Recent Developments and Divergences in the Doctrine of Piercing the Corporate Veil

By Elizabeth S. Fenton

The doctrine of piercing the corporate veil, always controversial, recently has experienced a resurgence and a broadening in many jurisdictions. At the same time, there are numerous jurisdictions in which the doctrine’s traditionally narrow application continues. This article will briefly address cases in a sample of jurisdictions that exemplify the divergences between the broad and narrow approaches to the doctrine. While some states strictly apply the doctrine and require evidence of fraud, others—most notably New York and Ohio—have moved away from the fraud requirement and merely require injustice or impropriety. This issue also implicates the pleading standards required to survive motions to dismiss. Although this short article does not presume to cover the universe of cases regarding piercing the corporate veil, it does highlight this trend in construction and application of the doctrine.

It is axiomatic that courts are generally reluctant to disregard the corporate form and pierce the corporate veil.1 Traditionally, the touchstone for the drastic remedy of piercing the corporate veil has been fraud. Many jurisdictions still require a demonstration of fraud.2 Other jurisdictions, however, have moved away from requiring fraud (and the concomitant heightened pleading requirement, in federal court as well as in many state courts) as a prerequisite to veil piercing.

The Fraud Requirement Remains Vital in Some Courts

Just this year, courts in Mississippi, New Jersey, and Michigan have reinforced the requirement of showing fraud before the corporate entity will be disregarded. In International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Aguirre,3 the Sixth Circuit Court of Appeals, affirming the district court’s grant of summary judgment, declined to pierce the corporate veil of a corporate employer in a suit filed by a union, a local, and former employees because there was no evidence that the employer’s principals acted with fraudulent intent.4 Specifically, the court observed:

As a general matter, it appears to us that the state of affairs of which plaintiffs complain is largely a function of legitimate factors—such as business decisions that proved unsuccessful, the company’s status as an S corporation, the administration of the trusts and the execution of corporate policies established by Hank Aguirre and the board—rather than any fraud on the part of defendants-appellees.5

Under this view, strictly construing the fraud requirement reduces the likelihood of piercing the corporate veil merely due to bad management.
Notably, the Sixth Circuit Court of Appeals also affirmed the district court’s grant of Rule 11 sanctions against the plaintiff because the “plaintiff’s evidence fell ‘far short’ of establishing [the corporate officer’s] liability.”6 The district court sanctioned the plaintiff’s counsel based on its view that, by the end of the discovery period, the plaintiff should have known that they had insufficient evidence to pursue the claim.7 Although the sanctions were limited to the costs, fees, and expenses related to preparing the Rule 11 Motion,8 this result is a cautionary tale for lawyers practicing in jurisdictions where fraud is required to pierce the corporate veil.

Likewise, federal district courts in Mississippi and New Jersey continue, consistent with the laws of those states, to apply strictly the fraud requirement. In Foamex v. Superior Products Sales,9 the court declined to allow a veil-piercing claim to proceed to trial, granting summary judgment because there was no evidence of “fraud or corporate malfeasance.” Similarly, a district court in New Jersey granted a motion for declaratory judgment filed by corporate defendants and held that defendants were entitled to have a jury determine whether the corporate veil should be pierced.10 This conclusion rested on the court’s analysis that, under New Jersey law, piercing the corporate veil was legal and not equitable because it was not discretionary where the corporate form is used “to perpetrate fraud, to accomplish a crime, or otherwise to evade the law.”11 Where state law requires a showing of fraud, fraud must typically be pled with particularity under Fed. R. Civ. P. 9(b) or similar state laws.12 Courts adhering to the more traditional view of veil piercing are less likely to disregard the corporate form. However, as discussed in the next section of this article, other jurisdictions have moved away from this fraud-based approach.

Other Courts Adopt More Liberal Approach to Veil Piercing

Courts in states as disparate as New York, Oregon, Pennsylvania, Ohio, and Washington have either moved away from the traditional fraud requirement or are in the process of doing so. For instance, Oregon takes one of the more liberal approaches to the doctrine of piercing the corporate veil. Under Oregon law, a three-part test guides whether a party can pierce the corporate veil:

- shareholder control of the corporation
- shareholder’s improper conduct in controlling the corporation
- causal link between improper conduct and plaintiff’s injury13

However, “improper conduct” encompasses “gross undercapitalization, milking or draining of corporate funds, misrepresentation, commingling of funds, holding out, and the failure to observe corporate formalities.”14 Similarly, before the corporate veil is pierced, Washington law requires that, “[f]irst, the corporate form must be intentionally used to violate or evade a duty . . . [and] [s]econd, the fact finder must establish that disregarding the corporate veil is necessary and required to prevent an unjustified loss to the injured party.”15 The touchstone for piercing the corporate veil in both of these states, therefore, is not fraud but “abuse of the corporate privilege.”16 While still moving away from the strict fraud requirement, courts in New York and Ohio appear to be struggling with the proper test for veil piercing. Courts in those states are exploring the boundaries of a laxer view of the requirements for piercing the corporate veil.
Because New York is a leading center of corporate law, the impact of this development could be substantial and far-reaching.

In New York, the corporate form is generally respected except “whenever necessary to prevent fraud or achieve equity.”17 The following describes the test for whether the veil will be pierced: “a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff’s injury.”18

Although fraud is probative of whether the veil should be pierced, it is not a prerequisite under New York law.19 However, the requirement of causation has the practical effect of limiting the application of veil piercing regardless of whether there is fraud or other wrongdoing.20 In Ohio, the test for piercing the corporate veil is set out in the leading case of Belvedere Condominium Unit Owners’ Association v. R.E. Roark Companies:

(1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own,
(2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and
(3) injury or unjust loss resulted to the plaintiff from such control or wrong.21

Three recent cases address the unsettled state of Ohio law regarding how broadly “an illegal act” is defined. In Music Express Broadcasting v. Aloha Sports, for example, the defendant/appellant contended that the trial court erred in adopting a magistrate judge’s decision that the corporate veil should be pierced under Belvedere. The appellate court agreed that Ohio law does not require fraud to pierce the corporate veil, although the Supreme Court had not “expressly addressed this issue.”22 The magistrate judge had found that the defendant (the majority shareholder) had personally benefited from his company’s business with the plaintiff, had mingled corporate funds with his personal funds, had made misrepresentations to the plaintiff, and had terminated his business without notifying the plaintiff.23

Similarly, in Taylor Steel v. Keeton, the Sixth Circuit Court of Appeals discussed the “unsettled” nature of the meaning of “illegal act” under Ohio law.24 The court affirmed the district court’s piercing of the corporate veil based on the defendant’s complete dominion over the company, inappropriate use of corporate funds, inadequate capitalization, and the failure of the defendant to produce any corporate records.25 While the majority of the court of appeals concluded that the Ohio Supreme Court would view the concept broadly, the dissent argued for certification of the question to the Ohio Supreme Court.26

There are limits under the Belvedere standard, however. In contrast to Music Express, in Nursing Home Group Rehabilitation Services v. Suncrest Health Care,27 an Ohio appellate court reversed a trial court’s denial of the defendant’s motion for directed verdict regarding whether the corporate veil should be pierced. The court focused on the fact that the evidence in the case only showed a breach of contract, the failure of the business, and the failure to pay fully the business’s creditors.28
The impact of this more liberal approach is felt in the application of pleading standards to claims for piercing the corporate veil. For example, in *Motorola, Inc. v. Airdesk, Inc.*, the district court denied a motion to dismiss a complaint “alleging intermingling of corporate and personal funds and the use of Airdesk funds for personal purposes.”29 The court concluded that the heightened pleading standard of Rule 9(b) of the Federal Rules of Civil Procedure did not apply because (1) Pennsylvania law did not require fraud to pierce the corporate veil and (2) the claims in the case did not concern fraud.30 As the *Motorola* case demonstrates, allegations regarding piercing the corporate veil are far more likely to survive summary judgment in these jurisdictions.

**Conclusion**

The doctrine of piercing the corporate veil appears to be in a state of transition in a number of jurisdictions. In addition to the trend away from the traditional fraud requirement, there are numerous other issues, beyond the scope of this article, regarding the doctrine that courts are addressing, including whether the doctrine is legal or equitable (and thus whether presentable to a jury),31 whether there is a distinction between the concepts of alter ego liability and piercing the corporate veil liability,32 and whether piercing the corporate veil is an independent cause of action or not.33 Such issues, however, do not limit the viability of a claim, remedy, or defense to the same extent that the stringency with which courts require a party to show fraud or wrongdoing do, as discussed above. Accordingly, practitioners should be well aware of the nuances of the doctrine as it is applied in their jurisdiction.

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**Endnotes**


3. *Int’l Union*, 410 F.3d at 302.

4. *Id.* at 303.

5. *Id.*

6. *Id.* at 304.

7. *Id.*

8. *Id.*


11. Id. at 477.

12. Even in states applying a more liberal approach to veil piercing, claims based on fraud still must be pled with particularity. See EED Holdings v. Palmer Johnson Acquisition Corp., 228 F.R.D. 508, 512 (S.D.N.Y. 2005) (granting a 12(b)(6) motion because plaintiff, because its claim for veil piercing was based on fraud, failed to plead fraud with particularity pursuant to Fed. R. Civ. P. 9(b) even though generally veil piercing claims were subject to notice pleading).


14. Id.


16. Id.


18. Id. at 464 (citations omitted).

19. Id. at 476 (citations omitted).


23. Id. at 744, 831 N.E.2d at 1092.


25. Id. at 606–07.

26. Id. at 611.


28. Id.


30. Id.


32. See, e.g., Int’l Union, United Auto., Aerospace & Agric. Implement Workers v. Aguirre, 410 F.3d 297, 302 (6th Cir. 2005) (“[v]eil piercing and alter ego concepts are separate and distinct” because veil piercing is vicarious liability, while