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The Fourth Circuit, "Suem" and Reverse Veil Piercing in Delaware

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**THE FOURTH CIRCUIT, “SUEM” AND
REVERSE VEIL PIERCING IN DELAWARE**

David G. Epstein* & Jake Weiss**

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I. INTRODUCTION

In *Sky Cable v. DIRECTV, Inc.*,¹ the United States Court of Appeals for the Fourth Circuit answered two narrow questions of first impression regarding the equitable remedy of reverse veil² piercing in Delaware. *Sky Cable* provides an affirmative answer to a question of whether Delaware would recognize reverse veil piercing and a negative answer to a question of whether Delaware's charging statute for limited liability companies³ precludes reverse veil piercing for a judgment creditor of an LLC member. In this Article, we suggest that Delaware courts might answer reverse veil piercing questions differently, based on equitable maxims and language in Delaware's charging statute not considered in *Sky Cable v. DIRECTV, Inc.*

II. *SKY CABLE* FACTS

In 2000, Randy Coley contracted with Plaintiff DIRECTV, Inc. to provide DIRECTV "programming to 168 rooms at the Massanutten Resort in Virginia."⁴ For the next twelve years, Coley received payments for DIRECTV's programming from more than 2,300 units while paying DIRECTV a monthly fee based on only 168 rooms and "fraudulently" retaining the excess revenue.⁵ In 2014, the District Court for the Western District of

1. 886 F.3d 375 (4th Cir. 2018). This case is a lead case in the new edition of DAVID G. EPSTEIN ET AL., *BUSINESS STRUCTURES* 621–26 (5th ed. 2019), which is a casebook covering corporations, limited liability companies, and partnerships.

2. There are no recent law review articles written by American law professors that focus on reverse veil piercing; the last such article is almost thirty years old. See Gregory S. Crespi, *The Reverse Pierce Doctrine: Applying Appropriate Standards*, 16 J. CORP. L. 33 (1990). An interesting essay by Professor Stephen Bainbridge has "reverse veil piercing" in the title but focuses on constitutional law. Stephen M. Bainbridge, *Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of Incorporated Employers*, 16 GREEN BAG 2D 235 (2013). Similarly, there is a short article by Professor Carter Bishop with "reverse piercing" in the title, but the article deals with all of the remedies of the IRS and secured creditors against a sole member limited liability company and devotes only a few pages to reverse veil piercing. See Carter G. Bishop, *Reverse Piercing: A Single Member LLC Paradox*, 54 S.D. L. REV. 199 (2009). These references are sort of like our using "SUEM" in the title of this Article. There are a few recent student notes in law reviews that focus on reverse veil piercing. E.g., Ariella M. Lvov, Note, *Preserving Limited Liability: Mitigating the Inequities of Reverse Veil Piercing with a Comprehensive Framework*, 18 U.C. DAVIS BUS. L.J. 161 (2018); Michael Richardson, Comment, *The Helter Skelter Application of the Reverse Piercing Doctrine*, 79 U. CIN. L. REV. 1605 (2011).

3. DEL. CODE ANN. tit. 6, § 18-703 (West, Westlaw through 82 Laws 2019, ch. 2, 4.).

4. *Sky Cable*, 886 F.3d at 382.

5. *Id.*

Virginia found Coley liable for 2,393 violations of the Communications Act⁶ and entered judgment against Coley for statutory damages of \$2,393,000.⁷

As a part of its post-judgment discovery, DIRECTV learned that in 2008 Coley formed several Delaware limited liability companies, including Thundertime, LLC.⁸ Thundertime was referred to by the Fourth Circuit as “ITT”.⁹ Coley is ITT’s sole member.¹⁰ In a deposition, Coley described ITT as a “real estate holding company.”¹¹ ITT exists to hold title to North Carolina real property purchased by Coley valued at more than \$5,000,000.¹²

To collect its judgment against Coley from these assets of ITT, DIRECTV filed a motion in the district court to “reverse pierce” the “corporate” veil of ITT.¹³ The district court granted that motion.¹⁴ The Fourth Circuit affirmed.¹⁵

III. TRADITIONAL VEIL PIERCING AND REVERSE VEIL PIERCING

Sky Cable distinguishes between “traditional veil piercing” and “reverse veil piercing.”¹⁶ Traditional veil piercing is an equitable remedy that enables a creditor of a business entity to recover a debt owed only by that business entity from an owner of that business entity.¹⁷ A scholar has traced the first

6. 47 U.S.C.A. § 605(a) (West, Westlaw through Pub. L. No. 116-5).

7. See *Sky Cable, LLC v. Coley*, No. 5:11CV00048, 2016 WL 3926492, at *1 (W.D. Va. July 18, 2016), *aff’d Sky Cable*, 886 F.3d 375. The Communications Act provides for statutory damages of \$1,000 for each violation. 47 U.S.C.A. § 605(e)(3)(C)(i)(II) (West, Westlaw through Pub. L. No. 116-5). Coley’s post-judgment conduct was no better. In its lengthy discussion of post-judgment proceedings, the district court opinion uses the term “obstructionist” and the phrase “playing fast and loose with the federal judiciary” to describe what Coley did and did not do. 2016 WL 3926492, at *2–3 (citations omitted).

8. 2016 WL 3926492, at *4.

9. *Sky Cable*, 886 F.3d at 382.

10. 2016 WL 3926492, at *4–5 (citations omitted). At times, Coley contended that his wife Kimberli also was a member of ITT, but the court concluded that he was equitably estopped from asserting that ITT was not a sole member limited liability company. *Id.* at *16.

11. *Id.* at *4 (citation omitted).

12. *Id.* (citations omitted). The other limited liability companies provided services for the income-producing property owned by ITT. *Id.* at *4–5 (citations omitted).

13. *Id.* at *4. ITT is a limited liability company, not a corporation. *Id.* Nonetheless, lawyers and judges often use the term “piercing the corporate veil” in connection with limited liability companies. *E.g.*, *Westmeyer v. Flynn*, 889 N.E.2d 671, 678 (Ill. App. Ct. 2008). Statements such as the following, “[w]e conclude that under Delaware law, the doctrine of piercing the corporate veil applies to a limited liability company,” are common. *Id.*

14. 2016 WL 3926492, at *1.

15. *Sky Cable, LLC v. DIRECTV, Inc.*, 886 F.3d 375, 393 (4th Cir. 2018).

16. *Id.* at 385 (quoting *NetJets Aviation v. LHC Commc’ns*, 537 F.3d 168, 176 (2d Cir. 2008)).

17. See *id.* at 385–86 (citations omitted). See generally EDWARD P. WELCH ET AL., FOLK ON THE DELAWARE GENERAL CORPORATION LAW: FUNDAMENTALS § 329.03 (2019

judicial use of the label¹⁸ veil piercing to an 1809 United States Supreme Court decision.¹⁹

Law professors are divided as to the merits of traditional veil piercing.²⁰ Nonetheless, all of the states have reported cases that recognize traditional veil piercing.²¹ There have been thousands of cases specifically dealing with this legal issue.²² Legal opinions usually begin with “Courts are reluctant to pierce the corporate veil and destroy the important fiction under which so much of the business of the country is conducted, and will do so only under such compelling circumstances as required such action to avoid protecting fraud, or defeating public or private rights.”²³

Reverse veil piercing is an equitable remedy that enables a creditor of a business owner to recover a debt owed only by that business owner from the

ed. 2019) (discussing piercing the corporate veil through a substantive commentary of Delaware law).

18. *Cf.* *Prest v. Petrodel Resources Ltd.* [2013] UKSC 34, [106] (appeal taken from Eng.) (“I consider that ‘piercing the corporate veil’ is not a doctrine at all, in the sense of a coherent principle or rule of law. It is simply a label . . . to describe the disparate occasions on which some rule of law produces apparent exceptions to the principle of the separate juristic personality of a body corporate . . .”).

19. *See* E. Merrick Dodd, Jr., *Dogma and Practice in the Law of Associations*, 42 HARV. L. REV. 977, 1015 n.137 (1929) (“The earliest case [on veil piercing] is probably *Bank of United States v. Deveaux*, 5 Cranch 61 (U. S. 1809).”).

20. *Compare* Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479 (2001) (arguing for abolishing the unjust practice of veil piercing), with Jonathan Macey & Joshua Mitts, *Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil*, 100 CORNELL L. REV. 99 (2014) (arguing that veil piercing is based on a remedial rational structure used to achieve legitimate policy objectives).

21. *See* Peter B. Oh, *Veil-Piercing*, 89 TEX. L. REV. 81, 81 (2010) (“[D]ataset of 2,908 cases from 1658 to 2006”); Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1044 (1991) (collecting data from 1,600 cases). The most up-to-date collection of traditional piercing the corporate veil cases can be found in STEPHEN B. PRESSER, *PIERCING THE CORPORATE VEIL* (2016 ed. 2016) (containing annual supplements).

22. *See* FRANKLIN A. GEVURTZ, *CORPORATION LAW* 69 (2d ed. 2010) (citing Thompson, *supra* note 21) (“[P]iercing claims constitute the single most litigated area in corporate law.”).

23. *Maule Indus. v. Gerstel*, 232 F.2d 294, 297 (5th Cir. 1956) (first citing *New Colonial Ice Co. v. Helvering*, 292 U.S. 435 (1934); then citing *Moline Props., Inc. v. Comm’r*, 319 U.S. 436 (1943); and then citing 18 C.J.S. *Corporations* § 6).

business entity.²⁴ Courts²⁵ and commentators²⁶ trace the concept of reverse piercing to *Kingston Dry Dock Co. v. Lake Champlain Transportation Co.*,²⁷ an opinion by Judge Learned Hand.

In *Kingston Dry Dock*, the plaintiff, Kingston, contracted with the parent corporation to repair the steamer *Charleston*, owned by a subsidiary corporation.²⁸ While the parent and subsidiary corporations shared nearly identical boards, the “business of each was separate.”²⁹ Following default by the parent, Kingston seized two other canal boats (not the steamer *Charleston*) owned by the subsidiary to satisfy the debt incurred and owed only by the parent.³⁰

The trial court permitted Kingston’s attachment of the subsidiary corporation’s property to satisfy the judgment against the parent corporation, in essence using the reverse veil piercing concept (without using the term “reverse veil piercing”).³¹ The parent was a shareholder of the subsidiary.³² Kingston, a creditor of the parent, was permitted to pierce the veil between the parent and the subsidiary to take property of the subsidiary to satisfy a debt of the parent.³³

The Second Circuit reversed.³⁴ In doing so, Judge Hand, by dictum, acknowledged the possibility of reverse veil piercing where a judgment creditor of the parent company is trying to collect that debt from property of a subsidiary company (without using the term “reverse veil piercing”): “[It may] be too much to say that a subsidiary can never be liable for a transaction done in the name of a parent, [S]uch instances, if possible at all, must be extremely rare.”³⁵

24. See *Sky Cable, LLC v. DIRECTV, Inc.*, 886 F.3d 375, 385–86 (4th Cir. 2018) (citations omitted). See generally 1 WILLIAM M. FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 41.70 (perm. ed., rev. vol. 2015).

25. *Postal Instant Press, Inc. v. Kaswa Corp.*, 77 Cal. Rptr. 3d 96, 101 (Cal. Ct. App. 2008) (citing *Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, 31 F.2d 265 (2d Cir. 1929)) (“Perhaps the oldest reverse piercing case is *Kingston* . . .”).

26. Kathryn Hespe, *Preserving Entity Shielding: How Corporations Should Respond to Reverse Piercing of the Corporate Veil*, 14 J. BUS. & SEC. L., Fall 2013, at 69, 76 (citing *Kingston*, 31 F.2d at 265) (“The concept of reverse veil piercing was first introduced in *Kingston Dry Dock Co. v. Lake Champlain Transportation Co.*”).

27. 31 F.2d 265.

28. See *id.* at 265.

29. *Id.* at 265–66.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 266.

34. *Id.* at 267.

35. *Id.*

While the *Kingston Dry Dock* opinion acknowledges the possibility of reverse veil piercing, the opinion nowhere uses the label “reverse veil piercing.” Indeed, the first reported case that we have been able to find that uses the phrase “reverse pierce” is a 1981 Minnesota Supreme Court decision, *Roepke v. Western National Mutual Insurance Co.*³⁶

In *Roepke*, Beverly Roepke, the widow of the sole shareholder and president of Rice County 66 Oil Company, was seeking reverse veil piercing.³⁷ Beverly’s husband, Lawrence, died in a car crash involving one of the six motor vehicles owned by the corporation.³⁸ At the time of the accident, the corporation maintained insurance policies on the six vehicles owned by the corporation, and Rice County 66 Oil Company was the named insured.³⁹

Under a somewhat convoluted Minnesota insurance statute,⁴⁰ Beverly could recover \$60,000 from the insurance company if the court reverse pierced the corporate veil and treated sole shareholder Lawrence Roepke as the same legal person as Rice County 66 Oil Company.⁴¹ Otherwise, Beverly could only recover \$10,000 from the insurance company.⁴²

The court ruled in favor of Beverly.⁴³ The full benefits of the insurance policy—an asset of the corporation—were thus made available to a person whose claim was based on a relationship to the shareholder and the rights of the shareholder to property owned by the corporation.⁴⁴ The Minnesota Supreme Court expressly limited:

[T]his holding to the facts peculiar to this case, the most significant of which are that decedent was the president and sole shareholder of the named insured corporation; the vehicles insured by defendant were used as family vehicles; and neither decedent nor members of his household owned any other vehicles.⁴⁵

The *Roepke* opinion also noted that Rice County 66 Oil Company had no creditors so that no other shareholder or creditor would be “adversely

36. 302 N.W.2d 350, 352 (Minn. 1981) (“[A]n application which defendant has characterized as a ‘reverse pierce.’”).

37. *Id.* at 351–52.

38. *Id.* at 351.

39. *Id.*

40. MINN. STAT. ANN. § 65B.41 (West, Westlaw through the end of the 2018 Reg. Sess.).

41. *See Roepke*, 302 N.W.2d at 351–52.

42. *See id.* at 351.

43. *Id.* at 353.

44. *See id.*

45. *Id.*

affected” by the reverse veil piercing.⁴⁶ With respect to the adverse effects of reverse veil piercing on the insurance company, the *Roepke* opinion did not expressly consider that the insurance company would be “adversely affected” by the reverse veil piercing.⁴⁷

Minnesota is not the only state in which courts have ordered reverse veil piercing. For example, in *United States v. Dimeglio*,⁴⁸ a United States District Court held that Texas law recognized reverse veil piercing and that under the Texas law of reverse veil piercing, creditors of John Joseph Dimeglio could collect from assets belonging to a limited liability company, Oak Creek II, LLC.⁴⁹

Dimeglio had convinced wealthy investors to purchase “units” in Oak Creek II, LLC, promising high yield returns; however, the investment was nothing more than a Ponzi scheme.⁵⁰ The court found that “Oak Creek II was Dimeglio’s alter ego based on [a] consideration of the total dealings [between] Oak Creek II, Dimeglio, and Oak Creek Management.”⁵¹ The trial record showed that:

(1) Oak Creek II was run exclusively by its “Managing Member,” Oak Creek Management; (2) Oak Creek Management was . . . owned and operated [solely] by Dimeglio, meaning Dimeglio was, in effect, the “Managing Member” with exclusive control over Oak Creek II; (3) Dimeglio used Oak Creek II as a . . . business conduit to perpetrate fraud on investors; (4) Dimeglio and Oak Creek II were one and the same; (5) Oak Creek II’s property and Dimeglio’s property were commingled and Dimeglio used Oak Creek II for personal purposes; and (6) Dimeglio had significant financial interest, ownership, and control over Oak Creek II.⁵²

After establishing that Oak Creek II was Dimeglio’s alter ego, the court noted that to pierce the veil of a limited liability company there must be proof the defendant used the entity to “perpetrate actual fraud for the defendant’s

46. *Id.* at 352.

47. In a later case, the Minnesota Supreme Court acknowledged that another insurance company was “no more adversely affected . . . than the insurance company in *Roepke*,” but did not explicitly find that the *Roepke* insurance company was adversely affected. *See Cargill, Inc. v. Hedge*, 375 N.W.2d 477, 479–80 (Minn. 1985).

48. No. A–11–CR–411–SS, 2014 WL 1761674 (W.D. Tex. May 1, 2014).

49. *Id.* at *4, *15 (citing *Zahra Spiritual Trust v. United States*, 910 F.2d 240, 243–44 (5th Cir. 1990)).

50. *Id.* at *5, *9 (citations omitted).

51. *Id.* at *5.

52. *Id.*

direct personal benefit.”⁵³ The court found that Dimeglio perpetrated actual fraud when he used Oak Creek II “to raise money from wealthy investors . . . [promising] guaranteed high yield returns, [and] [i]nstead of investing the [money] as he represented[,] . . . paid large management fees while initially returning about 10% of investors’ capital[,] . . . behavior . . . typical to a traditional Ponzi scheme.”⁵⁴ Dimeglio’s use of Oak Creek II as a Ponzi scheme allowed the government to reverse-pierce Oak Creek II’s veil.⁵⁵

Less than half of the states have reported cases ordering reverse veil piercing.⁵⁶ Still fewer states have expressly rejected the possibility of ordering reverse veil piercing under appropriate facts. The strongest statements of rejection of reverse veil piercing come from Georgia courts.

In *Acree v. McMahan*, the Georgia Supreme Court said:

We reject reverse piercing, at least to the extent that it would allow an “outsider,” such as a third-party creditor, to pierce the veil in order to reach a corporation’s assets to satisfy claims against an individual corporate insider. . . . Allowing outsider reverse piercing claims would constitute a radical change to the concept of piercing the corporate veil in this state and, thus, should be created by the General Assembly and not by this Court.⁵⁷

Other states have only opinions that simply find reverse veil piercing is not applicable to the facts before the court, without indicating whether reverse veil piercing will ever be available. For example, in *Commissioner of Environmental Protection v. State Five Industrial Park, Inc.*, the Connecticut

53. *Id.* at *10.

54. *Id.* at *9.

55. *See id.* at *10.

56. *See* Kurtis A. Kemper, Annotation, *Acceptance and Application of Reverse Veil-Piercing—Third-Party Claimant*, 2 A.L.R. 6TH 195 § 4 (2019) (listing eighteen states, D.C., and a number of federal courts that have accepted reverse veil-piercing); *see also* Jay D. Adkisson, *Charging Orders: The Peculiar Mechanism*, 61 S.D. L. REV. 440, 473 (2016) (“[C]reditors in some states were able to convince a few courts that reverse veil-piercing was warranted in some cases However, about as quickly as the tide of reverse-piercing cases came in, it went back out. . . . Reverse veil-piercing has thus been widely neutered, but is not quite dead.”).

57. 585 S.E.2d 873, 874–75 (Ga. 2003) (citation omitted). A similar statement can be found in *Commissioner of Environmental Protection v. State Five Industrial Park, Inc.*, 37 A.3d 724, 744 (Conn. 2012) (“[R]eject the doctrine of reverse veil piercing until the legislature signals otherwise.”).

Supreme Court ruled that the “trial court should not have applied reverse veil piercing, regardless of whether it is a viable theory in Connecticut.”⁵⁸

The court provided three reasons for its ruling. First, there were other shareholders of the corporation who would be adversely affected if the corporate veil were pierced so that a creditor of a shareholder could collect its judgment.⁵⁹ Second, there were other creditors of the corporation that would be similarly adversely affected.⁶⁰ Third, “there must be some wrong, beyond the creditor’s inability to collect,”⁶¹

Finally, there are states in which there are no reported cases that have expressly ruled one way or the other on the availability of reverse veil piercing. Delaware is one such state.⁶²

At first blush, that might seem surprising. Businesses specifically incorporate in Delaware because Delaware corporate law is more certain and complete than the corporate law of any other state.⁶³ Naturally, it would seem that if any state would have a well-developed law of reverse veil piercing, it would be Delaware.

Upon further reflection, however, the absence of settled Delaware law on reverse veil piercing is not surprising. Primarily public corporations—or those corporations that aspire to be large public corporations—incorporate in Delaware instead of the state in which they predominantly operate.⁶⁴ There is not a single reported case—in any state throughout the country—which involves piercing the corporate veil of a publicly held corporation.⁶⁵ Veil piercing issues arise in cases involving relatively small businesses that are close corporations or limited liability companies.⁶⁶

58. 37 A.3d at 734.

59. *See id.* at 734–35.

60. *See id.* at 735–36.

61. *Id.* at 738.

62. *See* Alan D. Wingfield & Massie P. Cooper, *Reverse Piercing of the Corporate Veil: New Implications in Light of a Fourth Circuit Decision*, MONDAQ, <http://www.mondaq.com/unitedstates/x/724316/Shareholders/Reverse+Piercing+Of+The+Corporate+Veil+New+Implications+In+Light+Of+A+Fourth+Circuit+Decision> (last updated Aug. 3, 2018).

63. *See* STEPHEN M. BAINBRIDGE, *CORPORATE LAW* 10 (3d ed., LEG 2015) (2002) (“There is considerable body of case law . . . which allows legal questions to be answered with confidence.”).

64. *See* Christopher Wink, *64% of Fortune 500 Firms are Delaware Incorporations: Here’s Why*, TECHNICAL.LY DELAWARE (Sept. 23, 2014, 10:11 AM), <https://technical.ly/delaware/2014/09/23/why-delaware-incorporation>.

65. *See* RICHARD D. FREER & DOUGLAS K. MOLL, *PRINCIPLES OF BUSINESS ORGANIZATIONS* 351 (2d ed., LEG 2018) (2013) (“It has never applied in the context of a publicly held corporation.”).

66. *Id.* (“[P]iercing occurs only in closely held corporations.”).

And, as the facts of *Sky Cable* illustrate with Coley's creation of a single member Delaware limited liability company to hold North Carolina real property, Delaware has become a mecca for not only incorporation but also for the organization of limited liability companies.⁶⁷ The combination of Delaware LLC's increasing popularity for closely held businesses—and the practical reality that courts will only pierce the veil of closely held businesses—makes *Sky Cable*'s answers to questions about reverse veil piercing under Delaware law important.

IV. VEIL PIERCING AND CHOICE OF DELAWARE LAW

Judicial opinions on choice of law commonly use the phrase “significant contacts.”⁶⁸ The *Sky Cable* litigation had significant contacts with Virginia and North Carolina.⁶⁹ The contract between DIRECTV and Coley was limited to Virginia—providing access to DIRECTV programming to residents at the Massanutten Resort located in Virginia.⁷⁰ There are reported Virginia state court decisions expressly recognizing reverse veil piercing.

In *Sky Cable*, there were also significant contacts⁷¹ with North Carolina.⁷² The real property that ITT owned was located in North Carolina.⁷³ There are reported North Carolina state court decisions expressly recognizing reverse veil piercing.⁷⁴

In *Sky Cable*, the only contact with Delaware was the fact that ITT was a Delaware limited liability company.⁷⁵ There were no Delaware state court decisions expressly recognizing reverse veil piercing.⁷⁶

67. See Michelle Kaminsky, *Starting Up? Which State to File your LLC In*, LEGALZOOM.COM, <https://www.legalzoom.com/articles/starting-up-which-state-to-file-your-llc-in> (last visited May 16, 2019).

68. E.g., *AEI Life LLC v. Lincoln Benefit Life Co.*, 892 F.3d 126, 135 (2d Cir. 2018) (quoting *Brinks Ltd. v. S. African Airways*, 93 F.3d 1022, 1030–31 (2d Cir. 1996)); *Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081, 1091 n.8 (9th Cir. 2018) (citing *Ito Int'l Corp. v. Prescott, Inc.*, 921 P.2d 566, 571 (Wash. Ct. App. 1996)).

69. See 886 F.3d 375, 382 (4th Cir. 2018).

70. See *id.* See generally MASSANUTTEN, <https://www.massresort.com> (last visited May 16, 2019) (resort's website).

71. See Kemper, *supra* note 56 (citing *C.F. Trust, Inc. v. First Flight L.P.*, 580 S.E.2d 806 (Va. 2003)).

72. See 886 F.3d at 382.

73. See *Sky Cable, LLC v. Coley*, No. 5:11CV00048, 2016 WL 3926492, at *4–5 (W.D. Va. July 18, 2016), *aff'd* *Sky Cable, LLC v. DIRECTV, Inc.*, 886 F.3d 375 (4th Cir. 2018).

74. See, e.g., *Fischer Inv. Capital v. Catawba Dev. Corp.*, 689 S.E.2d 143, 152 (N.C. Ct. App. 2009).

75. See *Coley*, 2016 WL 3926492, at *4.

76. See *Wingfield & Cooper*, *supra* note 62.

Not surprisingly, Coley argued that the court should look to the law of the state that had not recognized reverse veil piercing: “[T]he law of the state of incorporation in determining whether to disregard the corporate form and find the assets held by Coley’s limited liability companies are subject to the execution of the judgment against Coley in this case.”⁷⁷ Both the district court and the Fourth Circuit decided to apply Delaware law.⁷⁸

The Fourth Circuit provided the following reasoning for its decision to apply Delaware law: “The law of the state in which an entity is incorporated generally governs the question whether a court may pierce an entity’s veil. Accordingly, we apply Delaware law to this question.”⁷⁹ In a somewhat more extended discussion of the choice of law issue, the district court in *Sky Cable* refers to the internal affairs doctrine and to *Restatement (Second) of Conflict of Laws* section 307.⁸⁰ Most decisions to apply the law of the state of incorporation in resolving veil piercing problems are based on the internal affairs doctrine⁸¹ or *Restatement (Second) of Conflict of Laws* section 307.⁸²

The United States Supreme Court explains the internal affairs doctrine as “a conflict of laws principle which recognizes that only one State, i.e., [the state of incorporation] should have the authority to regulate a corporation’s internal affairs—matters peculiar to the relationship among or between the corporation and its current officers, directors and shareholders.”⁸³ The relationship between a corporation and its officers and directors—or the

77. *Coley*, 2016 WL 3926492, at *13.

78. *See Sky Cable*, 886 F.3d at 386 (footnote omitted); *Coley*, 2016 WL 3926492, at *13.

79. *Sky Cable*, 886 F.3d at 386. In a footnote, the court explains its limited discussion of choice of law: “The parties do not dispute that Delaware law applies” *Id.* at 386 n.8.

80. 2016 WL 3926492, at *12, *12 n.10 (quoting *United States v. Kilon Indus.*, 926 F. Supp. 2d 794, 814–15 (E.D. Va. 2013)).

81. *See Dassault Falcon Jet Corp. v. Oberflex, Inc.*, 909 F. Supp. 345, 349 (M.D.N.C. 1995) (citation omitted) (“[M]ost, if not all, jurisdictions . . . use the ‘internal affairs doctrine’ as their choice of law for piercing the corporate veil.”). Some states have even codified the internal affairs doctrine rule for traditional veil piercing. *E.g.*, MASS. GEN. LAWS ANN. ch. 156D, § 15.05(c) (West, Westlaw through the end of the 2018 2nd Ann. Sess.).

82. *E.g.* *U.S. SEC v. Levine*, 671 F. Supp. 2d 14, 33 (D.D.C. 2009) (citing RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 307 (AM. LAW INST. 1971) to rule state of incorporation controls piercing); *KDN Mgmt, Inc. v. WinCo Foods, LLC*, 423 P.3d 423, 429 (Idaho 2018) (stating since there was no Idaho corporation involved, Utah law controls piercing, according to § 307 of the Restatement).

83. *Edgar v. Mite Corp.*, 457 U.S. 624, 645 (1982) (citation omitted). *See generally The Internal Affairs Doctrine: Theoretical Justifications and Tentative Explanations for its Continued Primacy*, 115 HARV. L. REV. 1480 (2002), a thirty-two page note providing more than you want to (or need to) know about the internal affairs doctrine.

relationship between a corporation and its shareholders—is an “internal” relationship.⁸⁴

Veil piercing, however, does not involve a matter “peculiar to the relationship among or between the corporation and its current officers, directors and shareholders.”⁸⁵ Veil piercing involves the rights of a third-party creditor.⁸⁶ The relationship between a corporation and its creditors is an “external” relationship.⁸⁷ As such, should the internal affairs doctrine apply to piercing?⁸⁸

Professor Franklin Gevurtz provides a couple of reasons for the lack of judicial opinions that expressly consider the question of whether the internal affairs doctrine should govern choice of law in piercing cases.⁸⁹ First, piercing opinions often cite to—and rely on—reported decisions from other states.⁹⁰ Second, piercing opinions generally involve small corporations that do business and incur debts only in their state of incorporation.⁹¹

Recently, in *Pertuis v Front Roe Restaurants, Inc.*,⁹² the South Carolina Supreme Court considered whether the internal affairs doctrine applied to veil piercing.⁹³ Finding that the internal affairs doctrine applied to the “inner-

84. See Gregory Scott Crespi, *Choice of Law in Veil-Piercing Litigation: Why Courts Should Discard the Internal Affairs Rule and Embrace General Choice-of-Law Principles*, 64 N.Y.U. ANN. SURV. AM. L. 85, 97 (2008).

85. *Edgar*, 457 U.S. at 645 (citation omitted).

86. See *In re Acushnet River Proceedings*, 675 F. Supp. 22, 31 (D. Mass. 1987).

87. See Crespi, *supra* note 84 (footnote omitted).

88. See generally Crespi, *supra* note 84 (arguing that the internal affairs doctrine should not be applied to veil-piercing litigation).

89. GEVURTZ, *supra* note 22, at 108.

90. *Id.*

91. *Id.*

92. 423 S.C. 640, 817 S.E.2d 273 (2018).

93. *Id.* at 650, 817 S.E.2d at 278 (citations omitted); see Sarah C. Haan, *Federalizing the Foreign Corporate Form*, 85 ST. JOHN'S L. REV. 925, 962–63 (2011) (“Veil piercing’s equitable nature is essential in understanding why it falls outside the internal affairs doctrine, and thus why courts typically balk at extending the doctrine to require the application of the veil-piercing law of foreign governments. A court’s decision to disregard the corporate form is a singular exercise of equitable discretion that applies only to a specific facet of the legal case before it. It does not actually affect the corporation’s operations, activities, or affairs in any way. By disregarding the corporate form in a case, the court does not dissolve the corporation, or even make it likely that a second court will pierce the same corporation’s veil in a different case. It does not affect the relationship among the interested parties in any context outside the narrow dispute before the court, and the corporation need not change its operations to comply with the court’s decision or to continue to operate. This, of course, is significantly different from judicial decisions that *do* implicate a corporation’s internal affairs, such as the election of directors, the adoption of by-laws, shareholder voting, or the declaration of dividends, which generally impose real and often permanent changes on an entity’s operation or the composition or activities of its

workings” of a corporation and veil piercing involved “governmental policies”—and not the inner workings of a corporation—*Pertuis* rejected the internal affairs doctrine and applied South Carolina law in deciding whether to pierce the veil of a North Carolina corporation.

The internal affairs doctrine seems even less relevant to choice of law considerations for reverse veil piercing. In reverse veil piercing, neither the creditor nor the underlying transaction has any relationship—internal or external—to the corporation.

Similarly, *Restatement (Second) of Conflict of Laws* section 307 does not seem to address choice of law for traditional veil piercing, much less reverse piercing.⁹⁴ Section 307 is set out below.

A. § 307 Shareholders' Liability

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*.⁹⁵

Note both the italicized phrase “corporate debts” and the title of section 307. There are two different kinds of “corporate debts.” There are the debts owed by the corporation and the debts owed to the corporation. And, there can be shareholder liability for each of the two different kinds of corporate debts.⁹⁶

Traditional veil piercing becomes important when there is an unpaid debt owed by the corporation. Traditional veil piercing results in shareholder liability for the debts owed *by* the corporation.⁹⁷

There are also debts owed *to* the corporation by shareholders. A shareholder can have liability for a debt they owe to the corporation.⁹⁸ The first sentence of the Comment to *Restatement (Second) of Conflict of Laws* section 307 gives an example of a corporate debt that is a debt owed *to* the corporation by a shareholder: “Under the local law of most states, a

stakeholders.”); *see also* GEVURTZ, *supra* note 22, at 108–09 (discussing that rationales for internal affairs doctrine do not apply to veil piercing).

94. 423 S.C. at 650–51, 817 S.E.2d at 278 (citations omitted); *see also In re Acushnet River Proceedings*, 675 F. Supp. 22, 31 (D. Mass. 1987) (citation omitted) (veil piercing does not implicate the “internal affairs” doctrine because veil piercing involves third-party rights).

95. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 307 (AM. LAW INST. 1971) (emphasis added).

96. *Id.* (emphasis added).

97. *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 185 cmt. a (AM. LAW INST. 1934).

98. *See Crespi, supra* note 2, at 34.

shareholder is liable for any balance that remains unpaid upon a subscription made by him to the shares of a corporation.”⁹⁹

And the last sentence of that Comment suggests that section 307 deals with choice of law to determine a shareholder’s liability for their own debt that they owe *to* the corporation, not choice of law to determine shareholder liability under piercing the veil for a debt owed by the corporation: “Thus, only shareholders who have not fully paid for their shares or who have paid otherwise than in cash may be made liable to creditors of the corporation for its debts.”¹⁰⁰

It is not necessary to look to the Comment to *Restatement (Second) of Conflict of Laws* section 307 to see that section 307 does not address choice of law for reverse veil piercing. Again, the title to the section is “Shareholders’ Liability,” and it refers to “liability on the shareholder” for corporate debts. Reverse veil piercing does not involve a shareholder’s liability for corporate debts; reverse veil piercing involves “corporate liability” for “shareholders’ debts.”¹⁰¹

In *Sky Cable*, the Fourth Circuit’s choice of Delaware law was not outcome determinative.¹⁰² All of the other states with relevant contacts—North Carolina and Virginia—also recognize reverse veil piercing.¹⁰³

There are, however, veil piercing situations in which a court’s choice of law will matter. Several professors who have conducted more ambitious empirical research regarding veil piercing have concluded that “veil piercing rates vary substantially based on which state’s law is applied.”¹⁰⁴ For example, Professor Peter Oh reports a sixty percent rate of veil piercing in cases in which the court applied South Carolina law and only a 25.81% rate of veil piercing in cases in which the court applied Maryland law.¹⁰⁵

99. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 307 cmt. a (AM. LAW INST. 1971).

100. *Id.*

101. Indeed, Professor Gregory Crespi has argued that *Restatement (Second) of Conflict of Laws* section 307 should not govern choice of law questions involving traditional veil piercing. Crespi, *supra* note 84, at 109 (footnote omitted).

102. *See Sky Cable, LLC v. Coley*, No. 5:11CV00048, WL 3926492, at *18 (W.D. Va. July 18, 2016), *aff’d Sky Cable, LLC v. DIRECTV, Inc.*, 886 F.3d 375 (4th Cir. 2018).

103. *See sources cited supra* notes 71 & 74.

104. Oh, *supra* note 21, at 144 (footnote omitted); *see also* Thompson, *supra* note 21, at 1050 (footnote omitted) (“Among the eight states with the most piercing decisions, the percentage of cases in which courts pierced ranged from 31% in Pennsylvania and 35% in New York to 45% in California.”).

105. Oh, *supra* note 21, at 115–16.

V. CERTIFICATION OF QUESTION OF DELAWARE REVERSE VEIL PIERCING LAW

Certification is the process by which a federal court, faced with a question of first impression of state law, asks that state's Supreme Court to decide that state law question.¹⁰⁶ Coley filed a motion for certification of issues of Delaware law as to reverse veil piercing to the Delaware Supreme Court.¹⁰⁷ Initially, the Fourth Circuit granted the motion but later withdrew its certification order.¹⁰⁸

The certification of state law questions is discretionary within the federal court.¹⁰⁹ Obviously, the federal court is in the best position to determine whether it is confident in its determination of the state law answer to the question. In this case, Judge Keenan, who wrote the opinion in *Sky Cable*, was uniquely qualified to make such a determination. In 2002, the Fourth Circuit, in *C. F. Trust, Inc. v. First Flight Ltd. Partnership*, certified the question of whether reverse veil piercing was a part of Virginia law to the Virginia Supreme Court.¹¹⁰ At the time, Judge Keenan was a part of the Virginia Supreme Court, which provided an affirmative answer to that question.¹¹¹

And, so, we are not criticizing or even questioning the Fourth Circuit's decision not to certify the question.¹¹² We are just "wondering" whether the

106. *E.g.*, S.C. APP. CT. R. 244.

107. Br. of Appellee DIRECTV at 14, *Sky Cable, LLC v. DIRECTV, Inc.*, 886 F.3d 375 (4th Cir. 2018) (Nos. 16-1920(L), 16-1943, 16-1944, 16-1946) 2017 WL 4235980, at *14 (Sept. 20, 2017) (citations omitted).

108. *Id.* (citations omitted).

109. *Lehman Bros. v. Schein*, 416 U.S. 386, 390–91 (1974) (footnote omitted) ("We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. . . . *Its use in a given case rests in the sound discretion of the federal court.*") (emphasis added); see also CHARLES ALAN WRIGHT ET AL., 17A FEDERAL PRACTICE AND PROCEDURE § 4248 (3d ed. 2007).

110. 306 F.3d 126, 141 (4th Cir. 2002) (citation omitted).

111. See *C.F. Trust, Inc. v. First Flight L.P.*, 580 S.E.2d 806, 811 (Va. 2003); *Judge Barbara Milano Keenan*, U.S. CT. OF APPEALS FOR THE FOURTH CIR., <http://www.ca4.uscourts.gov/judges/judges-of-the-court/judge-barbara-milano-keenan> (last visited May 16, 2019) (listing Judge Keenan's years of service on the Virginia Supreme Court as 1991 to 2010).

112. *Cf.* Judge Dolores K. Sloviter, *Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 79 VA. L. REV. 1671, 1682 (1992) (footnote omitted) ("[A] federal judge will necessarily approach a decision filling in the interstices in the state decisional law through the prism of the eyes of someone steeped in federal law. That judge, who may not even be a citizen of the state involved, is certainly not likely to be as attuned as a state judge is to the nuances of that state's history, policies, and local issues."). *But cf.* Justin R. Long, *Against Certification*, 78 GEO. WASH. L. REV. 114 (2009) (questioning whether federal courts should ever certify questions of state law to the state's Supreme Court).

Fourth Circuit's decision not to certify the question of reverse veil piercing to the Delaware Supreme Court in this case can (or even needs to be) reconciled with the Fourth Circuit's decision to certify questions of reverse veil piercing to the Virginia Supreme Court in *C. F. Trust*.

VI. REVERSE VEIL PIERCING IN DELAWARE

Prior to *Sky Cable*, no case applying Delaware law had granted reverse veil piercing, and no prior case applying Delaware law had even expressly stated that reverse veil piercing was an available remedy—albeit not available under the facts before the court.¹¹³ There is, however, language in Delaware Court of Chancery decisions from 2015 and 2016 that the Fourth Circuit looked to for guidance as what the Delaware position on reverse veil piercing might be.

In 2015, in *CanCan Development v. Manno*,¹¹⁴ the Delaware Court of Chancery stated:

Despite seeking to hold Manno Enterprises liable for Manno's conduct, CanCan's arguments rely entirely on instances when courts have done the opposite and held an individual liable for the debts of an entity. 'Reverse pierce claims implicate different policies and require a different analytical framework from the more routine corporate creditor veil-piercing attempts.' No one grappled with the different implications. Had the claim been properly presented and supported, [the claim for reverse veil piercing] *might* have prevailed. Under the circumstances, it fails for lack of support.¹¹⁵

While dictum, this statement seems to predict that Delaware law would recognize reverse veil piercing under the facts of this case if the claim for reverse veil piercing had been properly presented and supported.

The 2016 Delaware Court of Chancery opinion that *Sky Cable* quotes from is less helpful. In *Spring Real Estate v. Echo/RT Holdings, LLC*,¹¹⁶ the court of Chancery noted:

One exception exists to the general rule that a parent has no property interest in the assets of a subsidiary. This general rule is based on the

113. See *Sky Cable, LLC v. Coley*, No. 5:11cv00048, 2016 WL 3926492, at *13 (W.D. Va. July 18, 2016), *aff'd* *Sky Cable, LLC v. DIRECTV, Inc.*, 886 F.3d 375 (4th Cir. 2018).

114. No. 6429-VCL, 2015 WL 3400789 (Del. Ch. Mar. 27, 2015).

115. *Id.* at *22 (emphasis added) (quoting *Crespi*, *supra* note 2, at 37).

116. No. 7994-VCN, 2016 WL 769586 (Del. Ch. Feb. 18, 2016).

premise that a corporation's assets are owned by the corporation, which is considered by state law to be a legal entity distinct from its shareholders. Thus, where the subsidiary is a mere alter ego of the parent *to the extent that the Court may engage* in “reverse veil-piercing,” the Court may treat the assets of the subsidiary as those of the parent for purposes of a trustee's standing to void allegedly fraudulent transfers of such assets.¹¹⁷

Note the italicized phrase “to the extent that the Court may.” This statement is not a prediction that under these facts a court would—or even might—recognize reverse veil piercing. The statement is *obiter dictum* as that term is defined in *White's Law Dictionary*: “Latin, saying ‘by the way.’”¹¹⁸

In 2017, in *PNC Bank v. Udell*,¹¹⁹ a creditor with a judgment against a member of a Delaware limited company argued a federal district court in Illinois should use outsider reverse veil piercing so that it could collect that judgment from the assets of the Delaware limited liability company.¹²⁰ The court summarily rejected that argument, stating, “Delaware law has not recognized reverse veil piercing as a cause of action. . . . [I]t is not the role of this Court in a diversity case like this one to expand the state law of another jurisdiction.”¹²¹

In holding that Delaware would recognize reverse veil piercing, *Sky Cable* describes *Cancan Development* and *Spring Real Estate* as “signal[ing] some willingness to apply a reverse theory of veil piercing.”¹²² *Sky Cable* also justified its reverse veil piercing holding on Delaware’s strong interest in preventing its business entities from being used as “vehicles for fraud,” explaining that without reverse veil piercing, fraudulent business owners could defraud their creditors by hiding assets in Delaware business entities.¹²³

117. *Spring Real Estate*, 2016 WL 769586, at *3 (emphasis added) (first citing *Kreisler v. Goldberg*, 478 F.3d 209, 213 (4th Cir. 2007); then citing *In re Am. Int’l Refinery*, 402 B.R. 728, 742 (Bankr. W.D. La. 2008); then citing *PSL Air Lease Corp. v. B.R. Corp.*, 1972 WL 124882, at *6 (Del. Super. Sept. 28, 1972), *aff’d*, 313 A.2d 893 (Del. 1973); and then citing *In re Am. Int’l Refinery*, 402 B.R. at 742–46).

118. *Obiter dictum*, WHITE’S LAW DICTIONARY (1985); see also Damon Thayer, *Learning to Differentiate between Judicial and Obiter Dicta*, 35 L.A. LAW., Apr. 2012, at 10 (footnote omitted) (“Courts often refer to obiter dicta as ‘mere dicta’ because they are frequently ‘by the way’ remarks with no persuasive value.”).

119. No. 16 C 5400, 2017 WL 3478814 (N.D. Ill. Aug. 13, 2017).

120. *Id.* at *2–3 (citations omitted).

121. *Id.* at *7 (citations omitted).

122. *Sky Cable, LLC v. DIRECTV, Inc.*, 886 F.3d 375, 387–88 (4th Cir. 2018) (first citing *Spring Real Estate*, 2016 WL 769586 at *3; then citing *Cancan Dev. v. Manno*, No. 6429–VCL, 2015 WL 3400789, at *22 (Del. Ch. Mar. 27, 2015)).

123. *Id.* at 387 (quoting *NACCO Indus. v. Applicia Inc.*, 997 A.2d 1, 26 (Del. Ch. 2009)).

VII. FOURTH CIRCUIT'S LIMITS ON REVERSE VEIL PIERCING IN DELAWARE

A. *Outsider Reverse Veil Piercing*

The Fourth Circuit expressly limits its holding to “outsider” reverse veil piercing: “The district court . . . correctly held that under Delaware law, *outsider* reverse veil piercing of an LLC is warranted”¹²⁴ Courts¹²⁵ and commentators¹²⁶ generally distinguish between outsider reverse veil piercing and insider reverse veil piercing.

Outsider reverse veil piercing permits a creditor of one of the owners of a business entity to recover that owner’s debt from the assets of the business entity.¹²⁷ That creditor has no relationship with the business entity. The equitable remedy is referred to as outside reverse veil piercing because the party seeking to disregard the business entity’s separateness operates from outside the business entity.

Kingston Dry Dock Co. v. Lake Champlain Transportation Co. is an example of outsider reverse veil piercing.¹²⁸ The parent corporation that was the judgment debtor was a shareholder of the subsidiary.¹²⁹ The creditor of the parent corporation seeking to disregard the separateness of the parent and the subsidiary had no relationship with the subsidiary.¹³⁰

On the other hand, insider reverse veil piercing permits one of the owners of a business entity to treat the entity’s assets as their own.¹³¹ This type of veil piercing is named so due to the fact that the party seeking to disregard entity separateness is an owner of the entity—in a sense, inside the entity.¹³²

Roepke v. Western National Mutual Insurance Co. is an insider reverse piercing case.¹³³ *Cargill, Inc. v. Hedge* is an easier-to-understand example of insider reverse veil piercing.¹³⁴ In that case, Sam and Annette Hedge purchased a farm, created a Minnesota family corporation (Hedge Farm, Inc.) and transferred title to their farm to Hedge Farm, Inc.¹³⁵ Sam bought supplies on

124. *Id.* at 389 (emphasis added) (footnote omitted).

125. *See, e.g., In re Phillips*, 139 P.3d 639, 644–45 (Colo. 2006) (en banc) (citations omitted).

126. *See, e.g., FLETCHER, supra* note 24, § 41.70.

127. Crespi, *supra* note 2, at 37.

128. 31 F.2d 265, 267 (2d Cir. 1929).

129. *See id.* at 265.

130. *See id.* at 267.

131. Crespi, *supra* note 2, at 37.

132. *See id.*

133. 302 N.W.2d 350, 352 (Minn. 1981).

134. 375 N.W.2d 477 (Minn. 1985).

135. *Id.* at 478.

credit for Hedge Farm, Inc. from Cargill.¹³⁶ When Hedge Farm, Inc. defaulted, Cargill obtained a judgment against Hedge Farm, Inc., executed the judgment on the farm, and bought the farm at a judicial sale.¹³⁷ Annette, the sole shareholder of Hedge Farm, Inc., intervened, asserting a homestead exemption.¹³⁸

Individuals are only entitled to such a homestead exemption in family homes that they themselves own.¹³⁹ The farm that Annette was claiming as her homestead belonged to a separate legal entity.¹⁴⁰ Hedge Farm, Inc. owned the farm; all that Annette owned was the stock of Hedge Farm, Inc.¹⁴¹ In order for Annette to have the farm as her homestead, she needed the court to treat what belonged to Hedge Farm, Inc. as belonging to her by ordering insider reverse veil piercing.¹⁴²

In ruling for Annette, the Minnesota Supreme Court looked to its earlier decision in *Roepke*:

The farmhouse was their family home The corporation was as much an alter ego for the Hedges as Mr. Roepke's corporation was for him. Appellant argues that its creditor rights are adversely affected if the corporate entity is disregarded, but Cargill is no more adversely affected by the reverse pierce than the insurance company in *Roepke*.¹⁴³

As the *Cargill* case illustrates, the end results of insider reverse veil piercing are very different from the results of traditional veil piercing. In traditional veil piercing, the creditor is the “winner” able to pierce the veil and satisfy debts from assets not otherwise available to it, and the shareholder is the “loser”—held liable for debts incurred by the business entity. Insider reverse veil piercing can be truly the reverse. Reconsider the end result in both *Roepke* and *Hedge*. The owner who wrongly treated the business entity as their alter ego was the “winner.”¹⁴⁴

136. *Id.*

137. *Id.*

138. *Id.*

139. *See id.* (first citing MINN. CONST. art. I, § 12; then quoting MINN. STAT. ANN. § 510.01 (West, Westlaw through the end of the 2018 Reg. Sess.); and then citing MINN. STAT. ANN. § 510.02 (West, Westlaw through the end of the 2018 Reg. Sess.)).

140. *Id.* At 478.

141. *Id.*

142. *See id.* at 478–79.

143. *Id.* at 479.

144. *Cf. Crespi, supra* note 2, at 51 (“It would be clearly aberrant to allow a corporate insider to reverse pierce the corporate veil because the insider caused the entity to fail to observe

While *Sky Cable* notes that “many courts strongly oppose allowing a company’s veil to be pierced for the benefit of the individuals who themselves have created the company,” it does not decide whether the Delaware Supreme Court would use the equitable remedy of insider reverse veil piercing.¹⁴⁵ Rather, the Fourth Circuit merely limits its holding regarding Delaware law of reverse veil piercing to outsider reverse veil piercing.¹⁴⁶

The dynamics and effects of the outsider reverse piercing in cases like *Dimeglio* and *Sky Cable* are also very different from the dynamics and effects of traditional veil piercing cases. In the typical traditional veil piercing case, liability for the debts of a business entity is imposed on an owner of that business because of actions of the owner—actions such as undercapitalizing the business, disregarding corporate formalities, or treating the business as their alter ego.¹⁴⁷ In essence, the “bad actor” is the loser when there is traditional veil piercing.

In *Dimeglio* and *Sky Cable*, liability for the debt of an owner of a business entity is imposed on that business entity because the owner treated that business entity as an alter ego. Consequently, *Dimeglio* and *Sky Cable* are like traditional veil piercing cases in that the owner of the business is the bad actor. The difference between *Dimeglio* and *Sky Cable* and traditional veil piercing is that in *Dimeglio* and *Sky Cable*, the debts of the bad actor are paid from the assets of another legal entity, and in traditional veil piercing, the debts of the business entity are paid from the assets of the bad actor. The bad actor is, in essence, the winner in *Dimeglio* and *Sky Cable* because of the outsider reverse veil piercing.

The outsider reverse veil piercing in *Dimeglio* and *Sky Cable* is not only inconsistent with traditional veil piercing, but it is also inconsistent with *Kingston Dry Dock Co. v. Lake Champlain Transportation Co.*,¹⁴⁸ the first case to recognize the possibility of outsider reverse veil piercing. In *Kingston*, Judge Learned Hand refused to reverse pierce the veil of a subsidiary so as to

the requisite corporate standards and operated it as the insider’s alter ego. This would violate perhaps the most fundamental rule of equity by allowing a person to profit from personal wrong doing.”).

145. 886 F.3d 375, 385, 386 n.6 (4th Cir. 2018) (first citing 1 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 7:18 (3d ed. 2017); and then citing 2 F. HODGE O’NEAL & ROBERT B. THOMPSON, CLOSE CORPORATIONS AND LLCs: LAW AND PRACTICE § 8:18 (rev. 3d ed. 2018)). After *Sky Cable*, a federal district court in Delaware concluded that the equitable remedy of insider reverse veil piercing is available in Delaware. See *Harrison v. Sorroof Int’l, Inc.*, 320 F. Supp. 3d 602, 614–17 (D. Del. 2018) (citations omitted) (holding subsidiary could pierce its own veil to reach its parent).

146. 886 F.3d at 389 (citations omitted).

147. See Thompson, *supra* note 21, at 1044–45 (footnotes omitted).

148. See *supra* notes 34–36 and accompanying text.

permit a creditor of its parent/shareholder because the subsidiary was not the bad actor—the subsidiary did not in any way “interpose in the conduct of [the parent/shareholder’s] affairs.”¹⁴⁹ And, as Judge Hand noted, a situation in which the business entity is interposing in the conduct of its owner’s affairs is “extremely rare.”¹⁵⁰

B. *Alter Ego*

The Fourth Circuit further limits its holding in *Sky Cable* to cases where the limited liability company is the alter ego of the judgment debtor.¹⁵¹ There are Delaware law cases¹⁵² and commentaries¹⁵³ on Delaware law that treat the terms “alter ego” and “piercing the veil” interchangeably.

Still other cases¹⁵⁴ and commentaries¹⁵⁵ do not use the terms “alter ego” and “piercing the veil” interchangeably. Instead they treat the alter ego theory as one of several possible grounds for veil piercing.¹⁵⁶ There is language in the *Sky Cable* opinion that suggested the Fourth Circuit took this one of several possible grounds approach when it said: “Reverse veil piercing under the alter ego theory”¹⁵⁷

The question of whether a business entity is the alter ego of its owner is a question of fact. Reported cases set out various lists of factors to be considered.¹⁵⁸

149. 31 F.2d 265, 267 (2d Cir. 1929).

150. *Id.*

151. 886 F.3d at 389.

152. *See, e.g.,* Harrison v. Sorooof Int’l, 320 F. Supp. 3d 602, 609 n.4 (D. Del. 2018) (citation omitted) (“Delaware courts use the terms ‘piercing the corporate veil’ and ‘alter ego’ theory interchangeably.”).

153. *E.g.,* 1 DONALD L. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 2.03[b][1][iv] (2d ed. 2018).

154. *In re Opus East, LLC*, 480 B.R. 561, 570 (Bankr. Del. 2012) (quoting *E. Minerals & Chems. Co. v. Mahan*, 225 F.3d 330, 333 n.7 (3rd Cir. 2000)) (“The alter ego theory [only] comes into play in piercing the corporate veil when one seeks to hold liable an individual *owner* who controls the [company].”) (alteration in original).

155. *See* COX & HAZEN, *supra* note 145, § 7:8 (citing PHILLIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS: TORT, CONTRACT, AND OTHER COMMON LAW PROBLEMS IN THE SUBSTANTIVE LAW OF PARENT AND SUBSIDIARY CORPORATION 111 (1987)) (“There are three primary variants within the ‘piercing the corporate veil’ jurisprudence—(1) the ‘instrumentality’ doctrine, (2) the ‘alter ego’ doctrine and (3) the ‘identity’ doctrine.”).

156. *See supra* notes 152–53 and accompanying text.

157. 886 F.3d at 389.

158. *E.g.,* United States v. Golden Acres, Inc., 702 F. Supp. 1097, 1104 (D. Del. 1988) (citing *DeWitt Truck Brokers v. W. Ray Flemming Fruit Co.*, 540 F.2d 681, 686–87 (4th Cir. 1976) (“[A]n alter ego analysis must start with an examination of factors which reveal how the

In holding that the United States District Court's determination that Coley is the alter ego of ITT was not clearly erroneous, the Fourth Circuit recited the following facts: "[U]tter lack of proper accounting records;"¹⁵⁹ "abundant evidence . . . that Mr. Coley and his LLCs comingled their funds," including, inter alia (1) checks made out to the LLCs were deposited in Coley's bank account; (2) unexplained transfers of funds from ITT to the other LLCs; (3) other LLCs payments on ITT's mortgages;¹⁶⁰ and (4) Coley's use of ITT's mortgage interest deductions on his individual tax returns.¹⁶¹

These facts are similar to the *Dimeglio* facts. *Dimeglio*, however, had one additional and crucially important fact that cannot be overlooked. The alter ego had been created for a fraudulent purpose; the owner created the limited liability company to implement his Ponzi scheme.¹⁶²

Coley contended that Delaware law also required a fact finding that the alter ego was created for a fraudulent purpose.¹⁶³ Coley did not use ITT in the unlawful transmission of DIRECTV programming.¹⁶⁴ Coley alleged that ITT was created for the lawful purpose of "insulating the Coleys from liability related to their rental properties."¹⁶⁵

The Fourth Circuit rejected Coley's contention of a fraudulent purpose requirement, reading Delaware alter ego law as requiring only "an overall element of injustice or unfairness."¹⁶⁶ The court then concluded the element

corporation operates and the particular defendant's relationship to that operation. These factors include whether the corporation was adequately capitalized for the corporate undertaking; whether the corporation was solvent; whether dividends were paid, corporate records kept, officers and directors functioned properly, and other corporate formalities were observed; whether the dominant shareholder siphoned corporate funds; and whether, in general, the corporation simply functioned as a facade for the dominant shareholder.").

159. *Sky Cable*, 886 F.3d at 390.

160. *Id.* at 390–91.

161. *Id.* at 391.

162. *United States v. Dimeglio*, No. A–11–CR–411–SS, 2014 WL 1761674, at *9 (W.D. Tex. May 1, 2014).

163. Opening Br. of Def.-Appellant Randy Coley at 20, *Sky Cable, LLC v. DIRECTV, Inc.*, 886 F.3d 375 (4th Cir. 2018) (Nos. 16-1920(L), 16-1943, 16-1944, 16-1946), 2017 WL 3832560, at *20 [hereinafter *Coley Opening Brief*] (footnote omitted).

164. *Id.* at 21, 2017 WL 3832560, at *21 (citation omitted).

165. *Id.* at 22, 2017 WL 3832560, at *22 (citation omitted). And, creating an LLC "for the very purpose of escaping personal liability is lawful." *Bartle v. Home Owners Coop.*, 127 N.E.2d 832, 833 (N.Y. 1955) (first citing *Natelson v. A.B.L. Holding Co.*, 183 N.E. 373, 374 (N.Y. 1932); and then citing *Rapid Transit Subway Const. Co. v. City of New York*, 182 N.E. 145, 150 (1932)).

166. *Sky Cable*, 886 F.3d at 389 (first quoting *NetJets Aviation, Inc. v. LHC Commc'ns, LLC*, 537 F.3d 168, 177 (2nd Cir. 2008); then citing *Irwin & Leighton, Inc. v. W.M. Anderson Co.*, 532 A.2d 983, 989 (Del. Ch. 1987); and then citing *Martin v. D.B. Martin Co.*, 88 A. 612, 615 (Del. Ch. 1913)).

of “injustice or unfairness” in this case was “DIRECTV has not received any payment on its judgment against Mr. Coley although the district court found Mr. Coley liable over four years ago.”¹⁶⁷

That element of “injustice or unfairness”—DIRECTV had not received any payment on its judgment—would seem to be present in every case in which outsider reverse piercing is invoked. Why else would the question of reverse veil piercing ever arise? By definition, the party invoking outsider reverse veil piercing is always an unpaid creditor that has a judgment against an owner of the business entity. That is why the Connecticut Supreme Court in *Commissioner of Environmental Protection v. State Five Industrial Park, Inc.*, required “some wrong beyond the creditor’s inability to collect.”¹⁶⁸

*Wallace ex rel. Cencom Cable Income Partners II, L.P. v. Wood*¹⁶⁹ is the Delaware Chancery Court case that seems most supportive of Coley’s contention. In that case, a creditor with a judgment for breach of fiduciary duty against the corporate general partner of a limited partnership asked the court to pierce the corporate veil so that it could collect the judgment from the corporate general partner’s shareholders.¹⁷⁰ In holding that the plaintiff creditor failed to state a claim for piercing the corporate veil, the Delaware Chancery Court stated:

Piercing the corporate veil under the alter ego theory “requires that the corporate structure cause fraud or similar injustice.” Effectively, the corporation must be a sham and exist for no other purpose than as a vehicle for fraud. Plaintiffs merely state that the purpose of the General Partner is to manage and operate the Partnership. Plaintiffs have not stated sufficient facts that if true would justify disregarding the corporate form of the General Partner.¹⁷¹

In *Wallace*, the only stated purpose for the creation of the corporate general partner entity was to insulate the owners of the corporate general partner from liability for the business activities of the corporate general partner.¹⁷² And, so the court in *Wallace* refused to pierce the veil.¹⁷³

167. *Id.* at 391 (citation omitted).

168. 37 A.3d 724, 738 (Conn. 2012).

169. 752 A.2d 1175 (Del. Ch. 1999).

170. *Id.* at 1183.

171. *Id.* at 1184 (quoting *Outokumpu Eng’g Enters. v. Kvaerner EnviroPower, Inc.*, 685 A.2d 724, 729 (Del. Super. Ct. 1996)).

172. *Id.*

173. *Id.*

Similarly, the only stated purpose for the creation of ITT was to insulate Coley from liability of the business activities of ITT.¹⁷⁴ Nonetheless, the court in *Sky Cable* affirmed the district court's decision to reverse veil pierce.¹⁷⁵

The *Sky Cable* opinion cited *Wallace* for various other general legal concepts but did not compare the facts of *Wallace* with the facts in the instant case.¹⁷⁶ Coley's appellate briefs did not even mention *Wallace*.¹⁷⁷

C. No Other Owner (and no Other Creditors?)

The Fourth Circuit further limited its holding as to the availability of the equitable remedy of reverse veil piercing to business entities that have a single owner.¹⁷⁸ That is a significant limitation.

Reverse veil piercing, unlike traditional veil piercing, adversely impacts any owner of the business. For example, if David and Jake are owners of B business entity, then traditional veil piercing by C—a creditor with a judgment against B business entity—to collect that judgment from owner David has no negative economic impact on other owner, Jake. In fact, such an outcome would have a positive economic impact on Jake. His equity interest in B business entity should have a greater value because B business entity's debts are reduced by traditional veil piercing.

On the other hand, if David and Jake are owners of B business entity, then reverse veil piercing by C—a creditor with a judgment against David—to collect that judgment from B business entity has a negative economic impact on Jake. Even though Jake has no connection to the debt David owes C, the economic value of Jake's interest in business entity B has been reduced because B business entity has less assets. Such a result occurs because the assets of a business entity that Jake owns will have been used to pay a debt that Jake does not owe.

In *Sky Cable*, there is no mention of whether ITT has any other creditors; however, is that not something that should be discussed? Such a fact was extremely important to the Connecticut Supreme Court in *Commissioner of*

174. *Sky Cable, LLC v. DIRECTV, Inc.*, 886 F.3d 375, 382 (4th Cir. 2018).

175. *Id.* at 389.

176. *See id.* at 386 (citing *Wallace ex rel. Cencom Cable Income Partners II, 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.”).

177. *See* Coley Opening Brief, *supra* note 163; Reply Br. of Def.-Appellant Randy Coley, *Sky Cable, LLC v. DIRECTV, Inc.*, 886 F.3d 375 (4th Cir. 2018) (Nos. 16-1920(L), 16-1943, 16-1944, 16-1946), 2017 WL 4512618 [hereinafter *Coley Reply Brief*].

178. There are reverse veil piercing cases in which the judgment debtor is not the sole owner, or even an owner. *See, e.g., LFC Mktg. Grp., Inc. v. Loomis*, 8 P.3d 841, 847 (Nev. 2000) (stating that judgment debtor was not a shareholder).

Environmental Protection v State Five Industrial Park, Inc., because reverse veil piercing impacts other creditors differently from traditional veil piercing.¹⁷⁹

Traditional veil piercing, based on the doings and misdoings of an owner, adversely affects the other creditors of that owner. Returning to the prior hypothetical example, if David and Jake are owners of B business entity and creditor L has made a loan to David, and creditor S has provided services to David for which it has not been paid, then traditional veil piercing by C—a creditor with a judgment against B business entity—to collect that judgment from owner David has a negative economic impact on L and S. If C is successful, it will be paid from David’s assets that would otherwise be available to pay L and S. Such a result seems appropriate—creditors bear the risk of the doings and misdoings of their debtor.

Outside reverse veil piercing, like traditional veil piercing, is based on the doings and misdoings of an owner. The negative impact of reverse veil piercing, however, is on the creditors of the business entity rather than on creditors of that bad actor owner.

Again, assume that David and Jake are the owners of business entity B. B has two creditors: L, which has made a loan to B, and S, which has performed services for B and has not yet been paid. If C, a creditor with a judgment against David, is able to invoke the equitable remedy of reverse veil piercing to collect its judgment against David from the assets of business entity B, then there will be fewer assets available for B to pay L and S. Why should those creditors of B bear the risk of the doings and misdoings of David, someone who is not their debtor?

D. Delaware’s Charging Statute’s Limits on Reverse Veil Piercing

Coley’s principal argument was that Delaware § 18-703 (referred to by both Coley and the Fourth Circuit as “the charging statute”)¹⁸⁰ precludes the use of reverse veil piercing of a Delaware limited liability company. The statute provides in pertinent part:

(a) On application by a judgment creditor of a member or of a member's assignee, a court having jurisdiction may charge the limited liability company interest of the judgment debtor to satisfy the judgment. To the extent so charged, the judgment creditor has only

179. See 37 A.3d 724, 735–36 (Conn. 2012).

180. For a complete explanation of charging orders and charging order statutes, see Jay D. Adkisson, *Charging Orders: The Peculiar Mechanism*, 61 S.D. L. REV. 440 (2016).

the right to receive any distribution or distributions to which the judgment debtor would otherwise have been entitled in respect of such limited liability company interest.

(b) A charging order constitutes a lien on the judgment debtor's limited liability company interest.

....

(d) The entry of a charging order is the *exclusive remedy* by which a judgment creditor of a member or a member's assignee may satisfy a judgment *out of the judgment debtor's limited liability company interest* and *attachment, garnishment, foreclosure* or other legal or equitable remedies are not available to the judgment creditor, whether the limited liability company has 1 member or more than 1 member.

(e) No creditor of a member or of a member's assignee shall have any right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the limited liability company.¹⁸¹

In order to understand § 18-703, it is necessary to remember the difference between owning an interest in a corporation and owning an interest in a limited liability company. Ownership interest in a corporation is commonly referred to as stock, and the owner of stock is generally able to sell all of their ownership interest—their voting and other management rights as well as their dividend and other economic rights.¹⁸² Similarly, a judgment creditor of an owner of stock can seize that stock.¹⁸³ The buyer of that stock—in a sale by the stockholder or its judgment creditor—has whatever rights were held by the previous stockholder.¹⁸⁴

An owner of a Delaware limited liability company can sell—or otherwise assign—only their “limited liability company interest,” which is statutorily

181. DEL. CODE ANN. tit. 6 § 18-703(a)–(b), (d)–(e) (West, Westlaw through 82 Laws 2019, ch. 4) (emphasis added).

182. WILLIAM A. KLEIN, ET AL., BUSINESS ORGANIZATIONS AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES 108–09 (11th ed. 2010).

183. See *Buchanan v. Smith*, 83 U.S. 277, 301 (1872) (listing a judgment creditor’s seizure of corporation property as an element of fraudulent preference).

184. See KLEIN, ET AL., *supra* note 182.

limited to economic rights, such as the right to share in distributed profits, but excludes voting and other business management rights.¹⁸⁵

Just as Delaware statutorily limits what ownership interest an owner of a limited liability company can voluntarily transfer, Delaware also statutorily limits what ownership interest a judgment creditor of an owner of a limited liability company can reach to satisfy its judgment: the same “limited liability company interest,” i.e., economic rights only. That is the essence of § 18-703(a), (b) and (d), read together.

Coley focuses on the words “exclusive remedy” in § 18-703(d)—and on legislative history—to argue that “Delaware’s Legislature has plainly instructed courts that if a judgment creditor wants to use an LLC’s assets to satisfy the debt of one of its members, the exclusive remedy is a charging order.”¹⁸⁶ The Fourth Circuit focuses on the words “attachment, garnishment, foreclosure”(and the Latin phrase “*ejusdem generis*”) to conclude that the remedy of reverse veil piercing is not excluded by the Delaware charging statute because it is different from the remedies that are specifically excluded by the Delaware charging statute.¹⁸⁷ Those remedies enable a creditor to satisfy its judgment from its debtor’s property. Reverse veil piercing enables a creditor to satisfy its judgment from a separate entity’s property by disregarding the separateness.

The phrase “out of the judgment debtor’s limited liability company interest” in Delaware § 18-703(d) also supports the Fourth Circuit’s position. A judgment creditor of a limited liability company member does not seek reverse veil piercing to collect its judgment “out of the judgment debtor’s limited liability company interest.”¹⁸⁸ A judgment creditor of a limited liability company seeks reverse veil piercing to collect its judgment from the property of the limited liability company.

A California case, *Curci Investments, LLC v. Baldwin*,¹⁸⁹ provides further support for the *Sky Cable* holding that “Delaware’s LLC charging statute does not prevent a court from reverse piercing the veil of an LLC.”¹⁹⁰ Delaware § 18-703(d) is markedly similar to California’s charging statute § 17705.03(f): “This section provides the *exclusive remedy* by which a person seeking to enforce a judgment against a member or transferee may, in the

185. § 18-703(a) (West, Westlaw through 82 Laws 2019, ch. 4).

186. *Coley* Opening Brief, *supra* note 163, at 9, 2017 WL 3832560, at *9 (citation omitted).

187. *Sky Cable v. DIRECTV*, 886 F.3d 375, 388 (4th Cir. 2018) (first quoting § 18-703(d); and then citing *Harrison v. PPG Indus.*, 446 U.S. 578, 588 (1980)).

188. § 18-703(d) (West, Westlaw through 82 Laws 2019, ch. 4).

189. 221 Cal. Rptr. 3d 847 (Cal. Ct. App. 2017).

190. *Sky Cable*, 886 F.3d at 389 (citation omitted).

capacity of judgment creditor, satisfy the judgment from the *judgment debtor's transferable interest*.¹⁹¹

In *Curci Investments*, the LLC member judgment debtor made the same argument as Coley—that the phrase “exclusive remedy” in the California charging statute prevents a court from reverse piercing the veil of a California LLC.¹⁹² *Curci Investments*, like *Sky Cable*, rejected that argument, stating that “Reverse veil piercing is a means of reaching the LLC’s assets, not the debtor’s transferable interest in the LLC.”¹⁹³

In their discussion of the *Curci* case, Professors Carter Bishop and Daniel Kleinberger predict that the outcome of *Curci* “would likely have been different under Delaware law.”¹⁹⁴ Their prediction is based on § 18-703(e): “No creditor of a member or of a member's assignee shall have any right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the *property of the limited liability company*.”¹⁹⁵

Note the italicized phrase in Delaware § 18-703(e). Like reverse veil piercing, Delaware § 18-703(e) looks to the “property of the limited liability company.” And, unlike Delaware § 18-703(d), Delaware § 18-703(e) expressly excludes equitable remedies that enable a judgment creditor of a member to look to “the property of the limited liability” company to satisfy its judgment against the member.

There are other states that have limited liability company acts with a charging order provision similar to Delaware § 18-703(e).¹⁹⁶ As of this Article’s publication, we have not found a reported case in any state that expressly considers the possible effect of such a provision on the availability of reverse veil piercing by a creditor with a judgment against a member of a limited liability company to collect that judgment from the property of the limited liability company. None of the appellate court briefs in *Sky Cable* address the possible relevance of Delaware § 18-703(e). The *Sky Cable* opinion does not expressly address Delaware § 18-703(e).

There is, however, language in *Sky Cable's* dismissal of Coley’s Delaware § 18-703(d) argument that might also be relevant to consideration

191. CAL CORP. CODE § 17705.03(f) (West, Westlaw through Ch. of 2019 Reg. Sess. 2018) (emphasis added). California, like most states, uses the term “transferable interest” instead of the phrases “limited liability company interest.”

192. 221 Cal. Rptr. 3d at 853 (quoting § 17705.03(f)).

193. *Id.*

194. CARTER BISHOP & DANIEL KLEINBERGER, LIMITED LIABILITY COMPANIES: TAX AND BUSINESS LAW S6-16 n.407.5 (Supp. 2018).

195. *Id.* (emphasis added).

196. *E.g.*, OHIO REV. CODE ANN. § 1705.19 (West, Westlaw through File 172 of the 132nd General Assemb. (2017–18)); VA. CODE ANN. § 13.1-1041.1 (West, Westlaw through End of the 2018 Reg. Sess. and End of the 2018 Spec. Sess. 2004).

of a contention that Delaware § 18-703(e) excludes reverse veil piercing. The Fourth Circuit concluded its analysis of the Delaware charging statutes with the statement “piercing the veil of an LLC effectively eliminates the legal status of the LLC.”¹⁹⁷ If the status of the LLC is eliminated, then, arguably, there is no limited liability company and no “property of the limited liability company”—and as a result, reverse veil piercing is not barred by § 18-703(e), which protects “property of the limited liability company.”

Piercing the veil does not end the actual existence of the business entity. In *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*,¹⁹⁸ a case cited by the Fourth Circuit in *Sky Cable*,¹⁹⁹ the court’s piercing of the corporate veil of W. Ray Flemming Fruit Co. (WRF Fruit Co.) simply meant that DeWitt Truck Brokers could collect its judgment against WRF Fruit Co. from the principal shareholder of WRF Fruit Co. (whose name, not surprisingly turned out to be W. Ray Flemming).²⁰⁰ This result did not result in WRF Fruit Co. ceasing to exist as a corporation.²⁰¹

And so, in *Sky Cable*, ITT still exists. Recall that ITT held North Carolina real estate worth more than \$5,000,000. DIRECTV’s judgment was less than \$3,000,000. ITT is still a Delaware limited liability company, holding the balance of the North Carolina real estate not needed to satisfy DIRECTV’s judgment against Coley.²⁰² It is just that ITT has no separate legal status for purposes of the DIRECTV transactions.

E. Limited Liability Company

The Fourth Circuit limited its holding to “reverse piercing of an LLC.” There is no mention in *Sky Cable* of whether Delaware law would permit reverse piercing of a corporation—even a corporation that is the alter ego of its sole member.

California courts have concluded that reverse veil piercing is available when the business entity is a limited liability company but not available when the business entity is a corporation. In *Curci Investments, LLC v. Baldwin*, a California intermediate appellate court recognized reverse veil piercing of a

197. *Sky Cable v. DIRECTV*, 886 F.3d 375, 389 (4th Cir. 2018).

198. 540 F.2d 681 (4th Cir. 1976).

199. *Sky Cable*, 886 F.3d at 385 (citing *DeWitt*, 540 F.2d at 683).

200. *DeWitt*, 540 F.2d at 683 (footnote omitted).

201. JONATHAN R. MACEY, ET AL., *THE LAW OF BUSINESS ORGANIZATIONS* 182 (13th ed. 2017) (“Basically, the piercing issue involves the precise question of whether a specific shareholder is personally liable for a specific corporate obligation, and the court’s conclusion uses the ‘piercing the corporate veil’ as a justification to impose or refuse to impose liability in that specific context.”).

202. See generally *Sky Cable*, 886 F.3d at 377 (over \$2.3 million judgment).

limited liability company even though an earlier decision of that same court, *Postal Instant Press v. Kaswa Corp.*, a case involving a corporation, had broadly stated that there was no reverse veil piercing in California.²⁰³ The court in *Curci* emphasized that a creditor with a judgment against a shareholder of a corporation has a legal remedy that is not available to a creditor with a judgment against a member of a limited liability company. In that situation, the creditor of the shareholder has the legal remedy of seizing and selling its debtor's shares.

VIII. EQUITABLE MAXIMS

Veil piercing is an equitable remedy.²⁰⁴ Generally, an equitable remedy is not available where there is an adequate remedy at law.²⁰⁵ One of the oldest equitable maxims is that equity follows the law, i.e., a creditor must first exhaust its available legal remedies before obtaining an equitable remedy.

One of the remedies at law available to creditors in Delaware and other states is to recover property that its debtor has fraudulently transferred. If a shareholder of a corporation has fraudulently transferred property to the corporation—or a member of a limited liability company has transferred property to the limited liability company—then a judgment creditor of that business owner could use state fraudulent transfer law to recover the property fraudulently transferred.²⁰⁶

The Delaware fraudulent transfer statute provides in pertinent part:

§ 1304. Transfers Fraudulent as to Present and Future Creditors

203. *Compare Curci Invs., LLC v. Baldwin*, 221 Cal. Rptr. 3d 847, 848 (Cal. Ct. App. 2017) (“We agree *Postal Instant Press* is distinguishable, and conclude reverse veil piercing is possible under these circumstances.”), with *Postal Instant Press v. Kaswa Corp.*, 77 Cal. Rptr. 3d 96, 98 (Cal. Ct. App. 2008) (“The reasoning of the cases adopting outside reverse veil piercing of the corporate veil is flawed, and we join other courts declining to accept it.”).

204. *E.g.*, *Kinney Shoe Corp. v. Polan*, 939 F.2d 209, 211 (4th Cir. 1991) (“Piercing the corporate veil is an equitable remedy.”).

205. *Chavin v. H.H. Rosin & Co.*, 246 A.2d 921, 922 (Del. 1968) (citing *DuPont v. DuPont*, 85 A.2d 724, 733 (Del. 1951)) (“It is, of course, axiomatic that Equity has no jurisdiction over a controversy for which there is a complete and adequate remedy at law.”).

206. If as Professors Bishop and Kleinberger suggest, § 18-703(e) precludes a member's judgment creditor from using reverse veil piercing to recover that judgment from the assets of the limited liability company, then § 18-703(e) would also seem to preclude such a creditor's use of fraudulent transfer law to recover from the assets of the limited liability company. *See Curci*, 221 Cal. Rptr. 3d at 141.

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) With actual intent to hinder, delay or defraud any creditor of the debtor; or

(2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(a) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(b) Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

(b) In determining actual intent under paragraph (a)(1) of this section, consideration may be given, among other factors, to whether:

(1) The transfer or obligation was to an insider;

(2) The debtor retained possession or control of the property transferred after the transfer;

(3) The transfer or obligation was disclosed or concealed;

(4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) The transfer was of substantially all the debtor's assets.²⁰⁷

Had the facts suggested that Coley transferred all his real property for no consideration after engaging in a course of conduct that incurred significant liability for criminal fines, it would seem that Coley's transfers could be attacked as fraudulent under either Delaware § 1304(a)(1) or (a)(2). Although Coley raises this argument in his brief,²⁰⁸ neither the district court nor the Fourth Circuit in their opinions raised the possibility of fraudulent conveyance law as an adequate legal remedy.²⁰⁹ The fact that Coley's transfers to ITT occurred in 2008 raises the possibility that DIRECTV's fraudulent conveyance claim was barred by Delaware's four-year statute of limitations.²¹⁰

207. DEL. CODE ANN. tit. 6 § 18-1304(a), (b)(1)–(5) (West, Westlaw through 82 Laws 2019, ch. 4) (emphasis added).

208. Coley Opening Brief, *supra* note 163, at 16, 2017 WL 3832560, at *16.

209. *See* Sky Cable v. DIRECTV, 886 F.3d 375 (4th Cir. 2018); Sky Cable, LLC v. Coley, No. 5:11CV00048, 2016 WL 3926492 (W.D. Va. July 18, 2016), *aff'd* Sky Cable, 886 F.3d 375.

210. DEL. CODE ANN. tit. 6 § 18-1309(1)–(2) (West, Westlaw through 82 Laws 2019, ch. 4) ("A cause of action with respect to a fraudulent transfer or obligation under this chapter is

Professor Robert Clark's general discussion of veil piercing provides yet another possible explanation for the absence of any consideration of Delaware § 1304.²¹¹ He notes that many piercing the corporate veil cases involve "behavior that would invoke fraudulent conveyance law"²¹² but "piercing cases suppress mention of fraudulent conveyance law."²¹³ He then provides two reasons that piercing cases do not consider a possible fraudulent conveyance alternative: (1) plaintiffs' attorneys believe that it is easier to prove a piercing case than a fraudulent conveyance case and (2) judges believe that piercing the corporate veil law gives them greater discretion than fraudulent conveyance law.²¹⁴ Professor Clark then concludes his coverage of piercing with the admonition that in developing the law of veil-piercing, courts should "do so with explicit awareness of the extent to which plaintiffs resort to these doctrines as a way of avoiding the requirements of fraudulent conveyance law."²¹⁵

Moreover, by recovering under reverse veil piercing instead of fraudulent conveyance law, a creditor can avoid one of the limits of fraudulent conveyance law. Reverse veil piercing makes all of the assets of a business entity available to a creditor of an owner. Fraudulent conveyance law permits a creditor of an owner to recover from the business entity only those assets that the owner fraudulently transferred to the business entity.²¹⁶

And then there is the newest equitable maxim—the "ultimate equitable maxim." According to a recent *South Carolina Law Review* article by Judge Roger Young and Professor Stephen Spitz, the ultimate equitable maxim, which they refer to as "Spitz's ultimate equitable maxim" (SUEM) is that "in equity, good guys should win, and bad guys should lose."²¹⁷

In *Sky Cable*, there is no problem of identifying the "bad guy" and the "good guy" as those terms are used in the SUEM maxim. The district court and the Fourth Circuit clearly viewed Randy Coley as the bad guy and the

extinguished unless action is brought: (1) Under § 1304(a)(1) of this title, within 4 years after the transfer was made or the obligation was incurred or, if later, within 1 year after the transfer or obligation was or could reasonably have been discovered by the claimant; (2) Under § 1304(a)(2) or § 1305(a) of this title, within 4 years after the transfer was made or the obligation was incurred . . .").

211. ROBERT CHARLES CLARK, CORPORATE LAW 71–92 (1986).

212. *Id.* at 72.

213. *Id.* at 85.

214. *Id.*

215. *Id.* at 92.

216. 11 U.S.C.A. § 550(a)(1)–(2) (West, Westlaw through Pub. L. No. 116-15).

217. Roger Young & Stephen Spitz, *SUEM—Spitz's Ultimate Equitable Maxim: In Equity, Good Guys Should Win and Bad Guys Should Lose*, 55 S.C. L. REV. 175, 175 (2003).

long-suffering DIRECTV as the good guy.²¹⁸ And, so it is clear that because of the court's use of outsider reverse veil piercing, the good guy wins. DIRECTV is able to collect its judgment against Coley from the assets of ITT.

What is less clear is whether a bad guy like Coley is the only loser when a court orders outsider reverse veil piercing and holds a business entity liable for the debts of one of its owners. What about other owners of the business? Creditors of the business? Employees and customers of the business?²¹⁹

IX. CONCLUSIONS

It is not surprising that we have questions about the application of SUEM to reverse veil piercing and questions about *Sky Cable*'s application of reverse veil piercing. Judge Cardozo, while sitting on the New York Court of Appeals, used the phrase "enveloped in the mists of metaphor" to describe veil piercing.²²⁰ More recently, Judge Easterbrook—while still a law professor—and Professor Daniel Fischel described veil piercing as "happen[ing] freakishly. Like lightning, it is rare, severe and unprincipled."²²¹ The law of reverse veil piercing is even less clear.

In *Sky Cable*, the Fourth Circuit provided clear answers to two very specific questions of first impression: (1) under Delaware law, outsider reverse piercing of a limited liability company's veil is available when the LLC is the alter ego of its sole member,²²² and (2) subsection (d) of Delaware's LLC charging statute did not prevent the court from reverse

218. The Plaintiff DIRECTV, Inc. is the "good guy"—unless you have had problem with your DIRECTV subscription. Cf. Jacob Kastrenakes, *DIRECTV Now Appears to Be a Complete Mess*, VERGE (Jan. 13, 2017, 1:55 PM), <https://www.theverge.com/2017/1/13/14257936/directv-now-errors-complaints-att>.

219. Even less clear is the speculation in *Floyd v. IRS* that reverse veil piercing interjects uncertainty in the corporate structure that might alter the ability of innocent (i.e. SUEM "good guy") business entities to obtain credit. 151 F.3d 1295, 1299 (10th Cir. 1998) (citing *Cascade Energy & Metals Corp. v. Banks*, 896 F.2d 1557, 1577 (10th Cir. 1990)).

220. *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926).

221. Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89 (1985). Professors Christina L. Boyd and David A. Hoffman provide this criticism of law professors' criticism of veil piercing: "[C]urrent veil piercing scholarship is founded on sand. Scholars, courts, corporations, and their lawyers have all over-relied on judges' ultimate decisions to pierce and, in particular, on how judges justify themselves. Such reliance misleads for two principal reasons. First, trial court opinions are rare: as few as three percent of all federal trial court judicial decisions are reasoned opinions available for easy study on Westlaw. Second, a trial judge's decision to write an opinion—and what explanations she offers in support of her decision—is self-serving and difficult to predict." Christina L. Boyd & David A. Hoffman, *Disputing Limited Liability*, 104 NW. U. L. REV. 853, 855 (2010).

222. See *Sky Cable, LLC v. DIRECTV, Inc.*, 886 F.3d 375, 388 (4th Cir. 2018).

piercing the veil of an LLC.²²³ We do not disagree with *Sky Cable*'s answers to these narrow questions. Rather, we suggest that when a Delaware court—or a court in any other state—addresses reverse piercing issues it also consider the questions we have raised in this Article.

223. *Id.* at 389 (citation omitted).