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## Ripping off the corporate veil: The *Buckley* court's implications for non-shareholders and non-title holders

By Daniel R. Saeedi and Richard Y. Hu

"E"veloped in the mists of metaphor—that is how Justice Benjamin Cardozo once characterized the piercing-the-corporate-veil doctrine.<sup>1</sup> Holding an individual liable for corporate debt is one of the most litigated scenarios in corporate law, but who exactly can be held liable has been a source of confusion. Is the sphere of personal liability limited to officers, directors and shareholders, or can persons without corporate title or interest be held liable? In 2014, the Illinois Appellate Court cleared some of this confusion by concluding that even a person without a formal corporate title or ownership can be held liable where the piercing elements are met.

Piercing the corporate veil doctrine in Illinois requires proof of two elements: (1) unity of interest and (2) circumstances that make the fiction of a separate corporate existence a fraud and unjust. These elements are broad and equitable in nature, and exist because in certain circumstances it is fair to look beyond corporate formalities and hold an individual liable where the corporate entity was merely a "dummy or sham for another dominating entity."<sup>2</sup>

That is not to say that corporate forms have been disregarded. Illinois courts have traditionally applied the piercing doctrine only in cases where the defendant (against whom the piercing is sought) was bestowed with some sort of corporate title, whether it was an officer, director, high-level corporate employee, or a shareholder/owner. This "corporate title requirement" was for all practical purposes a third element, and has even been

advertised by the Illinois Supreme Court: "courts in some circumstances will disregard the corporate entity and find *shareholders, directors, or officers* personally liable for corporate obligations."<sup>3</sup> Prior to 2014, one would be hard-pressed to locate a single example of the corporate veil being pierced to hold an individual without a corporate title or equity interest liable.

This legal reality changed in April of 2014, when the Illinois Appellate Court for the First District, in *Buckley v. Abuzir*,<sup>4</sup> pierced the corporate veil to a pure third party who held no corporate titles or shareholder status. In the events leading up to *Buckley*, plaintiffs Mama Gramm's Bakery, Inc. ("Mama Gramm") and John Buckley obtained in the circuit court a default judgment in the amount of \$421,582.50 against defendant Silver Fox Pastries, Inc. ("Silver Fox") for its violation of the Illinois Trade Secrets Act, which included Silver Fox's acquisition of Mama Gramm's recipes and customer lists.<sup>5</sup> However, being unable to collect from the corporate entity Silver Fox, plaintiffs filed a separate cause of action against defendant Haitham Abuzir ("Abuzir") seeking to pierce Silver Fox's corporate veil even though Abuzir was and had never been a director, officer, employee, or shareholder of Silver Fox.<sup>6</sup> Plaintiffs' rationalization was that although Abuzir did not hold these particular formalities, his sister Suna Abuzir was Silver Fox's owner, his brother-in-law Ali Alsahli was Silver Fox's president and registered agent, and he himself funded Silver Fox, "made all business decisions," and "exercised ownership control over the corpo-

ration Silver Fox to such a degree that separate personalities of the corporation and [defendant] did not exist."<sup>7</sup>

The circuit court, however, disagreed with plaintiffs' position, and granted defendant's motion to dismiss on the basis that the corporate veil could not be pierced because he was never a director, officer, employee or shareholder.<sup>8</sup>

On appeal, the appellate court reviewed case law in twenty-two other states, finding that the majority of states found that shareholder or title status was non-dispositive.<sup>9</sup> Of those twenty-two other states, the laws of seventeen allowed piercing the corporate veil to reach non-shareholders and non-title holders, while the laws of three states had conflicting results, and the laws of two states prohibited reaching non-shareholders.<sup>10</sup>

The fact that *Buckley* undertook such an exhaustive exposition of sister jurisdictions illustrates that the court felt it was necessary to bring Illinois in line with the modern trend, which favors substance over form. Relying on the survey of other states, the appellate court concluded that "lack of shareholder status – and, indeed, lack of status as an officer, director or employee – does not preclude veil-piercing" and is, in fact, a proposition that is implicitly supported by prior Illinois precedent.<sup>11 12</sup> In essence, the *Buckley* court concluded that to restrain piercing the corporate veil through formalities would defeat the purpose of the equitable nature of the remedy since "[t]here are many ways to organize a sham corporation" to avoid holding title or stocks while still effectuating con-

trol.<sup>13</sup>

*Buckley* also gave a blueprint for naming a third party defendant and satisfying the piercing test. The first prong, unity-of-interest, could be satisfied through sufficient factual allegations of “(1) inadequate capitalization; (2) failure to issue stock; (3) failure to observe corporate formalities; (4) non-payment of dividends; (5) insolvency of the debtor corporation; (6) nonfunctioning of the other officers or directors; (7) absence of corporate records; (8) commingling of funds; (9) diversion of assets from the corporation by or to a stockholder or other person or entity to the detriment of creditors; (10) failure to maintain arm’s length relationship among the related entities; and (11) whether in fact, the corporate is a mere façade for the operation of dominant stockholders.”<sup>14</sup> To satisfy the second prong – circumstances that make the fiction of a separate corporate existence a fraud and unjust – the *Buckley* court advised parties to plead sufficient factual allegations of “why [a]dherence to the fiction of a separate corporate existence would sanction a fraud, promote injustice, and/or promote inequitable consequences;” how defendant ‘perpetrated an injustice’; or what ‘injuries’ existed.<sup>15</sup>

The *Buckley* decision may motivate the filing of more piercing lawsuits. The decision’s citation to corporate piercing statistics shows that piercing the corporate veil by Illinois courts is not nearly as rare as courts claim it is. In fact, the *Buckley* court noted that Illinois courts pierce the corporate veil in ap-

proximately 42% to 52% of cases, near the average for American courts.<sup>16</sup> This statistic sharply contrasts with Illinois opinions that state the court’s “reluctance” to pierce the corporate veil.<sup>17</sup>

*Buckley* also has strong implications for corporate clients, especially close corporations. There are many examples of close corporations having family members or long-time friends that, while not containing any official company title, in effect dominate its affairs. After *Buckley*, these individuals have potential liability.

Attorneys should pay particular attention to how courts follow *Buckley* in the coming years. While *Buckley* had a particular set of facts, its detailed analysis, citation to favorable piercing statistics and disregard for corporate formalities could provide the blueprint for increased claims against non-shareholders and non-titleholders. ■

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

2. *Jacobson v. Buffalo Rock Shooters Supply Inc.*, 278 Ill. App. 3d 1084, 1088 (1996).

3. *Prazen v. Shoop*, 2013 IL 115035, at ¶ 68 (emphasis added).

4. *Buckley v. Abuzir*, 2014 IL App (1st) 130469.

5. *Id.* at ¶ 3.

6. *Id.* at ¶¶ 3-4.

7. *Id.* at ¶ 3.

8. *Id.* at ¶¶ 4-5.

9. *Id.* at ¶¶ 17-29.

10. *Id.* (noting cases dealing with the laws of New York, Connecticut, Indiana, Delaware, Minnesota, and Montana have concluded that non-shareholders and non-title holders may be reached, that cases dealing with the laws of Colorado, Louisiana, Alabama, Alaska, Hawaii, Idaho, Massachusetts, Nebraska, Nevada, New Jersey, and South Dakota have concluded that non-shareholders can be reached, that cases dealing with the laws of California, Florida, and Texas have had conflicting results on whether non-shareholders can be reached, and that cases dealing with the laws of North Carolina and Maryland have concluded that non-shareholders cannot be reached).

11. *Id.* at ¶ 29.

12. Prior to *Buckley*, both *Macaluso v. Jenkins*, 95 Ill.App.3d 461 (2d Dist. 1981) and *Fontana v. TLD Builders, Inc.* 362 Ill. App. 3d 491 (2d Dist. 2005) represented the furthest reaches of piercing liability. The court in *Macaluso* pierced the corporate veil of a not-for-profit to reach its chairman and treasurer. *Macaluso*, 95 Ill.App.3d 462, 467. Furthermore, in *Fontana*, the court pierced the corporate veil to hold the company president and secretary liable. *Fontana*, 362 Ill.App.3d 498 - 99. While in both cases the defendants were not shareholders, they still respectively held officer titles. By contrast, the *Buckley* court pierced the corporate veil to hold a pure third party non-shareholder and non-officer liable. As it so held, *Buckley* characterized the defendant’s liability in *Fontana* as not turning on his status as an officer of the corporation. *Buckley*, 2014 IL App (1st) 130469 at ¶ 30.”

13. *Id.* at ¶¶ 31-32.

14. *Id.* at ¶ 15.

15. *Id.* at ¶ 39.

16. *Id.* at ¶ 11.

17. *Capital One Bank, N.A. v. Czekala*, 379 Ill. App.3d 737, 743 (2008); *Cosgrove Distributors, Inc. v. Haff*, 343 Ill.App.3d 426, 429 (2003); *In re Estate of Wallen*, 262 Ill.App.3d 61, 68 (1994).

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