Одне з нагальних питань, що підлягають вирішення є розподіл відповідальності при купівлі товарів в онлайн-магазинах. В умовах карантину представники окремих галузей бізнесу вдаються для кооперації для забезпечення безперервної роботи та отримання доходу. Так, наприклад, 20 березня «Нова пошта» разом з онлайн-магазином «Розетка» та мережею супермаркетів «АТБ» запустила доставку продуктів харчування додому. Однак, за принципом «магазин+онлайн крамниця+служба доставки» кооперуються і менші гравці ринку [2], а отже важливо забезпечити єдиний підхід до визначення меж відповідальності за порушення умов договору кожним агентом з ланцюжку онлайн-продажу. Особливу увагу слід приділити дотриманню строків такої доставки, передбачених публічним договором (адже прискорена доставка зазвичай тарифікується з певним коефіцієнтом) та відповідальності за їх порушення. Державними органами повинна бути забезпечена можливість звернення за захистом своїх порушених прав в безконтактному режимі, тобто з урахуванням новітніх технологій (наприклад, вже анонсовані мобільні додатки «SMART споживач» та «Купуй безпечне») [3].

Отже, карантин в Україні зумовлює обмеження цивільних прав в сфері договірного права, а механізми захисту суб’єктивних прав в мережі Інтернет потребують доопрацювання та пристосування до умов карантинних заходів.

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REVERSE VEIL PIERCING IN THE DOCTRINE OF UKRAINE AND FOREIGN COUNTRIES

Traditional legal entity theory does not contemplate the contemporary business practices. The national legal provisions governing corporate responsibility do not meet the needs of the modern market. The concept of absolute separate entity no longer mirrors the economic reality where the interests of the company and its controller often fuse together. The problem is that the corporate form gets abused by mala fide members of the company. In reliance on the separate personality of the corporate entity the unscrupulous controllers hide their personal assets behind the corporate veil.

In 1926, John Dewey wrote: «[D]octrines which once served to advance rules of law may be obstructive today. We often go on discussing problems in terms of old ideas when the solution of the problem depends upon getting rid of the old ideas, and putting in their place concepts more in accord with the present state of ideas and knowledge.»[1] The concepts, mechanisms and rules formulated in the 1990s lack flexibility and agility. There is a necessity of creating a legal environment where substance is prioritised over form. The ongoing corporate reform in Ukraine aims to bring a much needed clarity into the contradictory rules for organising and conducting business.

Certain aspects of the potential of incorporating the doctrine of piercing the corporate veil into the Ukrainian legal system were dealt with by the following legal scholars and practitioners: Y. Akimenko, N. Blazhivska, E. Dyadyuk, I.Grishina, T. Karnauh, O. Kibenko, O. Kologoida, I. Lukach, R. Maidanik, V. Makhinchuk, B. Shuba, Y. Sokolovskaya, I. Spasibo-Fateeva, Y. Zhornokuy.

In this article the author seeks to determine the origin and legal nature of the reverse veil piercing. The doctrine of the reverse veil piercing and the alter ego principle are discussed using the example of the US judicial practice, where they received the greatest development. Defining criteria for the application of the alter ego principle in forward and reverse veil piercing, the author seeks to establish a correlation of concepts. The aim of this article is to clarify the understanding of the notion of reverse piercing of the corporate veil.

Any legal analysis of the state of corporate responsibility must start with the established doctrine of separate legal personality of a corporate entity. Once incorporated a company becomes a legal person distinct from its members, even if it has only one incorporator with the sole control over the company. By incorporating the veil is pulled over the individuals establishing the legal entity. It is the company's business, not that of its shareholders. An artificial personality is created, with its own rights and liabilities. And thus a line is drawn between persons dealing with the company and its members, so that a claim cannot be brought directly against an individual controller. Generally, a creditor cannot proceed either against the members by ignoring the company or against the company through its members.[2] This «indelible line» is the cornerstone of the traditional corporate entity doctrine.[3, 667]

It warrants that company is protected from corporate assault and legal proceedings brought by the personal creditors of its members.

The conflict between the accepted fiction theory of separate corporate personality and the doctrine of piercing the corporate veil lies within the line-drawing. The concept of veil piercing permits to erase that line when the interests of justice demand so. It is an equitable doctrine and a remedy of last resort available to the claimants when the outdated concept of absolute separate entity does not correspond to the economic realities of the relationship between the company and its controller.

Reverse veil piercing is essentially the reverse of traditional veil piercing: it allows to disregard the corporate personality and treat an entity's assets as those of its members. Creditors of the individual controller of the company may attempt to seize the company's assets in satisfaction of the controller's personal debts. The controller can also claim to dismiss the corporate form in order to obtain certain financial benefits or to bring company's assets under the protection exclusively available to the controller as an individual. The two types of situations are referred to as outsider and insider reverse veil piercing respectively.[4]

It is often when the interests of the company and its controller are coextensive that the concept of reverse veil piercing is evoked. Therefore the notion of backward-piercing is commonly perceived as a continuation of alter ego principle. Though it does not seem logical to view the reverse piercing as an extension of one of the grounds of forward veil piercing, it is admitted that alter ego principle was further consolidated in the course of the reverse veil piercing doctrine development.

The alter ego principle was designed to address the abuse of the separate legal personality of the company by its controller. Both in regular and reverse veil piercing, the courts tend to employ the concept when «an entity's owner dominates the entity to the point that the entity and its owner are indistinguishable».[5] Where the controlling shareholder uses the company to commit a fraud or evade existing liability, the court will pierce the corporate veil and allow an action to be brought against the controller personally.

Because the alter ego principle was developed within the traditional veil-piercing theory, its application is bound to be problematic in the backward-piercing claims. As a ground for traditional veil piercing, the alter ego principle is not suited to the reverse piercing scenario and does not satisfy its peculiarity.[6] Michael J. Gaertner finds the application of the standard veil piercing grounds, including the alter ego principle, to the reverse veil piercing cases «particularly inappropriate». [3, 695]

The reader might wonder why the reverse piercing is needed. The effect of the outsider reverse piercing is that the debt of a shareholder is imputed onto the company. On the one hand, the creditor of a shareholder can already get to the assets of the company through its shares, which could be sold y the member to pay the debt. On the other hand, the piercing of the corporate veil – whether forward or reverse – is the last resort remedy. It is brought up only when conventional methods are ill-suited to achieve just and fair result in the case. Reverse veil piercing arises in contexts other than traditional veil piercing. It allows to bypass the two-step process of proceeding against the shareholder and then dissolving the company or selling the stock.

While controversial, [7] a far-famed California decision illustrates the relevance of reverse veil piercing to the corporate governance and responsibilities in limited liability companies. In Curci Investments, LLC v. Baldwin the appellate court instructed the trial court at the very least to assess the same factors as in a traditional veil piercing case when pondering whether the reverse veil piercing is appropriate.[8] Such factors were discussed in Sonora Diamond Corp. v. Superior Court (2000) 83 Cal.App.4th, and include but are not limited to the following: (1) commingling of funds and other assets of the two entities; (2) the holding out by one entity that it is liable for the debts of the other; (3) identical equitable ownership in the two entities; (4) use of the same offices and employees; (5) use of one entity as a mere shell or conduit for the affairs of the other; (6) inadequate capitalisation; (7) disregard of corporate formalities; (8) lack of segregation of corporate records; and (9) identical directors and officers. None of the factors are decisive and the court should evaluate the merits of the case.[9]

In Postal Instant Press, Inc. v. Kaswa Corp. the court asserted that» reverse piercing is not a logical extension of the standard alter ego doctrine but instead addresses significantly different concerns.»[10] However, it is apparent that in Curci the court suggested to consider the factors that are inherent to the alter ego analysis when deciding whether the veil should be pierced in reverse. California appellate court did not overrule but instead distinguished the Curci from the Postal Instant Press, choosing not to elaborate further on the matter of correlation between the reverse veil piercing doctrine and the alter ego principle.

In any case, the concept of reverse veil piercing is controversial. Most courts utilising reverse piercing apply the same criteria as under a traditional piercing analysis, but with the reverse effect. The doctrine lacks predictability. It is argued that courts have not established a universal approach to the reverse piercing claims and tend to examine irrelevant factors. While considering an individual’s questionable transfers of assets into an entity, some courts would thoroughly scrutinise company’s capitalisation and solvency and insist on strict adherence to the formalities. The concept is relatively new and its boundaries are yet to be defined.

Despite the lack of consensus in the area, reverse veil piercing has been recognized by many courts and it appears to be gaining favour. This is due to the fact that the traditional theory of separate corporate personality does not correspond to the real needs of the market and business. Today striking a balance between the interests of the company, its incorporators and their personal creditors requires more complex and advanced legal mechanisms. The concept of reverse veil piercing was introduced to tackle the unjust results produced by the strict adherence to the conventional approach of separate legal personality. Reverse piercing is an equitable doctrine in which substance prevails over form.

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ПРОБЛЕМАТИКА ВИКОНАННЯ ДОГОВОРІВ В УМОВАХ ПАНДЕМІЇ COVID-19 В УКРАЇНІ

У такий надзвичайно складний період боротьби світу із пандемією слід захистити себе в усіх можливих аспектах життя, в тому числі особливу увагу