

**DISPATCHES FROM THE TRENCHES**

**Combating Fraud: Piercing the Corporate Veil  
& Intentional Misrepresentation**

By Kenneth P. Weinberg

This issue of Dispatches from the Trenches discusses a case where a lessor successfully asserts a claim against an officer of a vendor that lied about whether equipment had been delivered.

*Advantage Leasing Corp. v. NovaTech Solutions, Inc.*, 2005 WL 674666 (Wis. App. Mar. 24, 2005).

This case involves claims by a leasing company named Advantage Leasing Corp. (öLessorö) against a president (öOfficerö) of a vendor named NovaTech Solutions, Inc. (öVendorö). It was brought in connection with a lease of computer equipment between Lessor and Brown Communications, Ltd. (öLesseeö)

Unfortunately, even prudent equipment lessors can be ödupedö into paying for equipment that which has, without their knowledge, not been delivered. Sometimes these lessors are able to recoup their investment from the vendor or lessee. In this case, Lessor was also able to successfully assert a claim against the president of the Vendor even when faced with arguments regarding the öpiercing of the corporate veil.ö

## **The Facts**

Lessor supplied lease financing for Lessee to purchase computer equipment from Vendor. Officer, the president of Vendor, filled out part of the application for Lessee and faxed it to Lessor. Lessor approved the financing and faxed Lessee a commitment letter.

What Lessor didn't know, was that Officer asked Lessee to acknowledge delivery of the equipment to Lessor before any such delivery occurred so as to allow Vendor to bill Lessor for the equipment and use Lessor's funding as a down payment to actually purchase the equipment. Officer informed Lessor that Vendor would deliver the equipment within a matter of days. After a few days, following Officer's advice, Lessee informed Lessor that the equipment had been delivered even though it had not. Lessor subsequently sent payment in full to Vendor. Officer cashed the check, kept a portion of the funds to allegedly cover payment owed by Lessee to Vendor for technical services performed and remitted the remaining balance directly to lessee.

Luckily, Lessor discovered the fraud, although the case does not specify how. Lessor sued Vendor for breach of contract for failure to deliver equipment to Lessee as required by the contract. It also sued Officer personally for intentional misrepresentation. This particular appellate case focused solely on the claim against Officer personally.

The Circuit Court had granted Officer's motion for summary judgment, reasoning that the "corporate veil" protected her from a personal suit because the alleged false statements were made in the course of her activities on behalf of Vendor. However, the Court of Appeals reversed that decision. Before outlining the basis of the Appellate Court's decision, this issue of Dispatches from the Trenches will briefly discuss the issue of the "corporate veil."

### **A Little Something about the Corporate Veil**

One of most important attributes of the corporate form, which is prized by shareholders is that of limited liability. One of the general principles of corporate law is that shareholders are not personally liable for the debts and obligations of a corporation beyond their capital investment in the corporation.

The general limitation of liability, however, may be qualified. Piercing the corporate veil is a judicial process whereby a court will disregard the usual immunity of shareholders from liability for wrongful corporate activity. This doctrine holds that the corporate structure, with its attendant limited liability features, may be ignored and personal liability imposed on shareholders in the case of wrongful acts done in the corporate name. See Robert B. Thompson, Piercing the Corporate Veil: An Empirical Study, 76 Cornell L. Rev. 1036, 1054-55 (1991).

In most states, veil piercing remains somewhat flexible because it is an equitable action taken at the discretion of the Courts. Unfortunately, this flexibility results in the veil piercing doctrine being applied in an inconsistent manner by the courts. *See Phillip I. Blumberg, The Law of Corporate Groups, Tort, Contract, and Other Common Law Problems in the Substantive Law of Parent and Subsidiary Corporations*, at xxxvi (1987 & Supp. 2000) (stating that piercing the corporate veil "fails to provide a workable framework for analysis, but it still largely prevails."). Even in states with well-developed corporate law, such as Delaware, those litigating this issue are not immune from this uncertainty. *See Harco Nat'l Ins. Co. v. Green Farms, Inc.*, No. 1131, 1989 WL 110537, \*4 (Del. Ch. 1989) ("While Delaware is acknowledged as having the best developed general corporate case law, comparatively speaking, its law for piercing the veil is underdeveloped.")

Despite the uncertainty surrounding the general application of the doctrine, one thing is clear: it is generally difficult to persuade a court to pierce the veil. For example, the Alabama Supreme Court has given a fairly comprehensive list of the factors relevant in piercing the corporate veil, stating:

"The corporate veil may be pierced where a corporation is set up as a subterfuge, where shareholders do not observe the corporate form, where the legal requirements of corporate law are not complied with, where the corporation maintains no corporate records, where the corporation maintains no corporate bank account, where the corporation has no employees, where corporate and personal funds are intermingled and corporate funds are used for personal purposes, or where an individual drains funds from the corporation." *Simmons v. Clark Equip. Credit Corp.*, 554 So. 2d 398, 401 (Ala. 1989).

### **Circumventing the Corporate Veil rather than Piercing It**

In the case at bar, the Wisconsin Court of Appeals ruled in favor of Lessor and remanded the case to the District Court, noting that Lessor "does not seek to pierce the corporate veil and hold Officer personally liable for an obligation of [Vendor, rather Lessor] seeks to hold Officer liable for her own tortious conduct." The Court cited *Fletcher Cyclopedia of the Law of Private Corporations*, which states:

"A corporate officer or agent who commits fraud is personally liable to a person injured by the fraud. An officer actively participating in the fraud cannot escape personal liability on the ground that the officer was acting for the corporation. Similarly, it is immaterial that the officer received no benefits from the transaction. The corporation may also be liable, but the individual is not thereby relieved of his or her own responsibility." §1143, at 232-36.

The Court also found in Lessor's favor with respect to whether Lessor alleged a valid intentional misrepresentation claim. Specifically, Lessor's claim was not undercut by the fact that Officer's representations related to future fact (e.g., her intention to deliver the merchandise) rather than pre-existing fact. According to the Court, "[s]tatements of fact must relate to present or pre-existing facts, not something to occur in the future, except when statements contain an expression of intent to do something in the future though the speaker has no such intent."

Finally, the Appellate Court held, contrary to Officer's assertions, that the facts in the record supported the theory that Lessor relied on Officer's statements as assurance for its decision to release the money to Vendor for the equipment alleged delivered to Lessee. Some sort of reliance is required for a claim of misrepresentation.

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