surprisingly, since most courts implicitly chose the law of the forum, the piercing rates of state courts mirror those of state laws. In fact, of the top eight jurisdictions with the most piercing cases, discussed previously in Table 3.7 (again highlighted in bold), the average difference in the piercing rates is just 3.64%, with the largest difference between the two piercing rates being only 6.12% in Delaware. The larger difference in Delaware is understandable since there were more cases applying Delaware law than the Delaware courts handling piercing cases. Thus, there could be a great motivation to engage in forum shopping.

The reluctance of the courts to specify the law of the forum as the proper choice of law rule must relate to the lack of a strong basis to officially endorse the law of the forum. The obvious weaknesses of the law of the forum as an approach are the lack of connections between the forum law and the underlying case, as well as the likelihood of forum shopping. Still, it is hard to imagine that close to three-fourth of the courts across the U.S. are reluctant to fulfil their responsibilities and ignore the legitimate rights of the litigants to have the correct applicable law applied.

Another explanation is that the courts view the substantive piercing laws of different states as substantively the same. However, as we have seen in Chapter 3, the state laws might not be as similar as they look at first glance, and this assumption

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35 This does not include federal courts as they are generally counted toward the respective jurisdictions they sit in.

36 There were 49 cases applying Delaware law while only 14 piercing cases being litigated in Delaware, leading to higher chance of variation.
certainly does not apply at all in the international cases. An incorrect perception of the similarity of the laws therefore might be the reason.

Finally, the reason may lie in the discretionary nature of piercing the corporate veil. As discussed in Chapter 3, piercing the corporate veil is highly discretionary no matter which state law is applied. The discretionary nature is by design in order to offer equity in the appropriate cases. When judges are faced with a piercing case, they might have reached a conclusion in their minds as to whether it is a worthwhile case to pierce the corporate veil. It is from that conclusion that they work back to the governing law issue. If they think the case merits piercing the corporate veil, they would try to figure out a way to circumvent the governing law as it might lead to a contrary result. Applying the law of forum here is the easiest choice as the law of the forum, no matter the formula, allows substantial flexibility in the discretion of the forum courts. From this perspective, the courts apply the law of the forum not because of their ignorance of parties’ interests but because of their insistence in offering ultimate equity to the parties, serving its role as an equitable remedy.

(b) Why not the law of the state of incorporation?

This question is partly answered by the analysis above. If courts want to bypass the determination of the applicable law due to the want of flexibility, this simply implies that adopting the law of the state of incorporation could lead to rigid and unreasonable results. This explanation is further supported by looking at the piercing rates of the respective choice of law approaches as displayed in Table 4.4 below:

37 See Chapter 3, Section 6.
Table 4.4 – Piercing Rates of Choice of Law Approaches

<table>
<thead>
<tr>
<th>Approach</th>
<th>No. of Cases</th>
<th>Percentage of Conflict Cases</th>
<th>Pierced Cases</th>
<th>Piercing Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Law of the state of Incorporation</td>
<td>106</td>
<td>13.09%</td>
<td>34</td>
<td>32.08</td>
</tr>
<tr>
<td>Law of Forum</td>
<td>44</td>
<td>5.43%</td>
<td>19</td>
<td>43.18</td>
</tr>
<tr>
<td>Law of Underlying Claim</td>
<td>41</td>
<td>5.06%</td>
<td>16</td>
<td>38.10</td>
</tr>
<tr>
<td>Law with the Most Significant Relationship</td>
<td>14</td>
<td>1.73%</td>
<td>6</td>
<td>42.86</td>
</tr>
<tr>
<td>No Specified Approach</td>
<td>533</td>
<td>65.80%</td>
<td>193</td>
<td>36.21</td>
</tr>
<tr>
<td>Others</td>
<td>72</td>
<td>8.89%</td>
<td>33</td>
<td>45.83</td>
</tr>
<tr>
<td>Total No. of Conflict Cases</td>
<td>810</td>
<td>100%</td>
<td>301</td>
<td>37.16%</td>
</tr>
</tbody>
</table>

As indicated in Table 4.4, the law of the state of incorporation has the lowest piercing rates of all approaches. Courts which are sympathetic to the plaintiff’s case will therefore be motivated to adopt other approaches, or simply to bypass the choice of law analysis in favour of the implicit application of forum law.
On the other hand, this still does not explain completely why the law of the forum (as a specified approach) and the law of the underlying transaction are viable alternative to the law of the state of incorporation among courts which believe in the need to specify a choice of law approach. There is therefore a need to examine the types of cases adopting these three different approaches.

**Law of Forum**

A closer look at those cases specifying the law of the forum as the choice of law approach shows that there is little reason for adopting the approach. The exceptions are jurisdictional piercing cases. As will be discussed in details in Chapter 5, of the 44 cases adopting the law of the forum as specified choice of law approach, 11 of them deals with jurisdictional piercing instead of traditional liability piercing.\(^{38}\) Meanwhile, the most chosen choice of law approach for jurisdictional piercing is also the law of forum, accounting for 12.79% of those cases.\(^{39}\) For jurisdictional purposes, it seems that the courts are more justified in applying the law of the forum. Establishing jurisdiction over an out-of-state defendant requires satisfying the constitutional due process and the state long-arm statute.\(^{40}\) The constitutional due process is based on the minimum contacts test

\(^{38}\) *Id.*

\(^{39}\) *See* Chapter 5, tb 5.7.

\(^{40}\) *Arnold v. AT & T, Inc.*, 874 F. Supp. 2d 825, 830 (E.D. Mo. 2012)(“In order for a federal court to exercise personal jurisdiction over a non-resident defendant two prerequisites must be satisfied. Firstly, the forum state’s long arm statute must be satisfied. Secondly, the Court must determine whether the defendant has sufficient contacts with the forum state to satisfy due process concerns of the Fourteenth Amendment.”).
first developed in the case of *International Shoe Co. v. Washington.*\textsuperscript{41} This test has been universally adopted by all states in the U.S. In addition, states can further restrict their own jurisdiction by the use of state long-arm statutes. These statutes will of course be applicable, as the law of forum, to the case regardless of the place of incorporation or the underlying claim.\textsuperscript{42}

**Law of the Underlying Claim**

**Table 4.5 – Composition of Cases Adopting Law of Underlying Claim**

<table>
<thead>
<tr>
<th></th>
<th>Diversity</th>
<th>Federal Question</th>
<th>Both Diversity and Federal Question</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012</td>
<td>2</td>
<td>10</td>
<td>3</td>
</tr>
<tr>
<td>2013</td>
<td>4</td>
<td>9</td>
<td>3</td>
</tr>
<tr>
<td>2014</td>
<td>2</td>
<td>6</td>
<td>2</td>
</tr>
<tr>
<td>Total</td>
<td>8</td>
<td>25</td>
<td>8</td>
</tr>
</tbody>
</table>

An examination of the cases that adopted the law of the underlying claim in Table 4.5 shows gravitation towards federal question cases. Federal question cases account for

\textsuperscript{41} 326 U.S. 310 (1945).
\textsuperscript{42} See chapter 6 for discussion of enforcement piercing.
25 out of 41 such cases (62.50%). This is substantially higher than the corresponding ratios in conflict cases. The percentage rises further to 80.49% if we also take into account cases that have both diversity and federal question.

Cases involving federal statutes are different from normal piercing cases in that the particular statutes may set forth different purposes and thus approaches in piercing the corporate veil. If that is indeed the case upon proper interpretation, it certainly makes sense to apply the law of the underlying transaction because that law, i.e., the federal statute, in fact dictates the application of federal common law.

Looking at the law of the state of incorporation again after reviewing the two alternative approaches, it can be observed that the law of the state of incorporation mainly deals with the classic piercing cases concerning liability rather than jurisdiction, and is based on common law rather than statutory law. Thus, to say that the law of the state of incorporation is the prevailing approach is not totally wrong considering that among the classic cases of liability piercing with no federal question, the law of incorporation remains the most popular applicable law approach. Its problem only lies on its perceived rigidity.

(c) Why isn’t the law of most significant relationship chosen?

This approach might look good on paper but is difficult to apply in practice. The biggest problem is probably the uncertainty associated with the approach. Looking

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43 Federal question cases only accounts for 31.60% of the 810 conflict cases. See Chapter 3, tb. 3.5.

closely at the rare cases adopting this approach, even they might not offer the strongest support for the approach. For example, in Secon Serv. Sys. v. St. Joseph Bank & Trust Co., the court claimed to apply the “most intimate contacts” rule under Indiana law to the piercing issue. However, the court did not explain why this applicable law rule which was originally intended for contracts was suitable for a piercing issue.46

4. Proposal for Improvements

As the survey has shown, close to 75% of piercing cases did not go through a choice of law analysis but instead they quietly applied the law of the forum. Is this a bad thing considering that the courts could have done this by design in order to maintain maximum discretion? Yet, the practice is against procedural justice and a proper choice of law analysis is required. There is a distinction between arbitrariness and discretion. The fact that judges are given considerable leeway in deciding a case does not mean that they can apply whichever substantive law they want. Forgoing the choice of law analysis for convenience is also unreasonable because determining the applicable law is part of the process of defining the parties’ rights.47 Thus, the focus of the discussion should be on how this choice of law analysis should be conducted. A three-step approach is suggested: distinguish the underlying issue; apply the law of the state of incorporation to the liability issue; and apply the law with the most significant relationship to the exceptional cases.

45 855 F.2d 406 (7th Cir. 1988).

46 Id, 412-3.

4.1 Distinguish Jurisdictional Piercing from Liability Piercing

The first step in conducting the choice of law analysis is to distinguish jurisdictional piercing from traditional liability piercing. Recently, the Texas Supreme Court clearly approved this distinction, stating that “veil-piercing for purposes of liability ("substantive veil-piercing") is distinct from imputing one entity’s contacts to another for jurisdictional purposes ("jurisdictional veil-piercing").”48 This is due to “the fact that personal jurisdiction involves due process considerations that may not be overridden by statutes or the common law.”49 Certain academics have also suggested for a long time that liability is a different issue to jurisdiction, and different rules should be applied to each.50 While this chapter focuses on the liability side, the current practice of applying the law of the forum to the jurisdiction seems to be the right approach. In Old Orchard Urban Ltd. Partnership v. Harry Rosen, Inc., the Illinois court held that jurisdiction piercing should be governed by the law of the forum:

“[A]lthough the law of the state of incorporation applies when a party seeks to substantively pierce a corporation’s veil, Illinois law governs the analysis where a party uses veil piercing to establish personal jurisdiction.”51

48 235 S.W.3d 163, 147 (Tex. 2007).
49 Id.
50 Phillip I. Blumberg, Kurt A. Strasser, Nicholas L. Georgakopoulos, & Eric J. Gouvin, Blumberg on Corporate Groups (New York, Aspen, 2nd ed, 2005).
This follows from “the sensible proposition that it is the forum state, not the domiciliary state of a company, that has a valid interest in the jurisdictional reach of the forum state's courts.”\textsuperscript{52} This distinction between the choice of law approaches in liability piercing and jurisdictional piercing is also emphasized in other cases. For example, in \textit{Superkite PTY Limited v. Glickman}, the court stated that “[w]hen a party uses veil piercing to establish personal jurisdiction, although the law of the state of incorporation applies to determine whether a party can substantively pierce a corporate’s veil, Illinois law governs the analysis of whether personal jurisdiction is proper.”\textsuperscript{53} However, it is safe to say that it is more than simply applying the piercing law of the forum. In fact, jurisdictional piercing demands a separate set of rules. The choice of law approach of jurisdictional piercing will be examined in detail in Chapter 5.\textsuperscript{54}


\textsuperscript{54} \textit{See} Chapter 5, tb 5.7 and accompanying discussion.
4.2 Applying the Law of the State of Incorporation to the Liability Issue

After putting aside the jurisdictional piercing, we should apply a default choice of law rule, the law of the state of incorporation, to the liability piercing. Establishing the law of the state of incorporation as a default rule has strong theoretical and practical underpinnings. In theory, while the nexus of the state of incorporation with the litigation varies from case to case, there is a legitimate interest of the state of incorporation to have its law applied to the piercing issue. As one court put it, “[t]he internal affairs doctrine also has the added benefit of recognizing that the state of organization generally has the greater interest in determining when and if limited liability may be stripped away from an entity organized pursuant to its laws.”55 Although it is true that corporations incorporated in Delaware or New York do business across the nation, it does not mean that the interests of such states are invariably tenuous. Ultimately, the most essential feature of incorporation is limited liability so it is difficult to see what else could be more important for an incorporating state than maintaining the limited liability. A state like Delaware, in particular, would certainly like to have its piercing law apply whether or not Delaware incorporated corporations were operating within or without the state.56 If the existence of the limited liability of a corporation incorporated by Delaware law is to be generally recognised,57 it makes sense for Delaware law to govern the abolition of limited


56 For Delaware’s interest in its corporate law in general, see “The State Competition Debate in Corporate Law” (1987) 8 Cardozo Law Review 709.

57 Second Restatement, supra note 12, § 297.
liability as well. The real question when piercing an out-of-state corporation lies in whether other states have an *overriding interest*, and in those exceptional cases, step three below will apply.

In most situations, however, it is submitted that the law of incorporation will have a stronger interest. As indicated earlier, contract cases account for the majority of all piercing cases.\(^{58}\) In these cases, the law of the state of incorporation should be regarded as part of the governing law as plaintiffs entered into the transaction fully aware that they were entering into a contract with a corporation incorporated in a particular state.\(^{59}\) A choice of law clause, properly included in a contract, will generally be given effect by the court\(^{60}\) and there is no reason why the same rule should not be applicable when it comes to piercing the corporate veil.

While the Second Restatement does not have a specific provision on piercing the corporate veil, even the most critical commentator has to admit that it could support a rebuttable presumption for the application of the law of the state of incorporation.\(^{61}\) In practice, we have also seen that the law of the state of incorporation is indeed the most chosen rule for the liability piercing in those cases where a choice of law

\(^{58}\) See *supra* Chapter 3, tb. 3.11.

\(^{59}\) *Birbara v. Locke*, 99 F.3d 1233, 1238 (“We believe a contract-based relationship, where the parties are plainly identified and their rights and obligations clearly defined, is less likely to present the sort of rare situation that calls for corporate disregard in order to prevent gross inequity”).

\(^{60}\) Second Restatement, *supra* note 12, § 187.

\(^{61}\) Crespi, *supra* note 19, 115 (“[S]ection 307 is better read as establishing only, at most, a rebuttable presumption that the law of the state of incorporation should be applied to piercing controversies and that a general choice-of-law analysis should be conducted before this determination is made”).
approach is specified. Finally, data also show that while no state has been consistent in applying the law of the state of incorporation, most states have cases supporting that approach.

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62 See supra tbl 4.1.
Table 4.6 - Jurisdictions that have Cases Applying the Law of the State of Incorporation

<table>
<thead>
<tr>
<th>No.</th>
<th>States</th>
<th>No. of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Arkansas</td>
<td>2</td>
</tr>
<tr>
<td>2</td>
<td>Florida</td>
<td>1</td>
</tr>
<tr>
<td>3</td>
<td>Illinois</td>
<td>15</td>
</tr>
<tr>
<td>4</td>
<td>Indiana</td>
<td>3</td>
</tr>
<tr>
<td>5</td>
<td>Iowa</td>
<td>1</td>
</tr>
<tr>
<td>6</td>
<td>Kentucky</td>
<td>1</td>
</tr>
<tr>
<td>7</td>
<td>Louisiana</td>
<td>3</td>
</tr>
<tr>
<td>8</td>
<td>Massachusetts</td>
<td>3</td>
</tr>
<tr>
<td>9</td>
<td>Minnesota</td>
<td>2</td>
</tr>
<tr>
<td>10</td>
<td>Mississippi</td>
<td>1</td>
</tr>
<tr>
<td>11</td>
<td>Missouri</td>
<td>1</td>
</tr>
<tr>
<td>12</td>
<td>New York</td>
<td>45</td>
</tr>
<tr>
<td>13</td>
<td>North Carolina</td>
<td>2</td>
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<tr>
<td>14</td>
<td>Ohio</td>
<td>1</td>
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<tr>
<td>15</td>
<td>Oklahoma</td>
<td>1</td>
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<tr>
<td>16</td>
<td>Oregon</td>
<td>1</td>
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<td>17</td>
<td>South Carolina</td>
<td>3</td>
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<tr>
<td>18</td>
<td>Tennessee</td>
<td>1</td>
</tr>
<tr>
<td>19</td>
<td>Texas</td>
<td>2</td>
</tr>
<tr>
<td>20</td>
<td>Virginia</td>
<td>2</td>
</tr>
<tr>
<td>21</td>
<td>Wisconsin</td>
<td>1</td>
</tr>
<tr>
<td>22</td>
<td>Federal</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td><strong>Total</strong></td>
<td><strong>94</strong></td>
</tr>
</tbody>
</table>

Table 4.6 shows that 22 states have had cases during the survey period that adopted the law of the state of incorporation as the choice of law approach. For those jurisdictions without cases applying the approach during the survey period, research of cases outside of the survey period have indicated general support of the law of the state of incorporation.\(^6\)

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\(^6\) Again, finding relevant cases adopting law of the state of incorporation does not mean that is a clear choice of law approach of the relevant states. See supra tbl 4.1 and accompanying discussion.
### Table 4.7 – Historical Research on Law of the State of Incorporation

<table>
<thead>
<tr>
<th>Jurisdictions indicated general support to state of incorporation</th>
<th>Jurisdiction</th>
<th>No. of Jurisdictions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama, Arizona, Colorado, Maryland, Nebraska, Nevada, New Jersey, Utah, Virgin Island</td>
<td>9</td>
<td></td>
</tr>
<tr>
<td>California, Connecticut, Delaware, District of Columbia, Michigan, New Hampshire, Pennsylvania, South Dakota, West Virginia</td>
<td>9</td>
<td></td>
</tr>
<tr>
<td>Georgia, Hawaii, Kansas, Rhode Island, Washington, Puerto Rico</td>
<td>6</td>
<td></td>
</tr>
<tr>
<td>Idaho, Maine, Montana, New Mexico, North Dakota, Vermont, Wyoming</td>
<td>7</td>
<td></td>
</tr>
</tbody>
</table>

Total 31
Table 4.7 summarizes the analysis of the states not covered in Table 4.6 (i.e. not having any case adopting the law of the state of incorporation during the survey period). It is important to note at this outset that this is not part of the empirical research, nor is the categorization conclusive. Having said that, of the thirty-one jurisdictions in Table 4.7, 18 have cases giving at least some general support to the law of the state of incorporation as the choice of law approach to piercing the corporate veil. These includes eight states that have cases showing strong support to the law of the state of incorporation as the choice of law approach, namely, Alabama, Arizona, Colorado, Maryland, Nebraska, Nevada, New Jersey.

64 See Group CG Builders and Contractors v. Cahaba Disaster Recovery, L.L.C. F.Supp.2d2012 WL 3245972 at *11 (“The law to be applied to the plaintiff's piercing the corporate veil/alter ego theory, instead likely turns on the law of incorporation of the entity—or enterprise of entities—to be pierced. See, e.g., Charter Servs., Inc. v. DL Air, LLC, 711 F.Supp.2d 1298, 1306 n. 13 (S.D.Ala.2010) (“DL Air was incorporated in the State of Delaware. As such, Plaintiffs' alter ego/veil piercing claims against DL Air are governed by Delaware law.”) (citing Jefferson Pilot Broad. Co. v. Hilary & Hogan, Inc., 617 F.2d 133, 135 (5th Cir.1980) (concluding that “[c]onsistently with the first Restatement, we think that Alabama courts would look to the law of the incorporating state ... in deciding whether to recognize or disregard a corporate entity”.)

65 See TFH Properties, LLC v. MCM Development, LLC F.Supp.2d2010 WL 2720843 (“We analyze plaintiffs' alter ego claims under Utah law, the law of the state of incorporation. See Restatement (Second) of Conflict of Laws § 307.”).

66 See Echostar Satellite Corp. v. Ultraview Satellite, Inc. F.Supp.2d2009 WL 1011204 (“The Colorado courts generally follow the choice of law principles set forth in the Restatement (Second) of Conflicts of Laws. See Wood Bros. Homes v. Walker Adjustment Bureau, 198 Colo. 444, 601 P.2d 1369, 1372 (Colo.1979). The Restatement provides that the law of the state of incorporation sets the standards for piercing a corporation's veil. See Restatement (Second) of Conflicts § 307 (1971); Cascade Energy & Metals Corp. v. Banks, 896 F.2d 1557, 1575 n. 18 (10th Cir.1990). It is undisputed that both Ultraview and Prime are Texas entities. Texas law, therefore, will be applied to EchoStar's attempt to pierce Ultraview's and Prime's corporate veil to hold Wickline liable for Ultraview and Prime's obligations, and Ultraview liable for Prime's obligations.”).

67 See RaceRedi Motorsports, LLC v. Dart Machinery, Ltd. 640 F.Supp.2d 660 (“Although Dart argues that Michigan law applies here, this Court has determined that the issue of piercing the corporate veil is governed by the law of the state of incorporation. Meisel v. Ustaoglu, Civ. No. 98–3863, 2000 WL
Utah,\textsuperscript{71} U.S. Virgin Island.\textsuperscript{72} There are nine other states that have cases showing some support, but are less clear, than the aforementioned eight, including California,\textsuperscript{73}

\begin{footnotesize}

\begin{itemize}
\item \textsuperscript{68} See Johnson v. Johnson 272 Neb. 263720 N.W.2d 20, 30 (“It is well established that when determining whether to pierce a corporate veil, the local law of the state of incorporation is applied. See Kellers Systems v. Transport Intern. Pool, 172 F.Supp.2d 992 (N.D.Ill.2001). Stated another way, whether Western Securities and Modern Equipment are alter egos, and the legal effect of such a finding, is determined by Delaware law.”).
\item \textsuperscript{69} See U.S. v. ERGS, Inc. F.Supp.2d2007 WL 174675 (“The court has reviewed the applicable rules governing the choice of law in such situations and agrees that California law controls. See, Restatement (Second) of Conflict of Law § 307 (1971) (providing that the local law of the state of incorporation will be applied to determine the existence and extent of a shareholder's liability to a corporation's creditors for corporate debts.”).
\item \textsuperscript{71} See Knight Bro., LLC v. Barer Engineering Co. of America 2011 WL 237153 at *5 (“The Court agrees with the parties that it applies the law of the state of incorporation, Vermont, to the issue of piercing the corporate veil under alter ego and instrumentalities.”)
\item \textsuperscript{72} See In re Tutu Wells Contamination Litigation 909 F.Supp. 1005, 1009 ( “In order to determine whether to pierce corporate veil of particular corporation, court must, pursuant to choice of law rules applicable in Virgin Islands, apply law of state of incorporation of that corporation.Restatement (Second) of Conflicts § 307.”).
\item \textsuperscript{73} See Schlumberger Logelco Inc. v. Morgan Equipment Co. F.Supp.1996 WL 251951 at *3 (“In the absence of a controlling choice of law provision, the court finds that the law of Austria, as the state of incorporation, governs plaintiffs' alter ego claim. Kalb, Voorhis & Co. v. American Fin. Corp., 8 F.3d 130, 132 (2d Cir. 1993). The court agrees with plaintiffs that Austria has a substantial interest in determining whether to pierce the corporate veil of one of its corporations. Moreover, England has no interest in the application of its law to a claim by two Panamanian corporations that California residents are liable for the debts of an Austrian corporation.”). \textit{Cf.} Wehlage v. EmpRes Healthcare Inc. 821 F.Supp.2d 1122 (“Because no statute governs the choice of law for the alter ego liability of corporations and because there is no effectivechoice-of-law contractual provision, California's governmental interests test determines which State's law applies to the alter egoliability of EmpRes Healthcare, Inc. Kearney v. Salomon Smith Barney, Inc., 39 Cal.4th 95, 100, 45 Cal.Rptr.3d 730, 137 P.3d 914 (2006); Washington Mutual, 24 Cal.4th at 919–20, 103 Cal.Rptr.2d 320, 15 P.3d 1071.”).
\end{itemize}
\end{footnotesize}

See Intrigue Shipping, Inc. v. Shipping Associates, Inc. 2013 WL 6978815 (“The parties have not cited any authority on the choice of law question. The court assumes that Panama law applies and will analyze the facts and arguments presented under that law to the extent it is known, noting that while Connecticut law is more expansive on the subject, the law of both jurisdictions is the same when a corporate entity is used to perpetrate a fraud.”).


See U.S. S.E.C. v. Levine 671 F.Supp.2d 14 (“Because Wire to Wire is incorporated in Nevada, Nevada law controls the alter ego analysis. See RESTATEMENT (SECOND) CONFLICTS OF LAWS § 307 (“The local law of the state of incorporation” governs the piercing the corporate veil analysis); see also Paliafito, 852 F.Supp. at 774.”). Cf TAC-Critical Systems, Inc. v. Integrated Facility Systems, Inc. 808 F.Supp.2d 60 (Expressly rejected law of the state of incorporation and performed interest analysis).

See Hollingsworth Logistics Group, LLC v. Equipment Leasing Services, LLC F.Supp.2d2010 WL 4386975 (“Generally, the law of the state of incorporation determines issues relating to the internal affairs of a corporation, as that protects the justified expectations of parties with interests in the corporation. First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba,462 U.S. 611, 621–22, 103 S.Ct. 2591, 2597, 77 L.Ed.2d 46 (1983).”). Cf Nieto v. Unitron, LP F.Supp.2d2006 WL 2255435 at *5 (“The Sixth Circuit was not faced with a choice-of-law issue in In re RCS Engineered Products Co. The issue did arise in Kalb, Voorhis & Co.2 Under facts similar to those presented here, the Second Circuit Court of Appeals observed that “[t]he state law to be applied is determined by the choice of law principles of the forum state.” Kalb, Voorhis & Co., 8 F.3d at 132… Analyzing this choice-of-law issue, the Chrysler Court held that, when the rights of third parties external to the corporation are at issue, [t]he state directly affected by the alleged corporate wrongdoing must be allowed to determine the extent to which the corporate veil may be pierced.” Stated otherwise, the law that governs the alter ego issue will be that of the state with the “most significant relationship” to the lawsuit.”).

See BAE Systems Information and Electronics Systems Integration Inc. v. SpaceKey Components, Inc. F.Supp.2d2011 WL 504070575 UCC Rep.Serv.2d 880 (“The parties further agree that the New Hampshire Supreme Court has not yet had the occasion to resolve a choice-of-law question in the context of corporate veil piercing. There is a split of authority on whether courts should apply the veil-piercing law of the state of incorporation (i.e., Virginia), or the state of the entity claiming to be harmed by an alleged abuse of the corporate form (i.e., New Hampshire). See 1 William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations § 43.72 (2006 rev. vol.).”).

See Panthera Rail Car LLC v. Kasgro Rail Corp. 2013 WL 4500468 (“Pursuant to the “internal affairs doctrine,” courts are to look to the law of the state of incorporation to resolve issues involving the internal
On the other hand, the research only found six jurisdictions having cases that strongly opposed the approach. These include Georgia, Hawaii, Kansas, Rhode Island, Washington, and Puerto Rico.

affairs of a corporation.”). Cf Wheeling-Pittsburgh Steel Corp. v. Intersteel, Inc. 758 F.Supp. 1054 (“A corporation that wishes to do business in the State of Pennsylvania and avail itself of the laws of Pennsylvania is certainly aware that Pennsylvania has an acute interest in any corporation that intends to use the corporate entity to defraud or cause injustice to citizens or corporations within Pennsylvania. In the determination of whether one is acting as an alter ego of a corporation, the Court is weighing the conduct of the corporation and those behind the corporation. The Court is not looking at the technical requirements for the formation of a corporate entity. It is black letter law that incorporation is a shield to personal liability. One attempting to use such shield must be aware of the conduct necessary to maintain its protection in every forum in which it plans to do business.”).

Burke v. Ability Ins. Co. 926 F.Supp.2d 1056 (“Although the issue of piercing the corporate veil involves different states' laws of incorporation, the noncontracting defendants are foreign defendants. Both parties briefed this substantive issue under South Dakota law. Thus, the court will assume without deciding that South Dakota law applies to this cause of action.”).

See Mountain Link Associates, Inc. v. Chesapeake Energy Corp. 2014 WL 4851993 at *7 (“Here, Oklahoma law, as the law under which CHK Appalachia was created, would apply under the internal affairs doctrine and § 307.8 Assuming, arguendo, that the Court should apply the factors listed in § 6 of the Second Restatement to the facts of this case, they would indicate either the laws of West Virginia or of Oklahoma. But the Court need not undertake an extensive general choice-of-law analysis, because the result is not outcome determinative. Both the Oklahoma and West Virginia law of veil-piercing point to the same result.”).

See Multi-Media Holdings, Inc. v. Piedmont Center, 15 LLC 583 S.E.2d 262, 265 (“In support of its argument on appeal, Multi-Media cites to Realmark Investment Co. v. American Financial Corp., 171 B.R. 692 (N.D.Ga.1994)... The court found that the Supreme Court of Georgia would follow the Restatement and would hold that the state of incorporation's law would apply to issues of piercing the corporate veil... First, we note that the Supreme Court of Georgia has recently reiterated that “the Restatement (Second) Conflict of Laws has never been adopted in Georgia” and “Georgia will continue to adhere to the traditional conflict of laws rules.” Convergys Corp. v. Keener, 276 Ga. 808, 809, 812, 582 S.E.2d 84 (2003).1 In addition, we conclude that Realmark is not applicable to the instant case because here the right of a third party external to the corporation is at issue and different conflicts principles apply. This is true even if we were to follow the Restatement.”).

See Merrill Lynch, Pierce, Fenner & Smith v. Arelma, Inc. F.Supp.2d 2004 WL 5326929 (“It would be contrary to the public policy of the United States to apply the law of Panama when, based on Arelma's contention, Panamanian law precludes use of the alter ego doctrine among private parties.”).
Finally, 7 states do not have cases on the choice of law issue. These include Idaho, Maine, Montana, New Mexico, North Dakota, Vermont and Wyoming. Not coincidentally, all of such states having very limited amount of piercing cases during the survey period (a combined 20 cases during the survey period).

Looking at Tables 4.6 and 4.7, it seems that law of the state of incorporation, while far from being the prevailing choice of law approach on piercing as some

84 See US Telecom, Inc. v. 535 Live, Inc. 1992 WL 151921*1 ("That is, a Kansas court hearing this case would apply the law of the state in which the contract was made to determine issues surrounding its making. Since the plaintiff's contention is, essentially, that Mr. Katz made the contracts with the plaintiff through his alter egos, the allegedly sham corporations, the issues here are ones surrounding the making of these contracts. For these purposes, then, the Court believes that the appropriate law to apply is that of Kansas, as opposed to that of the state of incorporation, Maryland or Delaware.").

85 See Scully Signal Co. v. Joyal 881 F.Supp. 727 at *736-737 ("The preliminary questions to be answered are: first, does each state involved have sufficient contacts with the parties and occurrences underlying the action to make application of any of the state's laws constitutionally permissible; and second, what is the nature of the conflict between the laws of those states.").

86 See Maring v. PG Alaska Crab Inv., Co., LLC 2006 WL 1940991 at *6 ("The court applies Washington law as it relates to piercing the corporate veil. A federal court exercising diversity jurisdiction “must look to the forum state's choice of law rules to determine the controlling substantive law.” Patton v. Cox, 276 F.3d 493, 495 (9th Cir.2002). Washington courts apply Washington law unless it conflicts with another potentially applicable body of law. Cox v. Lewiston Grain Growers, Inc., 936 P.2d 1191, 1195 (Wash.Ct.App.1997). The parties have not identified any conflict between Washington and Delaware law as it relates to piercing the corporate veil, and the court is not aware of one.").

87 See Wadsworth, Inc. v. Schwarz-Nin 951 F.Supp. 314 ("Generally, “when the subject is liability of officers and directors for their stewardship of the corporation, the law presumptively applied is the law of the place of incorporation.”… Officer liability, however, is *321 not always solely a matter of internal corporate relationships. Courts “pierce the corporate veil” for a number of reasons, some of which implicate only intra-corporate relationships, such as in shareholder derivative suits, and some of which implicate the interests of third parties outside of the organic structure of the corporation… We interpret the relevant section of the Restatement to mean that, when determining whether to pierce the corporate veil, the law of the state of incorporation presumptively applies, but that presumption can be rebutted. Where the basis for piercing stems from non-internal affairs, we look to see if another state's interest in officer liability from those affairs is greater enough than the interest of the state of incorporation to defeat the presumption. See Resolution Trust Corp. v. Chapman, 29 F.3d at 1126–1127 (J. Posner, dissenting.").

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claimed it to be, does seem to be the most acceptable approach in general. Thus, to formally recognise it as the default rule requires the least effort to make any change.

4.3 Applying the Law with the Most Significant Relationship to the Exceptional Cases

It must be emphasized that the law of the state of incorporation is to be applied as a default rule subject to exceptions, rather than a mandatory rule as it is used currently by most courts. If most courts have tried to circumvent the application of a mandatory rule due to its potential for injustice is ironic for a remedy that aims at offering equity in the first place. Thus, as much as we need to move away from the practice of bypassing the choice of law analysis, there is an equal need to avoid a hard-and-fast mandatory rule. The need for exceptions is loud and clear in Justice Ginsburg’s judgment:

“To give conclusive effect to the law of the chartering state in determining whether the separate juridical status of its instrumentality should be respected would permit the state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts. We decline to permit such a result.”88

It is important to note that she was not saying that the law of the place of incorporation should not be applied as a default rule, only that it should not be a mandatory rule in view of a fraudulent situation having regard to the purpose of

piercing the corporate veil in the big picture. In other words, piercing the corporate veil’s development as an equitable remedy means that the court should create exceptions beyond the default rule. In addition, this presumption and exception structure is already built into the Second Restatement. Section 307 is subject to the exception of Section 302 which states that if “some other state has a more significant relationship to the occurrence and the parties, in which event the local law of the other state will be applied.”\(^89\) Thus, Section 307 in fact only provides a rebuttable presumption for the internal affairs rule.\(^90\) There are also cases that have recognised this exception in practice. For example, in *Supply Chain Associates, LLC v. ACT Electronics, Inc.*,\(^91\) the court first acknowledged that its default choice of law approach was to apply the law of the state of incorporation,\(^92\) and it was only in exceptional cases where various factors suggested the deviation from the law of the state of incorporation that the court would pierce the corporate veil.\(^93\) After considering that various matters in the case were all related to Massachusetts, the court applied Massachusetts law, the law of the forum, to the piercing issue.\(^94\)

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89 Crespi, *supra* note 19, at 111-112.

90 *Id.*


92 *Id.*, 9 (“The local law of the state of incorporation will be applied to determine the existence and extent of a shareholder's liability to the corporation for assessments or contributions and to its creditors for corporate debts”).

93 *Id.*

94 *Id.*
It takes an exceptional situation for a court to apply the exception. The following part sets forth a number of factors for a court to consider in relation to this. It is important to note, however, that these are not exhaustive and the mere existence of such circumstances should not be conclusive either.

### 4.3.1 Tort Cases

Tort cases are situations where the courts might be more open to applying an exception. This is based on the tort and contract distinction outlined in Chapter 3.\(^5\) The idea is that plaintiffs in tort cases would not have a chance to negotiate with the defendant as to the governing law on the piercing issue since they do not know that they are going to be victims.\(^6\) Similarly, it could be argued that in tort cases where the plaintiff does not have a chance to choose the counterparty to the relationship and therefore does not enter into an implicit choice of law agreement of the piercing issue should be entitled to more flexibility in the choice of law analysis comparing with contract cases. In any event, given the very few tort cases (only 11.59%) this will not create a wide exception nor render the default rule meaningless.

### 4.3.2 Statutory Cases

As we have seen from Table 4.5, cases adopting the law of underlying claim as the choice of law approach are mainly cases involving federal statute. Accordingly,

\(^5\) See Chapter 3, Section 7.

\(^6\) *OMV Associates, L.P. v. Clearway Acquisition, Inc.*, 82 Mass. App. Ct. 561, 567-568 (2012) (“By contrast, the situation where a third party cannot discern which of two or more related corporate entities is involved in a given transaction has more typically arisen in the context of a tort, rather than in a contractual relationship”).
this suggests that special attention should be paid to statutory cases. In appropriate cases, law other than the law of the state of incorporation should be applied.

This is not to say that all statutory cases require the application of the exception but only those cases where the relevant statute, expressly or impliedly, specifies a separate standard for piercing the corporate veil. This exception is different from the traditional argument for the mandatory application of federal common law in federal statutory cases. That argument focuses on the presumably overriding federal interests in federal question cases over state corporate interests and proposes a lower standard for piercing the corporate veil.\textsuperscript{97} Here, the difference is that its purpose is not to create a separate, hard category for federal cases where federal interests always trump state interests but to confirm through a case-by-case statutory interpretation whether the relevant statute has formulated its own piercing standard.

\textit{4.3.3 International cases}

International cases might be the most challenging to the courts because of the way that they deviate from the default rule. The challenge lies in dealing with the variety of piercing laws from different jurisdictions around the world which might or might not share similarities with their counterparts in the U.S. There are, in fact, jurisdictions without a piercing law that instead rely on other mechanisms to protect creditors. For example, if Finland has no piercing law but it requires a corporation to have a minimum capital of $50,000 at the establishment of the corporation. The purpose of this minimum capital rule is to ensure that the corporation will have a

\footnote{Harvard Note, \textit{supra} note 44, 856 & n 20.}
certain level of assets in order to protect creditors. Due to this *ex ante* mechanism to protect the creditors, there is, at least, less need to have an *ex post* mechanism such as veil piercing.\(^{98}\) On the other hand, *Bancee* shows that the courts should be willing to deviate from the default rule in the right type of international cases. Justice Ginsburg did this very thing when rejecting the application of Cuban law, the law of incorporation of the Cuban Bank for which piercing was sought.\(^{99}\) Similarly, in *AngioDynamics, Inc. v. Biolitec AG*, the defendant tried to make the shareholder judgment-proof from piercing by attempting a merger between the defendant corporation and a corporation in Austria where U.S. judgments were not enforceable.\(^{100}\)

### 4.3.4 Multi-layer corporate groups

As mentioned above, multi-layer corporation groups are common and also pose specific problems due to the possibility of involving multiple corporations incorporated in different jurisdictions. For example, in *Inter-Tel Technologies, Inc. v. Linn Station Properties, LLC*,\(^ {101}\) the Supreme Court of Kentucky was asked to pierce both the defendant corporation and its parent corporation to reach both the parent and

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\(^{101}\) 360 S.W.3d 152.
grandparent shareholders. Addressing whether the court could pierce multiple corporate layers, the court stated the following:

“The Inter–Tel group insists that the parent and grandparent should not be viewed collectively but must be accorded separate recognition and only if Technologies’ corporate veil is pierceable can the courts next proceed to pierce Inter–Tel's corporate veil. They offer no authority for this sequential piercing argument and neither the Court of Appeals nor this Court has found such. There is, however, authority for piercing the veil of any related entity where the facts justify it … The equitable doctrine of veil piercing cannot be thwarted by having two entities, rather than one, dominate the subsidiary and dividing the conduct between the two so that each can point the finger to some extent at the other.”

While the court did not directly address the choice of law issue, it applied Kentucky law, the law of the state of incorporation of the defendant corporation, not just to the defendant corporation but also the parent corporation which was incorporated in Arizona.

The factors above are not mutually exclusive and could create a stronger case if multiple factors were present. It is, for example, not difficult to imagine a case where the defendant corporation is a subsidiary of a large foreign corporate group which has committed a tort and a statutory offence concurrently in the U.S.

102 Id, 165-166.
5. CONCLUSION

The current practice of the U.S. courts regarding the law applicable to veil piercing leaves a lot to be desired. With approximately 75% of the piercing cases without a proper choice of law analysis, the courts have applied the law of the forum by default in more than 80% of conflict cases. This practice seriously deprives litigants of their right to see the proper substantive law applied to such an important issue and makes the choice of the applicable law a choice with no choice. In addition, the great variations in piercing rates among different jurisdictions could create a great incentive for a plaintiff to pursue forum shopping.

On the other hand, creating a choice of law rule for piercing the corporate veil is difficult as the context of piercing is infinitely varied. The most efficient way to improve the current situation is to apply the law of the state of incorporation as a default rule. This approach would ensure that the interests of the incorporating state were consistently accounted for, and it has already had a solid amount of support from state courts in traditional liability piercing. The rigidity of this approach, however, could be cured with the adoption of an open-ended exception to accommodate difficult cases such as tort, statutory offences, international and multi-layer cases. This exception echoes the equitable nature of veil piercing as it does not make sense for a defendant to defeat veil piercing by a rigid choice of law rule. Courts, if adopting this presumption and exception approach consistently, could develop a body of case law could develop to further shape these exceptions and provide more certainties in the future. Meanwhile, this chapter also shows the value of empirical research for both identifying the real problem and potential
solutions. It has long been thought that the issue of choice of law rules was only the rigidity of the law of the state of incorporation.\textsuperscript{103} However, the empirical data clearly shows that the biggest problem was the “choice of no choice,” and the practice of bypassing the choice of law analysis. While the rigidity on the law of the state of incorporation is also true, empirical data help formulate the solution. The initial sorting of jurisdictional piercing and the identification of certain categories of cases that merit further considerations are all derived from the data.

In addition, we have also seen in this chapter the interdependence between piercing the corporate veil and choice of law rules. Choice of law issue could be determinative to the success of piercing case, while good choice of law rules must take into account the nature and purpose of the piercing doctrine. Choice of law rules on piercing are also interdependent with jurisdiction. As mentioned in this chapter, jurisdictional piercing is its own category of piercing and we must understand that to formulate general choice of law rules on piercing. Conversely, choice of law rules, as we will see in the next chapter, greatly influence the success of jurisdictional piercing. Choice of law rules on piercing will also be a focus of discussion in Chapter 6 relating to enforcement piercing.

\textsuperscript{103} See supra note 19, 117.
CHAPTER 5

JURISDICTIONAL PIERCING: THE ELEPHANT IN THE ROOM

1. Introduction

After a series of cases in the 1980s led by *World-Wide Volkswagen Corp. v. Woodson*\(^1\) and *Asahi Metal Industry Co. v. Superior Court of California*,\(^2\) the Supreme Court did not revisit the subject of personal jurisdiction extensively until 2011 when it considered specific jurisdiction in *J. McIntyre Machinery, Ltd. v. Nicastro*\(^3\) and general jurisdiction in *Goodyear Dunlop Tires Operations, S.A. v. Brown*.\(^4\) Subsequently in 2014, the Supreme Court further discussed the topic in *Daimler AG v. Bauman*.\(^6\) In particular, while discussing personal jurisdiction in both *Goodyear* and *Daimler*, the Supreme Court acknowledged that there could be a potential argument to acquire jurisdiction over out-of-state corporations by piercing the corporate veil.\(^7\) However, the

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\(^1\) 444 U.S. 286 (1980).


\(^3\) 131 S. Ct. 2780 (2011).

\(^4\) 131 S. Ct. 2846 (2011).

\(^5\) See Patrick J. Borchers, J. McIntyre Machinery, Goodyear, and the Incoherence of the Minimum contacts Test, 44 Creighton L. Rev. 1245, 1245 (2011) (“it marked for the first time in almost a quarter of a century that the United States Supreme Court engaged in an extended discussion of the minimum contacts test.”).

\(^6\) 134 S. Ct. 746 (2014).
court never discussed the substance of this veil piercing in the context of jurisdiction because the plaintiffs either forfeited the argument or failed to raise the argument in the first place. Despite the lack of full development of jurisdictional piercing, lower courts have since interpreted Goodyear and Daimler as positive precedents for the doctrine. This sets the stage for a much-needed exploration of jurisdictional piercing, the elephant in the room.

Jurisdictional piercing is the judicial process under which the separate legal existence of a company is disregarded so as to make a shareholder of the company subject to the personal jurisdiction of a court that it would not otherwise be subject to. At times, the

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7 Daimler 131 134 S. Ct. 746, 759 (2014) (“Daimler argues, and several Courts of Appeals have held, that a subsidiary's jurisdictional contacts can be imputed to its parent only when the former is so dominated by the latter as to be its alter ego.”). Goodyear 131 S. Ct. 2780, 2857 (2011) (“In effect, respondents would have us pierce Goodyear corporate veils, at least for jurisdictional purposes.”).

8 Goodyear 131 S. Ct. 2780, 2857 (2011) (“Neither below nor in their brief in opposition to the petition for certiorari did respondents urge disregard of petitioners' discrete status as subsidiaries and treatment of all Goodyear entities as a “unitary business,” so that jurisdiction over the parent would draw in the subsidiaries as well… Respondents have therefore forfeited this contention, and we do not address it.”).

9 Daimler 131 S. Ct. 2846 at 758 (2011) (“While plaintiffs ultimately persuaded the Ninth Circuit to impute MBUSA's California contacts to Daimler on an agency theory, at no point have they maintained that MBUSA is an alter ego of Daimler.”).

10 See e.g. on Goodyear, Viega GmbH v. Eighth Jud. Dist. Ct. 328 P.3d 1152, 1157 (“Subsidiaries' contacts have been imputed to parent companies only under narrow exceptions to this general rule, including “alter ego” theory and, at least in cases of specific jurisdiction, the “agency” theory. Unocal Corp., 248 F.3d at 926. The alter ego theory allows plaintiffs to pierce the corporate veil to impute a subsidiary's contacts to the parent company by showing that the subsidiary and the parent are one and the same. See, e.g., Goodyear, 564 U.S. at ———, 131 S.Ct. at 2857 (implying, but not deciding, that an alter ego theory would be appropriate in such a situation).”). See also Beach v. Citigroup Alternative Investments LLC 2014 WL 904650 (“As with a finding of presence for jurisdictional purposes through a corporate parent, a finding of corporate presence through the presence of a parent company to find local harm requires an inquiry analogous to piercing the corporate veil. See Goodyear Dunlop Tires Operations, S.A., 131 S.Ct. at 2857.). On Daimler, see NYKCool A.B. v. Pacific Intern. Services, Inc., 66 F.Supp.3d 385, 393 (“The Court did not express any doubt as to the soundness of an alter ego theory of jurisdiction, which is present only in the rather different circumstance in which one person or entity truly dominates another so that the two are indistinguishable for practical purposes.”). See also Sonera Holding B.V. v. Cukurova Holding A.S., 750 F.3d 221 (2d Cir.2014).
term “jurisdictional veil-piercing” is used instead by courts \(^{11}\) and scholars. \(^{12}\) It is similar to, yet different from, piercing the corporate veil as used in a liability context. \(^{13}\)

Traditionally, piercing the corporate veil is mostly used to make the shareholder liable for the debt of the company by asking the court to disregard the limited liability created by the incorporation of a company (hereinafter “liability piercing”). \(^{14}\) In both liability piercing and jurisdictional piercing, the court is asked to disregard the separate legal existence of a company, but the former is for the purpose of busting the limit on liability while the latter is to extend the limit of jurisdiction of the court from the company to the shareholder. Thus, “liability is not to be conflated with amenability to suit in a particular forum,” \(^{15}\) and either type of piercing could be raised independently or with one another. \(^{16}\)

While jurisdictional piercing had never been fully explained by the Supreme Court, it was not exactly a novel concept. As far back as 1925, Justice Brandeis declined to disregard the corporate existence of the Alabama subsidiary of Cudahy Packing Company, a Maine corporation in order to subject the latter to the jurisdiction of North


\(^{13}\) See Sher v. Johnson, 911 F.2d 1357, 1365 (9th Cir. 1990) (“Liability and jurisdiction are independent.”).

\(^{14}\) Robert B. Thompson, Piercing the Corporate Veil: An Empirical Study, 76 Cornell L. Rev. 1036, 1036 (1991) (“Piercing the corporate veil” refers to the judicially imposed exception to [limited liability] by which courts disregard the separateness of the corporation and hold a shareholder responsible for the corporation's action as if it were the shareholder's own.”).

\(^{15}\) American Telephone & Telegraph Co. v. Compagnie Bruxelles Lambert 94 F.3d 586, 591 (9th Cir. 1996).

Carolina in *Cannon Manufacturing Co. v. Cudahy Packing Co.* Framing the issue as to whether “the court lacked jurisdiction because the defendant, a foreign corporation was not within the state,” Justice Brandeis made one of the most oft-quoted statements on piercing the corporate veil: “The corporate separation, though perhaps merely formal, was real. It was not pure fiction.” Despite not using the term jurisdictional piercing nor even piercing corporate veil, the Supreme Court clearly analyzed the possibility of extending the North Carolina court’s jurisdiction on the concept of piercing the corporate veil. While *Cannon* is still considered valid law, it leaves plenty of question marks over its status in the contemporary jurisdiction regime. In particular, it is not clear whether Justice Brandeis was deciding the matter on federal or state law. Although he said that the case was not based on an interpretation of the Constitution, *Cannon* was decided before

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17 267 U.S. 333 (1925).

18 *Id.* at 336.

19 *Id.* at 337.

20 The court below had drawn analogy to liability piercing, though not using that term, see *Cannon Mfg. Co. v. Cudahy Packing Co.*, 292 F. 169 (1923) (“If the issue I am passing upon were a question of preventing fraud through a corporate fiction or of preventing an escape from just liability, the court would have little trouble in holding that there is such identity between the two corporations as to enable the court to prevent fraud; but while the courts generally have held that they will look through corporate fictions to prevent such fraud or to enforce just liability, yet I know of no case where it has been found that a separate legal corporate entity can have process served upon it and such process take the place of process on some other separate legal corporate entity.”).

21 See William A. Voxman, *Jurisdiction Over a Parent Corporation in its Subsidiary’s State of Incorporation*, 141 U. Pa. L. Rev. 327, 337-338 (1992) (“One sign that the Cannon doctrine is still valid is that the Supreme Court has never repudiated it despite having had occasion to do so. In fact, the Court may have implicitly recognized the doctrine's continuing validity in *Keeton v. Hustler Magazine.*”) See also Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 Cal. L. Rev. 1, (1986) (noting that Keeton “may amount, in fact, to an explicit revival of the Cannon doctrine.”).

22 *Cannon* 267 U.S. 333, 336 (1925) (“No question of the constitutional powers of the state, or of the federal government, is directly presented.”).
Erie Railroad Co. v. Tompkins,23 thus making it possible for the ruling to be based on federal common law.24 In addition, the substantive test declared by Cannon seems highly formalistic. Despite recognizing that the Maine parent corporation dominated the Alabama subsidiary “immediately and completely,”25 the court upheld the corporate existence of the subsidiary since its existence as a distinct corporate entity was “in all respects observed.”26 The confusion caused by these questions continues to date, prompting one commentator to describe the law on jurisdictional piercing as “in a state of flux.”27

Through the empirical research on cases decided in the three full years (2012-2014) after the decisions of Goodyear and McIntyre, this chapter surveys the contemporary practices of the courts on jurisdictional piercing and attempts to determine the right test that courts should apply. To be more specific, this chapter will explore the following key questions:

In what situations is jurisdictional piercing generally applied?

1. What is the relationship between jurisdictional piercing and liability piercing?

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23 Erie R.R. v. Tompkins, 304 U.S. 64 (1938). See Brilmayer & Paisley, supra note 21, at 5 n26 (“It is well understood since Erie R.R. v. Tompkins, 304 U.S. 64 (1938), that federal courts are not free to reexamine state decisions of ‘general common law’.”).

24 See Phillip I. Blumberg et al., Blumberg on Corporate Groups § 24.01 at 24-4 (2d ed. Supp. 2011-2012) (arguing that Cannon was “exclusively concerned with federal law.”).


26 Id.

27 See Phillip I. Blumberg et al., supra note 24, § 23.01 at 23-3.
2. What is the relationship between jurisdictional piercing, agency and direct jurisdiction?

How will jurisdictional piercing be applied?

3. Should state law or federal law govern the jurisdictional piercing question? If it were state law, which state’s law?

4. Should the substantive test of jurisdictional piercing be the same as that of liability piercing?

Section 2 sets out the background and importance of jurisdictional piercing. Tracing the history of jurisdictional developments in the United States, it highlights the way in which jurisdictional piercing has regained its importance and how it is on the verge of opening a new stage of the jurisdictional regime. Section 3 first goes into detail on each of the aforementioned questions and applies the findings of the empirical research accordingly. Section 4 makes recommendations to improve the current law based on the issues displayed in Section 3. Overall, this chapter finds that subject to certain justifications, the test for jurisdictional piercing should generally remain in the domain of state law. However, each state should develop a jurisdictional specific test for the purpose of jurisdictional piercing instead of blindly adopting the liability piercing test.

2. Background and Importance of Jurisdictional Piercing

Whilst it is not the purpose of this chapter to give a detailed description of the historical developments of personal jurisdiction, some background information is necessary. Generally speaking, personal jurisdiction in the United States has been
developed in four stages with the latest stage still in transition beginning with *Goodyear* and *McIntyre*. 
Stage 1 – Territorial Jurisdiction

In *McDonald v. Mabee*, the Supreme Court stated that: “[t]he foundation of jurisdiction is physical power.” 28 This is based on the fact that political power exercised by the courts of a nation in general only goes as far as its borders. 29 Sovereignty and jurisdiction have always gone hand in hand since the start of nations. In the Commentaries on the Conflict of Laws, 30 Justice Story 31 stated that the “first and most general maxim” of conflict of laws is that “every nation possesses exclusive sovereignty and jurisdiction within its own territory.” 32 Accordingly, early on, people within the territory of a state were subject to the jurisdiction of the state courts. 33 The assumption of personal jurisdiction was effected through the service of process to a person within the forum, and this remains a valid exercise of jurisdiction to date. 34 The prime case illustrating this form of jurisdiction is *Pennoyer v. Neff*. 35


29 See generally Restatement (First), Conflicts of Laws, 1934, §§ 77 to 78.

30 J. Story, Commentaries on the Conflict of Laws, Foreign and Domestic (Boston 1834).

31 Justice Story is widely regarded as “the father of the conflict of laws,” see Ernest G. Lorenzen, Story’s Commentaries on the Conflict of Laws—One Hundred Years After, 48 Harv. L. Rev. 15, 38 (1935).

32 Story, supra note 30, at 19.

33 Id. at 20 (“The sovereign has power and authority over his subjects, and the goods, which they possess within his dominions.”).

34 See Burnham v. Superior Court of California, 495 U.S. 604, 610 (1990) (“Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State.”).

35 95 U.S. 714 (1877).
In that case, Neff tried to recover a piece of land in Oregon from Pennoyer. Relying on a sheriff’s deed made upon the sale of the subjected property on execution issued upon a previous default judgment rendered against Neff, Pennoyer claimed that he had valid title. The issue was thus whether the previous default judgment was granted on a valid assumption of jurisdiction when process had not been served on Neff within the state of Oregon. Affirming the key role played by sovereignty mentioned above, Justice Field stated that “every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.” He went on to find for Neff. Pennoyer v. Neff has since been read as requiring the presence of the defendant within the state for the assumption of personal jurisdiction. Another key development in Pennoyer was the inclusion of the due process clause of the Fourteenth Amendment in the jurisdictional analysis. It was stated in the judgment that judgments without proper jurisdiction violated due process of the law under the Fourteenth Amendment.

The same concept of territorial jurisdiction was also reflected in the court’s approach in dealing with corporations. For example, in Bank of Augusta v. Earle, it was stated that:

36 Id.
37 Id.
38 Id. at 722.
39 International Shoe v. State of Washington, 326 U.S. 310, 316 (1945) (“Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of court was prerequisite to its rendition of a judgment personally binding him.”). See also Charles Alan Wright & Arthur R. Miller 4. Federal Practice and Procedure § 1064 (3d ed. 2002).
40 38 U.S. (13 Pet.) 519 (1839).
A corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation; and cannot migrate to another sovereignty.\(^41\)

Thus, the only forum in which to sue a corporation is its place of incorporation.

This form of jurisdiction as elaborated in *Pennoyer* and *Bank of Augusta* made sense when there was little travel across state borders and business was mostly confined within the state. However, with the development of the economy it was soon found to be insufficient.

*Stage 1a – Presence and Consent*

The rather simple basis of jurisdiction faced enormous challenges during the Industrial Revolution.\(^42\) Gone was the simple world where businesses largely stayed within the borders of a state from manufacture to distribution to consumption. Instead, business activities frequently extended across state borders, creating a need for the court to assume jurisdiction over out-of-state persons.\(^43\) Although not welcomed at first, the increase in national business activities was accompanied by the rise of limited liability companies.\(^44\)

\(^41\) *Id.* at 588.

\(^42\) *Id.*


\(^44\) See Dante Figueroa, *Comparative Aspects of Piercing the Corporate Veil in the United States and Latin America*, 50 Duq. L.Rev. 683, 703 (2012) (“Limited liability statutes were not initially enacted across the
Unlike natural persons, legal persons are capable of doing business in multiple states at the same time.\textsuperscript{45} This presented a serious challenge to the territorial regime. Instead of asking plaintiffs to travel to the home state of defendants for the lawsuits, it became necessary for courts to develop certain ways to assume jurisdiction over these out-of-state defendants.\textsuperscript{46}

Two transitional concepts slowly developed to fill this gap – presence and consent. In connection with presence, a corporation is subject to, other than its state of incorporation, the jurisdiction of a state if “it is doing business within the State in such manner and to such extent as to warrant the inference that it is present there.”\textsuperscript{47} In addition, states also started to require out-of-state corporations doing business in-state to appoint service agents to receive process.\textsuperscript{48} This constitutes consent of the out-of-state corporations to be subject to the jurisdiction.\textsuperscript{49}

Finally, one more possibility is piercing the corporate veil. However, the occasions when such a doctrine was applicable as well as the substantive test were all

\textsuperscript{45} See International Shoe v. State of Washington, 326 U.S. 310, 316 (1945) (“Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, it is clear that unlike an individual its ‘presence’ without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it.”)(internal citation omitted).
\textsuperscript{46} Id.
\textsuperscript{48} See S C Symeonides, \textit{American Private International Law}, (Kluwer 2008) 32 (“Many states require foreign corporations, as a condition for doing business in the forum state to appoint a local agent for the receipt of service of process.”).
\textsuperscript{49} Id.
very uncertain from the beginning. The most important case at the time was of course *Cannon*. As described above, the Supreme Court refused to pierce the corporate veil of the out-of-state Maine parent due to the proper maintenance of corporate formalities between the Alabama subsidiary and the Maine parent. In fact, *Cannon* shows how consent and presence worked together in this transitional era. First, the Alabama subsidiary was subject to the jurisdiction of North Carolina because it did business there and had appointed an agent to receive service of process.\(^{50}\) This is apparently an illustration of consent. Secondly, if the corporate formalities were not observed, it would then be possible for the court to hold the Maine parent subject to the jurisdiction of North Carolina, thus establishing “presence” of the Maine parent in North Carolina.\(^{51}\)

Eventually, however, the stop gap measures of presence and consent proved insufficient. Presence was criticized for its lack of substance. In *Hutchinson v. Chase & Gilbert, Inc.*,\(^{52}\) Judge Learned Hand summarized such criticism succinctly:

> “It scarcely advances the argument to say that a corporation must be ‘present’ in the foreign state, if we define that word as demanding such dealings as will

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50 Cannon Mfg. Co. v. Cudahy Packing Co., 292 F. 169, 174 (1923) (“[Record] showed that the Cudahy Packing Company of Alabama did business in the states of Alabama, Florida, Kentucky, North Carolina, South Carolina, Virginia, and Tennessee. Frank H. Ross, care the Cudahy Packing Company of Alabama, Charlotte, N.C., was the officer or agent in charge of its business in the state of North Carolina, and upon whom process against the corporation may be served.”). Note however that the Alabama subsidiary was not a defendant in the case.

51 Throughout Cannon, the Supreme Court has been framing the issue as one of presence, see *Cannon* 267 U.S. 333, 334-335 (1925) (“The main question for decision is whether, at the time of the service of process, defendant was doing business within the state in such a manner and to such an extent as to warrant the inference that it was present there.”).

52 45 F.2d 139 (2d Cir. 1930).
subject it to jurisdiction, for then it does no more than put the question to be answered. Indeed, it is doubtful whether it helps much in any event. It is difficult, to us it seems impossible, to impute the idea of locality to a corporation, except by virtue of those acts which realize its purpose. When we say, therefore, that a corporation may be sued only where it is ‘present’ we understand that the word is used, not literally, but as shorthand for something else.”

Similarly, the doctrine of consent was criticized by Judge Hand in *Smolik v. Philadelphia & Reading Co.*:53

“When it is said that a foreign corporation will be taken to have consented to the appointment of an agent to accept service, the court does not mean that as a fact it has consented at all, because the corporation does not in fact consent; but the court, for purposes of justice treats it as if it had. … The court, in the interests of justice, imputes results to the voluntary act of doing business within the foreign state, quite independently of any intent.”54

These all set the stage for the era of minimum contacts in Stage 2.

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54 *Id.* at 151.
Stage 2 – Minimum Contact

Whilst the doctrines of presence and consent helped alleviate the problems by extending the traditional territorial basis of jurisdiction, they were too artificial to truly address problems caused by the increasing inter-state activities. This can be illustrated by the facts of *International Shoe Co. v. State of Washington*.55

International Shoe was a company incorporated in Delaware. For years, it had sold shoes in Washington through a team of Washington-based salesmen in order to solicit business there.56 Instead of setting up a branch at a fixed location in Washington, the salesmen were given “a line of samples … which they display[ed] to prospective purchasers. On occasion they rent permanent sample rooms, for exhibiting samples, in business buildings, or rented rooms in hotels or business buildings temporarily for that purpose.”57 In addition, they had no authority to accept orders. All the orders they solicited were to be transmitted to International Shoe’s office at St. Louis for approval.58 The business operations of International Shoe in Washington were organized in such a way only because this meant it could not be considered to have a presence in Washington under the precedents at the time, thus hoping to avoid being sucked into the jurisdiction

55 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

56 Id.

57 Id. at 313-314.

58 Id. at 314.
of the state of Washington.\textsuperscript{59} When the state of Washington sued International Shoe for unpaid taxes, this fact was expected to be its strongest defense.

When the case went to the Supreme Court, it saw the case as an opportunity to reinvent the jurisdictional regime by introducing a more common sense approach of minimum contacts. Instead of changing or adding to the presence doctrine, Justice Black proclaimed that a person was subject to the jurisdiction of a court as long as he had “certain minimum contacts with [the forum] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.'”\textsuperscript{60} Applying this new minimum contacts doctrine to \textit{International Shoe}, the court found the company’s business activities in the state of Washington to have been systematic and continuous and, therefore, had no difficulty finding minimum contacts.\textsuperscript{61}

Since \textit{International Shoe}, we have entered into the era of minimum contacts. All the efforts of subsequent courts have been directed towards interpreting and refining what “minimum contacts” mean and whether the conduct of a person fits into that definition. Notably, there have been two important interpretations, namely purposeful availment; and the distinction between specific and general jurisdiction. First, the Supreme Court found that “the constitutional touchstone remains whether [or not] the defendant

\textsuperscript{59} \textit{Id.} at 315 (“Appellant also insists that its activities within the state were not sufficient to manifest its ‘presence’ there and that in its absence the state courts were without jurisdiction...It refers to those cases in which it was said that the mere solicitation of orders for the purchase of goods within a state, to be accepted without the state and filled by shipment of the purchased goods interstate, does not render the corporation seller amenable to suit within the state.”).

\textsuperscript{60} \textit{Id.} at 316.

\textsuperscript{61} \textit{Id.} at 320.
purposefully established ‘minimum contacts’ in the forum state.”\textsuperscript{62} Then the court asks “whether the defendant purposefully avails himself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”\textsuperscript{63} With this, the court has injected a mental aspect to the test.

Second, the Supreme Court further subdivides personal jurisdiction into two categories: specific jurisdiction and general jurisdiction. These two categories of personal jurisdiction are based on the reading of \textit{International Shoe}\textsuperscript{64} and adopted by the Supreme Court in \textit{Helicopteros Nacionales de Columbia v. Hall}.\textsuperscript{65} Specific jurisdiction stands for the kind of personal jurisdiction that “aris[es] out of or relate[s] to the defendant's contacts with the forum.”\textsuperscript{66} At the other end of the spectrum, general jurisdiction covers the situation where the suit does not “aris[e] out of or relate to the defendant's contacts with the forum”\textsuperscript{67} yet the “continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.”\textsuperscript{68}

Overall, the minimum contacts era firmly establishes the long arm jurisdiction of the courts beyond territorial jurisdiction. Specific and general jurisdictions further set up

\begin{itemize}
\item \textsuperscript{62} Burger King Corp. v. Rudzewicz 471 U.S. 462, 474.
\item \textsuperscript{63} Hanson v. Denckla, 357 U.S. 235, 253 (1958).
\item \textsuperscript{64} \textit{See} Von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv.L.Rev. 1121, 1136–1164 (1966).
\item \textsuperscript{65} 466 U.S. 408 (1984).
\item \textsuperscript{66} \textit{Id.} at 414 n8.
\item \textsuperscript{67} \textit{Id.} at 414 n9.
\item \textsuperscript{68} \textit{International Shoe} 326 U.S. 310, 318 (1945).
\end{itemize}
the spectrum of the types of activities that constitute minimum contacts, be it a one-off act directly related to the suit in question or substantial activities in the forum that are unrelated to the claim. It must also be noted that the minimum contacts test only serves as the outer limit to the state’s long arm jurisdiction.69 States can set out the extent of the long arm jurisdiction they wish to exercise by way of their respective long arm statute as long as it is within the constitutional limit.70 For example, Ohio does not allow the assumption of general jurisdiction as none of the prongs under the Ohio’s long arm statute allows for such a type of jurisdiction.71 On the other hand, most states have extended their jurisdiction under long arm statutes to the maximum limit allowed under minimum contacts.72 For these states, the two prongs of jurisdiction analysis (minimum contacts and state long-arm statute) have merged into one and they simply need to apply the minimum contacts test.73

Finally, it must be noted that International Shoe did not refer to Cannon nor jurisdictional piercing in general. However, as far as the particular facts in Cannon are concerned, jurisdictional piercing is no longer required under the minimum contacts test.

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69 See Le Bleu Corp. v. Standard Capital Grp., Inc., 11 F. App’x 377, 379 (4th Cir.2001) (“North Carolina’s long-arm statute “has been interpreted to extend to the outer limits allowed by the Due Process Clause.”).

70 Id.

71 Conn v. Zakharov, 667 F.3d 705, 717 (“Ohio law does not appear to recognize general jurisdiction over non-resident defendants, but instead requires that the court find specific jurisdiction under one of the bases of jurisdiction listed in Ohio’s long-arm statute.”).

72 See Blumberg, supra note 24, at 23-9 n22.

73 See e.g. Young v. New Haven Advocate, 315 F.3d 256, 261 (4th Cir.2002) (“As Virginia’s general long-arm statute extends personal jurisdiction to the fullest extent permitted by due process, the statutory inquiry merges with the constitutional inquiry.”).
In *Cannon*, the contract which was the subject of complaint was entered into by a Maine parent instead of the Alabama subsidiary.\(^7^4\) Considering that the dispute arose directly from a contract between the Maine parent corporation and the North Carolina plaintiff, the suit should fall squarely within the specific jurisdiction of the North Carolina court. However, what if the Maine parent learned from the case and ring-fenced its jurisdictional exposure by having the Alabama subsidiary entered into the transaction with the North Carolina plaintiff? Will the court still have jurisdiction over the Maine parent? The chess match between the court and the big corporations continues in this latest stage of the jurisdictional development.

*Stage 2a – Jurisdictional Piercing*

Minimum contacts appear to solve a large part of the problem that arises from out-of-state companies doing in-state business. However, the outer limit of minimum contacts continues to be a matter of huge controversy. For specific jurisdiction, the biggest problem is what is known as the “stream of commerce.”\(^7^5\) This metaphor represents “an extensive chain of distribution” that the product has been through before

\(^7^4\) *See* Cannon Mfg. Co. v. Cudahy Packing Co., 292 F. 169, 170 (1923) (“The transactions out of which the alleged breach of contract in the present case grew had no relation to any activity of the Alabama corporation. The alleged contract was made solely with the packing company, the Maine corporation…, and the Alabama corporation, as such, is in no way concerned with the merits of the controversy.”).

\(^7^5\) This term was mentioned by the Supreme Court in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-298 (“The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.”).
reaching the ultimate consumer in product liability cases.\textsuperscript{76} If the out-of-state defendant simply sold its products through this stream of commerce through which it would be reasonably foreseeable to land in the hands of the ultimate users in the forum, will that constitute a basis for the assumption of specific jurisdiction by the forum court? In \textit{Asahi Metal Industry Co. v. Superior Court of California},\textsuperscript{77} the Supreme Court was split on that question. Four justices led by Justice O’Connor opined that “the placement of a product into the stream of commerce, without more,”\textsuperscript{78} would not be sufficient to establish specific jurisdiction. There must be additional conducts by the defendant that indicate “an intent or purpose to serve the market in the forum State.”\textsuperscript{79} These include “designing the product …, advertising …, establishing channels for providing regular advice to customers …, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.”\textsuperscript{80} This is known as the “stream of commerce plus” approach.\textsuperscript{81} On the other hand, four other justices led by Justice Brennan were of the opinion that the awareness of the defendant of the distribution system along with economic benefits that resulted from the sale would be sufficient for the finding of minimum contacts.\textsuperscript{82} The court ultimately agreed to dismiss the case for failing to comply

\textsuperscript{76} \textit{Goodyear} 131 S.Ct. 2846, 2854-2855 (2011).

\textsuperscript{77} 480 U.S. 102 (1987).

\textsuperscript{78} \textit{Id.} at 112.

\textsuperscript{79} \textit{Id.}

\textsuperscript{80} \textit{Id.}


\textsuperscript{82} \textit{Id.} at 845 (“although [the Japanese manufacturer] did not design or control the system of distribution that carried its valve assemblies into [the forum], the [manufacturer] was aware of the distribution system's
with the reasonableness prong of *International Shoe*. By the time of the trial, the original U.S. plaintiff had already settled with the Taiwanese manufacturer, and the only issue remained in the lawsuit was between the Taiwanese manufacturer and the Japanese component manufacturer. All the justices thus concurred that the assumption of jurisdiction in such a case would not be consistent with the “traditional notions of fair play and substantial justice.”

For general jurisdiction, the exact situations in which it would be triggered were still unclear due to a lack of precedents by the Supreme Court. Although the distinction between specific and general jurisdictions was clearly adopted by the Supreme Court in *Helicopteros*, the Supreme Court in *Helicopteros* failed to find general jurisdiction. The lone case recognized by the Supreme Court as an example of the exercise of general jurisdiction was *Perkins v. Benguet Consol. Mining Co.* However, the case is rather dated and was decided before the formal adoption of general jurisdiction in *Helicopteros*.

As a result, on June 27, 2011 the Supreme Court took the opportunity to address these problems of specific and general jurisdictions in two separate cases. First, the

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84 *Id.* at 121.

85 *See Helicopteros*, 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404 (finding that helicopter purchases and purchase-linked activity in Texas were insufficient for the assumption of the general jurisdiction against the defendant in Texas.).

86 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952) (finding jurisdiction over a Philippine corporation that managed its business in Ohio during the Japanese occupation of the Philippine.).
stream of commerce issue was discussed in McIntyre. In that case, a worker was injured in New Jersey whilst operating an allegedly defective machine manufactured by McIntyre UK, a company incorporated and with its principle place of business in the UK. The issue was whether the New Jersey court could exercise specific jurisdiction over McIntyre UK, a company which did not have a branch nor did business directly in New Jersey. In fact, all transactions, including the transaction that brought the machine to New Jersey, were conducted through a separate agent based in Ohio. This Ohio agent was authorized by McIntyre UK to use the name McIntyre America (hereinafter “McIntyre USA”) and served as the exclusive U.S. distributor of McIntyre UK. Other than the sale through McIntyre USA, the only relevant contacts of McIntyre UK consisted of (1) the official of McIntyre UK participating in certain trade exhibitions in Las Vegas, and (2) four machines manufactured by McIntyre UK ending up in New Jersey. Using the stream of commerce metaphor, will the placement of the McIntyre machines through the distribution by McIntyre USA in Ohio and eventually reaching the ultimate user in New Jersey provide the New Jersey court with specific jurisdiction?

Despite the intention to solve the “decades-old questions left open in Asahi,” the Supreme Court once again failed to come to a consensus on the issue. Four justices led by Justice Kennedy held firm to the stream of commerce plus approach and rejected

87 131 S. Ct. 2780 (2011).
88 Id.
89 Id. at 1258.
90 Id. at 2785.
foreseeability on its own as a way of satisfying the purposeful availment requirement for minimum contacts. On the other hand, Justice Ginsburg, in a strong dissenting opinion joined by two other justices, criticized the plurality on a number of points, including the plurality’s reliance on outdated doctrines of sovereignty and implied consent. Of particular interest in the discussion of this chapter, she found minimum contacts against McIntyre UK by highlighting, inter alia, the role of McIntyre USA in McIntyre UK’s plan to penetrate the U.S. market. However, specific jurisdiction was in the end denied since the remaining two justices in Justice Breyer’s concurring opinion simply thought the assumption of jurisdiction would be inconsistent to established precedents but did not agree with the plurality’s reasoning. Since the justices failed to reach a majority judgment on stream of commerce, we are left in the exact same position as prior to McIntyre. Lower courts that previously adopted the stream of commerce approach have continued to do so after McIntyre.

91 See id. at 2788 (“as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State…”).

92 See id. at 2794-2804.

93 See id. at 2796-2798.

94 See id. (“I again reiterate that I would adhere strictly to our precedents and the limited facts found by the New Jersey Supreme Court. And on those grounds, I do not think we can find jurisdiction in this case. Accordingly, though I agree with the plurality as to the outcome of this case, I concur only in the judgment of that opinion and not its reasoning.”).

95 See e.g. In re Chinese Manufactured Drywall Prods.Liab. Litig., 894 F. Supp. 2d 819, 844 (E.D. La. 2012) (“The Fifth Circuit has unequivocally declared its adherence to Justice Brennan's concurrence in Asahi and the stream-of-commerce doctrine originated in World–Wide Volkswagen...Thus, the Court must reject the “stream-of-commerce-plus” approach to specific personal jurisdiction in favor of the less stringent “stream-of-commerce” approach.”).
As for general jurisdiction, its application was put to the test in *Goodyear Dunlop Tires Operations, S.A. v. Brown.* In this case, two boys were killed in a traffic accident outside Paris, France. Their parents initiated an action in North Carolina against the subsidiaries of Goodyear in Europe, alleging negligence in the manufacture of defective tires that caused the injury. In contrast with the case in *McIntyre,* the action and injury complained of in *Goodyear* all happened in France and there was clearly no application of specific jurisdiction. Instead, the plaintiff argued that the defendants should be subject to the general jurisdiction of the North Carolina court for placing their products in the stream of commerce to North Carolina. The Supreme Court rejected this argument as stream of commerce is confined to specific jurisdiction analysis. It also took the opportunity to restate the general jurisdiction doctrine. Most notably, the Court tried to confine the applicability of general jurisdiction to the “home” of the defendant: [f]or an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is

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97 Id.
98 Id. at 2852 (“They have no place of business, employees, or bank accounts in North Carolina. They do not design, manufacture, or advertise their products in North Carolina. And they do not solicit business in North Carolina or themselves sell or ship tires to North Carolina customers.” The only direct connection is “a small percentage of their tires were distributed in North Carolina by other Goodyear USA affiliates.”).
99 Id. (“Acknowledging that the claims neither “related to, nor ...ar[0]se from, [petitioners’] contacts with North Carolina,” the Court of Appeals confined its analysis to “general rather than specific jurisdiction.”).
100 Id. at 2854-2855.
101 Id. at 2855 (“Flow of a manufacturer’s products into the forum, we have explained, may bolster an affiliation germane to specific jurisdiction...But ties serving to bolster the exercise of specific jurisdiction do not warrant a determination that, based on those ties, the forum has general jurisdiction over a defendant.”).
fairly regarded as at home [such as] place of incorporation, and principal place of business.”

The most significant point of the judgment for our purpose, however, is the brief discussion of piercing the corporate veil as a potential alternative to acquiring jurisdiction. As an alternative to the failed general jurisdiction argument, the plaintiff sought to “pierce the corporate veil of the European subsidiaries to impute the contacts of Goodyear to such subsidiaries.” Unfortunately, the court regarded the plaintiff as having forfeited the argument and did not discuss the viability nor substantive test of the jurisdictional piercing. The court, however, did not reject piercing the corporate veil as a way that could potentially grant jurisdiction to the forum.

Both Goodyear and McIntyre indicate the new problem the courts face with corporate groups. It is true that the long arm jurisdiction established under International Shoe allowed the courts to extend their jurisdiction upstream to reach the out-of-state corporations which either have directly committed the conduct being complained about (specific jurisdiction) or have directly conducted such a high volume of activities in the forum that the relatedness thereof does not matter (general jurisdiction). However, the out-of-state manufacturers could simply cut off the reach of the court by setting up a separate subsidiary or agent downstream to handle its affairs in the forum, such as the distribution of the goods. Using the stream of commerce metaphor, setting up subsidiaries

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102 Id. at 2845.


104 Id.
essentially builds a dam and blocks the courts from tracing upstream. Whilst the deadlock in the stream of commerce continues post-*McIntyre*, companies are encouraged to utilize sophisticated corporate structures to avoid jurisdictional exposure.

By the same token, suing parent companies at their upstream “home” is equally difficult. As *Goodyear* has shown even though Goodyear is subject to general jurisdiction at its place of incorporation and principal place of business, these fora are not considered as “home” for its out-of-state subsidiaries. Whilst it is argued that the value of general jurisdiction is to ensure that there will always be at least one forum in which a plaintiff can sue,¹⁰⁵ such alleged value can be substantially dissipated by simply having the subsidiaries do the “dirty work” out of state.

In short, setting up intermediaries that are corporate could effectively stop the plaintiff from pursuing the corporate parent either from the place of act/injury through specific jurisdiction or from the place of incorporation/principal place of business through general jurisdiction. Thus, in the next Supreme Court case on jurisdiction, that of *Daimler AG v. Bauman*,¹⁰⁶ there was a bold attempt by the plaintiff to sidestep the corporate structure through the use of the agency doctrine.

In *Daimler*, a number of Argentinians filed suits in California against Daimler AG, a German company, for its violation of human rights in Argentina during Argentina’s “Dirty War.”¹⁰⁷ They claimed that California had general jurisdiction over Daimler AG

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¹⁰⁶ 134 S.Ct. 746 (2014).
¹⁰⁷ *Id.*
in two ways. First, there was direct general jurisdiction over Daimler AG.\(^{108}\) Second, there was jurisdiction under an agency theory. The jurisdictional contacts of MBUSA, the subsidiary of Daimler AG in the United States with extensive operations in California, are to be imputed to Daimler AG since MBUSA has served as its agent in California.\(^{109}\) Both arguments failed. As for the direct general jurisdiction based on Daimler AG’s own contacts with California, this had failed in the lower court.\(^{110}\) Thus, the focus of the case was on the agency prong. Under the test approved by the Ninth Circuit, the court should ask whether the subsidiary “performs services that are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation’s own officials would undertake to perform substantially similar services.”\(^{111}\) This was considered by the Supreme Court to be too broad. If such a test were to be adopted, “[a]nything a corporation does through an independent contractor, subsidiary, or distributor is presumably something that the corporation would do ‘by other means' if the independent contractor, subsidiary, or distributor did not exist.”\(^{112}\)

Further, Justice Ginsburg was of the opinion that even if there was found to be agency between MBUSA and Daimler AG, California still could not be regarded as

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\(^{108}\) *Id.* at 751 (“Plaintiffs invoked the court's general or all-purpose jurisdiction. California, they urge, is a place where Daimler may be sued on any and all claims against it, wherever in the world the claims may arise.”).

\(^{109}\) *Id.* at 752 (“Alternatively, plaintiffs maintained that jurisdiction over Daimler could be founded on the California contacts of MBUSA, a distinct corporate entity that, according to plaintiffs, should be treated as Daimler's agent for jurisdictional purposes.”).

\(^{110}\) *Id.* (“Daimler's own affiliations with California, the court first determined, were insufficient to support the exercise of all-purpose jurisdiction over the corporation.”).

\(^{111}\) *Id.* at 759.

\(^{112}\) *Id.*
“home” to Daimler AG.113 Elaborating on the “home” concept that she developed in Goodyear, Justice Ginsburg further narrowed down the potential home that one can make for a corporation. She emphasized that a home could not be found whenever “a foreign corporation's in forum contacts can be said to be in some sense ‘continuous and systematic’”114 but that it must be “‘continuous and systematic’ as to render [it] essentially at home in the forum State.”115 Accordingly, general jurisdiction does not apply because California is not the state of incorporation nor the principal place of business for either MBUSA or Daimler. It appears that being a large market for one’s products and having substantial profits are not sufficient to satisfy the restated general jurisdiction test of Justice Ginsburg.116

Finally, on jurisdictional piercing, Justice Ginsburg recognized that “several Courts of Appeals have held, that a subsidiary's jurisdictional contacts can be imputed to its parent only when the former is so dominated by the latter as to be its alter ego.”117 Furthermore, the Ninth Circuit’s aforementioned agency test was “less rigorous” than the jurisdictional piercing test. Unfortunately, since the jurisdictional piercing was never raised in the proceedings, the Supreme Court again failed to make an authoritative statement on the viability and substance of the doctrine.118 However, with the Supreme

113 Id.
114 Id. at 761.
115 Id.
116 Id. at 766-767 (“MBUSA's California sales account for 2.4% of Daimler's worldwide sales… in 2004 [a]nd… $4.6 billion.”).
117 Id. at 759.
118 Id. at 758.
Court rejecting agency\textsuperscript{119} as the alternative avenue in acquiring jurisdiction, the confusing status of stream of commerce, and with \textit{Daimler} further narrowing the possible home available for general jurisdiction, jurisdictional piercing appears to be the best hope for expanding the existing jurisdictional reach under due process.

Some lower courts have interpreted the treatment of jurisdictional piercing under \textit{Goodyear} and \textit{Daimler} and have regarded both cases as positive precedents for the doctrine. In \textit{Viega GmbH v. Eighth Jud. Dist. Ct.},\textsuperscript{120} whilst acknowledging that \textit{Goodyear} did not openly approve jurisdictional piercing, the court was of the opinion that \textit{Goodyear} had “impl[ied],” but not “decid[ed],” that an alter ego theory would be appropriate in such a situation.\textsuperscript{121} After \textit{Daimler} was decided, the same optimism was expressed in \textit{NYKCool A.B. v. Pacific Intern. Services, Inc.}\textsuperscript{122} The court in that case stressed that alter ego, unlike agency, is the appropriate theory in obtaining jurisdiction: “[t]he Court did not express any doubt as to the soundness of an alter ego theory of jurisdiction, which is present only in the rather different circumstance in which one person or entity truly dominates another so that the two are indistinguishable for practical purposes.”\textsuperscript{123}

On the other hand, other courts took a more neutral stance and simply regarded the new round of Supreme Court cases as not adding any substance to the doctrine. For

\textsuperscript{119} At least as far as the version previously adopted by the Ninth Circuit.

\textsuperscript{120} 328 P.3d 1152.

\textsuperscript{121} \textit{Id.} at 1157.

\textsuperscript{122} 66 F.Supp.3d 385.

\textsuperscript{123} \textit{Id.} at 393.
example, in *In re Chinese Manufactured Drywall Prods. Liab. Litig.*,124 it was stated that “in the recent Supreme Court cases addressing personal jurisdiction over foreign defendants the Court either declined to address the imputation of minimum contacts between affiliated corporate entities, the issue was not before the Court [in] Goodyear.”125

While the law is not clear at this stage, the potential of jurisdictional piercing may be illustrated by the three cases above. First, for general jurisdiction, by disregarding the subsidiary’s corporate existence, jurisdictional contacts might be attributed upstream from the subsidiary (MBUSA) to the parent (Daimler AG) or downstream from the parent (Goodyear) to the subsidiary (European subsidiaries). The upstream attribution will not have the aforementioned issue of agency where the agent’s home is not significant enough to be the principal’s home.126 This is because jurisdictional piercing will make the parent and subsidiary one entity for the purpose of general jurisdiction. The home of the subsidiary will automatically be the home of the parent. For downstream attribution, jurisdictional piercing also avoids the issue of whether the jurisdictional

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125 *Id.* at 867 (citation omitted).

126 *See supra* notes 115 & 116.
contacts of the principal could be imputed to the agent. In the terminology of liability piercing, this upstream attribution is regarded as reverse piercing.

Second, for specific jurisdiction, although the court did not even mention piercing as a possible alternative in McIntyre, we can still see the potential application of piercing the corporate veil in that very case. Although McIntyre USA was not a subsidiary and shareholding is usually present in piercing the corporate veil, most states allow for piercing the corporate veil over unrelated companies, at least as far as liability piercing is concerned. For these jurisdictions, shareholding is but one factor of the piercing question, the lack of which is not fatal to the claim. New Jersey, the forum of the McIntyre case, happens to be one of these jurisdictions. Thus, if the control exercised by McIntyre UK over McIntyre USA was so extensive, there was a chance the two companies could be regarded as one for the purpose of jurisdiction.

127 See Brilmayer & Paisley, supra note 21 at 19 (“it is more plausible to impute the contacts of the agent to the principal than vice versa. Agents act on behalf of their principals, to whom their activities are attributed... Normally, ...control is asymmetric, so that it will be easier to show jurisdiction over the principal based upon the agent's actions than the converse.”).

128 Admittedly, reverse piercing is not accepted in all states in liability piercing contexts. It is noted however that the Supreme Court at least did not reject outright reverse piercing for jurisdictional purposes in Goodyear.

129 See Buckley v. Abuzir, 8 N.E.3d 1166, 1173, 1176-1177 (“our research shows that the majority of jurisdictions addressing this question allow veil-piercing against nonshareholders... In short, the weight of authority supports the conclusion that lack of shareholder status—and, indeed, lack of status as an officer, director, or employee—does not preclude veil-piercing. Illinois falls in line with the majority.”).

130 See Angelo Tomasso, Inc. v. Armor Construction & Paving, Inc., 187 Conn. 544, 447 A.2d 406, 412 (1982) (“stock ownership, while important, is not a prerequisite to piercing the corporate veil but is merely one factor to be considered in evaluating the entire situation.”).

Looking closer at the lower court’s judgment, it seems that there was substantial control applied by McIntyre UK over McIntyre USA:

“[The correspondence between McIntyre UK and McIntyre USA] support the reasonable inference that [McIntyre UK] retained a significant measure of control over the level of McIntyre America's inventory of defendant's machines, which remained defendant's property until McIntyre America sold them to United States customers. It is also reasonable to infer that [McIntyre UK] dictated the “margin” or “commission” McIntyre America would receive when a sale was accomplished. It is thus evident that the two companies were acting closely in concert with each other to sell defendant's machines to customers throughout the United States, through a distribution system in which McIntyre America was a conduit for the sales.”¹³²

Whether this alleged control will be sufficient to pierce the corporate veil of McIntyre UK remains unclear; it simply shows the possibility under jurisdictional piercing. In the right case, piercing the corporate veil can bridge the gap between the two divisions of the Supreme Court on stream of commerce. The plus factors listed by Justice O’Connor are not exhaustive.¹³³ Exercising a level of excessive control that could amount to piercing the corporate veil seems to be at least as good a plus factor as designing or marketing the products in the forum.¹³⁴


¹³³ See supra note 81.

¹³⁴ Id.
Potentials aside, the effectiveness of jurisdictional piercing still hinges on the formulation of the courts. For example, if the forum in McIntyre were Texas, the lack of shareholding between McIntyre UK and McIntyre USA could be fatal as Texas law regards shareholding as essential in piercing the corporate veil. A bird’s-eye view of the key precedents shows highly fragmented approaches among different states, both in their choice of law approaches as well as their attitudes toward adopting the test of liability piercing for the purpose of jurisdictional piercing. These issues are further analyzed in Section 3 below.

3. The Questions and Findings

There are four important questions to ask when it comes to jurisdictional piercing:

In what situations is jurisdictional piercing generally applied?

1. What is the relationship between jurisdictional piercing and liability piercing?

2. What is the relationship between jurisdictional piercing, agency and direct jurisdiction?

How will jurisdictional piercing be applied?

3. Should state law or federal law govern the jurisdictional piercing question? If it were state law, which state’s law?

4. Should the substantive test of jurisdictional piercing be the same as that of liability piercing?

135 See Bollore S.A. v. Import Warehouse, Inc., 448 F.3d 317, 325 (5th Cir.2006) (“[t]he great weight of Texas precedent indicates that, for the alter ego doctrine to apply against an individual under this test, the individual must own stock in the corporation.”).
After setting out the background and importance of these questions, the answers derived from the findings from empirical research are given. We will however look at some basic findings first.
Basic Findings

Table 5.1 - Number of Jurisdictional Piercing Cases

<table>
<thead>
<tr>
<th>Year</th>
<th>No. of piercing cases</th>
<th>No. of conflict cases</th>
<th>% of conflict cases in piercing cases</th>
<th>No. of jurisdiction piercing cases</th>
<th>% of jurisdiction piercing cases in conflict cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012</td>
<td>340</td>
<td>253</td>
<td>74.41%</td>
<td>44</td>
<td>17.39%</td>
</tr>
<tr>
<td>2013</td>
<td>348</td>
<td>266</td>
<td>76.44%</td>
<td>32</td>
<td>12.03%</td>
</tr>
<tr>
<td>2014</td>
<td>356</td>
<td>291</td>
<td>81.74%</td>
<td>29</td>
<td>9.97%</td>
</tr>
<tr>
<td>Total</td>
<td>1,044</td>
<td>810</td>
<td>77.59%</td>
<td>105</td>
<td>12.96%</td>
</tr>
</tbody>
</table>

There are 105 jurisdictional cases and these accounted for 10.67% and 12.96% of the piercing cases and conflict cases respectively. It is clear that jurisdictional piercing happened much less often than liability piercing. However, with more than 100 cases relatively evenly distributed over three years, they still represent a substantial amount and prove that jurisdictional piercing is an established legal doctrine in contemporary jurisprudence. In addition, comparing these with the jurisdictional piercing cases of the Thompson Study, it should be apparent that there has been an increase in jurisdictional piercing cases in the modern era. The Thompson Study only has 141 jurisdictional cases.
up to 1985,\textsuperscript{136} just roughly four times the number of cases in an average year covered by this research.

However, the significance of jurisdictional piercing cases goes beyond the sheer number from both a jurisdictional and liability perspective. First, as discussed in Section 2, if the Supreme Court formally adopts piercing the corporate veil as a way to establish jurisdiction and sets out the substantive test, jurisdictional piercing will increase exponentially and open up a whole new horizon for the jurisdictional regime. Second, in regard to liability piercing, jurisdictional piercing successes are determinative to any accompanying liability piercing. If the defendant successfully defeats jurisdictional piercing, the courts will have no jurisdiction and hence no authority to adjudicate on any liability piercing. Thus, success in jurisdictional piercing essentially guarantees success in liability piercing.

Finally, jurisdictional piercing impacts on the other choice of law issues discussed in this thesis. On choice of law, we have seen in Chapter 4 that the first step of the suggested approach on choice of law on piercing is to distinguish liability piercing and jurisdictional piercing. This choice of law aspect will be discussed in depth below. Further, successful jurisdictional piercing also provides more fora and therefore conflict cases for choice of law analysis. The role of jurisdiction to enforcement piercing will be discussed in Chapter 6.

However, jurisdictional piercing cases have been on the decline over the past three years, from 44 cases in 2012 to 29 in 2014. This is a rather interesting development especially when both the numbers of piercing cases and conflict cases increased during the same period. One of the explanations could be the rejection of agency as an alternative way to acquire jurisdiction in *Daimler*. While the Supreme Court was clear that it did not reject jurisdictional piercing, both agency and jurisdictional piercing are a kind of vicarious jurisdiction based on imputing the contacts of the in-state’s subsidiary to the out-of-state parent.\(^{137}\) Rejecting agency, therefore, could have a chilling effect on jurisdictional piercing on lower courts. That said, this might not be the best explanation considering that the big drop in jurisdictional piercing cases predated *Daimler* and started in 2013.

The chilling effect of *Daimler* might arguably be present in the drop in piercing rate as shown below in Table 5.2.

\(^{137}\) *See* Brilmayer & Paisley, *supra* note 21 at 18-19.
<table>
<thead>
<tr>
<th></th>
<th>Piercing cases</th>
<th>Conflict cases</th>
<th>Jurisdictional cases</th>
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</thead>
<tbody>
<tr>
<td><strong>2012</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>No. of cases</td>
<td>340</td>
<td>253</td>
<td>44</td>
</tr>
<tr>
<td>Pierced cases (%)</td>
<td>113 (33.24%)</td>
<td>91 (35.97%)</td>
<td>8 (18.18%)</td>
</tr>
<tr>
<td><strong>2013</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>No. of cases</td>
<td>348</td>
<td>265</td>
<td>32</td>
</tr>
<tr>
<td>Pierced cases (%)</td>
<td>133 (38.22%)</td>
<td>105 (39.6%)</td>
<td>15 (46.88%)</td>
</tr>
<tr>
<td><strong>2014</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>No. of cases</td>
<td>355</td>
<td>292</td>
<td>29</td>
</tr>
<tr>
<td>Pierced cases (%)</td>
<td>122 (34.37%)</td>
<td>102 (34.93%)</td>
<td>8 (27.59%)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>No. of cases</td>
<td>1,043</td>
<td>810</td>
<td>105</td>
</tr>
<tr>
<td>Pierced cases (%)</td>
<td>368 (35.28%)</td>
<td>298 (36.79%)</td>
<td>31 (29.52%)</td>
</tr>
</tbody>
</table>

The piercing rate for the piercing cases covered in the research is 35.25%, lower than the 40.18% in the Thompson Study. However, while the relevant piercing rates of conflict cases is similar, at 36.79%, the piercing rate for jurisdictional piercing cases
dropped significantly to just 29.52%. This indicates a substantially bigger challenge to piercing the corporate veil in jurisdictional piercing cases. This difference in piercing rates between general piercing cases and jurisdictional piercing cases is also observed in the Thompson Study. The jurisdictional piercing rate there is 36.88% compared with an overall piercing rate of 40.18% for all cases.138 The jurisdictional piercing rate of the Thompson Study is higher than the one here but so is the difference between the two studies in overall piercing rate.

The piercing rate for jurisdictional piercing dropped from 46.88% in 2013 to 29.52% in 2014. Considering that Daimler was decided in January 2014, one could attribute the drop in 2014 almost entirely to Daimler. However, the data is limited to just one year in 2014. In addition, we can see that the piercing rate of 2014 is still higher than that of 2012. An argument therefore can be made that the 2013 high piercing rate might be just an outlier instead. Further, very few cases covered in the research actually cited Goodyear or Daimler. Particularly with regard to Daimler and those jurisdictional piercing cases that have cited Daimler are generally positive on its impact on jurisdictional piercing, 139 it will be interesting to see if the low piercing rate and drop in jurisdictional piercing cases continue.

138 Thompson Study, supra note 137 at 1060.
139 See supra note 10.
Question 1 - What is the relationship between jurisdictional piercing and liability piercing?

Normally, there will be two related companies. As mentioned earlier in the discussion of McIntyre, they do not however necessarily need to have a shareholding of one another. These will be termed “C1” and “C2” hereinafter. Since the purpose of jurisdictional piercing is to impute jurisdictional contacts from one entity to another, generally only one of them will be subject to the jurisdiction of the forum but not the other. The same goes with liability and we will assume for the purpose of discussion that only one entity is liable or subject to the forum’s direct jurisdiction. In addition, one related question is whether the jurisdictional piercing is raised alongside traditional liability piercing. Jurisdictional piercing might be raised together with liability piercing or they might each be raised respectively and independent of each other. Having regard to the above considerations, the exposure of C1 in terms of liability and/or jurisdiction based on its relationship with C2 can be presented in four possible scenarios:

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140 See supra note 132.
**Table 5.3 - Interactions between jurisdictional piercing and liability piercing**

<table>
<thead>
<tr>
<th>C1 under forum’s jurisdiction</th>
<th>C2 under forum’s jurisdiction</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>C1 liable</strong></td>
<td></td>
</tr>
<tr>
<td>No JP, No LP</td>
<td>JP but no LP – 80 cases</td>
</tr>
<tr>
<td></td>
<td>with piercing rate of 26.25%</td>
</tr>
<tr>
<td></td>
<td><strong>1</strong></td>
</tr>
<tr>
<td><strong>C2 liable</strong></td>
<td></td>
</tr>
<tr>
<td>No JP but LP – 938 cases</td>
<td>JP &amp; LP - 25 cases with JP</td>
</tr>
<tr>
<td>with piercing rate of 35.93%</td>
<td>piercing rate of 40% and LP</td>
</tr>
<tr>
<td>(conflict 705 cases; non-</td>
<td>piercing rate of 28%</td>
</tr>
<tr>
<td>conflict 233 cases)</td>
<td></td>
</tr>
<tr>
<td><strong>4</strong></td>
<td></td>
</tr>
</tbody>
</table>

1 The use of table for presentation is inspired by Brilmayer & Paisley, supra note 21, at 9. However, the purpose of the table used here and that of their article are different. Their table mainly discusses relationship between jurisdictional piercing and agency.
The first thing to note from Table 5.3 is that jurisdictional piercing and liability piercing might not coincide in any given case. Based on the framework in Table 5.3, we are interested in finding out the answers to the following sub-questions:

a. How are piercing cases distributed among Boxes 2, 3 and 4?
b. How does a case falling into these boxes affect the success rate of piercing?

Box 1 represents the situation where neither type of piercing is required. In that scenario, C1 (assuming to be the company with assets to satisfy potential judgment) is the only company that committed the act that is complained of and so liability piercing is not triggered. There is also no need to apply jurisdictional piercing since C1 is subject to the direct jurisdiction of the court. This direct jurisdiction can be either general or specific. For example, if C1 is incorporated in New Jersey, it will be subject to the jurisdiction of the New Jersey courts. On the other hand, C2, the related company, does not enter into the picture either on jurisdiction or liability. Since Box 1 does not involve either type of piercing, it is not a scenario that this chapter is concerned with and the number of such cases is not known.

In Box 2, there are 80 cases, accounting for just 7.67% of all piercing cases. However, the majority of these are jurisdictional piercing cases, representing 76.19% thereof. Here, the plaintiff resorts to jurisdictional piercing against C1 but does not require liability piercing. If the plaintiff were to pursue jurisdictional piercing against McIntyre UK as we have discussed hypothetically in Section A, it will fit into Box 2. Since the plaintiff only pursued McIntyre UK for products-liability directly, there is no
need to conduct liability piercing between McIntyre UK and McIntyre USA.142 The plaintiff would also have no intention to make it shoulder the potential liability of McIntyre UK anyway since McIntyre USA had been made bankrupt by the time of the lawsuit.143

In connection with jurisdiction, since we know that the Supreme Court ultimately rejected the stream of commerce theory, direct jurisdiction over McIntyre UK could not be obtained. Instead, assuming that the control exerted by McIntyre UK over McIntyre USA was excessive and legitimate,144 jurisdictional piercing could serve as a potential avenue to make McIntyre UK subject to the jurisdiction of the New Jersey court.

The piercing rate of Box 2 cases is 26.25%, slightly lower but still in line with the piercing rate of all jurisdictional cases of 29.52%.

There are 25 cases in Box 3. Box 3 requires both types of piercing as represented by the darkest shading in Table 5.3 above. Assuming now that McIntyre UK was just a holding company based in England, and the defective machine was manufactured and sold by McIntyre USA, it will be necessary for the plaintiff to pursue both jurisdictional and liability piercing. Technically, these are two separate exercises. Depending on the respective tests under jurisdictional piercing and liability piercing, it is possible that

142 McIntyre is a products-liability case against the manufacturer, McIntyre UK. McIntyre USA, the distributor, was not a defendant in the case as it had been bankrupt at the time of the proceeding. See Nicastro v. McIntyre Mach. Am., Ltd., 945 A.2d 92, 97 (N.J. Super. Ct. App. Div. 2008) (“McIntyre Machinery America, Ltd… was defendant’s exclusive distributor in the United States prior to going bankrupt in 2001.”).

143 Id.

144 See supra note 133.
piercing might be successful regarding jurisdictional piercing but not liability piercing.\textsuperscript{145} For example, if the court applies a more lenient standard for the jurisdictional piercing, the plaintiff might be successful in requiring the defendant to defend the lawsuit in New Jersey. However, should the court apply a more demanding standard on liability piercing, the case will still fail and leave the plaintiff without any compensation.\textsuperscript{146}

Since each of the cases in Box 3 has two sets of piercing, there are two piercing rates. The piercing rate of jurisdictional piercing in Box 3 is 40\% which compares to just 26.25\% in Box 2. Thus, the observation is that the courts are more likely to pierce the corporate veil in a jurisdictional context when liability piercing is raised in the same case. However, any strategic benefits gained by the plaintiff are moot since the liability piercing rate of Box 3 cases is 28\%, not far from the 26.25\% of the Box 2 jurisdictional piercing. From the perspective of the defendant, as long as one of the two piercings is unsuccessful, it will not be liable. This might explain the small number of cases involving both jurisdictional and liability piercing in Box 3. As we will see below, this will have an impact on our analysis of the test of jurisdictional piercing.

Finally, there are 938 cases in Box 4 with a piercing rate of 35.93\%. Breaking it down further, there are 705 and 233 conflict cases and non-conflict cases respectively. Box 4 is the opposite of Box 2. There is no need for jurisdictional piercing but a need for liability piercing. Further, changing the facts of \textit{McIntyre} could help illustrate this case. It

\textsuperscript{145} Of course, if the tests for the two types of piercing are the same, one might argue for only needing one exercise of piercing for both purposes.

\textsuperscript{146} The reverse case, that is, success in liability piercing and failure in jurisdictional piercing, is more difficult to comprehend. If the plaintiff fails jurisdictional piercing in the first place, the court will be without jurisdiction to adjudicate the liability issue.
is assumed first that McIntyre UK and McIntyre USA were both New Jersey corporations and, second, that McIntyre USA was the business unit that manufactured the machine with McIntyre UK being a holding company. For the plaintiff to get any financial compensation, he will have to pierce the corporate veil of McIntyre USA in order to reach McIntyre UK since McIntyre USA is bankrupt. On the other hand, since both corporations are subject to the general jurisdiction of the New Jersey courts, there will be no need for jurisdictional piercing. This case did not involve jurisdictional piercing nor did it involve conflict of laws. Everything happened in New Jersey and all parties were based in New Jersey.¹⁴⁷

Having regard to the above, it appears that we are most interested in Boxes 2 and 3 as both involve jurisdictional piercing. However, cases covered in Box 4 could still be relevant even if they only involve liability piercing. This is because a large percentage of jurisdictional piercing cases actually borrow their tests from liability piercing as we will see in the discussion of Question 3 below.¹⁴⁸

¹⁴⁷ However, it is possible to have a conflict of law case affecting liability piercing but does not involve jurisdictional piercing. For example, if we keep McIntyre USA as an Ohio corporation, there will still be general jurisdiction over McIntyre UK and hence no need for jurisdictional piercing. But in terms of which law governing the liability piercing issue, there will be a choice of law issue. The court may have to decide whether to apply Ohio law, the state of incorporation of McIntyre USA, or New Jersey law, the law of forum.

¹⁴⁸ One could also argue that liability piercing is pre se relevant to jurisdictional piercing since piercing is a concept originated from liability piercing.
Question 2 - What is the relationship between jurisdictional piercing, agency and direct jurisdiction?

As *Daimler* has shown, plaintiffs often endeavor to acquire jurisdiction over the out-of-state parent by both direct jurisdiction (either general or specific) and by other forms of vicarious jurisdiction (agency and/or jurisdictional piercing). Question 2 explores the relationship between direct jurisdiction and jurisdictional piercing. The following sub-questions are derived from the framework in Table 5.3:

a. Are the jurisdictional piercing claims accompanied by a direct jurisdiction claim under traditional minimum contacts theory and/or agency?

b. How does the availability of direct jurisdiction claim affect the piercing rate?

Both Questions 1 and 2 are important because they could affect the plaintiff’s strategic decision in formulating his/her jurisdictional piercing argument.

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149 See supra notes 109 & 110.
Table 5.4 - Relationship with direct jurisdiction and agency

<table>
<thead>
<tr>
<th></th>
<th>Jurisdictional piercing only</th>
<th>Jurisdictional piercing with direct jurisdiction</th>
<th>Jurisdictional piercing with agency</th>
<th>Jurisdictional piercing with direct jurisdiction and agency</th>
</tr>
</thead>
<tbody>
<tr>
<td>No. of cases</td>
<td>42</td>
<td>45</td>
<td>4</td>
<td>10</td>
</tr>
<tr>
<td>Piercing cases</td>
<td>18</td>
<td>8</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Piercing rate</td>
<td>42.86%</td>
<td>17.78%</td>
<td>50%</td>
<td>20%</td>
</tr>
<tr>
<td>Cases with jurisdiction</td>
<td>42</td>
<td>10</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Success rate of finding jurisdiction</td>
<td>42.86%</td>
<td>22.22%</td>
<td>50%</td>
<td>30%</td>
</tr>
</tbody>
</table>

Table 5.4 shows the extent of the impact on the piercing rate of both finding piercing and jurisdiction by having a direct jurisdiction discussion under the minimum contacts test and/or agency in the same case. All jurisdictional cases are divided into the four categories in Table 5.4 based on the type of jurisdictional discussions by the court in each case. For the interests of the plaintiff, it does not matter under what basis the court acquires jurisdiction against the defendant as long as one of the bases succeeds.
Accordingly, apart from showing the jurisdictional piercing rates under each category, the overall success rates of finding jurisdiction are also included. The distribution of simple jurisdictional piercing cases and those with additional arguments are about even, with 42 simple cases and 59 cases with additional arguments.

There are two interesting findings from Table 5.4. First, one may have assumed that arguing for multiple bases of jurisdiction will increase the chances of success in finding jurisdictions. That is true but only to a very limited extent. The additional arguments only amount to 3 more successful cases in finding jurisdiction among the three categories with additional arguments, namely, 2 and 1 for raising additional arguments of direct jurisdiction and agency/direct jurisdiction.

Second, simple jurisdictional piercing cases with no additional arguments have a much higher success rate. Compared with the ultimate jurisdiction success rate of the other three categories combined together, simple jurisdictional piercing cases have a 42.86% piercing rate, more than just 25.42% of the combined categories. In addition, it is also higher than the general piercing rate of all jurisdictional cases (29.52%).

The best explanation for this is probably that the courts do not need to analyze other grounds for jurisdiction when there is a successful and winning argument in jurisdictional piercing. On the contrary, if the jurisdictional piercing argument is weak, both the plaintiff and the court will need to analyze the other bases. Whilst these additional bases may help at times, they are not generally sufficient to save a weak case. In conclusion, more than anything, the additional bases for jurisdiction are just signs of
weakness in the jurisdictional piercing claim. Like raising liability piercing in the same case, more may not be better when it comes to jurisdictional piercing.

**Question 3 - Should state law or federal law govern the jurisdictional piercing question? If it were state law, which state’s law?**

The third question is in essence a choice of law question. Here, there are two levels of considerations. First, when a state court is faced with a jurisdictional piercing question, does it have authority to decide the governing law? In other words, if jurisdictional piercing, like liability piercing, is a state law matter, the states will be free to adopt their own governing law. However, if jurisdictional piercing, perhaps because of its strong connection and significant impact on jurisdiction, is a federal law matter, then the state courts will have no choice but to apply federal law.

Second, if jurisdictional piercing is a state law matter, the next level of consideration is which state’s jurisdictional piercing law the state courts will apply. If liability piercing is any indicator, it has been found that the choice of law approaches of state courts vary. While it was widely believed that liability piercing applies the law of the state of incorporation, Chapter 4 shows that it is more of a mixed bag with the law

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150 For the purposes of this thesis, federal courts sitting in diversity cases are also regarded as state courts.

151 See Chapter 3, Section 4. Liability piercing is largely a corporate law matter, though it is possible for state courts to apply federal common law, especially for liability piercing relating to federal statutes. However, the application of federal common law in liability piercing is more a choice by the respective state courts than a federal mandate.

152 See Chapter 4, tb 4.1.

153 See Tyson Fresh Meats, Inc. v. Laver Ltd., L.L.C., 918 F. Supp. 2d 835, 855 (N.D. Iowa 2013) (“Most jurisdictions recognize the internal affairs doctrine whereby “the law of the state of incorporation” is used to determine “issues relating to the internal affairs of a corporation.”).
of forum being a much more popular choice in practice as far as liability piercing is concerned.\(^{154}\) It will be interesting to see whether the choice of law approach in jurisdictional piercing resembles that of liability piercing.

**Table 5.5 - Choice of law between State and Federal Laws**

<table>
<thead>
<tr>
<th></th>
<th>State</th>
<th>Federal</th>
</tr>
</thead>
<tbody>
<tr>
<td>No. of cases</td>
<td>86</td>
<td>19</td>
</tr>
<tr>
<td>Pierced cases</td>
<td>25</td>
<td>6</td>
</tr>
<tr>
<td>Piercing rate</td>
<td>29.07%</td>
<td>31.58%</td>
</tr>
</tbody>
</table>

The first thing to notice is the predominant number of cases applying state law. This means that most courts in the United States view the choice of law question on jurisdictional piercing as one falling into the domain of the states. There are only 18 cases that applied federal law. That indicates that only 18.10% of courts believe there could be only one federal test for jurisdictional piercing. Thus, it is obvious that there is clear preference in adopting state law. The convenience and familiarity could be a big factor, especially in cases where both jurisdictional and piercing issues have been raised in the

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\(^{154}\) See Chapter 4, tb 4.3.
same case. As we have seen though, the number of these cases is not as sizeable as one might have thought.\textsuperscript{155}

It can also be argued that the states should make a decision as to which law is to apply having regard to the current jurisdictional regime. As discussed in Section 5.1, the jurisdictional analysis is a two-prong analysis involving first the minimum contacts test under \textit{International Shoe} and second the state long arm statute.\textsuperscript{156} In order to establish jurisdiction, theoretically, all courts must satisfy both prongs.\textsuperscript{157} While the majority of states collapse these two prongs into one when they interpret the reach of their long arm statutes to the maximum extent allowed under minimum contacts,\textsuperscript{158} it is a choice of the state and one cannot deny the fact that states are stakeholders in the exercise of jurisdiction. As shown in Table 5.6 below, jurisdictional piercing was discussed by the courts in 21.90\% of cases when the courts were solely considering the state’s long-arm statute and not in the discussion of the federal due process issue.

\begin{itemize}
\item \textsuperscript{155} Less than one fourth of all jurisdictional cases, see \textit{supra} tb 5.3.
\item \textsuperscript{156} \textit{See supra} note 74.
\item \textsuperscript{157} \textit{Id}.
\item \textsuperscript{158} \textit{Id}.
\end{itemize}
Table 5.6 Stages at which Jurisdictional Piercing is Considered

<table>
<thead>
<tr>
<th>Category</th>
<th>Count (Percentage)</th>
</tr>
</thead>
<tbody>
<tr>
<td>State long-arm statute</td>
<td>23 (21.90%)</td>
</tr>
<tr>
<td>Due process: general &amp; specific</td>
<td>1 (0.95%)</td>
</tr>
<tr>
<td>Due process: general</td>
<td>10 (9.52%)</td>
</tr>
<tr>
<td>Due process: specific</td>
<td>19 (18.10%)</td>
</tr>
<tr>
<td>Due process: unclear</td>
<td>30 (28.57%)</td>
</tr>
<tr>
<td>Unclear</td>
<td>22 (20.95%)</td>
</tr>
<tr>
<td>Total</td>
<td>105 (100%)</td>
</tr>
</tbody>
</table>

Second, it is perhaps more important to understand how the rule of jurisdictional piercing, as decided by a state, could be consistent with minimum contacts as Section 5.1 discusses how minimum contacts test has become the gold standard of jurisdictional analysis since *International Shoe*. With minimum contacts being a federal standard based on the interpretation of the due process clause, it seems at first glance that it will not be compatible with the state jurisdictional piercing standard. However, the key to reconciling the two lies in the nature of jurisdictional piercing. As explained by the court
in *Great American Duck Races, Inc. v. Intellectual Solutions, Inc.*,\(^{159}\) “[t]he theory behind finding personal jurisdiction in such alter-ego situations is that, because the corporation and individual are considered to be the same entity, the jurisdictional contacts of one are the jurisdictional contacts of the other for purposes of the due process analysis.”\(^{160}\) In other words, instead of providing a separate and competitive standard like the now faded theory of “presence,” jurisdictional piercing simply works to interpret who is the person/entity that is subject to the standard of minimum contacts. Jurisdictional piercing, therefore, works with minimum contacts instead of trying to bypass it. Accordingly, a number of courts have endorsed the compatibility of jurisdictional piercing and due process:

Federal courts that have considered the issue conclude that it is compatible with due process for a court to exercise personal jurisdiction over an individual... that would not ordinarily be subject to personal jurisdiction in that court when the individual... is an alter ego... of a corporation that would be subject to personal jurisdiction in that court.\(^{161}\)

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\(^{159}\) 2013 WL 1092990.

\(^{160}\) *Id.*

\(^{161}\) *Id. see also* Pro Tanks Leasing v. Midwest Propane and Refined Fuels, LLC (“This Court believes when the unique circumstances for a corporate veil piercing and/or alter ego determination are met the proper question is not whether the parent has minimum contacts with a jurisdiction. To the contrary, the proper question is whether the parent and/or the subsidiary have minimum contacts, because the parent is essentially one in the same with the subsidiary—it is its “alter ego.””).
A corporation is a creature of state law\textsuperscript{162} and so it makes sense for the states to define what it is, including when such artificial existence is to be disregarded. As Brilmayer & Paisley argue, “[t]he substantive relations that enter into due process calculations are primarily a matter of the law that creates the cause of action, usually state law. The due process clause does not itself create notions of agency, conspiracy, and the like.”\textsuperscript{163} Accordingly, it can be argued that on the choice of law question, a state retains the authority to decide which is the test to apply for jurisdiction as much as for liability.

Once it is established that the states have autonomy on the choice of law question, it is up to each state to find out for itself the choice of law rule it prefers, much like liability piercing. To some states, that means the law of the state of incorporation.\textsuperscript{164} For others, it may be the law of the forum.\textsuperscript{165}

Due to the fact that, essentially, most states view jurisdictional piercing cases as a state law matter, this makes the next choice of law question – which state’s law governs the jurisdictional piercing – even more important. Table 5.7 sets out the different approaches adopted to decide that question:

\textsuperscript{162} See Soviet Pan Am Travel Effort v. Travel Comm., Inc., 756 F.Supp. 126, 131 (S.D.N.Y.1991) (“Because a corporation is a creature of state law whose primary purpose is to insulate shareholders from legal liability, the state of incorporation has the greater interest in determining when and if that insulation is to be stripped away.”).

\textsuperscript{163} See Brilmayer & Paisley, supra note 21 at 25.

\textsuperscript{164} See Guidry v. Seven Trails West, LLC 2013 WL 1883192 (“Such assertion of personal jurisdiction over the nonresident defendant..., is contingent upon the ability of the plaintiffs to pierce the corporate veil. The law of the state of incorporation determines whether and how to pierce the corporate veil.”).

\textsuperscript{165} See Estate of Thomson ex rel. Estate of Rakestraw v. Toyota Motor Corp. Worldwide 545 F.3d 357, 362 (“In applying the alter-ego theory of personal jurisdiction in this diversity action, we must look to Ohio law.”).
Table 5.7 – States’ Choice of Law Approach in Jurisdictional Piercing

<table>
<thead>
<tr>
<th>Approaches</th>
<th>Jurisdictional piercing (state law)</th>
<th>Percentage of jurisdictional cases</th>
<th>Conflict cases</th>
<th>Percentage of conflict cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Law of incorporation of subsidiary</td>
<td>7</td>
<td>8.14%</td>
<td>102</td>
<td>12.59%</td>
</tr>
<tr>
<td>Law of incorporation of parent</td>
<td>1</td>
<td>1.16%</td>
<td>4</td>
<td>0.49%</td>
</tr>
<tr>
<td>Law of forum</td>
<td>11</td>
<td>12.79%</td>
<td>45</td>
<td>5.56%</td>
</tr>
<tr>
<td>Law of underlying claim</td>
<td>2</td>
<td>2.33%</td>
<td>41</td>
<td>5.06%</td>
</tr>
<tr>
<td>Interest analysis</td>
<td>1</td>
<td>1.16%</td>
<td>2</td>
<td>0.25%</td>
</tr>
<tr>
<td>Law with the most significant relationship</td>
<td>0</td>
<td>0%</td>
<td>11</td>
<td>1.36%</td>
</tr>
<tr>
<td>No specified approaches</td>
<td>60</td>
<td>69.77%</td>
<td>531</td>
<td>65.56%</td>
</tr>
<tr>
<td>Same</td>
<td>2</td>
<td>2.33%</td>
<td>45</td>
<td>5.56%</td>
</tr>
<tr>
<td>Consent</td>
<td>2</td>
<td>2.33%</td>
<td>28</td>
<td>3.46%</td>
</tr>
<tr>
<td>Others</td>
<td>0</td>
<td>0%</td>
<td>1</td>
<td>0.12%</td>
</tr>
<tr>
<td>Total no. of conflict cases</td>
<td>86</td>
<td>100%</td>
<td>810</td>
<td>100%</td>
</tr>
</tbody>
</table>

The point that stands out most from Table 5.7 is not that a particular approach dominates the states’ choice of law approaches but that none does. The majority of cases have no choice of law analyses applied thereto during the adjudication process. 69.77% of jurisdictional piercing cases that applied state laws have not gone through choice of law analysis. This is similar to the high percentage of general conflict cases (65.56%) that

166 Since non-conflict cases have no choice of law concern, they are excluded from this analysis.
did not do the same. It is therefore more important to look at the law actually applied by the courts, including the majority cases where there was no choice of law analyses.

Table 5.8 Application of Forum Law in Jurisdictional Piercing

<table>
<thead>
<tr>
<th></th>
<th>Jurisdictional piercing (state law)</th>
<th>Conflict cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Applied forum law</td>
<td>73</td>
<td>687</td>
</tr>
<tr>
<td>Percentage of forum law</td>
<td>84.88%</td>
<td>84.81%</td>
</tr>
<tr>
<td>Applied non-forum law</td>
<td>13</td>
<td>123</td>
</tr>
<tr>
<td>Percentage of non-forum law</td>
<td>15.12%</td>
<td>15.19%</td>
</tr>
<tr>
<td>Total cases</td>
<td>86</td>
<td>810</td>
</tr>
</tbody>
</table>

It is clear from Table 5.8 that, like liability piercing cases,\textsuperscript{167} jurisdictional piercing cases essentially have the law of the forum applied to them at the end, whether there is choice of law analysis or not. The most significant differences between the two categories of cases are that jurisdictional piercing prefers law of the forum even more, accounting for 12.79% of jurisdictional piercing cases compared with just 5.56% of cases.

\textsuperscript{167} See Chapter 4, tb 4.3.
conflict cases; and has even less reliance on the law of the state of incorporation, accounting for only 8.14% of jurisdictional piercing cases compared with 12.59% of conflict cases (see Table 5.7). This is probably due to the much stronger connection and interest that jurisdiction has with the forum. Unlike liability piercing where the focus is between the parties, the emphasis on a relationship between a forum and the defendant seems to have a significant impact on the courts’ choice of law approach.

**Question 4 - Should the substantive test of jurisdictional piercing be the same as that of liability piercing?**

The fourth question asks what the substantive test should look like. Should it just be identical to the traditional corporate law tests adopted in liability piercing? Or should there be a specifically designed test customized for the purpose of jurisdictional piercing?

Traditionally, piercing the corporate veil is a liability concept. According to Professor Frederick Powell, the most common test used for liability piercing consists of a three-prong test: (1) excessive control, (2) fraud or injustice and (3) proximity to injury.\(^{168}\)

Although the actual tests applied by the states vary, they are, nonetheless, mainly mixing and matching with the two key components: control and fraud.\(^{169}\) Generally, both components are required but there are also cases where they are used in a disjunctive

\(^{168}\) See Frederick J. Powell, Parent and Subsidiary Corporations: Liability of a Parent Corporation for the Obligations of Its Subsidiary.

\(^{169}\) See Chapter 3, note 66.
On the other hand, should jurisdictional piercing have its own test? How relevant should elements of control and fraud play in this jurisdictional specific formula? The relationship between jurisdictional piercing and liability piercing as discussed in Question 1 is therefore highly relevant.

Table 5.9 - Liability Test v.s. Jurisdictional Specific Test

<table>
<thead>
<tr>
<th></th>
<th>Jurisdictional specific test</th>
<th>Liability test</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Number of cases</strong></td>
<td>37</td>
<td>64</td>
</tr>
<tr>
<td><strong>Number of pierced cases</strong></td>
<td>13</td>
<td>19</td>
</tr>
<tr>
<td><strong>Piercing rate</strong></td>
<td>35.14%</td>
<td>29.69%</td>
</tr>
</tbody>
</table>

The majority of jurisdictional cases have adopted the same liability test instead of creating a jurisdictional specific test. Further, in Table 5.9, the piercing rate of liability test (29.69%) is almost identical to the general piercing rate of the jurisdictional piercing (29.52%). However, the jurisdictional specific test has a much higher piercing rate than both the liability test and the general piercing test (35.28%). The reason for this discrepancy seems to be the treatment of fraud element.

170 See Chapter 3, Section 5.

171 There are only 101 cases in the Table. This is because there are 4 cases that did not actually specify the test.
It has been argued that the test for jurisdictional piercing should not be as demanding as liability piercing. In *Marine Midland Bank, N.A. v. Miller,*\(^{172}\) it was said that “[u]nlike piercing the corporate veil, it is not necessary to show “that the shell was used to commit a fraud.”\(^{173}\) Alternatively, courts have said that either establishing excessive control or fraud can succeed for jurisdictional piercing. For example, in *Int'l Equity Invs., Inc. v. Opportunity Equity Partners, Ltd.,*\(^{174}\) Judge Kaplan was of the opinion that the control factor alone could be sufficient for jurisdictional piercing:

> “New York law allows the corporate veil to be pierced *either* when there is fraud or when the corporation has been used as an alter ego. The latter normally requires a showing of ... complete control by the dominating corporation that leads to a wrong against third parties. But this standard is relaxed where the *alter ego* theory is used not to impose liability, but merely to establish jurisdiction. In such an instance, the question is only whether the allegedly controlled entity was a shell for the allegedly controlling party; it is not necessary to show also that the shell was used to commit a fraud.”\(^{175}\)

A piercing test that only needs to satisfy one factor (control) is clearly much easier for the plaintiff than one with two factors (control and fraud). This more lenient approach is reflected in those cases that have applied the jurisdictional specific test.

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\(^{172}\) 664 F.2d 899 (2d Cir.1981).

\(^{173}\) *Id.* at 904.


\(^{175}\) *Id.* at 459 (internal quotation marks omitted).
### Table 5.10 - Reason for Failure in Jurisdictional Piercing

<table>
<thead>
<tr>
<th></th>
<th>Jurisdictional specific test</th>
<th>Liability test</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Control, fraud and proximity</td>
<td>0 (0.00%)</td>
<td>1 (2.22%)</td>
<td>1 (1.45%)</td>
</tr>
<tr>
<td>Control and fraud</td>
<td>1 (4.17%)</td>
<td>14 (31.11%)</td>
<td>15 (21.74%)</td>
</tr>
<tr>
<td>Just fraud</td>
<td>2 (8.33%)</td>
<td>7 (15.56%)</td>
<td>9 (13.04%)</td>
</tr>
<tr>
<td>Just control</td>
<td>18 (75.00%)</td>
<td>13 (28.89%)</td>
<td>31 (44.93%)</td>
</tr>
<tr>
<td>Insufficient facts</td>
<td>0 (0.00%)</td>
<td>6 (13.33%)</td>
<td>6 (8.70%)</td>
</tr>
<tr>
<td>No application</td>
<td>3 (12.5%)</td>
<td>4 (8.89%)</td>
<td>7 (10.14%)</td>
</tr>
<tr>
<td>Total</td>
<td>24 (100.00%)</td>
<td>45 (100.00%)</td>
<td>69 (100.00%)</td>
</tr>
</tbody>
</table>

Table 5.10 shows the reason why piercing failed according to the courts. There are 69 failed piercing cases where the courts had set forth the jurisdictional piercing tests. These cases are further divided between those that adopted a jurisdictional specific test and a liability test. Fraud is a factor for 48.89%\(^{176}\) of cases adopting a liability test while only accounting for 12.5% of cases adopting a jurisdictional specific test. Cases that failed entirely due to the lack of fraud account for 15.56% of liability test cases although only 8.33% of jurisdictional specific test cases. In addition, even if same factors are to be

\(^{176}\) Calculated by combining the categories of “Control, Fraud and Proximity,” “Control and Fraud” and “Fraud only” in the Liability piercing column.
considered for both tests, there are suggestions that they should be considered under a more lenient standard in a jurisdictional context rather than a liability context.\footnote{See Miramax Film Corp. v. Abraham WL 22832384 ("The standard for piercing the corporate veil for purposes of obtain jurisdiction is a less stringent one.").}

Having discussed the more lenient standard found in the jurisdictional specific test, the question is why there should be a different standard from liability piercing and how having a lower standard can be justified. It is first necessary to consider the differences between the purposes of the two types of piercing. The purpose of jurisdictional piercing is to make the parent company subject to the jurisdiction of the forum whereas the purpose of liability piercing is to make it subject to the debt of the subsidiary. The former asks whether it is fair to require the out-of-state defendant to travel to the forum to defend itself\footnote{Ultimately, International Shoe asks whether there exist minimum contacts that will satisfy “traditional notion of fair play and substantive justice.” See International Shoe, 326 U.S. 310, 316.} while the latter asks whether it is fair for the shareholder to be responsible for the liability of the company.\footnote{See Laba die Coal Co. v. Black, 672 F.2d 92, 96 (D.C.Cir.1982). ("In general, federal courts accord separate corporate entities great deference and will disregard the corporate form only in limited circumstances “when the incentive value of limited liability is outweighed by the competing value of basic fairness to parties dealing with the corporation.”").} In other words, one examines “the relationship between the defendant, the forum, and the litigation”\footnote{See Shaffer v. Heitner, 97 S.Ct. 2569, 2580 (1977) ("the relationship among the defendant, the forum, and the litigation…became the central concern of the inquiry into personal jurisdiction.").} and the other examines the relationship between the shareholder and company (the control factor)\footnote{See Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc. 826 N.W.2d 816, 830 (“The first prong of the test focuses on the shareholder's relationship to the corporation.”).} as well as the relationship between the shareholder and plaintiff (the fraud
This point is succinctly presented by Professor Blumberg: “[b]ecause the powerful influence of limited liability, creating additional pressures opposed to any attribution of substantive liability, is entirely absent in the case of amenability to jurisdiction, one might suppose that more relaxed standards of piercing would apply.”

Simply put, jurisdictional piercing aims to make the shareholder come to the forum; it is several steps away from making it liable for the liability of the company. Under this approach, for cases where both piercings are alleged by the plaintiff, it remains a two-prong process: first a more lenient standard for jurisdictional piercing, followed by a more stringent liability piercing.

By combining the two variables under Questions 3 and 4, we can derive four categories of potential test to be adopted for jurisdictional piercing. These are set out in Table 5.11.

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182 Id. at 831 (“The second prong of the test examines the relationship of the plaintiff to the corporation”).
Table 5.11 - Possible Jurisdictional Piercing Tests

<table>
<thead>
<tr>
<th></th>
<th>State law</th>
<th>Federal law</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Liability test</strong></td>
<td>60 cases with piercing rate of 26.67%</td>
<td>4 cases with piercing rate: 25%</td>
</tr>
<tr>
<td></td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td><strong>Jurisdiction specific test</strong></td>
<td>23 cases with piercing rate of 43.48%</td>
<td>14 cases with piercing rate of 21.43%</td>
</tr>
<tr>
<td></td>
<td>2</td>
<td>4</td>
</tr>
</tbody>
</table>

Each of the four categories will be examined in more detail below.

*Category 1*

Courts adopting the approach of Category 1 essentially handle jurisdictional piercing the same way they do liability piercing both in terms of choice of law and the substantive test. Since jurisdictional piercing borrows the concept from liability piercing and applies it to the jurisdictional context,\(^{184}\) it is not surprising that courts will simply apply the same test to both the choice of law question and the substantive test.

First, on the choice of law question, it can be argued that the states should make the decision as to which law to apply having regard to the current jurisdictional regime.

\(^{184}\) *See supra* note 20
The argument is that if a parent company is found by the court to have exercised such dominance and excessive control over its subsidiary to defraud the plaintiff or otherwise subject him/her to injustice, there is no reason why that parent company should not be regarded as the same entity as the subsidiary for both the purposes of liability and jurisdiction.\textsuperscript{185} Following this approach, the jurisdictional piercing and liability piercing will effectively be merged into one piercing for those cases alleging both piercing. Thus, if the court accepts a plaintiff’s jurisdictional piercing claim, there will be no need to undergo the same piercing test for a liability purpose.\textsuperscript{186}

The data in Table 5.11 are clearly a huge vote of confidence in the approach of Category 1. This is not surprising considering that liability cases are the mainstay of the piercing regime. When jurisdictional piercing only accounts for less than one-tenth of all piercing cases, it is expected that courts may be influenced by the more traditional liability piercing and simply use the same test for both purposes. This is also reflected by the lack of in-depth analysis why Category 1 is to be adopted among cases choosing the Category 1 approach.

\textsuperscript{185} See Cardell Fin. Corp. v. Suchodolski Assocs., No. 09 Civ. 6148, 2012 U.S. Dist. LEXIS 188295, 47–48 (S.D.N.Y.) (“On an alter-ego claim for liability, the corporate veil will be pierced if a plaintiff can demonstrate that ‘the alleged dominating party exercised complete domination over the corporation with respect to the subject transaction and that such domination was used to commit a fraud or other wrong which injured [the] plaintiff.’”).

\textsuperscript{186} See e.g. Coombs v. Unique Refinishers, Inc. 2013 WL 1319773.
Example of Category 1

**Epps v. Stewart Information Services Corp.**\(^{187}\)

*Epps*, decided by the Court of Appeal of the Eighth Circuit, is one of the most cited cases on jurisdictional piercing.\(^ {188}\) The case involved a class-action against a nonresident holding company based on the Real Estate Settlement Procedures Act and the defendant sought to dismiss the case due to the lack of personal jurisdiction. In this case, the defendant was the only named defendant in the suit and there was no issue of liability piercing.\(^ {189}\) In addition, the defendant was incorporated in Delaware, had no place of business in Arkansas, was not authorized to do business in Arkansas and had no direct contact with Arkansas other than being the shareholder of two Arkansas subsidiaries.

After holding that there was no specific jurisdiction over the defendant, the court considered whether there could be general jurisdiction based on the contacts of the Arkansas subsidiaries. Positively affirming the role of jurisdictional piercing, the court said that “[p]ersonal jurisdiction can be properly asserted over a corporation if another is acting as its alter ego, even if that alter ego is another corporation.”\(^ {190}\) Secondly, on the choice of law question, the court stated clearly that “[s]tate law is ... to determine whether and how to pierce the corporate veil.”\(^ {191}\) The court went on to apply Arkansas law.\(^ {192}\)

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\(^{187}\) 327 F.3d 642 (8th Cir.2003).

\(^{188}\) See e.g. Gilbert v. Security Finance Corp. of Oklahoma, Inc., 152 P.3d 165 (Okla.2006); Viasystems, Inc. v. EBM-Papst St. Georgen GmbH & Co., KG, 646 F.3d 589.

\(^{189}\) Making this a Box 2 case in Table 3.

\(^{190}\) 327 F.3d 642, 649.

\(^{191}\) Id.
Citing Humphries v. Bray, a case on liability piercing, the court stated that the piercing test “is founded in equity and is applied when the facts warrant its application to prevent injustice.” Thus, the court seems to have adopted the same piercing test as used in liability piercing. Applying the test to the fact, it was found that the defendant was no more than an ordinary shareholder to the Arkansas subsidiaries. The piercing failed accordingly and so did personal jurisdiction.

**Category 2**

Category 2 accords with Category 1 in terms of the choice of law analysis but differs regarding the substantive test. Instead of copying the test of liability piercing, courts adopting the approach of Category 2 argue that the substantive test should be tailored for the purpose of jurisdictional piercing due to their differences.

It must be noted that Category 2 is the second most accepted approaches. While Category 1 and its liability test seem to be more popular, the jurisdictional specific test still accounts for more than 20% of all approaches. More importantly, courts adopting Category 2, as shown in the discussion in Question 4 above and PHC-Minden case below,

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192 Note that Arkansas law is both the law of forum as well as the law of incorporation of the subsidiaries. *See id.*


194 *Id.* at 793.

195 *See* Grand Aerie Fraternal Order of Eagles v. Haygood, 402 S.W.3d 766, 779 (“We note that “jurisdictional veil-piercing” is distinct from “substantive veil-piercing,” so imputing a related entity’s contacts for jurisdictional purposes requires a showing that the parent controls the subsidiary's internal operations and affairs.”).
have clearly given more thought to explaining why it is the better approach. On the other hand, courts adopting Category 1 rarely display the same effort and seem to have used the liability approach out of convenience. The focus on control for the core element of the jurisdictional specific is hardly surprising and is consistent with the leading authorities discussed here.

*Example of Category 2*

*PHC-Minden, L.P. v. Kimberly-Clark Corp.*\(^{196}\)

Texas has been the most consistent jurisdiction in applying a jurisdiction specific test for jurisdictional piercing, and *PHC-Minden* is one of the best representative cases on this position by the Texas Supreme Court.\(^{197}\)

*PHC-Minden* is a products-liability case. The manufacturer filed a third party claim against a hospital in Louisiana. The issue was whether Texas could assume jurisdiction over the hospital. Whilst the hospital was not a Texas resident, the manufacturer argued that its parent, a Tennessee corporation, did business in Texas and the parent’s contacts should be imputed to the hospital, thereby subjecting the hospital to Texas’s jurisdiction.

On the question of jurisdictional piercing, the court began by approving jurisdictional piercing as a means of acquiring jurisdiction, holding that “[p]ersonal

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\(^{196}\) 235 S.W.3d 163.

\(^{197}\) *See also* BMC Software Belgium, N.V. v. Marchand 83 S.W.3d 789.
jurisdiction may exist over a nonresident defendant if the relationship between the foreign corporation and its parent corporation that does business in Texas is one that would allow the court to impute the parent corporation’s ‘doing business' to the subsidiary.”

While the court did not expressly address the choice of law issue, it is clear from the judgment that the court adopted state law. For example, the court stated that “the party seeking to ascribe one corporation's actions to another by disregarding their distinct corporate entities prove this allegation because Texas law presumes that two separate corporations are distinct entities.”

It then clarified that Texas’s test is jurisdictional specific, stating that “veil-piercing for purposes of liability (“substantive veil-piercing”) is distinct from imputing one entity’s contacts to another for jurisdictional purposes (“jurisdictional veil-piercing”).” This distinction is mainly caused by the fact that jurisdictional piercing involves consideration of due process. Regarding the components of the test, most notably, “fraud—which is vital to [liability] piercing...—has no place in assessing contacts to determine jurisdiction.” Instead, “atypical control” is the only prerequisite for the piercing test. In addition, the court added that certain factors that are relevant to liability piercing had no relevance to jurisdictional piercing, such as sharing of names and

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198 PHC-Minden 235 S.W.3d 163, 173.
199 Id. (emphasis added).
200 Id. at 174.
201 Id. (“This makes sense in light of the fact that personal jurisdiction involves due process considerations that may not be overridden by statutes or the common law.”).
202 Id. 175.
203 See id. 175-176.
undercapitalization. Applying the above test to the facts, it was found that there was no atypical control exerted by the parent over the hospital and the case was accordingly dismissed for lack of personal jurisdiction.

Category 3

Category 3 is the category that takes away the states’ authority in terms of choice of law and applies a uniform substantive test that resembles the one used in the liability context. There are only 4 Category 3 cases, the least among the four categories. The reason for the lack of support for this approach may lie in the odd Cannon case.

Whilst uncertainties revolve around the true meaning of Cannon, one way of interpreting it could fit it into this category. First, as mentioned in Section 1, Cannon was decided before both International Shoe and Erie. Thus, the principle that it laid down on jurisdictional piercing could be interpreted as federal common law. While Cannon could be theoretically overruled by both Erie and International Shoe, the case remains valid in view of Supreme Court’s decision in Keeton. Apart from that, there has been a long line of lower cases applying Cannon to jurisdictional piercing. Thus, it can be

\[204\] Id. 174-175.

\[205\] See supra note 23.


\[207\] See supra note 21.

\[208\] See supra note 225, at 450 (“Over 500 published cases have cited Cannon since 1925.”).
argued that *Cannon* has mandated a federal standard for jurisdictional piercing despite the lack of Supreme Court authority on how *Cannon* can be reconciled with *International Shoe*.

Whilst Justice Brandeis avoided using the term liability piercing in *Cannon*,209 the most decisive factor cited by the court in *Cannon* appears to be corporate formality. This is different from the classic three-prong approach but does fit with another line of classic piercing cases.210 Although this formalistic approach and the control-focused approach of Category 2 do not require the fraud prong, *Cannon*’s emphasis could be much more stringent than the test of Category 2. For large corporations, it is much easier for them to maintain corporate formalities, thus rendering it difficult to pierce the corporate veil under the more flexible and equitable based approach.211

However, as Table 5.11 has shown, much to the expectation of Professor Blumberg,212 *Cannon* has become a non-factor in the area of jurisdictional piercing. In fact, there are only 35 cases that have cited *Cannon* in the three-year research period according to Westlaw and most of them simply cited *Cannon*’s basic premise of

209 See supra note 20.

210 See Blumberg *supra* note 24, at 24-8 (“The criteria for the Cannon doctrine will be immediately recognized as very much the same as one of the alternative criteria for establishing the first prong of classic piercing jurisprudence, turning on the subsidiary’s lack of separate existence.”).

211 See William A. Voxman, Comment, *Jurisdiction over a Parent Corporation in Its Subsidiary's State of Incorporation*, 141 U. PA. L.REV. 327, n19 (1992) (“Some commentators argue that Cannon is too formalistic in the sense that the mere existence of a parent-subsidiary relationship will almost always result in the recognition of the corporate separation between the parent and subsidiary for jurisdictional purposes.”).

212 See Blumberg *supra* note 24, at 24-6 (“With passage of time, the authority of Cannon has been significantly eroded.”).
maintaining the independent separateness of companies in jurisdiction without relying on Cannon for the actual jurisdictional test. As much as the formalistic approach becomes a thing in the past in liability piercing, the same seems to be the case for jurisdictional piercing.

**Category 4**

Category 4 is the exact opposite to Category 1. It can be seen as a further transformation of Cannon. As Cannon has not made it very clear what substantive test to apply, some courts therefore have decided to adopt a jurisdictional specific test instead. Thus, it may be regarded as a mix of Categories 2 and 3. In terms of piercing rate, the contrast with Category 2 is great. Category 2 has the highest piercing rate while Category 4 has the lowest. This again reflects the huge distinction in piercing rates between the jurisdictional specific test and liability test as it has been extensively discussed in Question 4 above.

None of the cases adopting this category in the empirical research explained clearly why this is the proper approach. Searching through older authorities, the leading case that explained this approach was *Energy Reserve.* In that case, the U.S. District Court in Kansas took a very innovative view of choice of law. According to the court, the minimum contacts test is the one and only avenue in establishing jurisdiction since

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Technically speaking, the court was of the opinion that piercing the corporate veil does not play “any proper role in the analysis of the constitutional propriety of the exercise of jurisdiction.” 215 This is because “[t]he formalistic approach of the alter ego doctrine… is irrelevant to the question [of] whether the exercise of jurisdiction over an absent parent corporation would violate the Due Process Clause.” 216

In other words, there can only be one federal standard based on minimum contacts. Based on this approach, the “piercing” test is necessarily jurisdictional specific. The two-prong test of control and fraud that Category 1 used for both liability and jurisdictional purposes will be merged with the standard minimum contacts test. From the court’s perspective, components of liability piercing are relevant but not necessary for the finding of jurisdiction:

Concededly, a corporation's relationship with an affiliated corporation in the forum is relevant to the due process question in a manner different from that in which it pertains to the corporate law question of alter ego relationships and “veil piercing.” For alter ego purposes the nature of the relationship the identity between the corporations is alone controlling. For jurisdictional purposes, the fact of the existence of the relationship however substantial or attenuated the relationship may be is a minimum “contact, tie or relation” with the forum that

214 Id. at 496 (“All exercise of state court jurisdiction, and impliedly the exercise of personal jurisdiction in federal court…, must be analyzed under the standards of International Shoe.”).

215 Id. at 490.

may render possible the constitutional exercise of jurisdiction if the relevant factors, including both convenience and the orderly administration of the laws, balance in that direction. The mere existence of the relationship is one relevant factor. The nature of the relationship the degree of control or identity bears upon the weight to be given that one factor, but it does not foreclose reliance on this factor as a legitimate consideration in the due process analysis. The distinction between the two standards should be readily apparent. 217

Accordingly, gone are the rigid requirements of passing control and fraud prongs. Instead, control and fraud are all but two factors on the long list of facts considered by the court to see whether the case warrants the finding of minimum contacts.

Both Categories 2 and 4 advocate a jurisdictional specific test. However, the test of Category 2 appears to be about customizing the traditional piercing test whilst Category 4, as explained by Energy Reserve, could be viewed as rejecting the pigeon-hole approach and merging the jurisdictional test with minimum contacts. Besides, technically Category 2 still tries to interpret the identity of the “person” who is subject to the minimum contacts test. On the other hand, Category 4 under Energy Reserve does not interpret the identity of the “person” but what constitutes a “contact.”

However, even by looking at the cases in Category 4, it seems that the Energy Reserve approach above is devoid of practical significance. No case during the three-year research period relied on the Energy Reserve approach. Even for raw cases, there are only 4 cases that have cited Energy Reserve and In re Teletronics during the three-year

research period. Despite the well-reasoned argument of *Energy Reserve*, the lack of support probably stems from a lack of higher courts’ endorsement both at the State Supreme Court or Federal Court of Appeal level.\(^\text{218}\) It is also too far from the more established practices of Categories 1 and 2 which makes it a “dangerous innovation”\(^\text{219}\) for the courts. Finally, as will be shown in *Amrep* below, the same result desired by the judge could be easily achieved by Categories 1 and 2, particularly Category 2. Thus, there is no need for the courts to overhaul their entire regime.

*Example of Category 4*

*Alto Eldorado Partnership v. Amrep*\(^\text{220}\)

*Amrep* is a case decided by the Court of Appeal of New Mexico. Despite the lack of support of the *Energy Reserve* approach based on data derived from the empirical review, *Amrep* is still a worthwhile case to examine for the purpose of this chapter as the three judges in the case each vowed for Categories 1, 2 and 4 respectively.

The case revolved around whether the New Mexico court had jurisdiction over Amrep, an out-of-state parent company listed on the New York Stock Exchange. The key

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\(^{219}\) In *Hart Holding Co. v. Drexel Burnham Lambert, Inc.*, the Court of Chancery of Delaware rejected *Energy Reserves* as a case rarely followed. *See C.A. No. 11514, 1992 WL 127567, 718 (Del. Ch. May 28, 1992)* (“It has not met with wide or easy acceptance elsewhere. It certainly does not represent the law of Delaware.”).


\(^{220}\) 131 S.Ct. 2780 (2011).
issue was whether jurisdiction could be based on Amrep’s relationship with its New Mexico subsidiary.

One judge, Judge Kennedy, adopted the Category 4 approach. Following the lead of *Energy Reserve*, Judge Kennedy did not require “all of the elements of alter ego be proven in order to hale a foreign corporate parent into court, but [he] can and will consider whatever elements a plaintiff shows in assessing minimum contacts.” More particularly on control, he was of the view that “[t]he corporate relationship might also be probative of whether it is fundamentally fair to require the defendant to defend a suit in the forum.” This is the same for the fraud factor. Finding that Amrep exerted excessive control over the subsidiary in New Mexico, including its day-to-day operations, Judge Kennedy found the necessary minimum contacts to claim jurisdiction.

A second judge, Judge Sutin, concurred with the finding of jurisdiction but not the reasoning of Judge Kennedy. His approach was exactly the same as Category 2. He started with the traditional three-prong liability piercing test adopted by New Mexico. After reviewing certain precedents, he found that “[a] prima facie showing of instrumentality or domination should be sufficient to establish the minimum contacts necessary for jurisdiction without also having to prove the improper or fraudulent

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221 *Id.* at 617 (“this principle in holding that due process guided by elements of an alter ego analysis frame our inquiry into the district court's personal jurisdiction over Amrep. The question then is not whether corporate law restricts our jurisdiction in contravention of the above principle, but whether due process allows for it.”).

222 *Id.* at 616.

223 *Id.*

224 *Id.* (“the showing of formation for an improper purpose…, while not constitutionally mandated, might also be probative.”).
purpose and proximate causation elements required to establish liability.”225 Thus, his approach is the same as *PHC-Minden*, requiring just the first control prong for jurisdictional piercing. Finding the plaintiff had presented sufficient evidence for the first prong, he dismissed Amrep’s motion for lack of personal jurisdiction.

Judge Packard, delivered a dissenting opinion. He adopted the classic Category 1 test. Going through a long list of authorities, he criticized the other judges’ approach as not being supported by precedents. Instead, he believed that the traditional three-prong liability test was proper.226 To justify his approach, he reasoned that “corporations are formed precisely for the purpose of insulating the owners thereof and such purpose ought to be respected, whether for liability or jurisdiction.”227

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225 *Id.* at 621.

226 *Id.* at 622 (“Other jurisdictions that have addressed the issue have unequivocally held that for purposes of personal jurisdiction, it is not sufficient to establish only instrumentality, and instead a plaintiff must also establish that the corporation that is using another corporation as its instrumentality has formed it or is using it to perpetrate a fraud or other injustice or for some other improper purpose.”).

227 *Id.*
Finally, we look at whether the jurisdictional piercing rate is influenced by the underlying claim. Under prevailing corporate theory, it is believed that courts should be more willing to piece corporate veil in tort cases than contract cases due to the fact that plaintiffs in contracting cases will have the opportunity to protect themselves by choosing the more solvent counterparty.\(^{228}\) This theory was found to be incompatible with the data

\(^{228}\) See Thompson Study, at 1038.
from the Thompson Study. For jurisdictional piercing, one might argue that the court should be more willing to grant a plaintiff’s request to pierce jurisdictionally in tort cases considering that plaintiffs in contract cases can choose to contract directly with the out-of-state parent in order to get the forum court to have specific jurisdiction thereto. However, the data shows the same puzzling picture as in the Thompson Study. Contract cases actually have a higher piercing rate (40.95%) than that of tort cases (30.48%). This difference is even higher than the one between contract and tort cases in general piercing cases. This finding, however, is not conclusive due to the lack of tort cases in the samples here.

4. Recommendations and Conclusion

In connection with the current jurisdictional piercing practice, it is clear that the contemporary approach is to leave the decision on choice of law to each state while not supporting a federal standard across the nation. Of course, simply having a majority of courts adopting the former approach does not necessarily mean that it is the better approach. However, without any clear precedents at the Supreme Court, each state reaches this approach organically instead of having a standard imposed on them from the top. This fact suggests at least the advantage of assumed efficiency.

The analysis, however, should not stop there. The state choice of law approach shall be subject to an important caveat, that is, jurisdictional piercing must not be of such a low

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229 See Thompson Study, at 1058 (finding that “the results show that courts pierce more often in the contract context than in tort context.”).

230 See Chapter 3, tb 3.11.
standard that renders the minimum contacts test meaningless. The constitutional structure of jurisdictional piercing under the state choice of law approach is to interpret what a “person” means in the minimum contacts test. If the definition of “person” is entirely up to the state to interpret without any limitation, it is theoretically for the state to adopt an unreasonably low standard for jurisdictional piercing, such as the ownership of shares. This point has been raised by Brilmayer and Paisley succinctly, stating that

“the state may not alter the definition of state-created rights in order to defeat a federal constitutional claim. Similarly, states may not alter their procedural rules when federal rights are at stake. Discriminatory treatment of federal rights is unconstitutional, and the Supreme Court will review a state law decision to determine whether it has a substantial basis in state law.”

A low standard like that will essentially catch all passive out-of-state holding companies which do nothing in the forum state other than holding shares in a subsidiary that is subject to forum jurisdiction, and effectively rendering minimum contact meaningless. In other words, this definition will create minimum contacts for simple shareholding and violate the basic minimum contact test.

By analogy, Daimler has shown that the Supreme Court will not hesitate to clamp down on vicarious jurisdiction if the test becomes so lenient that it would render the minimum contacts standard meaningless. As we have seen in that case, the Ninth Circuit’s version of the agency test simply asks whether the agent is important to the

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231 See Brilmayer & Paisley, supra note 21, at 27.
Justice Ginsburg is of the view that such a low standard will have the effect of subjecting every single multi-national company to the jurisdiction of every state where it does business with an agent. In essence, this is a floodgate argument. While there is no reported jurisdictional piercing during the research period that adopts a low standard as simple share ownership, this is certainly an important threshold to bear in mind.

On the question of the substantive test, the issue of whether courts should adopt a jurisdictional specific test seems to hinge on whether jurisdictional piercing should be more lenient than liability piercing given the much higher piercing rate yielded under the jurisdictional specific test. The answer seems to be positive given that jurisdictional piercing simply requires the defendant to defend himself in the forum instead of having the liability conclusively imposed thereon. It also makes sense to restrict the application of the fraud factor to liability piercing instead of jurisdictional piercing. It is still hard to see why fraud has to be an essential element for jurisdictional piercing.

Piercing the corporate veil, even for liability purposes, is influenced by the underlying cause of action. The prime examples of a more lenient standard in a liability context are those cases involving ERISA. In ERISA cases, courts almost always refer to the federal policy behind ERISA to protect employees and thus always forgo the

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232 See supra note 113. It is noted that in discussing the Ninth Circuit’s test on agency, the Supreme Court did not reject the test on the basis of it not being a uniform federal standard but simply object to the broad test. This could be seen as a support to the conclusion of the author’s view on Question 1, that is, to adopt states’ rules on jurisdictional piercing.

233 Id.

fraud element as an essential factor.\textsuperscript{235} For jurisdictional piercing, it can be argued that underlying federal justification for the assertion of jurisdiction is purposeful availment. This certainly is a much lower standard than fraud. If a parent company exerts excessive control over the subsidiary to the extent that it becomes merely an instrument of the corporation for the purpose of doing business in the forum, it could be considered as purposefully making available the benefits and protection of the forum. Fraud, on the other hand, will impose a higher standard than the underlying federal policy demands. Unlike liability piercing where piercing is supposed to happen only when the privilege of incorporation is “abused,” jurisdiction does not operate in the same way. As long as an out-of-state corporation has obtained the protection and benefits of the forum, the \textit{quid pro quo} is to be subject to the forum’s jurisdiction. Therefore, the fraud factor, apparently a factor installed to cater for the concept of “abuse” can have no place in the jurisdictional piercing formula. The emphasis on control factor can also be found in the rare federal court judgments that have discussed jurisdictional piercing after \textit{Daimler}.\textsuperscript{236}

Adopting a more lenient, jurisdictional specific standard will have the effect of expanding the jurisdiction of the United States. While the normative aspect of the expansion of the jurisdiction is a much larger topic that this thesis intends to cover, such expansion, at least as far as a jurisdictional specific standard will bring thereto, is justified. First, unlike changing the minimum contacts standard, jurisdictional piercing remains an

\textsuperscript{235} See N.L.R.B. v. Al Bryant, Inc., 711 F.2d 543, 553 (3d Cir.1983)(“In claims pursuant to the National Labor Relations Act (NLRA), however, the standard for establishing the existence of an alter ego is less burdensome... Under the NLRA, “[t]he focus of the alter ego doctrine ... is on the existence of a disguised continuance or an attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or a technical change in operations.”).

\textsuperscript{236} See supra note 10.
exception that will be applied by courts with caution. The eventual expansion of jurisdiction, therefore, as a result of the adjustment brought by the jurisdictional specific test will be limited. In addition, as we have seen in Section 3, a jurisdictional specific test only has a 5.45% higher piercing rate than the liability test. Thus, the adjustment will only help such marginal cases but it will not help in overhauling the entire jurisdictional regime.

Normatively, although the Supreme Court has shown concern on the effect that expanding the United States’ jurisdiction will have on comity, the modest expansion suggested here should be acceptable. In *McIntyre*, it is clear that the three Justices led by Justice Ginsburg are ready to extend the jurisdiction of New Jersey to cover McIntyre UK. Drawing on the equivalent European Union jurisdiction rules, Justice Ginsburg thought it was absurd for New Jersey to have no jurisdiction as the place of injury when the home court of McIntyre UK would have allowed such jurisdiction should the injury happen in the European Union.237 This is just one example in which current U.S. jurisdiction is actually not as expansive as it is perceived. This view is also supported by Professor Trevor Hartley, a leading scholar on EU law and private international law.238

237 *See McIntyre* 131 S. Ct. 2780, 2803 (“The Court's judgment also puts United States plaintiffs at a disadvantage in comparison to similarly situated complainants elsewhere in the world. Of particular note, within the European Union, in which the United Kingdom is a participant, the jurisdiction New Jersey would have exercised is not at all exceptional.”).

238 *See* Trevor C. Hartley, International commercial litigation: Text, Cases, and Materials on Private International Law (2009), 161 (“This survey suggests that there is no ground for saying that American jurisdiction over European defendants is in general more extensive than European jurisdiction over Americans; though it may be in certain cases. The real ground for European resentment is the combination of jurisdictional rules that are fairly extensive; though not necessarily more extensive than comparable European ones; with procedural rules that are significantly more favourable to the plaintiff. From a purely
Ultimately, adopting the jurisdictional specific test reaffirms the overall goal of jurisdictional piercing; that is, to bring the jurisdictional test closer to the actual world. As stated by Judge Weinstein in *Bulova Watch Co., Inc. v. K. Hattori & co., Ltd.*, “we cannot apply the law in a way that has any hope of making sense unless we attempt to visualize the actual world with which it interacts.” Jurisdictional piercing is valuable because of that function and the jurisdictional specific test will help in achieving that.

This chapter focuses on the how piercing the corporate veil and choice of law shape the law of jurisdiction, the next chapter will discuss how choice of law and jurisdiction shape enforcement piercing.

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jurisdictional point of view, American law is no more extensive than the law of many European countries.”).

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239 508 F.Supp. 1322, 1328.
CHAPTER 6

ENFORCEMENT PIERCING: AN OVERLOOKED DIMENSION

6.1 Introduction

Academic discussion on piercing the corporate veil has been focusing on its dramatic impacts on the liability of shareholders.1 Most of the time, the shareholder will be sued for piercing the corporate veil in the same trial along with the defendant company which is being sued for the underlying cause of action (say, breach of contract of the company).2 The piercing claim will be successful only if the plaintiff succeeds both on the underlying claim against the company as well as on the piercing claim against the shareholder.3 Nonetheless, piercing the corporate veil will not necessarily be applied by

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2 See Ostrolenk Faber LLP v. Genender Intern. Imports, Inc. 2013 WL 1289140 (III.App. Mar. 29, 2013) (“Since piercing the corporate veil is an equitable remedy, in order to maintain this count, [plaintiff] must also state a sufficient claim for liability in a separate cause of action.”).

3 See, e.g., Galford v. Friend. 2014 WL 5311389 (“The Court concludes that a determination of whether piercing the corporate veil is appropriate is unnecessary because it has concluded that there have been no violations in the first instance of [the underlying claim].”); Elie v. Ifrah PLLC 2014 WL 547958 (“Because plaintiff has not stated causes of action for which relief can be granted, a claim for piercing the corporate veil may not exist on its own. Accordingly, this cause of action must be dismissed.”); Stanley Warranty, LLC v. Universal Adm's Service, Inc. 2014 WL 4805669 (“Because no real cause of action remains against [the defendant], the claim to pierce the corporate veil must also be dismissed.”); Vollrath v. Corinthian Ophthalmic, Inc. 2014 WL 6602274 (“Because Plaintiff’s claims for fraud and UDTPA fail as a matter of law, Plaintiff’s attempt to pierce [defendant company’s] corporate veil and impute liability to Defendant [shareholder] on those same claims necessarily fails.”); Goel v. Ramachandran 975 N.Y.S.2d 428 439 (“Since the complaint fails to adequately set forth these underlying causes of action against [the company], those causes of action must be dismissed as against [the shareholder], since “an attempt of a third party to
the plaintiff in the same trial with the underlying substantive cause of action. By
eliminating the legal personality of the defendant company, piercing the corporate veil
may be utilized in the subsequent enforcement proceeding to enforce a judgment against
the shareholder of the company.\(^4\) Thus, discussions on piercing the corporate veil should
not be restricted to the doctrine being used alongside the substantive underlying liability
in the same trial (hereinafter, “first instance piercing”), but also in the enforcement
proceedings.\(^5\) Enforcement of judgment by piercing the corporate veil in this sense
(hereinafter, “enforcement piercing”) is rarely examined in detail by academics.\(^6\) This
chapter will explore the various conflict-of-laws aspects on which enforcement piercing
will impact as compared with the standard first instance piercing cases through empirical
research on the enforcement piercing cases. As will be seen, issues on choice of law and

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\(^4\) See Christopher P. Hall & David B. Gordon, Enforcement of Foreign Judgments in the United States, 10
Int’l L. Practicum 57, 57 (1997) (“Virtually every state in the U.S. recognizes the concept of piercing the
corporate veil, pursuant to which a state or federal court will allow the successful litigant to pursue the
assets of an individual who has dominated the defendant corporation to such a degree, or used the corporate
form to conduct a fraud on its creditors, that the protection provided by the corporate form should be
disregarded. The precise legal theory pursuant to which each state permits piercing of the corporate form to
attack the assets of the individual owners differs from state to state.”).

\(^5\) Another important usage of piercing the corporate veil is in jurisdictional piercing, see discussion in
Chapter 6.

\(^6\) While guidance might be found from the Restatement of Conflict of Laws and Restatement of Judgment
on the topic, as we will see, it is far from clear and may cause even more confusion. It is also interesting to
note that, in Thompson’s Research, enforcement piercing is not categorized as a separate type of piercing.
Professor Thompson did categorize other procedure-related types of piercing such as those relating to
jurisdiction and venue (see Thompson’s Study, supra note 1, 1061).
jurisdiction that are discussed in Chapters 4 and 5 will be significant considerations in enforcement piercing.

Enforcement piercing is not uncommon, particularly when the plaintiff finds out only during or after the original trial that the abnormally close relationship between the defendant company and the shareholder or its assets has been removed by the shareholder after the defendant company lost the case. However, enforcement piercing is a worthwhile topic to discuss not only because of its frequency, but because of the potential advantages it could bring to the plaintiff in his or her piercing the corporate veil claim. An illustration will be helpful.

In *Bank of Montreal v. SK Foods, LLC*, the plaintiff first obtained a judgment against the defendant company for its liability as a guarantor of a default loan in the U.S. District Court for the Northern District of Illinois. Subsequently, the plaintiff tried to pierce the corporate veil in an enforcement proceeding in the district court for the Northern District of California against certain persons who were alleged to control the

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7 See, e.g., *Nykcool A.B. v. Pacific Fruit Inc*. 2012 A.M.C. 2014 2018 (“The Judgment remains wholly unsatisfied… [Plaintiff] conducted post judgment discovery to locate [defendants’] assets in order to satisfy the Judgment, during which the following information was learned about the alleged alter egos…”).

8 See, e.g., *NYKCool A.B. v. Pacific Intern. Services, Inc*. 2013 WL 6799973 (“[Plaintiff] obtained evidence showing that the [original] judgment debtors had transferred assets from [one group company] to [another group company] in Ecuador to avoid the judgment…”).


11 There were three persons who were alleged to have controlled the defendant company, namely, a natural person, a trust, and a corporation, all of which claimed to be controlled ultimately by the individual. *See id.* 594. However, it is not clear from the case whether they were shareholders to the defendant company. In any event, that does not seem to affect the court’s decision in piercing the corporate veil.
company. The California Federal District Court held for the plaintiff on the piercing claim against two of the three shareholders, thus allowing the plaintiff to enforce against such shareholders the judgment it had obtained in Illinois against the corporate defendant. The most interesting part of this case is the plaintiff’s decision to pursue the piercing claim in California instead of trying to pierce the corporate veil of the company to reach the shareholders in the same trial in Illinois or in a subsequent enforcement proceeding in Illinois.

As discussed in Chapter 3, different states have different substantive laws governing on the piercing issue. The choice-of-law approaches also vary across different states. In *Bank of Montreal*, without undergoing the choice-of-law analysis, the California District Court simply applied California piercing law, the *lex fori*, on the piercing issue. However, the applicable law and the result of the case could be different should plaintiff bring the piercing issue before the Illinois District Court in the first place.

12 *Id.*

13 *Id.*, 601–602.

14 If plaintiff tries to pierce the corporate veil in an enforcement proceeding in Illinois, that will still be considered as an enforcement piercing.

15 See discussion in Chapter 3, Section 4.

16 Note, however, that the states are generally not consistent in their choice-of-law approaches and courts in the same states often adopt different tests, see Chapter 4, tb 4.1.

17 The practice of not applying a choice-of-law approach on piercing of corporate veil is certainly not uncommon. In fact, most courts bypass their exercises, see *infra* Section 6.4, tb 6.8.

Firstly, the Illinois District Court might apply the *lex fori*, the Illinois law on piercing.¹⁹ Secondly, based on the review of piercing cases over the three-year period between 2012 and 2014, cases governed by California law have a higher success rate in piercing the corporate veil (34.09%) than those governed by Illinois law (27.45%).²⁰ If we assume that the Illinois court would have applied Illinois law, and Illinois law on piercing is less favorable to the plaintiff in this case, the plaintiff would prefer to have the piercing issue litigated in California than in Illinois. In other words, there will be a motivation for forum-shopping. The facts of *Bank of Montreal* suggest that this was exactly what the plaintiff did. At the beginning of the Illinois action, the defendant company actually sought to have the litigation moved to California, and the plaintiff resisted strongly against it and eventually succeeded.²¹

However, instead of moving the entire litigation to California, what makes the forum-shopping in enforcement piercing special are the multiple forum-shopping possibilities. These refer to the number of legal issues and fora that the plaintiff can shop for. Firstly, unlike a first instance piercing case in which the plaintiff sues both the defendant corporation (for the underlying cause of action) and its shareholder (for

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¹⁹ The choice-of-law approaches of the states have been widely inconsistent. That said, based on empirical research, it has been suggested that most states ultimately applied the *lex fori*. See Chapter 4, tb 4.3 and accompanying discussion. Should the Illinois court apply other approaches, such as the law of the state of incorporation, then the piercing case would have been governed by Nevada law since the defendant company is a Nevada corporation.

²⁰ See supra tb 3.7. These percentages must be treated with caution. The fact that a state enjoys a higher piercing rate generally does not dictate the success rate in a particular case. Ultimately, it depends on the specific facts of the case. A state law with a lower success rate on piercing in general could still be more favorable to the plaintiff in certain given facts.

piercing the corporate veil) in the same state,\textsuperscript{22} forum-shopping could be done on each of the underlying causes of action and piercing the corporate veil. Thus, if the Illinois substantive contract law is more favorable than the California substantive contract law,\textsuperscript{23} but the California substantive piercing law is more favorable than the Illinois substantive piercing law,\textsuperscript{24} the plaintiff will be able to get the best of both worlds by having the underlying contract claim litigated in Illinois and the piercing issue litigated in California through enforcement piercing. Secondly, there could also be more fora to forum-shop in enforcement piercing. If enforcement could be sought in any state where the defendant has assets,\textsuperscript{25} the pool of fora the plaintiff could choose will be substantially bigger than that of first instance piercing cases which are subject to jurisdictional limitations. For example, if the shareholder has assets in both California and New York, and California piercing law is less favorable than that of New York,\textsuperscript{26} the plaintiff could instead just seek enforcement piercing in New York to satisfy the Illinois judgment.

\textsuperscript{22} It is possible for enforcement piercing in the same state to have this advantage. The same court might apply one choice-of-law approach to piercing (e.g., the law of the state of incorporation), but a different choice-of-law approach in enforcement piercing (e.g., the lex fori).

\textsuperscript{23} This is assuming that the choice-of-law rules on contract of both Colorado and Illinois will both yield their respective forum law. In \textit{Bank of Montreal}, both California and Illinois would likely apply Illinois law because there is likely a governing law clause in the guaranty. \textit{See Bank of Montreal v. SK Foods, LLC}, 476 BR 588 (ND Cal. 2012).

\textsuperscript{24} Assuming the choice-of-law rules on piercing of both Colorado and Illinois will both yield their respective forum law.

\textsuperscript{25} This may potentially be subject to jurisdictional Restrictions on enforcement piercing will be discussed extensively in \textit{infra} Section 3.

\textsuperscript{26} New York has a general piercing rate of 44.06\%, substantially higher than the piercing rate of California (34.09\%). \textit{See} Chapter 3, tb 3.7.
If the potential advantages offered by favorable governing law on piercing (as indicated above) exceed the limitations/costs imposed on such forum-shopping (as indicated in, *inter alia*, any jurisdictional limitations on enforcement piercing), the piercing rate of enforcement piercing will be higher than the first instance piercing cases. This theory will be tested in this chapter by the empirical research through the survey of recent enforcement piercing cases. If this theory holds, the next focus of the chapter is to discuss whether such advantages are justified.

Section 6.2 of this chapter discusses the background of enforcement piercing in more detail. Section 6.3 provides the findings of the empirical research, showing that enforcement piercing has a substantially higher piercing rate than the first instance piercing, thereby supporting this theory above. Finally, Section 6.4 concludes that enforcement piercing shall not provide the unjustifiable advantages to induce forum-shopping. Instead, the conflict-of-law rules should be realigned to create a level playing field for piercing the corporate veil whether that happens in the first instance trial or in the subsequent enforcement proceedings.

### 6.2 Background

Enforcement piercing stems from two core legal concepts relating to enforcement piercing, namely, (i) piercing the corporate veil, and (ii) enforcement of foreign judgment. Chapter 3 has introduced the concept of piercing of the corporate veil at length, and this section will begin by introducing the basic requirement of enforcement of sister state judgment in the United States. After that, the four possible scenarios created by their interactions will be discussed. Finally, six specific conflict-related issues will be laid out.
6.2.1 Enforcement of foreign judgment in the United States

To understand enforcement piercing, one must also look at the enforcement mechanism within the United States. The enforcement of a judgment rendered by a state court (F1) in a sister state in the United States (F2) is generally governed by the Full Faith and Credit clause of the Constitution.27 Under the clause, it was stated that “[f]ull faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.”28 By federal legislation, this national recognition of judgments has been extended to judgments rendered by federal courts.29

To qualify for enforcement in another state,30 the judgment must be considered a valid judgment.31 The Restatement (Second) of Conflict of Laws has set out the relevant criteria, as follows:

27 See S.C. Symeonides, American Private International Law, (Kluwer 2008) 327 (“As between the states in the United States, the recognition requirements are prescribed by federal law, primarily the Constitution’s Full Faith and Credit clause…”).


29 28 U.S.C. §1738 ([judgments of any court within the United States] “shall have the same full faith and credit in every court within the United States… as they have by law or usage” [in the judgment-rendering courts].).

30 For the purpose of this chapter, we are focusing only on enforcement and will not discuss recognition without the need for positive relief in F2. See Restatement (Second) of Conflict of Laws, at 277 (“A foreign judgment is recognized… when it is given the same effect that it has in the state where it was rendered with respect to the parties, the subject matter of the action and the issues involved. A foreign judgment is enforced when, in addition to being recognized, a party is given the affirmative relief to which the judgment entitles him.”).
“§92. Requisites of a Valid Judgment

A judgment is valid if

(a) The state in which it is rendered has jurisdiction to act judicially in the case; and

(b) A reasonable method of notification is employed and a reasonable opportunity to be heard is afforded to persons affected; and

(c) The judgment is rendered by a competent court; and

(d) There is compliance with such requirements of the state rendition as are necessary for the valid exercise of power by the court.”32

There will be few disputes for enforcement in F2 if piercing was litigated and succeeded along with the underlying cause of action in the same trial in F1. Applying the above criteria, judgment resulting therefrom will be enforced in F2 against the parent if (i) F1 has jurisdiction over the parent (ii) who was properly served with notice and (iii) F1 had subject matter jurisdiction and (iv) had followed the state procedural rule of F1.33 As we will see below, it will be much less clear in the case of enforcement piercing where the plaintiff tries to pierce the corporate veil of the parent in the enforcement action in F2.

31 See Restatement (Second) of Conflict of Laws, § 93 (“A valid judgment rendered in one State of the United States must be recognized in a sister State…”).

32 See Restatement (Second) of Conflict of Laws, § 92.

33 This will be Scenario 2 below, see infra Section 2.2. tb 6.1.
Each of the basic requirements above could be separate hurdle for the plaintiff in enforcement piercing.

6.2.2 The four possible scenarios

There are two important variables in relation to enforcement piercing, namely, (i) whether there is an enforcement piercing, and (ii) whether there exists any conflict element in the case. The table below shows the four possible scenarios that could be created by the two variables.

Table 6.1 – The Four Possible Scenarios

<table>
<thead>
<tr>
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<th>No Enforcement Piercing</th>
<th>Enforcement Piercing</th>
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</thead>
<tbody>
<tr>
<td><strong>Non-conflict Case</strong></td>
<td>Scenario 1</td>
<td>Scenario 3</td>
</tr>
<tr>
<td><strong>Conflict Case</strong></td>
<td>Scenario 2</td>
<td>Scenario 4</td>
</tr>
</tbody>
</table>

i. **Scenario 1**

Scenario 1 refers to the classic first instance piercing cases. Both the underlying cause of action (e.g., tort or contract) and the piercing of the corporate veil are litigated in the same trial in the same state (F1). The case is also purely domestic and without any conflict element. \(^{34}\) For example, a New York plaintiff

\(^{34}\) See Chapter 2 for a definition of conflict cases.
sues a New York defendant company for the underlying cause of action as well as a New York shareholder of the company for piercing the corporate veil in the same trial in a New York state court.35

ii. Scenario 2

Like Scenario 1, the underlying cause of action and piercing are both litigated in the same proceedings in F1. What separates the two Scenarios is the involvement of a conflict element in the Scenario 2 cases. It is important to note that these cases, despite not being enforcement piercing cases, could involve a sister state for enforcement purposes. Using the Bank of Montreal case as an example, if the underlying contract claim and piercing were both litigated in Illinois, the plaintiff could bring the resulting favorable judgment against the shareholder in California for enforcement. However, this is not enforcement piercing despite the involvement of both piercing the corporate veil and the enforcement of a foreign judgment. The piercing issue, like the contract claim, will be merged with the resulting judgment in F1.36 F2 will simply enforce the judgment debt against the shareholder without any regard to the piercing issue. So long as F1 fulfils all the requirements specified in Section 2.1 above, F2 will have

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36 See Restatement (Second) of Conflict of Laws, § 95, comment c. (“If the judgment under the local law of the State where it was rendered is a valid and final judgment for the recovery of money damages and its effect is to merge the cause of action in the judgment, the plaintiff may no longer maintain an action on the original cause of action in any State.”). See also Pyshos, 630 N.E.2d at 1058 (“where a party obtains a judgment against another party, the underlying claim merges with the judgment and the judgment becomes a new and distinct obligation of the corporation which differs in nature and essence from the original claim.”).
to give effect to the F1 judgment.37 Because piercing has been completed in F1 prior to the commencement of enforcement proceedings in F2 under Scenario 2, it again will not be the focus of this chapter.38

iii. Scenario 3

Scenario 3 is an enforcement piercing case. The plaintiff first sues the defendant in F1 under a cause of action and subsequently receives a judgment in his or her favor. He or she then further pursues the shareholder by utilizing the piercing the corporate veil doctrine in a separate proceeding in F1. Thus, there are two trials in F1, one for the underlying cause of action against the defendant company, and the other for the enforcement piercing against the shareholder. Again, enforcement piercing in the same state is not unusual. The plaintiff might not have realized that the defendant corporation is a shell company with no real assets until the post-judgment discovery process.39 It is also possible that the shareholder has intentionally removed the assets of the defendant in an attempt to frustrate the collection of judgment by the plaintiff.40

37 See supra note 33.

38 For other conflict issues arising from these Scenario 2 cases, such as choice-of-law and jurisdiction-related issues, please see generally Chapters 4 and 5 above.

39 See supra note 7.

40 See supra note 8.
iv. Scenario 4

Of the four scenarios, Scenario 4 is the most relevant for this chapter. The major difference between Scenario 3 and Scenario 4 is the involvement of a conflict element in Scenario 4. This is the most apparent when the enforcement piercing is conducted in another state. This affords the plaintiff multiple opportunities to forum-shop for favorable governing laws, first for the governing law of the underlying cause of action in F1, then for the governing law of piercing the corporate veil in F2. The Bank of Montreal case is exactly a Scenario 4 case, one in which both California and Illinois were involved. It must also be noted that Scenario 4 covers both the cases where F2 is a different state court and a federal court. For example, if F1 is a state court in Illinois and F2 is a federal court in Illinois, it will still be regarded as a Scenario 4 case for the possibility of the federal court applying a different lex fori, namely, the federal common law, to the piercing issue.

A potential choice-of-law issue may also be present despite the lack of involvement of another state in Scenario 4 so long as there is a conflict element.41 Using the Bank of Montreal case as an example, even if both the underlying cause of action and the enforcement piercing occurred in California, the same California court could potentially apply a different governing law in the enforcement piercing. In a first instance piercing case (Scenarios 1 and 2), it is possible that the California court may apply one choice of law approach, say, the law of the state

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41 For a definition of the conflict element, see Chapter 2.
of incorporation\textsuperscript{42} and find that, for the purpose of discussion, Nevada law applies.\textsuperscript{43} However, in enforcement piercing, if the same California court presides over the piercing issue in the subsequent enforcement action, it could have adopted a different choice-of-law approach due to the different nature of the proceedings. For instance, it could have regarded enforcement piercing as an enforcement method and thus be governed by the \textit{lex fori}, that is, California law.\textsuperscript{44}

That said, there are certainly more choice-of-law possibilities in cases where another state is involved.

The extent to which the plaintiff could forum-shop on the piercing issue in the enforcement stage is dictated by the six issues to be introduced in Section 2.2 below.\textsuperscript{45} Both Scenarios 3 and 4 will be the focus of this chapter.

\textbf{6.2.3 Conflict issues with enforcement piercing}

\textbf{6.2.3.1. Choice of law}

The conventional default choice-of-law rule on first instance piercing is the law of the state of incorporation.\textsuperscript{46} However, as elaborated in Chapter 4, the truth

\textsuperscript{42} See JBR, Inc. v. Cafe Don Paco, Inc., 2013 WL 1891386 (N.D.Cal, May 6, 2013) (the California court applied Texas law which was the law of the state of incorporation of the defendant company).

\textsuperscript{43} The defendant corporation is a Nevada corporation in Bank of Montreal. See Bank of Montreal v. SK Foods, LLC, 476 BR 588 (ND Cal. 2012).

\textsuperscript{44} See Toho-Towa Co., Ltd v. Morgan Creek Productions, Inc., No. B242095 (Cal. Ct App., July 11, 2013) (the California court applied California law to the piercing issue despite the company having been incorporated in Delaware). The potential choice-of-law approaches will be discussed fully in \textit{infra} Section 2.3.1.

\textsuperscript{45} Scenario 3 is subject only to restriction imposed by \textit{res judicata}, see \textit{infra} Section 2.3.5.
is that different states have a different choice-of-law rule on the applicable law on piercing, and it has been found that most courts in the United States simply forgo the choice-of-law analysis and apply the *lex fori*.\(^\text{47}\) This provides a motivation for parties to forum-shop.\(^\text{48}\) Depending on the choice-of-law approach, the motivation to forum-shop could be even more rampant in enforcement piercing. There are three possible approaches based on the authorities.

**6.2.3.1.1 First Approach – F1 Piercing Law**

The first approach is that the choice-of-law rule on enforcement piercing in F2 is dictated by the choice-of-law rule of F1. The basis for this approach could be found in §94 of the *Restatement (Second) of Conflict of Laws* which provides that “[w]hat persons are bound by a valid judgment is determined, subject to constitutional limitations, by the local law of the State where the judgment was rendered.”\(^\text{49}\) This is further explained in comment b:

“Persons who are bound personally by the adjudication of litigated matters are (1) parties who were personally subject to the jurisdiction of the court which rendered the judgment, (2) *persons in privity with a party*, and (3), more rarely, persons who stand in a special relationship to a party or privy.

\(^{46}\) *See Restatement (Second) of Conflict of Laws*, § 307, at 328 (“the local law of the state of incorporation will be applied to determine the existence and extent of a shareholder’s liability to the corporation for assessments or contributions and to its creditors for corporate debts.”).

\(^{47}\) *See Chapter 4, tb 4.3.*

\(^{48}\) *Id.*

\(^{49}\) *See Restatement (Second) of Conflict of Laws*, § 94, at 279.
What persons are in privity with a party to the judgment or are otherwise affected by the judgment on account of a special relationship to a party or a privy is determined by the local law of the State where the judgment was rendered provided that this law meets the requirement of due process.” [emphasis added]50

Thus, if enforcement piercing is regarded as giving effect to the F1 judgment against the privy (the shareholder) of the corporate defendant, F2 should therefore follow the choice-of-law rule of F1, whichever that is. Adopting this approach, the California court in Bank of Montreal should apply Illinois law on the piercing issue. The policy reason behind such an approach could be the prevention of forum-shopping. The plaintiff will not be able to pick and choose the favorable piercing law governing the enforcement piercing by going to another state. Whether the plaintiff has piercing litigation in F1 (along with the underlying cause of action) or F2 (by way of enforcement piercing), the piercing issue will be governed by the same piercing rule of F1.

6.2.3.1.2 Second Approach – Same Approach as First Instance Piercing

However, the Restatement is not as clear as one might want it to be. After stating the general rule above, comment b went on to state that “the liability of a shareholder imposed by the State of incorporation” should refer to the rule set forth in §30751 which in turn refers back to the law of the state of incorporation.52

50 See Restatement (Second) of Conflict of Laws, § 94, comment b, at 279.

51 Id.
This may lead to an argument that enforcement piercing should be an exception to the aforementioned rule that “privity” is to be interpreted by F1 rule.\textsuperscript{53} Following this line of argument, so long as a shareholder’s liability is in question, it is to be governed by the general rule of piercing, regardless of the forum being a court of first instance or a court of enforcement.\textsuperscript{54} Although this rule is unclear under the Restatement (Second), this is seemingly the approach adopted by a number of courts, including the Seventh Circuit, as shown by Judge Posner in On Command Video Corp. v. Roti.\textsuperscript{55}

To sum up, this second approach is to treat the choice of law of enforcement piercing by the same approach in first instance piercing.\textsuperscript{56} While the Restatement does not elaborate on why the shareholder’s liability should be different from the general privity rule, the basis of using the law of the state of incorporation seems to be that enforcement piercing is just like any piercing by which the shareholder is to be held liable for the conduct of the defendant corporation. This is to be

\begin{itemize}
\item \textsuperscript{52}See Restatement (Second) of Conflict of Laws, § 307.
\item \textsuperscript{53}Instead of stating “[a]s to the liability of a shareholder imposed by the State of incorporation, see § 107,” it will be much clearer if the Restatement states that the liability of a shareholder is governed by the State of incorporation.
\item \textsuperscript{54}If every state adopts the law of the state of incorporation as the liability piercing rule, the first and second approaches will yield the same result, namely, that the law of the state of incorporation governs.
\item \textsuperscript{55}On Command Video Corp. v. Roti, 705 F.3d 267, 272 (7th Or. 2013) (stating that “veil-piercing claims are governed by the law of the state of the corporation whose veil is sought to be pierced” and held accordingly that Illinois law, being the state of incorporation of the defendant company, governed the piercing claim that sought to enforce a Colorado judgment against the shareholder).
\item \textsuperscript{56}At least as far as the choice-of-law rule of first instance piercing under the Restatement, For the Restatement, the advocated approach is state of incorporation. In reality, courts often deviate from that approach.
\end{itemize}
contrasted from jurisdictional piercing where the purpose is to impute the jurisdictional contacts of the corporation to the shareholder. Of course, if all courts adopt the Restatement (Second)’s suggested approach, i.e., the law of the place of incorporation, it will have the effect of eliminating the motivation to forum-shop because all courts (whether the court of first instance or the enforcement court) will just refer back to the law of the state of incorporation. However, as far as the majority of piercing cases are concerned, the practices of courts vary and it is uncertain whether the law of the state of incorporation will be the choice-of-law approach.

6.2.3.1.3 Third Approach – Lex Fori

Finally, the third approach is to treat enforcement piercing as an enforcement method and to apply the procedural rules of the forum (F2). Because the general choice-of-law rule for procedure is the lex fori, enforcement piercing should similarly be governed by the lex fori. It is, however, at best controversial to call enforcement piercing a procedural rule. Looking at the three relevant sections of

57 See Superkite PTY Limited v. Glickman 2014 WL 1202577 at *6 (“When a party uses veil piercing to establish personal jurisdiction, although the law of the state of incorporation applies to determine whether a party can substantively pierce a corporation’s veil, Illinois law governs the analysis of whether personal jurisdiction is proper.”). See generally Chapter 5.

58 See infra tb 6.9 (finding that 84.81% of courts simply forgo the choice-of-law analysis and apply the lex fori).

59 See Restatement (Second) of Conflict of Laws, § 99 (“The local law of the forum determines the methods by which a judgment of another state is enforced.”). See also RBC Bearings, Inc. v. Thin Section Bearings, Inc. 2007 WL 2727160, at *1 (D.Conn. Sept. 18, 2007).
the *Restatement (Second) of Conflict of Laws*,\(^{60}\) it seems that the reporter never had enforcement piercing in mind at all in §94. Looking at the nature of the enforcement piercing, it is more to do with the substantive rights of the parties than how a litigation is to be conducted.\(^{61}\) More importantly, of all the approaches, this approach clearly encourages forum-shopping because a plaintiff could be certain *ex ante* that the *lex fori* of F2 will apply in enforcement piercing.

Having regard to the three approaches, it is predicted that if most courts adopt the first approach, there will not be an advantage to forum-shop by the plaintiff. On the contrary, if courts were to adopt the second\(^{62}\) or particularly the third approaches, the piercing rate of enforcement piercing cases will be higher than the first instance piercing cases. The plaintiffs will therefore be more motivated to forum-shop by way of enforcement piercing so long as the costs of enforcement piercing are on a par with those of first instance piercing.

The next four issues serve as additional hurdles that the plaintiffs need to clear when utilizing enforcement piercing. Because they are not present in first instance

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\(^{60}\) *Restatement (Second) of Conflict of Laws*, §§94, 99 and 307.

\(^{61}\) See K. Roosevelt, *Conflict of Laws*, 2010 Thomson Reuters/Foundation Press, New York, 18 (arguing that the “[s]ubstantive law is concerned with what people do outside of court, what is sometimes called “primary conduct.”” and “[p]rocedural law is concerned with what people do inside court, litigating behavior, or what is sometimes called “secondary conduct.””) Support of this view could be found in the *Restatement*. Examples of procedural matters given by the *Restatement* include “the proper form of action, service of process, pleading, rules of discovery, mode of trial and execution and costs.” See *Restatement (Second) of Conflict of Laws* §99, at 123.

\(^{62}\) Assuming that the predominant approach adopted is not based on the law of the place of incorporation.
piercing, how hard it is to get pass them will determine the motivation for plaintiffs to utilize enforcement piercing.

6.2.3.2 Personal jurisdiction

Choice of law provides a potential advantage to a plaintiff in forum-shopping, but the prerequisite of forum-shopping is to have multiple fora for such shopping. Since the availability of a forum is decided by jurisdictional rules, they have long been the safety valves for the control of forum-shopping.

In a first instance piercing case, forum-shopping of the piercing issue is just like the forum-shopping of any legal issue, the plaintiff must have an alternative forum with personal jurisdiction over the shareholder.\footnote{This could potentially be achieved by jurisdictional piercing. See discussion in Chapter 5.} However, the same jurisdictional requirement over a shareholder may not apply to enforcement piercing.

As Section 2.1 has shown, the requirements in the enforcement of a judgment consist of only personal jurisdiction over the \textit{defendant}, but there is no such requirement over the \textit{privy}, the shareholder in an enforcement piercing.\footnote{See supra note 33.} Thus, one can at least argue that as long as the shareholder has assets in a particular state, the \textit{prima facie} analysis is that the plaintiff could reach such assets by enforcement piercing against the shareholder in such state.
On the other hand, there are also precedents requiring personal jurisdiction over the shareholder in F2. One of the leading cases is *Dudley v. Smith* where the Court of Appeal of the Fifth Circuit was asked by the plaintiff to enforce an Alabama judgment against the shareholder who was a Mississippi resident. The shareholder argued that Alabama did not have personal jurisdiction over it. Drawing on a number of Alabama-related activities by the shareholder, the court found personal jurisdiction over the shareholder and therefore the plaintiff’s piercing claim was successful. While not all precedents have clearly elaborated the rationales behind the requirement, and some courts even admitted that they did not know if that is a requirement, the answer could simply be due process. *Restatement (Second) of Conflict of Laws* provides that “if a State of the United States has rules of privity that are inconsistent with due process, these rules are void and persons covered by the rules may not be held affected by the judgment either in a sister State of in the State of rendition itself.” This view is shared by Judge Edelstein in *Wm Passalacqua Builders, Inc. v. Resnick Developers South*

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65 *Dudley v. Smith*, 504 F.2d 979 (5th Cir. 1974).

66 *Id.* 982.

67 *Id.*

68 While *Dudley* discussed the personal jurisdiction of the shareholder, the court there did not expressly state that personal jurisdiction is required over the shareholder either.

69 See *Holmes-Marc v. Support Management, Inc.* 2013 WL 1342282 at *2 (“It is not clear to the court whether… the court may recognize a foreign judgment and enforce it against a third party that was not a party to the proceeding which rendered the foreign judgment. [The Massachusetts procedural rule], for example, requires the foreign state to have had personal jurisdiction over the person or entity against which the judgment was entered.”).

70 *Restatement (Second) of Conflict of Laws, comment b*, at 279.
In that case, the plaintiff sought to enforce a Florida judgment against the shareholder in New York. On the point of personal jurisdiction, Judge Edelstein first made the observation that “courts have enforced judgments against “alter egos” where the court had jurisdiction over the alleged “alter ego.” He then went on to distinguish the requirement of due process in first instance piercing and enforcement piercing where the former does not require an F2 finding of personal jurisdiction over the shareholder:

“[w]hen the alleged “alter ego” is a party to the action whether the “alter ego” status is litigated, due process will be satisfied. This determination need not be made as part of the underlying action in order to enforce a judgment.”

However, in enforcement piercing, personal jurisdiction is required in F2 since “the court is determining the alter ego issue in a proceeding to which the [shareholders] are parties.” This determination can only be valid “[i]f the court has jurisdiction over the alleged “alter egos.” Accordingly, the Due Process clause of the U.S. Constitution demands that the enforcement court (F2) must have personal jurisdiction over the shareholder. The lack of such requirement will

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72 Id.
73 Id. 284.
74 Id.
75 Id.
76 Id.
essentially allow the plaintiff to forum-shop for enforcement piercing in whichever state that the shareholder has assets.\footnote{This is not to be confused with \textit{in rem} jurisdiction. No such case is identified in the research anyway.}

A counter-argument could be that if enforcement piercing is successful, the shareholder and the defendant corporation will be regarded as the same person, therefore satisfying the jurisdictional requirement by granting F1 jurisdiction over the shareholder. This is essentially a jurisdictional piercing.\footnote{On jurisdictional piercing, \textit{see generally} Chapter 5.} In \textit{Systems Div., Inc. v. Teknek Electronics, Ltd},\footnote{\textit{Sys. Div., Inc. v. Teknek Elecs., Ltd}, 253 F. App’x 31,33 (Fed. Cir. 2007).} the court applied exactly this doctrine, stating that “[t]he exercise of jurisdiction over an alter ego is compatible with due process because a corporation and its alter ego are the same entity – thus, the jurisdictional contacts of one are the jurisdictional contacts of the other for the purposes of the \textit{International Shoe} due process analysis.”\footnote{\textit{Id.} 37.} Although this argument is certainly viable, it must be noted that jurisdictional piercing and liability piercing might not be the same. The former must satisfy the “minimum contact” test as set forth in \textit{International Shoe},\footnote{\textit{International Shoe Co. v. State of Washington} 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).} while the latter is a state corporate law concept that is solely decided by the state court.\footnote{Most of the courts however apply the same test. For the detailed debate, \textit{see} Chapter 3.} Thus, being able to satisfy the piercing test alone does not guarantee the provision of a solid due process basis that satisfies due process.
In any event, general observation over the state cases shows fragmented practices among different states. With the U.S. Supreme Court recently further limiting the general jurisdiction of courts over large corporations that have business spanning over multiple states in *Goodyear*,83 and *Daimler*,84 there is an increasing need to find out the prevailing practice of courts on jurisdiction in enforcement piercing cases. In *Goodyear*, it was argued by the plaintiff that North Carolina had general jurisdiction over the defendants because their parent company had a substantial operation in the said state despite neither having their place of incorporation nor principal place of business there.85 This argument was emphatically rejected by Justice Ginsburg who delivered the unanimous judgment of the U.S. Supreme Court.86 Pointing to general jurisdiction being the “home” to the corporation, she clarified that only the state of incorporation or principal place of business could give court general jurisdiction.87 This adds to the importance of finding the answer to the jurisdictional requirement.


86 Id. 2851.

87 Id. 2854 (“For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home. See Brilmayer 728 (identifying domicile, place of incorporation, and principal place of business as “paradigm[mal]” bases for the exercise of general jurisdiction.”).
6.2.3.3 Subject matter jurisdiction

If the enforcement court is required to also have subject matter jurisdiction over the shareholder, it will again limit the forum-shopping opportunities of the plaintiff. This generally refers only to federal question cases where both F1 and F2 are federal courts. After the F1 federal court rendered a judgment against the defendant corporation based on federal question subject matter jurisdiction, the F2 federal court must decide whether it has subject matter jurisdiction to take the case for enforcement piercing. The Restatement (Second) of Conflict of Laws is silent on this. The answer to that could however be provided by the U.S. Supreme Court. In Peacock v. Thomas,88 the court was faced with enforcement piercing claim by the plaintiff against the officer of the defendant who was liable for a judgment based on an ERISA claim.89 It was decided that “[p]iercing the corporate veil is not itself an independent ERISA cause of action, but rather is a means of imposing liability on an underlying cause of action.”90 As a result, the plaintiff’s piercing claim “does not state a cause of action under ERISA and cannot independently support federal jurisdiction.”91 Nor could plaintiff rely on the subject matter jurisdiction of the original trial, i.e., ancillary jurisdiction.92

89 Id. 352.
90 Id. 354.
91 Id. 353–354.
92 Id. 355 (“In a subsequent lawsuit involving claims with no independent basis for jurisdiction, a federal court lacks the threshold jurisdictional power that exists when ancillary claims are asserted in the same proceeding as the claims conferring federal jurisdiction.”).
However, this rule is not without its issue, most notably the artificiality of distinguishing piercing of the corporate veil from fraudulent transfer. The latter will be able to invoke the ancillary jurisdiction of the court. This narrow distinction is followed by subsequent courts, despite notable hesitation in some difficult cases. One aspect that the courts rarely explore is the possibility of subject matter jurisdictional piercing in an enforcement scenario, but no reported case on this has been identified by the author, and certainly not during the survey period. Finally, if the case also happens to be a diversity case, the subject matter jurisdiction issue will not arise since the plaintiff does not need to rely on federal question jurisdiction.

\[93\] Id. 356 (“we have approved the exercise of ancillary jurisdiction over a broad range of supplementary proceedings involving third parties to assist in the protection and enforcement of federal judgments – including…fraudulent conveyances.”).

\[94\] See Epperson v. Entertainment Express, Inc., 242 F.3d 100, 106 (2d Cir. 2001) (“Since Peacock, most courts have continued to draw a distinction between post-judgment proceedings to collect an existing judgment and proceedings, such as claims of alter ego liability and veil-piercing, that raise an independent controversy with a new party in an effort to shift liability.”). See also International Broth. of Elec. Workers Local 449 v. Black Ridge Energy Services, Inc. 2014 WL 3891291 at*8 (“a judgment-enforcement action based on a retroactive alter ego claim… requires its own basis for federal jurisdiction separate from the extant judgment against [shareholder].”).

\[95\] See, e.g., Knox v. Orascom Telecom Holding S.A.E., 477 F. Supp. 2d 642 646 (S.D. N.Y. 2007) (“Plaintiff’s contend that the circumstances of this action are more in line with those in Epperson, because Plaintiffs do not seek to hold [shareholder] liable for the judgment against the [defendant company]. Rather, they simply seek recovery of funds due the [defendant company] that happen to be in [shareholder’s] possession. There is some merit in both parties’ arguments, rendering the Court’s judgment an acutely close call.”).

\[96\] There are examples that subject matter jurisdiction could be gained through the application of piercing of the corporate veil doctrine, see, e.g., RMS Titanic, Inc. v. Zaller, 978 F. Supp. 2d 1275 1291 (N.D. Ga. 2013) (extending subject matter jurisdiction based on the Latham Act over foreign party through piercing the corporate veil due to its alter ego status with a U.S. party).
6.2.3.4 Notice

The *Restatement (Second) of Conflict of Laws* did not state any additional requirement on enforcement piercing (*e.g.*, the requirement of personal jurisdiction and subject matter jurisdiction),\(^97\) the *Restatement (Second) of Judgment* however discusses an additional notice requirement. §59(5) states that:

“A judgment against a corporation that is found to be the alter ego of a stockholder or member of the corporation establishes personal liability of the latter *only if he is given notice that such liability is sought to be imposed and fair opportunity to defend the action resulting in the judgment.*” (emphasis added)\(^98\)

Thus, the shareholder must be notified at the F1 proceeding in order for it to be liable for the judgment. This rule seems to be derived from a widely influential U.S. Supreme Court case, *Zenith Radio Corp. v. Hazeltine Research, Inc.*\(^99\) In that case, the Supreme Court rejected the plaintiff’s attempt to hold the shareholder liable for the defendant’s judgment debt in an enforcement action due to the fact that the shareholder was not served with notice of the first instance

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\(^97\) One may argue that it was discussed indirectly, *see supra* note 56 (requiring that the interpretation of “privy” under F1 law must be subject to due process).

\(^98\) *Restatement (Second) of Judgment*, § 59(5).

proceeding against the defendant.100 However, a closer look at *Zenith* may yield a different interpretation.

Firstly, there was no enforcement piercing in the case. In the lower court, the parent was held liable on the basis of a stipulation between the subsidiary and the plaintiff which provided that “for purposes of this litigation [the subsidiary] and its parent… will be considered to be one and the same company.”101 Thus, not only there was no enforcement piercing, there was no piercing at all. This was the view taken by the U.S. Supreme Court. It rejected the stipulation as a valid basis to hold the parent liable, stating that:

“[p]erhaps [plaintiff] could have proved that the trial court might have found that [defendant subsidiary] and [parent] were alter egos; but absent jurisdiction over [parent], that determination would bind only [defendant subsidiary]. *If the alter ego issue had been litigated, and if the trial court had decided that [defendant subsidiary] and [parent] were one and the same entity and that jurisdiction over [defendant subsidiary] gave the court jurisdiction over [parent], perhaps [parent’s] appearance before judgment with full opportunity to contest jurisdiction would warrant entry of judgment against it. But that is not what occurred here.* The trial court’s judgment against [parent] was based wholly on [defendant subsidiary’s] stipulation. [Defendant subsidiary] may have executed the stipulation to avoid litigating the alter ego issue, but this fact cannot

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100 *Id.* 110 (“It is elementary that one is not bound by a judgment *in personam* resulting from litigation in which he is not designated as party or to which he has not been made a party by service of process.”).

101 *Id.* 109.
foreclose [parent], which has never had its day in court on the question of whether it and its subsidiary should be considered the same entity for purposes of this litigation.” (emphasis added) 102

Apart from this not being a piercing case technically, the decision of “piercing” was based on the concession of the subsidiary which had no such authority. More importantly, the Supreme Court, from the extract above, was clearly of the opinion that, should a parent properly be served and found liable on piercing at trial, it would have accepted the parent’s liability based on piercing.103 Thus, if F2 adjudicates the piercing issue against the shareholder in the enforcement proceeding (which did not happen in Zenith), the shareholder will have that opportunity to litigate on the alter ego issue and therefore comply with due process.104 It will be interesting to see whether courts follow the rule formulated by the Restatement (Second) of Judgment or the interpretation of Zenith advocated above.

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102 Id. 111.

103 Id.

104 See Wm Passalacqua Builders, Inc. v. Resnick Developers S.,Inc., 933 F.2d 131, 142–143 (2d Cir. 1991) (“In Zenith the Court held it unconstitutional for a court to enforce a judgment against a parent corporation—alleged to be the alter ego of a subsidiary—who had controlled the litigation against the subsidiary, but who had never been subjected to the personal jurisdiction of the court. What the defendants ignore is the statement in Zenith that the judgment against the subsidiary could be res judicata against the parent in a court, as the district court here, that did have proper jurisdiction over the parent. Consequently, if the plaintiffs in this case can prove the defendants are in fact the alter ego of Developers, defendants *143 jurisdictional objection evaporates because the previous judgment is then being enforced against entities who were, in essence, parties to the underlying dispute; the alter egos are treated as one entity.”).
6.2.3.5 Res judicata

The final issue that might limit the plaintiff’s advantage of enforcement piercing is *res judicata*. An argument that has consistently been raised and rejected by the courts is that piercing could not be raised in an enforcement proceeding in F2 because it will constitute *res judicata*, in other words, barring the relitigation of the legal matter.\(^\text{105}\) It is typically argued by the defendant that enforcement piercing in F2 is in essence a relitigation of the underlying cause of action that has been adjudicated in F1, and therefore prohibited by *res judicata*.\(^\text{106}\)

The courts rejected this argument because the plaintiffs are not relitigating the underlying cause of action that was concluded in F1, but the piercing issue which is a separated legal concept from the underlying cause of action.\(^\text{107}\) Instead, the strongest argument for *res judicata* is that the plaintiff, although it did not raise the piercing argument in F1, *could have* raised it in F1 instead of dragging it to F2.

\(^{105}\) See *Monahan v. N.Y. City Dep’t of Corr.*, 214 F.3d 275, 284 (2d Cir.2000) (“The doctrine of… claim preclusion holds that a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.”).


\(^{107}\) See *American Federated Title Corp. v. GFI Management Services, Inc.* 39 F. Supp. 3d 516, 523 (“The issue of contractual liability was litigated in a proceeding in which Defendants here were not parties, and it involved issues distinct from whether Defendants are liable on a veil-piercing theory.”); *Strange v. Estate of Lindemann* 408 S.W.3d 658, 661 (“Typically, a postjudgment suit against an alleged alter ego is not a collateral attack on the prior judgment, and thus is not barred by *res judicata*.”).
for enforcement piercing. However, for the piercing claim to be barred, it “logically must have arisen before the prior action.”

This will come down to a factual question. Does plaintiff have the information about the need of piercing when the trial in F1 was in process (e.g., whether there are enough assets in F1 to satisfy the judgment) and the prospect of piercing (e.g., whether the shareholder and the defendant corporation are of such a relationship that piercing is possible)? To hold otherwise, “any time a plaintiff sues a corporation, it would effectively be required to join the corporation’s owners or be barred from later recovering on the judgment from the owners in a separate veil-piercing action.” This issue will be further examined in the empirical research. Apparently, the choice-of-law rules of res judicata could have an impact on the whole forum-shopping game. How strictly the courts interpret the factual scenarios for a plaintiff to raise the piercing argument in F1 will be of key significance in the applicability of the doctrine.

6.2.3.6 State Procedural Rule

An issue that might arise in enforcement piercing is whether enforcement piercing can constitute a valid claim during the enforcement stage. Generally,

108 See supra note 111.

109 Id. American Federated Title Corp. v. GFI Management Services, Inc. 39 F. Supp. 3d 516, 524. See also Strange v. Estate of Lindemann 408 S.W.3d 658, 661 (“For res judicata to apply to a claim, that claim must have been in existence when the first suit was filed.”).

110 Id.
piercing the corporate veil is regarded as an equitable remedy.\footnote{See Lutyk, 332 F.3d at 193 n. 6 (“As ‘an equitable remedy,’ piercing the corporate veil is not technically a mechanism for imposing ‘legal’ liability, but [rather] for remedying the ‘fundamental unfairness that will result from a failure to disregard the corporate form.’”).} It is ancillary in nature and cannot by itself be the cause of action of a litigation.\footnote{See In re JNS Aviation, LLC, 376 B.R. 500, 521 (Bankr.N.D.Tex.2007) (“Under Texas law, “an assertion of veil piercing or corporate disregard does not create a substantive cause of action [...] ... such theories are purely remedial and serve to expand the scope of potential sources of relief by extending to individual shareholders or other business entities what is otherwise only a corporate liability.””). See also discussion in Chapter 3, Section 6.} Thus, if the underlying cause of action is merged into the judgment, how could the plaintiff sue the shareholder with only piercing the corporate veil? Different states have different answers, depending on the procedural rule of the state in question. For example, in Illinois, enforcement piercing has long been regarded as an exception to the general rule that piercing cannot be a cause of action. In\footnote{Buckley v. Abuzir 8 NE3d 1166, 1169 (Ill. Dist. Ct. App.2014).} Buckley v. Abuzir, the court stated that although “[p]iercing the corporate veil is not a cause of action but, rather, a means of imposing liability in an underlying cause of action… [p]arties may… bring a separate action to pierce the corporate veil for a judgment already obtained against a corporation.”\footnote{Bank of Montreal v. SK Foods, LLC, 476 BR 588, 597 (ND Cal. 2012).} In California, enforcement piercing can be effected by an amendment of the original judgment. In\footnote{Bank of Montreal v. SK Foods, LLC, 476 BR 588, 597 (ND Cal. 2012).} Bank of Montreal, the court stated that “California Civil Procedure Code §187 allows the amendment of a judgment to add additional judgment debtors on the grounds that a person or entity is the alter ego of the original judgment debtor.”\footnote{Bank of Montreal v. SK Foods, LLC, 476 BR 588, 597 (ND Cal. 2012).}
states, it is less clear how the enforcement piercing is to be in compliance with the
general requirement of a cause of action.\textsuperscript{115}

Having reviewed the issues above, it is clear that the different approaches on the
choice of law could change the potential advantages available to the plaintiff in
enforcement piercing, while issues in 2.2.2. to 2.2.6. could have the effect of
imposing hurdles of forum-shopping.

\section*{6.3 Findings of Empirical Research}

The findings of the empirical research are presented in this Section. Firstly, the
basic statistics, including the number of the various types of cases and the respective
piercing rates, will be set forth. Secondly, the findings on the six conflict issues
highlighted in Section 6.2 will be presented.

\textsuperscript{115} In most cases, the courts simply do not address the procedural aspect of enforcement piercing. For
example, in \textit{In re Gigliotti} 507 B.R. 826, 829 (Bankr. E.D. Pa. 2014), the court simply stated that the
plaintiff sought to “recover on the state court judgment from the [shareholders] based on a theory of
piercing the corporate veil.”).
Table 6.2 – Basic Findings of Enforcement Piercing

<table>
<thead>
<tr>
<th></th>
<th>No. of Cases</th>
<th>Pierced Cases</th>
<th>Piercing Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Raw Cases</strong></td>
<td>1,587</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td><strong>Piercing Cases</strong></td>
<td>1,044</td>
<td>368</td>
<td>35.25%</td>
</tr>
<tr>
<td><strong>Conflict Cases</strong></td>
<td>810</td>
<td>298</td>
<td>36.79%</td>
</tr>
<tr>
<td><strong>Enforcement Piercing Cases</strong></td>
<td>90</td>
<td>47</td>
<td>52.22%</td>
</tr>
<tr>
<td><strong>Non-enforcement Piercing Cases</strong></td>
<td>953</td>
<td>320</td>
<td>33.58%</td>
</tr>
</tbody>
</table>

Among the 1,044 piercing cases, there are a total of 90 enforcement cases (Scenarios 3 and 4). This represents 8.62% of all piercing cases. These are without doubt a minority, but the enforcement piercing cases still account for a sizeable number of all piercing cases. This makes enforcement piercing a clearly established category of piercing cases, thus attesting to its importance. However, if we take into account only the successful piercing cases, the importance of the enforcement piercing cases shines further. As indicated in Table 6.3, of the 368 successful piercing cases, 47 of them are enforcement piercing cases, accounting for 12.77% of such cases.

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116 Data reproduced from tb 3.1.
Table 6.3 – Type of Enforcement Piercing Cases

<table>
<thead>
<tr>
<th></th>
<th>No Enforcement Piercing</th>
<th>Enforcement Piercing</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Non-conflict</strong></td>
<td>206</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td></td>
<td>24</td>
</tr>
<tr>
<td><strong>Conflict</strong></td>
<td>748</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td></td>
<td>66</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td>1,044</td>
</tr>
</tbody>
</table>

Section 6.2.2 breaks down piercing the cases into the four Scenarios\textsuperscript{117} and Table 6.3 shows the distributions of piercing cases in accordance with the categorization. Scenario 1 includes purely domestic cases with no conflict element. There are 206 such cases, accounting for 19.73% of all piercing cases. Not surprisingly, Scenario 2, \textit{i.e.,} first instance piercing cases with conflict elements, accounts for most piercing cases (748 cases (71.65%)). The lion’s share of such cases could be explained by the predominance of conflict cases (most notably, diversity in the litigating parties)\textsuperscript{118} and first instance piercing cases being substantially more in number than the enforcement piercing cases. It is important to note again that these cases, although not relevant to the enforcement piercing cases, will have conflict issues such as choice of the proper law on piercing as well as jurisdiction.\textsuperscript{119} However, because these cases do not involve enforcement piercing, they are not relevant to our purpose.

\textsuperscript{117} See supra Section 2.2.

\textsuperscript{118} See supra tb 2.

\textsuperscript{119} See supra note 47.
The most important finding belongs to the substantially higher piercing rate of the enforcement piercing cases (52.22%) as compared with that of the non-enforcement piercing cases (33.54%), a difference of almost 20%. At first glance, one might attribute this difference to the fact that the enforcement piercing cases are those cases that have had success in the underlying cause of action. Because piercing the corporate veil is not in itself a cause of action, if the underlying cause of action fails, so will the claim on piercing the corporate veil.\textsuperscript{120} This will be the case for Scenarios 1 and 2 where the underlying cause of action was tried together with the piercing issue in the same trial. Meanwhile, enforcement piercing will not be subject to the same problem. In this sense, enforcement piercing will offer the plaintiff no strategic advantage. Because the piercing rate of enforcement piercing does not take into account the failure rate of the underlying cause of action, under this rationale, the plaintiff essentially gains nothing by delaying the

\textsuperscript{120} See supra note 3.
piercing claim to the enforcement stage. However, this argument is not convincing if one looks at the number of cases where piercing failed because of a failure in the underlying cause of action, as shown in Table 6.5.

Table 6.5 – Reasons of Failure for Non-enforcement Piercing Cases

<table>
<thead>
<tr>
<th>Reason</th>
<th>Number of Cases</th>
<th>Percentage of Failed Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Failure for Underlying Cause of Action</td>
<td>5</td>
<td>0.79%</td>
</tr>
<tr>
<td>Failure for Other Reasons</td>
<td>628</td>
<td>99.21%</td>
</tr>
<tr>
<td>Total Failed Cases</td>
<td>633</td>
<td>100%</td>
</tr>
</tbody>
</table>

Apparantly, while theoretically a piercing case could fail because of failing the underlying cause of action, such instances are rare in practice. Thus, although it could still be a reason behind the higher piercing rate, there must be other explanations.

An alternative is to be found in the element of fraud. The idea is that in many of the enforcement piercing cases, plaintiffs bring the enforcement piercing in F2 because of the fraudulent conduct of the defendant and its shareholder. A prime example is the fraudulent transfer of the assets of the defendant to the shareholder.121 In cases like these, the F2 court will likely be sympathetic to the plaintiff who has won the underlying cause of action in F1 but who is not able to be compensated because of the fraudulent conduct of the defendant and its shareholder. If an enforcement piercing action is brought, it is

121 See supra note 8.
likely to satisfy the fraud element which is usually required by most states’ piercing tests.

This view is recorded in Table 6.6.

**Table 6.6 – Comparison of Reasons for Successful Piercing**

<table>
<thead>
<tr>
<th>Reason</th>
<th>Piercing Success</th>
<th>Piercing Failure</th>
<th>Enforcement Piercing Success</th>
<th>Enforcement Piercing Failure</th>
<th>Non-enforcement Piercing Success</th>
<th>Non-enforcement Piercing Failure</th>
</tr>
</thead>
<tbody>
<tr>
<td>Control, Fraud, and Proximity</td>
<td>27</td>
<td>17</td>
<td>3</td>
<td>3</td>
<td>24</td>
<td>14</td>
</tr>
<tr>
<td>Control and Fraud</td>
<td>181</td>
<td>221</td>
<td>34</td>
<td>12</td>
<td>147</td>
<td>209</td>
</tr>
<tr>
<td>Proximity and Fraud</td>
<td>2</td>
<td>7</td>
<td>2</td>
<td>6</td>
<td>2</td>
<td>7</td>
</tr>
<tr>
<td>Just Fraud</td>
<td>38</td>
<td>113</td>
<td>2</td>
<td>6</td>
<td>36</td>
<td>107</td>
</tr>
<tr>
<td><strong>Fraud-related Subtotal</strong></td>
<td>248</td>
<td>358</td>
<td>39</td>
<td>21</td>
<td>209</td>
<td>337</td>
</tr>
<tr>
<td>Just Control</td>
<td>64</td>
<td>126</td>
<td>1</td>
<td>3</td>
<td>63</td>
<td>123</td>
</tr>
<tr>
<td>Just Proximity</td>
<td>-</td>
<td>3</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>3</td>
</tr>
<tr>
<td>Proximity and Control</td>
<td>-</td>
<td>1</td>
<td>-</td>
<td>1</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Insufficient Fact</td>
<td>-</td>
<td>62</td>
<td>-</td>
<td>2</td>
<td>-</td>
<td>60</td>
</tr>
<tr>
<td>No Application/Irrelevant</td>
<td>56</td>
<td>125</td>
<td>7</td>
<td>16</td>
<td>49</td>
<td>109</td>
</tr>
<tr>
<td><strong>Others Subtotal</strong></td>
<td>120</td>
<td>317</td>
<td>8</td>
<td>21</td>
<td>112</td>
<td>295</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>368</td>
<td>675</td>
<td>47</td>
<td>43</td>
<td>321</td>
<td>632</td>
</tr>
</tbody>
</table>

As mentioned in Chapter 3, the fraud factor represents the injustice which results from the excessive control.\(^{122}\) The assumption is that this factor will be the best indicator

\(^{122}\) See Chapter 3.
to access the sympathy of the courts in the enforcement piercing cases. Accordingly, enforcement piercing cases should have a higher success rate in this element.

Table 6.6 shows the actual factors which the courts have applied to determine the piercing issue in given cases. These factors are broadly categorized into the three major elements of piercing, namely, control, fraud, and proximity,\(^{123}\) which in turn yield the combinations set forth in Table 6.6. In total, there are 606 cases in which the courts have considered the fraud element. 248 of these fraud-related piercing cases were successful, and 358 of these cases failed, yielding a success rate of 40.92%. In contrast, the success rate on the fraud-related enforcement piercing cases was 65.00%, a difference of 24.08%. The difference is even more pronounced if the respective success rates of fraud-related enforcement piercing cases and fraud-related non-enforcement piercing cases (38.28%) are compared. This further expands the difference to 26.72%.

On the other hand, the data on non-fraud-related piercing cases are relatively closer. The success rate of the non-fraud-related piercing cases generally is 37.85%, whereas the corresponding rates for enforcement piercing and non-enforcement piercing are at 27.59% and 37.07%, respectively, thereby showing a difference of less than 10%.

The percentage of cases that actually considered fraud is also higher for enforcement piercing cases. Among the 90 enforcement piercing cases, 60 cases (66.66%) actually considered fraud. In contrast, only 546 non-enforcement piercing cases (57.29%) actually considered fraud. Among the successful enforcement piercing cases, the fraud-related cases account for 82.89%. The corresponding percentage for non-enforcement

\(^{123}\) See Chapter 3, Section 5.
piercing cases is only 65.11%. In short, the courts have considered the fraud element more frequently and more favorably in enforcement piercing cases, and that supports the assumption that the courts may be more sympathetic to enforcement piercing and this therefore results in the higher piercing rate.

However, even with the higher piercing rate due to the fraud element, one cannot conclude that this is purely due to sympathy or favorable applicable law. This is particularly so if one looks at the difference in piercing rates between Scenarios 3 and 4. As set forth at the beginning, the hypothesis of this chapter is that the various conflict-of-law rules offer potential advantages to a plaintiff in terms of forum-shopping. For enforcement piercing cases with conflict elements (Scenario 4), the piercing rate is 56.06%, higher than the general piercing rate of enforcement piercing, and substantially higher than the piercing rate of enforcement piercing without conflict elements (41.66%). The difference of 14.40% in the piercing rate due to the absence of a conflict element clearly suggests that sympathy is not the only reason for the higher general piercing rate. Instead, we must look into the choice-of-law advantages and potential limitation of forum-shopping for a more detailed analysis.

**Choice of law**

As will be seen below, the advantages come from favorable choice-of-law rules (and the resulting favorable governing law) as a result of the second forum-shopping afforded by enforcement piercing.
Table 6.7 – Choice-of-law Approaches of Scenario 4 (Conflict Enforcement Piercing)

Cases

<table>
<thead>
<tr>
<th>Approach of F1</th>
<th>No. of Cases</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Treated as if First Instance Piercing</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Procedural Rule of F2</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>No Specified Approach</td>
<td>49</td>
<td>74.24%</td>
</tr>
<tr>
<td>Law of Incorporation</td>
<td>5</td>
<td>7.57%</td>
</tr>
<tr>
<td>Law of Forum</td>
<td>3</td>
<td>4.55%</td>
</tr>
<tr>
<td>Law of Transaction</td>
<td>3</td>
<td>4.55%</td>
</tr>
<tr>
<td>Closest Connections</td>
<td>1</td>
<td>1.52%</td>
</tr>
<tr>
<td>Others</td>
<td>5</td>
<td>7.57%</td>
</tr>
<tr>
<td>Total</td>
<td>66</td>
<td>100%</td>
</tr>
</tbody>
</table>

Among the three suggested approaches in Section 2.3.1, none of the cases expressly adopts any one of such approaches. Instead, the majority of cases simply did not involve any choice-of-law analysis (77.27%). However, it is submitted that most courts implicitly adopt the second approach, namely, treating enforcement piercing the same as first instance piercing for the choice-of-law matter.

Firstly, while the cases do not expressly state that the choice-of-law approaches of the two types of piercing are the same, 7.58% of enforcement piercing cases had
expressly adopted the law of the state of incorporation. That again is the conventional approach of first instance piercing.\textsuperscript{124} In fact, if one compares the choice-of-law approaches of the general piercing cases with those of the enforcement piercing cases, the percentages of the various approaches are actually similar.

Table 6.8 – Comparison of Choice-of-law Approach

<table>
<thead>
<tr>
<th>Approach</th>
<th>Enforcement Piercing with Conflict Element</th>
<th>General Piercing with Conflict Element</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Specified Approach</td>
<td>74.24%</td>
<td>65.56%</td>
</tr>
<tr>
<td>Law of Incorporation</td>
<td>7.57%</td>
<td>13.09%</td>
</tr>
<tr>
<td>Law of Forum</td>
<td>4.55%</td>
<td>5.56%</td>
</tr>
<tr>
<td>Law of Transaction</td>
<td>4.55%</td>
<td>5.06%</td>
</tr>
<tr>
<td>Closest Connections</td>
<td>1.52%</td>
<td>1.60%</td>
</tr>
<tr>
<td>Others</td>
<td>7.57%</td>
<td>9.01%</td>
</tr>
<tr>
<td>Total</td>
<td>100%</td>
<td>100%</td>
</tr>
</tbody>
</table>

Similar to the choice-of-law approaches of general piercing cases with conflict elements, the ironic observation is that “no specified approach” is the most common approach, accounting for 74.24% of the enforcement piercing conflict cases and 65.56% of the general piercing cases, respectively. Among the most adopted approaches when the

\textsuperscript{124} See discussion in Chapter 4.
courts specified an approach is the law of the place of incorporation in both types of cases, accounting for 7.57% and 13.09%, respectively. This is followed by the law of forum and the law of transaction, each accounting for around 5% of the respective type of cases. Closest connections is the last category with percentages of 1.52% and 1.60%, respectively. Overall, it can be seen that the distributions of the choice-of-law approaches are very similar between the two types of cases, but the similarity does not stop there.

Putting aside the specified approaches, the fact is that most courts simply apply the forum law of F2 in the end for both types of cases. Table 6.9 shows the actual law applied by the court in both the enforcement piercing cases with a conflict element and the general piercing cases with a conflict element.
Table 6.9 – Application of Forum Law

<table>
<thead>
<tr>
<th></th>
<th>Enforcement Piercing Cases with Conflict Element</th>
<th>Conflict Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Applied Forum Law</strong></td>
<td>58</td>
<td>687</td>
</tr>
<tr>
<td><strong>Percentage of Forum Law Application</strong></td>
<td>87.88%</td>
<td>84.81%</td>
</tr>
<tr>
<td><strong>Applied Non-forum Law</strong></td>
<td>8</td>
<td>123</td>
</tr>
<tr>
<td><strong>Percentage of Non-forum Law Application</strong></td>
<td>12.12%</td>
<td>15.19%</td>
</tr>
<tr>
<td><strong>Total Cases</strong></td>
<td>66</td>
<td>810</td>
</tr>
</tbody>
</table>

Of the 66 enforcement piercing cases with a conflict element, 87.88% of those cases applied the forum law of F2. This is very close to the finding that 84.81% of all conflict piercing cases applied forum law. This combines with the similarities in the specified approaches shown in Table 6.8, and the lack of any special approach for enforcement piercing (like three approaches suggested in Section 2.3.1), thereby suggesting strongly that the courts do not tailor specific choice-of-law rules for
enforcement piercing. Instead, they have simply applied the same approach as if it was a first instance piercing.\textsuperscript{125}

The result of the practice that the courts treat enforcement piercing as first instance piercing on the choice-of-law issue and the effective application of forum law, is the motivation for plaintiffs to engage in forum-shopping. That however is just half of the equation; we must also look at the various hurdles that might limit such forum-shopping, as discussed in Section 2.3.2-2.3.6. Table 6.10 summarizes the failed conflict enforcement piercing cases which result from the application of one of such hurdles.

\textsuperscript{125} The fact that most courts adopt F2’s forum law could also support the argument that courts regard enforcement piercing as a procedural remedy of F2. However, even if we take that as a possibility, this approach will not be recommended in any event for the potential of forum-shopping, as will be shown below. See infra Section E.
Table 6.10 – Hurdles in Conflict Enforcement Piercing Cases

<table>
<thead>
<tr>
<th></th>
<th>Successful Cases</th>
<th>Percentage of Conflict Enforcement Cases</th>
<th>Discussed Cases</th>
<th>Percentage of Conflict Enforcement Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Personal Jurisdiction</td>
<td>2</td>
<td>3.03%</td>
<td>6</td>
<td>9.09%</td>
</tr>
<tr>
<td>Subject Matter Jurisdiction</td>
<td>3</td>
<td>4.55%</td>
<td>7</td>
<td>10.61%</td>
</tr>
<tr>
<td>Notice</td>
<td>2</td>
<td>3.03%</td>
<td>6</td>
<td>9.09%</td>
</tr>
<tr>
<td>Res Judicata(^\text{126})</td>
<td>-</td>
<td>-</td>
<td>7(^\text{127})</td>
<td>10.61%(^\text{128})</td>
</tr>
<tr>
<td>State Procedural Rules(^\text{129})</td>
<td>1</td>
<td>1.52%</td>
<td>3(^\text{130})</td>
<td>4.56%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>6(^\text{131})</strong></td>
<td><strong>9.09%(^\text{132})</strong></td>
<td><strong>27(^\text{133})</strong></td>
<td><strong>40.91%(^\text{134})</strong></td>
</tr>
</tbody>
</table>

\(^\text{126}\) Note that *res judicata* is not limited to conflict cases.

\(^\text{127}\) There are only seven conflict enforcement cases raising the *res judicata* defense with none successful. However, if we also include the non-conflict enforcement cases, there are four additional cases with one succeeded.

\(^\text{128}\) Id.

\(^\text{129}\) Note restriction imposed by state procedural rule is not limited to conflict cases.

\(^\text{130}\) There are only three conflict enforcement cases raising the *res judicata* defense with one successful. However, if we also include the non-conflict enforcement cases, there are 1 additional case with none succeeded.

\(^\text{131}\) While there were a total of eight occasions in which one of the defenses succeeded in defeating an enforcement piercing, three of such occasions were in the same case. Thus, only six cases succeeded by using one of more such defenses.

\(^\text{132}\) See id.

\(^\text{133}\) See id.

\(^\text{134}\) See id.
Table 6.10 shows that the hurdles discussed in Section 2.3 rarely negatively impacted the enforcement piercing cases. Of the 66 conflict enforcement piercing cases (Scenario 4 cases), only six such cases failed because of one or multiple of these hurdles. These arguments were presented in 27 cases, but the success rate of the argument was only 22.22%. The specific findings on each of these hurdles are presented below.

6.3.1 Personal jurisdiction

Only two Scenario 4 cases failed on the basis of a lack of personal jurisdiction over the parent in F2. Apart from those two cases, only four other cases discussed the jurisdictional requirement of the parent and the argument failed. It is noted that the jurisdictional requirement over the parent will not be an issue in some of these cases anyway. In eight of the 66 Scenario 4 cases, the parent was actually incorporated/or had its principal place of business in the forum, thereby giving general jurisdiction to the forum. Enforcement piercing by its very nature seeks to hold the parent liable for the debt of the subsidiary; the plaintiff will therefore try to initiate enforcement piercing in a jurisdiction in which the parent has assets and the state of incorporation/principal place of business is one of the many places where the parent will have assets. Thus, we are left with an unclear picture of the rules, but, practically speaking, it is rare for enforcement piercing cases to fail on jurisdictional grounds.

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135 Note, however, the discussion of the lowered importance of *res judicata*. See infra Section D.iv.

136 See *supra* note 93.
6.3.2 Subject matter jurisdiction

Similar to personal jurisdiction, only seven cases discussed the issue of subject matter jurisdiction and only in three of these cases the issue prevented the enforcement piercing from succeeding. Because the subject matter jurisdiction issue could only arise in federal question cases, a more accurate discussion should focus the success rate of this argument against federal question cases that have no diversity. Of the 21 federal question cases with no diversity, these three cases account for 14.29% of all such cases. While this suggests a higher significance for subject matter jurisdiction in these cases, due to the small number of federal question cases, the practical impact on enforcement piercing in general remains small. It is also noted that the courts have neglected to discuss subject matter jurisdiction in 14 such cases. Having said that, if subject matter jurisdiction becomes an issue in a particular case, the plaintiff could always consider bringing enforcement piercing in the state court in most cases.

6.3.3 Notice

Notice is also not a significant impediment. Apart from the very few cases that have discussed (six) and succeeded (two) in the notice issue for the purpose of preventing enforcement piercing, successful argument on notice may not bar a plaintiff from raising

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137 See supra Section 2.3.3.

138 Unlike personal jurisdiction, subject matter jurisdiction cannot be waived.

139 State courts enjoy concurrent jurisdiction in most cases, see supra note 28, 36. Whether to bring the case to the state court will, however, be subject to other considerations.
enforcement piercing again. In *Nykcool A.B. v. Pacific Fruit Inc.*,\(^{140}\) while the court rejected enforcement piercing by referring to the notice requirement, it went on to state that the judgment creditor “is free to commence a new action against those parties before whatever court would have personal and subject matter jurisdiction over those additional parties.”\(^{141}\) Practically speaking again, it is unlikely for there to be a notice requirement.

### 6.3.4 State Procedural Rule

There are only three conflict enforcement piercing cases that have discussed the viability of bringing enforcement piercing under the relevant state procedural rule, with only one succeeding with the defense. Since this argument could be brought also in non-conflict enforcement piercing cases, we can also add those cases into the analysis. However, there was only one such case and it was not successful. Accordingly, state procedural rule is not likely to be a real threat to the success of the plaintiff.

### 6.3.5 Res judicata

*Res judicata* is the most raised conflict defense to enforcement piercing and yet the least successful. No conflict case surveyed in the research has succeeded in the argument. As argued above, the strongest argument for *res judicata* in an enforcement piercing case is that the plaintiff *could* have raised the issue in the original trial of the underlying cause of action. However, in the seven conflict enforcement cases that have discussed this issue, no court has made such a finding.


\(^{141}\) *Id.* 2028.
While the argument is most frequently raised among all defenses, it must be noted that like the discussion on state procedural rule above, *res judicata* could be raised in non-conflict enforcement piercing cases as well. Thus, it may be better to measure the frequency of the defense against all 90 enforcement piercing cases instead. In this light, the defense was raised in 12.22% of cases, with one successful case. Even with that exception (and the case can be distinguished on its facts\textsuperscript{142}). Factors 3.1 to 3.5 in this section all could have added extra requirements on the plaintiff’s enforcement piercing and hence made it more difficult to pierce successfully. However, as has been shown above, they are not real hurdles in practice, the uncertainty in the law theoretically notwithstanding. With the current choice-of-law approaches favoring forum-shopping and minimal restrictions on forum-shopping, this clearly helps the success rate of enforcement piercing. This therefore fits with our hypothesis that the higher success rates are due to the favorable conflict reasons.

### 6.3.6 International cases

The discussion above has assumed that F1 is a U.S. court. What if F1 is a non-U.S. court? This section deals with the situation where the judgment was rendered by a court of a foreign country.

\textsuperscript{142} See *Strange v. Estate of Lindemann*, 408 S.W.3d 658, 661 (Tex. App. 2013). ("Typically, a postjudgment suit against an alleged alter ego is not a collateral attack on the prior judgment, and thus is not barred by res judicata. See, e.g., Matthews Constr. Co. v. Rosen, 796 S.W.2d 692, 694 (Tex.1990)... But this veil-piercing suit is distinguishable because Rusty, a shareholder, was a party to the prior suit, obtained a jury finding that he had not committed fraud in connection with the allegations arising from the company's operation of Strange's lease, and also obtained a take-nothing judgment in his favor based in part on that finding").
The first thing to note is that the Full Faith and Credit Clause is not applicable.\textsuperscript{143} Instead, the enforcement is generally subject to state laws.\textsuperscript{144} While the state enforcement rules might be different, they are substantially the same.\textsuperscript{145} Generally, the enforcement rules of a foreign-country judgment are very similar to those of a sister-state judgment.\textsuperscript{146} The foreign-country judgment will still need to be a valid judgment nonetheless, \textit{i.e.}, satisfying the rules in §92 of \textit{Restatement (Second) of Conflict of Laws}.\textsuperscript{147} There are additional defenses that are applicable to the enforcement of a foreign-country judgment that would not be otherwise available in the enforcement of a sister-state judgment (\textit{e.g.}, the foreign-judgment is contrary to public policy).\textsuperscript{148} However, they are not particularly relevant to enforcement piercing.\textsuperscript{149} There has also been some confusion over the

\textsuperscript{143} See \textit{supra} note 28, 333 (“The Full Faith and Credit clause, which plays such an omnipotent role in the recognition of sister-state judgments, does not apply to foreign-country judgments.”). See also David P. Stewart, “Recognition and Enforcement of Foreign Judgments in the United States”, YBPIL 12 (2010), 179, 180 (Unlike sister-state judgments that must be accorded full faith and credit, the judgments of foreign courts are not constitutionally entitled to recognition or enforcement in U.S. courts.).

\textsuperscript{144} See Stewart, \textit{id}. (“Because the vast majority of actions for recognition are filed in state courts, and because even those filed in the federal courts are founded on “diversity” jurisdiction, the decision to give effect to a foreign judgment is almost always made under state law.”).

\textsuperscript{145} See Stewart \textit{id}.181-182 (point to the fact that most states have adopted either the 1962 Uniform Foreign Money-Judgments Recognition Act or the similar 2005 Uniform Foreign-Country Money Judgment Recognition Act).

\textsuperscript{146} See \textit{supra} note 33. Courts are required to reject enforcement for lack of jurisdiction (personal or subject matter) of the foreign court while they are permitted to reject enforcement for lack of proper notice. See Stewart, \textit{supra} note 149, 182-183.

\textsuperscript{147} See \textit{Restatement (Second) of Conflict of Laws}, §98 (“A valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying cause of action are concerned.”) and \textit{comment a}, at 298 (“The rule of this Section is limited to valid judgments, that is, to judgments which meet the requirements of §92.”).

\textsuperscript{148} See \textit{supra} note 28, 346–353.

\textsuperscript{149} See, \textit{supra} note 28, 348–350 (\textit{e.g.}, non-enforcement of penal and tax law).
applicability of the reciprocity doctrine. In the U.S. Supreme Court case *Hilton v. Guyot*, \(^{150}\) the Supreme Court refused to enforce the French judgment since France failed to reciprocally enforce the U.S. judgment. \(^{151}\) However, most commentators are of the opinion that the *Hilton* rule is a federal common law rule that did not survive the *Erie* case, which provides for federal courts applying state laws. \(^{152}\)

There is only one case in the survey period that involves an F1 judgment rendered by a foreign country, \(^{153}\) and the way the court handled the enforcement piercing did not differ from the general practice observed in this chapter. However, there are still other interesting observations from the survey. Despite the relatively little difference between the enforcement regimes for a sister-state judgment and foreign-country judgment, this could still potentially give rise to a motivation of forum-shopping. In the enforcement piercing context, this may result in a plaintiff first domesticating \(^{154}\) the foreign judgment in a state with a favorable enforcement rule first before seeking enforcement piercing in another sister state that has favorable piercing rule. One may regard the domesticating state as an “F1a state” because it is the transition state where the foreign judgment is

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\(^{150}\) 159 US 113 (1895).

\(^{151}\) *Id.*

\(^{152}\) See *supra* note 28, 334. See also Stewart *supra* note 149, 183 (“It is important to note that reciprocity between the rendering and enforcing jurisdictions is not required by the 1962 Act (or its 2005 revision), much less the *Hilton* doctrine, although some states have included such a ground in their enactments.”).

\(^{153}\) *Vitol, S.A. v. Primerose Shipping Co. Ltd.* 708 F.3d 527 (4th Cir. 2013). Also there are in fact three cases involving underlying judgments rendered in the United Kingdom (including *Vitol*), yet two of them chose domestication. In contrast, only one case involving domesticating of a sister-state judgment.

\(^{154}\) Domestication refers to the practice of seeking to have “the foreign country judgment... recognized in one state, but [to have] its enforcement...sought in another state.” See Stewart *supra* note 149, 193.
domesticated as a U.S. judgment before enforcement piercing is sought in F2. Although it is far from dispositive due to the limited number of cases, three cases involved such an F1a state and two of them involved the original judgments being rendered in the United Kingdom.\textsuperscript{155} This could be viewed as yet another forum-shopping exercise. The plaintiff first seeks to domesticate the judgment in a state where the judgment could be recognized most easily, \textit{i.e.}, a state with a less stringent enforcement rule, then proceed with enforcement piercing at a state which has both the assets to satisfy the judgment along with favorable piercing law. In this way, the plaintiff can enjoy three favorable rules, namely, the favorable law on underlying cause of action, the favorable enforcement rule of foreign-country judgment, and, finally, the favorable piercing rule. Having said that, with the limited number of such enforcement piercing cases, the observations above are far from conclusive.

Finally, enforcement piercing in a foreign country judgment context could also have an impact on the choice of law approach. As discussed in Section 2.3.1.1 above, it could be argued that F1 law should govern the piercing issue due to the Full Faith and Credit clause. However, since F2 “is not bound by the rendering country’s concept of res judicata,”\textsuperscript{156} the argument will not be relevant where the enforcement piercing in issue deals with a foreign country judgment. However, the lone case on foreign country judgment in our survey does not touch on this issue.


\textsuperscript{156} See Stewart supra note 149, 189.
6.3.7 Tort v. contract

It has long been an interesting debate as to whether the courts should be more willing to pierce the corporate veil in tort cases where the plaintiff could not take self-protected measures than in contract cases where the plaintiff could have done so.\textsuperscript{157} The Thompson Study shows that the courts in practice did not follow that logic.\textsuperscript{158} Surprisingly, it was found that courts did the exact opposite and were more willing to pierce the corporate veil in contract cases than tort cases.\textsuperscript{159} This section explores how the tort versus contract debate will impact on enforcement piercing.

It has been stated in Section 2.2 that the underlying cause of action of the F1 trial will be merged with the judgment subsequent to the trial.\textsuperscript{160} As a result, the prediction is that the tort versus contract debate will have no impact on enforcement piercing and therefore the piercing rates should be about the same for the enforcement of judgments based on tort or contract. This prediction is supported by the empirical research.

\textsuperscript{157} See discussion in Chapter 3.7.

\textsuperscript{158} See supra note 1.

\textsuperscript{159} Id.

\textsuperscript{160} See supra note 37.
Table 6.11 – Tort v. Contract

<table>
<thead>
<tr>
<th>Enforcement Piercing</th>
<th>Tort</th>
<th>Contract</th>
<th>Statute</th>
<th>Unknown</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of Cases</td>
<td>8 (50.00%)</td>
<td>60 (51.66%)</td>
<td>22 (40.91%)</td>
<td>3 (66.67%)</td>
</tr>
<tr>
<td>(Piercing Rate)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

As Table 6.11 has shown, there are 60 F1 judgments that have contract as the underlying cause of action. They account for the majority of the enforcement piercing cases, whereas F1 judgments based on tort and statute account for only eight and 22 enforcement piercing cases, respectively. However, as far as the piercing rates are concerned, the tort and contract cases are very close, having piercing rates of 50.00% and 51.66%, respectively. These are also very close to the 52.22% general piercing rate for enforcement piercing. The only type of cases that have a substantially lower piercing rate than the general enforcement piercing rate are the statute cases, having a piercing rate of 40.91%. The best possible explanation is the presence of the defense of subject matter jurisdiction. As mentioned above, despite a limited impact on enforcement piercing as a whole, it does apply only to enforcement piercing that involves federal questions and therefore it applies only to statute-related cases. Overall, the findings from the tort versus contract debate have been consistent with the general findings of the empirical research.
that contract cases happened to have higher piercing rate than tort cases, but not substantially higher.\textsuperscript{161}

\textbf{6.4 Conclusion}

The findings discussed in Section 3 show that a plaintiff can, whether intentionally or not, obtain an advantage over the defendant in the piercing action if he or she moves the piercing part of the proceeding from the first instance trial to the enforcement proceedings. This advantage is most notable in the choice-of-law aspect where the plaintiff could choose the favorable piercing law by bringing the enforcement proceeding in a state where such law will be applied. We also see that the various conflict-of-law safeguards are rarely discussed and are even more rarely successful. While the uncertainty of the various rules could discourage the plaintiffs from engaging in enforcement piercing, those who did have been benefited from them as indicated by the much higher piercing rate. These leave us with two questions. Firstly, why are there not more enforcement piercing cases? Secondly, are the advantages to the plaintiff by enforcement piercing justified?

As shown in Table 6.2, enforcement piercing accounts for about 8.63\% of all piercing cases. Given the substantially higher piercing rate of enforcement piercing, it is natural to ask why there are not more of such attempts by the plaintiffs. The first response will be the lack of information. Prior to this empirical research, there had not been any research on enforcement piercing. Thus, it is possible that the plaintiffs and their counsel are simply not aware such advantages. Secondly, while the empirical research above

\textsuperscript{161} See Chapter 3, Section 7.
shows that the various choice-of-law approaches and limitations on jurisdictions are generally favorable to the plaintiffs in enforcement piercing in practice, it also shows that the laws on each of the issues are far from uncertain. It is one thing that the general percentage is in favor of plaintiff’s undertaking enforcement piercing, but each case must be analyzed on its own and the uncertainty surrounding a particular legal issue could simply discourage plaintiffs from making the attempt in the first place. Finally, the research does not and could not take into account the additional litigation costs involved in enforcement piercing. There is no question that first instance piercing, where both the underlying cause of action and the piercing claim are handled in one proceeding in the same court, is less costly both in terms of time and money. Thus, if enforcement piercing is to take place, the plaintiffs must be convinced that the lure of the higher piercing rate is higher than the uncertainty of the law and the extra legal costs. Finally, enforcement piercing will make sense only when there are assets of shareholders located in a sister state. Plaintiffs will not incur extra legal costs to conduct enforcement piercing unless there are assets in F2. These factors therefore could simply make it too costly for enforcement piercing to be the prevailing practice.

On the question of the legitimacy of the advantages to the plaintiff, it is clear that the advantages afforded by the current practice on the conflict issues are not justified. Of the three reasons suggested for the higher piercing rate, the first two, namely, the *de facto* success of the underlying action and the sympathy from the court, are both justified. The truth is that there will always be legitimate reasons for bringing the piercing part of the
litigation in the enforcement stage. The key therefore is not to stop enforcement piercing, but to provide a level playing field for the litigants. If the plaintiff needs to bring the piercing issue to the enforcement stage, he or she should not be better off because of the change of forum. However, as we have seen, the combined effect of favorable choice-of-law rule and minimal jurisdictional limitation practically allows the plaintiff to enforce against the parent anywhere in the United States where the parent happens to have sufficient assets, and hence more potential options in finding the favorable governing law on piercing.

Thus, it is suggested that the preferred approach on choice of law should be the law of the state of incorporation. As argued in the case of first instance piercing, the state of incorporation always has a strong interest in having its law applied in a piercing situation. This should be the same whether the forum for the piercing dispute is in the first instance trial or the enforcement court. If all courts adopt such an approach, the plaintiff will have the same piercing rules whether it is F1 or F2. This shall be the general rule. However, courts should retain a certain discretion in doing justice to the litigants by departing from the law of the state of incorporation in particular situations. This should, however, be exceptional and should not interrupt the general design of preventing forum-shopping. In short, the general choice of law approach suggested in Chapter 4 should be

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162 See supra notes 7 & 8.
163 See supra note 58.
164 See supra note 19 (suggesting that the choice-of-law rule of first instance piercing shall be law of the place of incorporation but subject to a flexible exception).
adopted.\textsuperscript{165} This shows that adopting the suggested approach is one stone killing two birds (both choice of law issues of first instance piercing and enforcement piercing).

Meanwhile, the jurisdictional safeguards should be respected by the courts. As argued in Section 2.2.2, it is unreasonable to ignore the jurisdictional requirement over the shareholder in F2 who has not been a part of the F1 proceedings.\textsuperscript{166} To do otherwise will violate due process. We can also consider the question from the jurisdictional perspective of F1. In a traditional first instance piercing case, plaintiff will have to satisfy the F1 court that F1 has jurisdiction over both the defendant corporation and the shareholder. However, if plaintiff were to allow to pursue enforcement piercing in wherever state the shareholder has asset without requiring the judgment enforcement state to have jurisdiction thereto, it will seriously undermine the jurisdiction of F1. This will open a floodgate, particularly keeping in mind the possibility of the plaintiff first enforcement piercing at a state that the shareholder does not have asset but has low threshold of piercing law, then seeking to enforce further this F2 judgment in another state (F3) where the shareholder has assets under Full Faith and Credit. This will be another form of abuse of domestication.

The same goes with subject matter jurisdiction. The restraints that could be neglected are the notice requirement and \textit{res judicata}; this is because they are not valid limitations of the exercise of jurisdiction.\textsuperscript{167} How these changes should be effected is

\textsuperscript{165} See Chapter 4, Section 4.

\textsuperscript{166} If plaintiff manages to satisfy the jurisdictional requirement in F2 through jurisdictional piercing, that is of course perfectly fine.

\textsuperscript{167} See argument in \textit{supra} Section 2.3.4 and 2.3.5.
subject to further investigations. Theoretically, it is feasible for Congress to legislate based on the Full Faith and Credit Clause. However, piercing the corporate veil, both in first instance piercing cases and in enforcement piercing cases, has long been the domain of state law. An alternative could be a model statute in the line of the Uniform Enforcement of Foreign Judgments Act. 168 However, despite both being possible measures, 169 the empirical research of this thesis does not yield any data that support one measure over the other. Hopefully, this discussion here will at least raise the awareness of the important enforcement piercing issues with the courts when dealing with such cases.


169 Both measures are inspired by Professor Stewart’s discussion on potential reforms in the context of the enforcement of foreign country judgment. See supra note 149, 197-199.
CHAPTER 7

CONCLUSION

Having assessed the three conflict of laws issues of piercing the corporate veil in Chapters 4 to 6, this chapter highlights the interactions of the three chapters with a bird eye view and shows (i) the interdependence between piercing the corporate veil and each of the conflict issues; and (ii) the interdependence among the three conflict issues as applied to piercing the corporate veil. It is only when these relationships are properly understood that the doctrines could work together in creating the level playing field between the plaintiffs and defendants.

1. Interdependence between Piercing the Corporate Veil and Conflict of laws Issues

1.1 Choice of Law and Piercing the Corporate Veil

As discussed in Chapter 4, the contemporary practice of choice of law rule in piercing cases is ironically not to have choice of law rule. The empirical finding is that close to three-fourth of courts in the United States simply bypassed the choice of law analysis in conflict cases and applied forum law to the piercing issue, resulting in more than 84% of cases applying forum law. This creates motivation for forum shopping as shown by a higher piercing rate for conflict cases. It is therefore suggested that the law of the state of incorporation should be adopted by all courts as the default rule on liability piercing cases subject to a flexible exception.
1.2 Jurisdiction and Piercing the Corporate Veil

Chapter 5 discusses on the impact of piercing corporate veil in expanding the jurisdictional bases of states, and seeks to find out the proper approach of such jurisdictional piercing. Most courts treated jurisdictional piercing just like the usual liability piercing, therefore applying state law and the usual liability test. While the application of state forum law could be justified by closer connection of the purpose of piercing and the forum law, applying the forum’s piercing law on liability piercing blindly to jurisdictional piercing could be unconstitutional if the state corporate law provides for a threshold that is lower than the minimum contact standard enshrined by International Shoe. This is because of the fact that state jurisdictional rules can only restrict but not to expand a state’s jurisdiction. Accordingly, it is suggested that state courts should develop a jurisdictional specific test for the purpose of jurisdictional piercing instead of relying on the same liability test for liability piercing.

1.3 Enforcement of Foreign Judgment and Piercing the Corporate Veil

Through splitting the piercing the corporate veil issue from underlying cause of action and conduct two separate proceedings instead of one, enforcement piercing doubles the chance of forum shopping in favor of the plaintiff. This is supported by empirical findings that enforcement piercing in fact led to substantially higher piercing rate than non-enforcement piercing. It is also found that the jurisdictional rules did not impose much limitation of such forum shopping practice. As a result, it is suggested that the law of the state of incorporation should be adopted (the same approach described in Chapter 4)
and jurisdictional limitation should be observed strictly by the courts to eliminate forum shopping.

2. Interactions among the three chapters

2.1. Interdependence between Choice of law on Piercing and Jurisdiction

Choice of law rules have substantial impacts to jurisdictional piercing just like its impacts on liability piercing. However, it is found that jurisdictional piercing involves different considerations from general piercing and therefore demands a different set of choice of law rules. Thus, while the suggested general choice of law rule is the law of the state of incorporation, the suggested choice of law rule for jurisdictional piercing is the law of the forum state.

Conversely, because of this difference, the first step of the general choice of law rule is to distinguish liability piercing and jurisdictional piercing. It is only after taking that initial step could one go on to apply the general choice of law approach of the law of the state of incorporation.

Further, choice of law rules could only be relevant after the court has satisfied itself that it has jurisdiction to adjudicate the case in the first place. Jurisdictional piercing, especially if the Supreme Court clears the uncertainty as to the proper test, could increase the jurisdictional bases of the forum to take on the case against the corporate defendant on the top. In other words, jurisdictional piercing could increase the scenarios where choice of law rules will be relevant.
2.2 Interdependence between Choice of law on Piercing and Enforcement of Foreign Judgment

The contemporary practice of bypassing choice of law analysis in piercing cases and the effective use of forum law creates forum shopping opportunities for the plaintiff. Enforcement piercing is the amplifier to such forum shopping by splitting the underlying cause of action from the piercing issue. In this way, plaintiff could maximize their chance of winning the underlying litigation and making the shareholder answerable to the resulting judgment debt. In this sense, choice of law rules (or the lack hereof) provide the motivation for plaintiff to engage in enforcement piercing. The suggestion of adopting choice of law approach of the law of the state of incorporation could therefore reduce such strategic enforcement piercing practices.

2.3 Interdependence between Enforcement Piercing and Jurisdiction

The aforementioned strategic forum shopping in enforcement piercing could also be eliminated by courts observing jurisdictional limitation imposed by the Due Process Clause. Empirical findings show that courts have not been consistent in applying the relevant limitation. It is therefore recommended that courts should take those due process considerations seriously to create a level playing field for the litigants on both sides. Jurisdictional piercing can however be used to overcome such jurisdiction limitation in appropriate cases.

On the other hand, if the current enforcement piercing practice were to continue, it will also undercut the effectiveness of the jurisdiction of F1. Instead of needing jurisdiction on both the defendant corporation and its shareholder in F1 for the piercing to
succeed, plaintiff could simply conduct enforcement piercing in F2 after successfully suing the defendant corporation in F1. This means that the plaintiff effectively undercut the jurisdiction basis of F1. Tightening both choice of law rules and jurisdictional limitation of enforcement piercing in F2 will both have the effect of stopping such undermining of F1’s jurisdiction as they will eliminate the forum shopping motivation of the plaintiff.

In summary, the current landscape of conflict of laws on piercing is marked by the lack of awareness of the three issues by courts. This results in uncertainty and inconsistence within and without the states, and an environment that is generally favorable for forum shopping by the plaintiffs. What need to be done is for courts to have a full set of considerations on various conflict of laws issues. Consistently applying the state of incorporation will go a long way of solving forum shopping issues both at first instance piercing and enforcement piercing. The same goes with jurisdictional side. While jurisdictional piercing is legitimate, court cannot just treat it as liability piercing and ignore due process. Similarly, in enforcement piercing, courts cannot adjudicate enforcement piercing without satisfying that as a F2 court, it has jurisdiction over the shareholder in the first place. In the end, both piercing the corporate veil and conflict of laws rules are created to do justice. Applying piercing rules without conflict of laws considerations will simply lead to unfair situations and defeat the design of the doctrine.

On the other hand, the development of fair conflict of laws rule also depends on the deep understanding of the piercing of corporate veil doctrine. We can only tell a conflict of laws approach is proper by having the nature and purpose of the piercing doctrine in
mind. The various aspects of conflict of law rules have been examined in details in this thesis to show the significance of this point. Hopefully, this thesis will be the first step toward stabilizing this aspect of piercing and add to the rich literature thereof.

Conflict of laws was once described by Prosser as “a dismal swamp filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon.”

1 Determining the conflict of laws issues on piercing the corporate veil in the U.S. may appear worse than this but it is hoped that this empirical study serves as a roadmap to find a way out of this misty swamp.

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