The fiduciary shield doctrine

Avoid litigating claims against officers and directors by challenging personal jurisdiction **Interviewed by Troy Sympson**

The fiduciary shield doctrine is an equitable doctrine that can protect individuals from litigation for actions they take on behalf of their employers.

It allows courts to decline to exercise personal jurisdiction over nonresident defendants sued for acts performed in their capacities as corporate agents. And absent personal jurisdiction, suits against nonresident, individual defendants can be quickly dismissed.

The rationale for the fiduciary shield doctrine is rooted in concepts of equity and fairness — whether it would be fair to sue a nonresident in Illinois for acts carried out on behalf of his or her employer.

Generally, agents are not personally liable for acts they carry out for their employers, but this doesn't always protect employees as planned, as they can still be sued, says Andrew D. Campbell, a partner at Novack and Macey LLP.

"While the doctrine of limiting the personal liability of agents is alive and well, it still doesn't stop litigants from naming officers or agents of a corporation as defendants," says Campbell.

But a motion to dismiss asserting the fiduciary shield doctrine can quickly extract individual, nonresident defendants from a suit, says Campbell.

Smart Business spoke with Campbell about the fiduciary shield doctrine and how to protect your directors, officers and other agents from litigation.

Andrew D. Campbell
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Does the law generally protect directors, officers and other agents from liability for actions they take on behalf of their employers?

For the most part, yes, but exceptions apply to the rule of limited liability, and getting to a determination of nonliability can be time consuming and expensive.

While exceptional cases can sometimes have merit, corporate agents are often parties to suits because plaintiffs perceive tactical benefits in suing them. These perceived benefits can include increasing the settlement value of a case, intimidating the individual litigant or saddling the individual with the time-consuming and expensive tasks of litigation.

Also, naming directors and officers can trigger D&O insurance policies, thereby increasing the pool of funds available to settle the suit or pay a judgment. The fiduciary shield often can be raised in a motion to dismiss early on, thereby nullifying these perceived benefits.

How does personal jurisdiction affect the application of the fiduciary shield doctrine?

To have jurisdiction over a defendant, whether it's a corporation or an individual, a plaintiff must show that the court can exercise its power over that defendant. So, for a court in Illinois to assert jurisdiction over someone from Wisconsin, for example, there must be an Illinois statute allowing for the exercise of jurisdiction, and constitutional requirements must be satisfied.

In Illinois, the 'long arm' statute provides that jurisdiction may be had over a person for any basis permitted by the U.S. Constitution and the Illinois Constitution. The U.S. Constitution allows for personal jurisdiction as long as that person has 'minimum contacts' with the state. And it is rather easy to establish these minimum contacts.

Assuming there are minimum contacts, a court must then consider whether exercising personal jurisdiction would be fair and just. The fiduciary shield doctrine is an outgrowth of this inquiry.

What is an example of how the fiduciary shield doctrine applies?

It often comes up when a corporation and one or more of its officers are being sued. For example, suppose a Wisconsin corporation was hired to construct a building in Illinois and a lawsuit is filed in Illinois arising out of the construction project. The corporation would certainly be subject to personal jurisdiction in Illinois, but what about the officers — Wisconsin residents — who negotiated the contract and entered into the deal on behalf of their employer?

Entering into a contract for a construction project will often involve lengthy negotiations and will require the builder's employees to travel to Illinois. But is this enough contact with Illinois to render them subject to being sued here in their individual capacities?

In a recent decision, with similar facts, the court dismissed two officers from a suit under the fiduciary shield doctrine. It found that one officer, who signed a construction contract and participated in telephonic meetings about the project — but who never traveled to Illinois — was not subject to jurisdiction here. Likewise, another officer, who did come to Illinois to attend progress meetings, but never for personal reasons, was also not subject to personal jurisdiction.

Are there circumstances under which courts are less likely to apply the fiduciary shield doctrine?

The doctrine is discretionary, so a court can decide whether to apply it based on the circumstances presented.

Courts often will refuse to apply the fiduciary shield doctrine to someone who is a high-ranking company officer with a direct financial stake in the company. A direct financial stake typically doesn't mean an officer who holds shares as part of a retirement plan. Instead, courts are generally concerned with substantial shareholders, for example, those owning 20 percent or more of the company. But, monetary incentives aren't the only thing courts consider.

Although less common, personal motives — spite, vindictiveness or maliciousness — have, at times, led courts away from applying the fiduciary shield doctrine. Further, where there are allegations that a corporate entity was merely a 'sham' utilized for an individual defendant's personal benefit, the fiduciary shield doctrine is less likely to apply.

These exceptions notwithstanding, utilizing the fiduciary shield doctrine at the outset of a case can be a powerful tool in extracting nonresident agents from lawsuits during their initial stages. <<

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