Lessons Learned from the U.S. Supreme Court's Confirmation of Corporate Separateness

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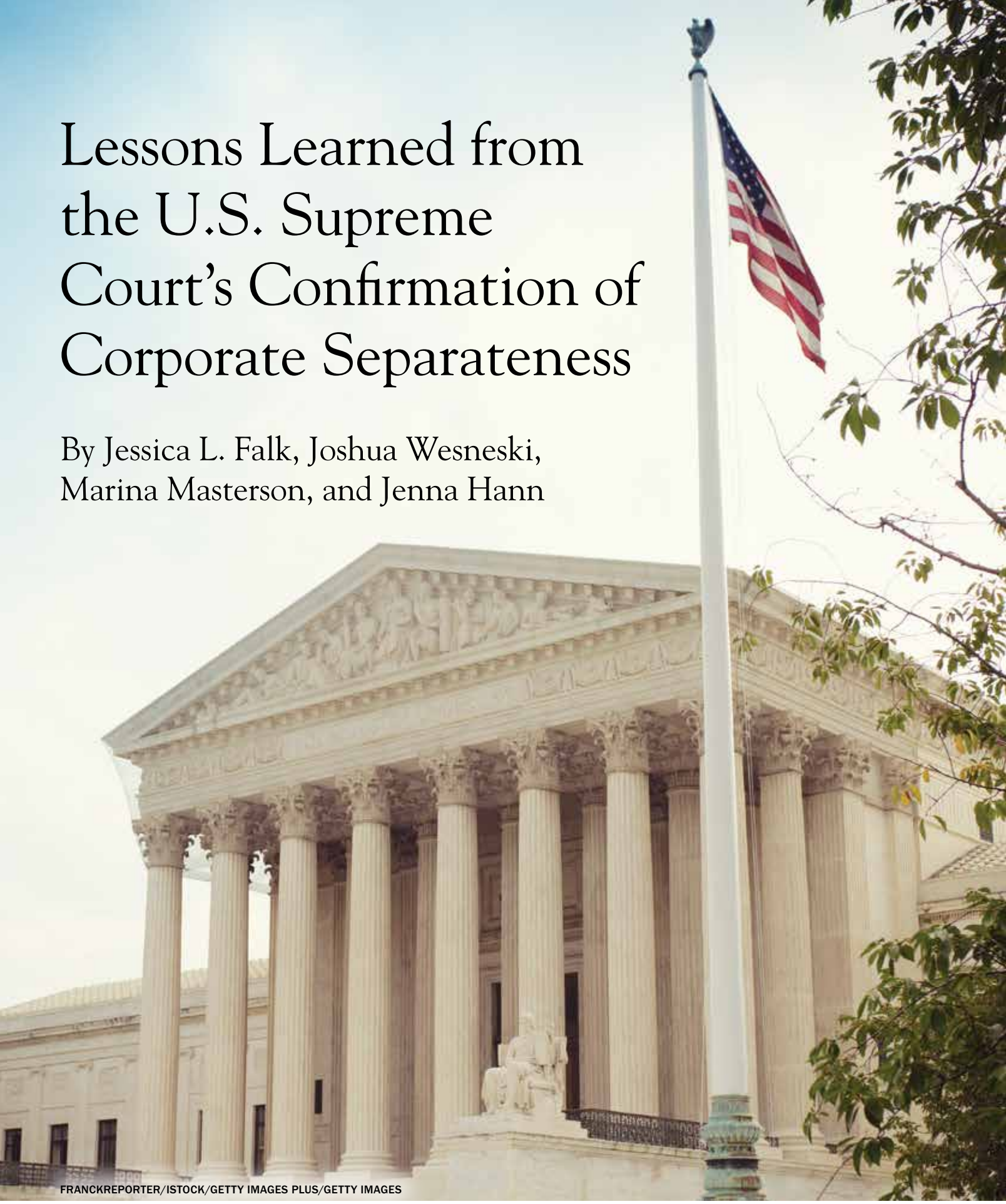

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The U.S. Supreme Court's recent decision in *Dewberry Group, Inc. v. Dewberry Engineers Inc.*[1] raises impactful—and as-of-yet unresolved—questions regarding recovery against corporate affiliates, while also providing a helpful reminder of the importance of strategic decisions about who to sue and which liability theories to pursue.

For plaintiffs, every case begins with a critical choice—which parties to sue. In some cases, naming the right defendants is easy and straightforward. Sometimes, though, intricate corporate structure may complicate the determination of which entities can or should be held accountable for an alleged harm. The law generally honors the "corporate separateness" of related entities, which means the liability of a parent company will not normally be imputed to a subsidiary (and vice versa). As a result, a plaintiff may find itself with a winning judgment against an insolvent or nearly insolvent defendant whose solvent corporate affiliates face no liability. Plaintiffs can sometimes "pierce the corporate veil" by showing that affiliates have abused the corporate form or argue that the insolvent defendant facing the judgment was really an alter ego of its solvent affiliates, but these are narrow doctrines that sophisticated corporations may have tools to circumvent. So for plaintiffs, anticipating and planning for these challenges early on are important steps for a successful litigation. And for defendants, holding the line on attempts to muddy corporate separateness is equally important.

The Supreme Court in *Dewberry* reinforced how tricky and complex it can be for plaintiffs to ensure realistic recovery in light of corporate-separateness doctrines. But the Court also left open some options for navigating the issues that arise in litigation against a corporate enterprise. There, Dewberry Engineers sued a rival real estate development company—Dewberry Group—for trademark infringement under the Lanham Act. The district court granted summary judgment in favor of plaintiff Dewberry Engineers. The Lanham Act permits prevailing plaintiffs, like Dewberry Engineers, to recover the "defendant's profits."[2] Although Dewberry Group (the only named defendant) itself generated $0 in net profits, its legally distinct, noninfringing affiliates had made millions of dollars in profits since Dewberry Group began using the "Dewberry" mark to provide real estate development services. Dewberry Engineers therefore sought—and obtained in the lower courts—disgorgement of $43 million in profits from those affiliates. The district court and the U.S. Court of Appeals for the Fourth Circuit treated Dewberry Group and its affiliates as a "single corporate entity" for disgorgement purposes because, practically speaking, Dewberry Group generated all of the revenue reported by these affiliates.[3]

The Supreme Court unanimously vacated the award, reaffirming that the bedrock principle of corporate separateness allows courts to award only profits properly ascribable to named defendants. The Court's opinion was straightforward and helpful for defendants in confirming that corporate separateness is a powerful shield against liability even when its application arguably leads to inequity. However, a close analysis of *Dewberry* reveals important unanswered questions and highlights valuable lessons about avoiding costly pleading mistakes.

The *Dewberry* Remand Will Grapple with Corporate Entity Liability and Equity Issues

The majority opinion in *Dewberry* addressed a relatively narrow question. The district court and the Fourth Circuit had relied entirely on a provision in section 1117(a) of the Lanham Act allowing for a recovery of the "defendant's profits" to sustain the award of disgorgement from the affiliates. The Supreme Court observed that since the term "defendant" is not "specially defined" in the statute, it "bears its usual legal meaning" as "the party against whom relief or recovery is sought."[4] Only Dewberry Group, and not its affiliates, had been named as a defendant. Thus, the Court held that the "long settled" rule of corporate separateness and "the demand to respect corporate formalities" precluded the use of section 1117(a)'s general provision for disgorgement of a "defendant's profits" to justify the award against Dewberry Group's affiliates.[5]

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In making that determination, though, the Court explicitly left open some alternative options for obtaining the profits of an affiliate. For example, Dewberry Engineers asked the Court to consider the effect of other language in section 1117(a) providing that, "subject to the principles of equity," a court may exercise discretion to "enter judgment for such sum as the court shall find to be just" where a profit-based recovery would be inadequate.[6] According to Dewberry Engineers, the district court's award was appropriate under this "just-sum" provision. The Court did not rule on this alternative theory because the lower courts had not invoked the provision to support their opinions and Dewberry Engineers had not previously raised it.

TIP: Plaintiffs battling corporate defendants must name the right parties and plead all colorable theories of damages to have the best chance of recovery.

The Court similarly "state[d] no view" on the U.S. government's amicus arguments regarding a court's ability to look behind a defendant's records to consider the "economic realities of a transaction," even without relying on the just-sum provision.[7] Justice Sotomayor, in concurrence, expressed support for this theory, emphasizing that "principles of corporate separateness do not force courts to close their eyes to practical realities in calculating a 'defendant's profits.'"[8] Nor did the Court examine whether Dewberry Engineers could have justified the disgorgement of profits by piercing the corporate veil. It appears that Dewberry Engineers had not pursued a veil-piercing theory in the district court, and the lower courts had not examined such a theory. And the Court expressed no view on the preservation of any of these issues.

In some respects, these questions on remand are more important to practitioners than the narrow issue of statutory interpretation the Supreme Court actually decided. If disgorgement of an affiliate's profits can be justified as an exercise of a court's equitable authority to award a "just" sum under section 1117(a), then it arguably makes little difference whether the "defendant's profits" provision is sufficient on its own to justify such an award. Similarly, if a court may construe a "defendant's profits" as those that represent a defendant's "true financial gain"—as urged by the government—then it is possible an unnamed affiliate's profits could still inform the calculation of a "defendant's profits." In other words, while the Court narrowly held that "defendant" means the named defendant, it left open possible avenues for determining what profits are attributed to a defendant.

The Court's decision therefore leaves for remand important questions that could significantly affect plaintiffs' ability to recover profits from affiliates of a corporate defendant, notwithstanding the Court's resolution of the statutory question in *Dewberry*. Indeed, if the theory posed by the government and Justice Sotomayor is adopted on remand, it could reduce the potency of the corporate-separateness doctrine and potentially introduce new liability risks for corporate families.

Lessons from *Dewberry* for Litigants

The reality for Dewberry Engineers as a plaintiff, though, is that some of these questions may never be resolved, and it may be left without any opportunity to invoke these alternative theories for disgorgement of profits.

Dewberry exemplifies the principle that winning a case on the merits is not enough to ensure a fruitful recovery. Dewberry Engineers had little trouble convincing the lower courts that Dewberry Group violated its trademark and breached the terms of the parties' earlier settlement agreement, prevailing on the issues at summary judgment in 2021. The district court awarded Dewberry Engineers its $43 million in disgorged profits in 2022, yet Dewberry Engineers has not seen a dime of that money in the three years since.

Much of this comes down to decisions that Dewberry Engineers made early in the litigation, first regarding the entities it named as defendants, and second regarding the theories of recovery it pursued at trial and on appeal. As Dewberry Engineers faces the prospect of a hollow victory, its experience provides a reminder of the importance of pleading and preservation decisions in the trial court.

Name the right defendants. Dewberry Engineers was likely faced with a difficult decision from the start. It ultimately decided to name Dewberry Group alone as a defendant in its 2020 complaint. This may have been its only viable option if the Dewberry Group affiliates did not themselves engage in any infringing activities (setting aside the possibility of pursuing a veil-piercing theory, discussed below). Or maybe it could not accurately identify the correct defendant-entities until discovery was underway.

Regardless of whether Dewberry Engineers could have sidestepped this appeal by naming the affiliates themselves as defendants, this case provides three important pleading reminders for plaintiffs.

First, plaintiffs can maximize their ability to recover by naming as defendants any and all corporate entities over which there is a colorable claim of liability in the initial complaint. Federal Rule of Civil Procedure 15 permits parties to amend their pleadings as a matter of course early on in a case. However, after the time to amend as a matter of course has expired,

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adding additional defendants requires the opposing party's consent or leave of court.[9] Courts are instructed to "freely give leave when justice so requires,"[10] but a court may be hesitant to grant leave to amend if the basis for adding additional defendants was clear from the outset. A plaintiff could also try piercing the corporate veil to get at a named defendant's real assets after a judgment has already been entered. However, this argument is hard to make and often unsuccessful in practice. Thus, the best way to avoid uncertainty is to name all potentially liable entities from the start. Any wrongfully named defendants can protect themselves by seeking to dismiss the complaint.

Second, before filing a complaint, plaintiffs should carefully consider the solvency and assets of the defendants they choose to name. Answering these questions at the prefiling stage may require significant research, and finding the answers may be complicated when dealing with a nonpublic corporation or an intricate corporate structure. However, exercising due diligence in this area early on could reveal critical information about a defendant's financial health that will help inform litigation strategy. If the only potentially liable defendant is nearly insolvent or judgment-proof, a plaintiff seeking monetary damages may reconsider the value and risk of the litigation as a whole.

Third, when public sources do not sufficiently show which corporate entities have actually benefited from the alleged unlawful conduct, plaintiffs should utilize discovery devices to ensure that they are pursuing the proper legal theories and the proper defendants. As discussed earlier, Rule 15 allows plaintiffs to amend pleadings with the opposing party's consent or with the court's leave once the time for amending as a matter of course has expired. And the court is instructed to "freely give leave when justice so requires."[11] Therefore, a plaintiff may seek to amend its complaint if discovery uncovers information sufficient to try piercing the corporate veil or identifying other entities that actually reaped profits from the alleged unlawful conduct.

Argue corporate separateness in defense. Corporate defendants should take advantage of the power of corporate-separateness arguments. The Supreme Court had no trouble affirming the tradition of the corporate structure in *Dewberry*. Rather than pivoting to a more plaintiff-friendly policy that would permit plaintiffs to reach the pockets of unnamed affiliates based on nontextual equity concerns, the Court confirmed that attention to corporate structure may prevent defendants from being subjected to massive judgments. For now, the primary takeaways for defendants are to pay attention to corporate structure and be vigilant in arguing against assertions of veil-piercing and alter ego. But defendants, especially those litigating under the Lanham Act, should follow developments in this case on remand.

Don't leave colorable arguments on the table. As noted above, it is unclear whether Dewberry Engineers will be permitted to raise any of the alternative theories floated by the parties and amici curiae, but not ultimately resolved, by the Supreme Court. For reasons not addressed by the Court, Dewberry Engineers does not appear to have raised veil-piercing or the just-sum provision of section 1117(a) in the district court, even though the calculation of lost profits and the treatment of Dewberry Group and its affiliates as a "single corporate entity" was a central topic in the parties' disgorgement award briefing. Principles of estoppel, forfeiture, and/or waiver may prevent Dewberry Engineers from asserting those theories now.

Dewberry Engineers may have felt sufficiently confident in its interpretation of the Lanham Act and saw no need to raise alternative theories. If that is the case, though, that simply underscores that an early assessment of the relative strength of various arguments is not always the best litmus test for determining which theories to preserve. It can be difficult to take a step back and evaluate the big picture when immersed in the busy, fast-paced schedule of a case that is barreling toward trial. It is nevertheless important to thoughtfully craft the trial record for a potential appeal, even if it means raising and preserving arguments that face longer odds or that may require additional factual development. Otherwise, you could find yourself in the same position as Dewberry Engineers—with success on the merits but an inability to recover.

Dewberry's Possible Broader Implications

The Court's opinion in *Dewberry* is relatively narrow and straightforward, focusing principally on a discrete issue of statutory interpretation. But the questions the Court left *un*answered may prove to be of greater significance, both on remand and beyond. The possibility that these alternative theories of damages may now take center stage on remand is a helpful reminder (and perhaps for Dewberry Engineers, a painful one) that strategic decisions early in the case can have significant ramifications later on. ◀

Notes

1. 145 S. Ct. 681 (2025).
2. 15 U.S.C. § 1117(a).
3. *Dewberry*, 145 S. Ct. at 687–88.
4. *Id.* at 686.
5. *Id.* at 686–87.
6. 15 U.S.C. § 1117(a).
7. *Dewberry*, 145 S. Ct. at 688.
8. *Id.* at 690 (Sotomayor, J., concurring).
9. Fed. R. Civ. P. 15(a)(2).
10. *Id.*
11. *Id.*