

FIDUCIARY SHIELD WILL NOT BAR ASSERTION OF PERSONAL  
JURISDICTION OVER NONRESIDENT OWNER OF  
CORPORATE SHELL

*Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899 (2d Cir. 1981)

In *Marine Midland Bank, N.A. v. Miller*,<sup>1</sup> the Second Circuit Court of Appeals distinguished its test for piercing the corporate veil<sup>2</sup> from the criteria for applying the fiduciary shield doctrine<sup>3</sup> in holding that the mere finding of a corporate shell, without a showing of fraudulent use, is sufficient to subject the shell corporation's owner to personal jurisdiction<sup>4</sup> in the forum in which the corporation has transacted business.<sup>5</sup>

Plaintiff, Marine Midland Bank, N.A., brought a diversity action<sup>6</sup>

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1. 664 F.2d 899 (2d Cir. 1981).

2. "Piercing the corporate veil" is an equitable exception to the general rule that the corporate entity will not be disregarded. H. HENN, HANDBOOK OF THE LAW OF CORPORATIONS § 146 (2d ed. 1970). "Where the corporation has been used as an 'instrumentality' or 'adjunct' of the parent, . . . the 'corporate veil' will be 'pierced' and the persons behind it will be exposed to the bright light of liability." N. LATTIN, THE LAW OF CORPORATIONS § 14 (2d ed. 1971). See also 1 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41-41.3 (rev. perm. ed. 1975 & Supp. 1982) (discussion of federal and state courts' criteria for disregarding the corporate entity).

For an early discussion of the doctrine, see Wormser, *Piercing the Veil of Corporate Entity*, 12 COLUM. L. REV. 496 (1912).

3. The fiduciary shield doctrine defeats the assertion of personal jurisdiction over a nonresident corporate fiduciary predicated upon his corporate activities in the forum. *United States v. Montreal Trust Co.*, 358 F.2d 239 (2d Cir. 1966); *Rene Boas & Assocs. v. Vernier*, 22 A.D.2d 561, 257 N.Y.S.2d 487 (1965). For a discussion and critique of the doctrine, see Sponsler, *Jurisdiction Over the Corporate Agent: The Fiduciary Shield*, 35 WASH. & LEE L. REV. 349 (1978); Comment, *Chancellor v. Lawrence: Minimum Contacts and the Fiduciary Shield Doctrine*, 15 J. MAR. L. REV. 251 (1982).

4. Constitutional due process requires that the court have jurisdiction over the parties and the subject matter of the suit. *Pennoyer v. Neff*, 95 U.S. 714 (1877). Personal, or in personam jurisdiction, is the power of the court "to summon a defendant before it to adjudicate the claim against him." 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1064 (1969 & Supp. 1981). See generally C. WRIGHT & A. MILLER, *supra*, at §§ 1063-1069 (historical development of personal jurisdiction).

5. Among the statutes which form the basis for personal jurisdiction, New York's long-arm statute, N.Y. Civ. Prac. Law § 302(a) (McKinney 1972 & Supp. 1981), provides that courts "may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through an agent: 1. transacts any business within the state; or 2. commits a tortious act within the state. . . ." There is a large body of law on what satisfies the "transacting business" requirement. See 7B N.Y. CIV. PRAC. LAW §§ 72-83 (McKinney 1972), 29-103 (Supp. 1981).

6. *Marine Midland Bank, N.A. v. Miller*, 512 F. Supp. 602 (S.D.N.Y. 1981). The amount in controversy exceeded \$10,000; the plaintiff's offices were in New York and the defendant was a resident of West Virginia. *Id.* at 603. See 28 U.S.C. § 1332(a)(1) (1976).

against defendant James W. Miller for negligent misrepresentation. The cause of action was Miller's allegedly tortious conduct<sup>7</sup> as president of Miller & Associates, a coal consulting firm that advised Marine Midland on the future of a mining investment.<sup>8</sup> Claiming that his contacts with the forum were made solely in his corporate capacity,<sup>9</sup> Miller moved, pursuant to Federal Rule of Civil Procedure 12(b)(2),<sup>10</sup> to dismiss the complaint for lack of personal jurisdiction.<sup>11</sup> In opposition to

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7. Under New York law, commercial misrepresentation made in expectation of reliance is potentially tortious conduct within the purview of New York's long-arm statute. *White v. Guarente*, 43 N.Y.2d 356, 372 N.E.2d 315, 401 N.Y.S.2d 474 (1977).

8. In 1977, a group of investors sought to borrow approximately \$6,000,000 from Marine Midland Bank, N.A. to finance a coal mining project. Miller & Associates prepared a feasibility report (the "Miller Report") and submitted it to the bank. The Miller Report stated that the proposed mine would yield nearly 27 million tons of coal of commercially acceptable quality. James Miller made at least two visits to the bank's New York offices, where he presented and confirmed the report's findings and conclusions. Marine Midland retained a second coal consulting firm, Keplinger & Associates, which confirmed the Miller Report's findings and conclusion. The bank subsequently loaned the investors more than \$9,000,000. In March 1979 Keplinger informed Marine Midland that both consulting firms had overstated the quality and quantity of the project's coal resources. Almost no coal could be economically mined and, consequently, the investors were unable to repay Marine Midland. 664 F.2d at 900-901.

In a separate action commenced in August 1979, Marine Midland sued Keplinger & Associates and Miller & Associates. *Marine Midland Bank v. Keplinger & Assocs., Inc.*, 488 F. Supp. 699 (S.D.N.Y. 1980).

9. *Marine Midland Bank, N.A. v. Miller*, 512 F. Supp. 602, 603-04, 604 n.4 (S.D.N.Y. 1981). *See also* *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 901 (2d Cir. 1981) (acted solely in corporate capacity).

10. FED. R. CIV. P. 12(b)(2) provides in relevant part: "Every defense in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may . . . be made by motion: . . . (2) lack of jurisdiction. . . ."

11. *See supra* note 4. The Supreme Court has set the criteria for subjecting nonresidents to personal jurisdiction. *See* *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. Superior Court*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Hanson v. Denckla*, 357 U.S. 235 (1958); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). In *International Shoe*, the Court held:

[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

326 U.S. at 316. *See generally* 2 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 4.25 (2d ed. 1982) (jurisdiction to be governed by state standards as limited under due process clause of fourteenth amendment).

Consistent with due process requirements, a state may enact a long-arm statute which will authorize the assertion of personal jurisdiction over a nonresident defendant for a cause of action which arose through the defendant's activities in the forum. *E.g.*, *Elkhart Eng'g Corp. v. Dornier Werke*, 343 F.2d 861 (5th Cir. 1965). *Cf.* *Hess v. Pawlowski*, 274 U.S. 352 (1927) (Constitution permits exercise of jurisdiction over nonresidents for torts committed on forum state's highways

this motion, Marine Midland presented deposition testimony and several affidavits to support its contention that Miller & Associates was Miller's alter ego, and that his corporate activity in the forum should thus form the predicate for subjecting him to personal jurisdiction.<sup>12</sup>

The district court granted Miller's motion to dismiss.<sup>13</sup> The court found that Miller's activities in the forum were undertaken strictly on behalf of the corporation. Consequently, the fiduciary shield doctrine prevented the court from asserting personal jurisdiction predicated on these activities.<sup>14</sup> The court rejected Marine Midland's theory that the corporation's activities should be attributed to Miller himself for the purpose of asserting jurisdiction. The court reasoned that in the absence of any showing of fraud, proof of a corporate shell does not satisfy its requirements for piercing the corporate veil.<sup>15</sup>

On appeal, the Second Circuit Court of Appeals reversed, and *held*: the fiduciary shield doctrine will not defeat the assertion of personal

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per nonresident motorist statutes). However, the Court in *International Shoe* recognized that continuous corporate activity within the forum may be found so substantial as to justify suit against it on a cause of action that arose outside the state. 326 U.S. 310, 318.

New York's long-arm statute, 7B N.Y. CIV. PRAC. LAW § 302 (McKinney 1972 & Supp. 1981), authorizes New York courts to assert personal jurisdiction over nondomiciliaries on the basis of certain acts. The New York legislature chose not to take full advantage of the constitutional reach of long-arm jurisdiction. New York Advisory Comm. Rep. (N.Y. Legis. Doc., 1958, No. 13). Generally, New York limits its exercise of personal jurisdiction by requiring that nonresident defendants' minimum contacts be related to the cause of action in the suit. 7B N.Y. CIV. PRAC. LAW § 302 (McKinney 1972 & Supp. 1981). For a thorough analysis of § 302, see Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d 443, 450-52, 209 N.E.2d 68, 71-72, 261 N.Y.S.2d 8, 13-15. See also 7B N.Y. CIV. PRAC. LAW § 59-156 (McKinney 1972), § 29-102 (Supp. 1981) (annotation of cases interpreting § 302); Homburger, *The Reach of New York's Long-Arm Statute: Today and Tomorrow*, 15 BUFFALO L. REV. 61, 61-62 (1965) (origins of § 302). See generally 2 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 4.41-1 (2d ed. 1982) (historical development of long-arm statutes); 4 C. WRIGHT & A. MILLER, *supra* note 4, at §§ 1063-1069 (1967 & Supp. 1982) (discussion of personal jurisdiction development).

12. 664 F.2d at 901. The affidavits alleged that Miller & Associates had not maintained the corporate form because contract formation and performance, billing procedures and services were conducted in conjunction with other businesses owned entirely by Miller himself. There was evidence that Miller & Associates was seriously undercapitalized, and that it "was in effect nothing more than a telephone number and stationery." *Id.* at 901.

13. 512 F. Supp. at 602, 603.

14. *Id.* at 604. The fiduciary shield doctrine is a judicial interpretation of the legislature's intended reach of the long-arm statute. See *United States v. Montreal Trust Co.*, 358 F.2d 239, 242 (2d Cir. 1966). See also *supra* note 3. The Iowa Supreme Court, however, has found the fiduciary shield doctrine to be a due process limitation on the exercise of jurisdiction. See *Iowa ex rel Miller v. Internal Energy Management Corp.*, 324 N.W.2d 707, 711 (Iowa 1982). But see *supra* note 11.

15. 512 F. Supp. at 604.

jurisdiction over a nonresident corporate employee predicated upon his activities in the forum when the plaintiff makes a prima facie showing that the corporation is the defendant's "shell". A showing of fraud, which the Second Circuit has held is a necessary predicate for piercing the corporate veil, relates to the more onerous finding of liability and not to the threshold issue of jurisdiction.<sup>16</sup>

The law permits individuals to incorporate their activities for the very purpose of escaping personal liability,<sup>17</sup> on the theory that society would not receive the benefits of corporate activity if this qualified grant of immunity were not available to encourage and facilitate the establishment of certain enterprises.<sup>18</sup> Piercing the corporate veil is an equitable exception to the general principle that the acts of a corporation will not subject its shareholders to individual liability.<sup>19</sup> In *Taylor v. Standard Gas & Electric Co.*,<sup>20</sup> the Supreme Court held that the general grant of shareholder immunity from liability is withheld when it "would work fraud or injustice."<sup>21</sup> In *Anderson v. Abbott*,<sup>22</sup> the Court held that it would pierce the corporate veil upon a showing of fraud,<sup>23</sup> and suggested that inadequate capitalization of the corporation in rela-

16. 664 F.2d at 904. See *infra* notes 19-33, 88 and accompanying text.

17. See, e.g., *Anderson v. Abbott*, 321 U.S. 349 (1944); *Kirno Hill Corp. v. Holt*, 618 F.2d 982 (2d Cir. 1980); *Zubik v. Zubik*, 384 F.2d 267 (3d Cir. 1967), cert. denied, 390 U.S. 988 (1968); *Bartle v. Home Owners Coop.*, 309 N.Y. 103, 127 N.E.2d 832 (1955); *Natelson v. A.B.L. Holding Co.*, 260 N.Y. 233, 183 N.E. 373 (1932); *Rapid Transit Subway Constr. Co. v. City of New York*, 259 N.Y. 472, 182 N.E. 145 (1932).

In *Anderson*, the Court noted "[t]he fact that incorporation was desired in order to obtain limited liability does not defeat that purpose." 321 U.S. at 361.

18. "Limited liability is the rule, not the exception; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted." *Anderson v. Abbott*, 321 U.S. at 362.

19. *Lowendahl v. Baltimore & Ohio R.R.*, 247 A.D. 144, 287 N.Y.S. 62, *aff'd*, 272 N.Y. 360, 6 N.E.2d 56 (1936). In *Lowendahl*, the court held that a showing of fraud is necessary to disregard the corporate entity, and explained:

Stockholders' immunity from corporate obligation is fundamental to the very concept of the corporation as a separate legal entity. Around it the entire body of corporation law is built. It is accepted in theory and practice and ingrained in our legal and economic systems. Courts will not lightly disregard the corporate entity.

247 A.D. at 154, 287 N.Y.S. at 72. See A. CONARD, CORPORATIONS ON PERSPECTIVE §§ 270-277 (1976) (discussion of shareholders' liability for corporate activities); I W. FLETCHER, *supra* note 2, at § 33 (corporation, not shareholder, is legally liable for its torts); H. HENN, *supra* note 2, at § 146 (1970) (limited liability is principal objective of incorporation); N. LATTIN, *supra* note 2, at §§ 11-12 (shareholders' limited liability is general rule).

20. 306 U.S. 307 (1939).

21. *Id.* at 322.

22. 321 U.S. 349 (1944).

23. *Id.* at 362.

tion to its purpose and undertaking would be a factor in denying the shareholder's defense of limited liability.<sup>24</sup>

Courts applying New York law specifically discuss and apply well-recognized standards for piercing the corporate veil.<sup>25</sup> The court in *Lowendahl v. Baltimore & Ohio R.R.*<sup>26</sup> held that the proponent must establish three criteria: first, that the parent was in complete control of the corporation at the time the cause of action arose, to the point that the entity "had . . . no separate mind, will, or existence of its own"; second, that the defendant used this control to perpetrate fraud upon the plaintiff; and third, that the defendant's control and fraudulent use of the corporate entity was the proximate cause of the complaint.<sup>27</sup> Several courts applying New York law adhere to the *Lowendahl* crite-

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24. *Id.* No New York case has ever held that inadequate capitalization alone is sufficient to pierce the corporate veil. *Garter v. Snyder*, 607 F.2d 582, 588 (2d Cir. 1979). Several federal and New York courts have cited the inadequacy of corporate capital as a factor in the issue of whether to disregard the corporate entity. *See, e.g.*, *Garter v. Snyder*, 607 F.2d 582, 586 (2d Cir. 1979); *Brunswick Corp. v. Waxman*, 459 F. Supp. 1222, 1231 (E.D.N.Y. 1978); *Ariate Compania Naviera, S.A. v. Commonwealth Tankship Owners, Ltd.*, 310 F. Supp. 416, 420 (S.D.N.Y. 1970); *Mull v. Colt Co.*, 31 F.R.D. 154, 163-64 (S.D.N.Y. 1962); *Port Chester Elec. Constr. Corp. v. Atlas*, 40 N.Y.2d 652, 657, 357 N.E.2d 983, 986-87 (1976); *Jenkins v. Moyses*, 254 N.Y. 319, 324, 172 N.E. 521, 522 (1930). Other courts refuse to evaluate the adequacy of capitalization when asked to pierce the corporate veil. *See, e.g.*, *Fisser v. International Bank*, 282 F.2d 231, 240 (2d Cir. 1960); *Hellenic Lines, Ltd. v. Winkler*, 249 F. Supp. 771, 777-78 (S.D.N.Y. 1966); *Walkovszky v. Carlton*, 18 N.Y.2d 414, 419, 223 N.E.2d 6, 9 (1966). Several commentators believe that inadequate corporate capitalization is tantamount to fraud, and, therefore, should be sufficient to pierce the corporate veil. *See* A. CONARD, *supra* note 19, at § 274; H. HENN, *supra* note 2, at § 147; N. LATTIN, *supra* note 2, at § 15; Note, *Liability of a Corporation for Acts of Subsidiary or Affiliate*, 71 HARV. L. REV. 1122 (1958); Comment, *Allegations of Sham Incorporation Held Sufficient to Establish Single Enterprise*, 32 BROOKLYN L. REV. 408 (1966).

25. *E.g.*, *Williams v. McAllister Bros.*, 534 F.2d 19 (2d Cir. 1976) (must show corporation is "mere instrumentality" and that it is used fraudulently); *Interocean Shipping Co. v. National Shipping & Trading Corp.*, 523 F.2d 527 (2d Cir. 1975) (must show "complete domination" and fraud); *Fisser v. International Bank*, 282 F.2d 231 (2d Cir. 1960) (must show that corporation has no separate existence, that shareholders used it fraudulently, and that their control gave rise to cause of action); *In re Ira Haupt & Co.*, 304 F. Supp. 917 (S.D.N.Y. 1969) (same); *Walkovszky v. Carlton*, 18 N.Y.2d 414, 223 N.E.2d 6, 276 N.Y.S.2d 585 (1966) (must show perversion of corporate form and fraud). *Cf.* *Kirno Hill Corp. v. Holt*, 618 F.2d 982 (2d Cir. 1980) (veil will be pierced when corporation used to perpetrate fraud or corporate form is completely dominated); *P.S. & A. Realities, Inc. v. Lodge Gate Forest, Inc.*, 205 Misc. 245, 127 N.Y.2d 315 (Sup. Ct. 1954) (complete disregard of corporate organization sufficient to find shareholders liable).

26. 247 A.D. 144, 287 N.Y.S. 62, *aff'd*, 272 N.Y. 360, 6 N.E.2d 56 (1936).

27. *Id.* at 157, 287 N.Y.S. at 75. The court in *Lowendahl* drew on two influential, if broad, statements of the circumstances under which the corporate entity will be disregarded and its shareholders will be held liable for corporate torts. In the first, *United States v. Milwaukee Refrigerator Transit Co.*, 142 F. 247 (C.C.E.D. Wis. 1905), the court observed: "When the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the

ria when plaintiffs seek to hold defendant shareholders individually liable for their corporation's torts.<sup>28</sup> The court in *Walkovszky v. Carlton*,<sup>29</sup> however, underscored the complexity of piercing the corporate veil when it distinguished between the assertion that a corporation is a "fragment of a larger corporate combine which actually conducts the business" and the claim that a corporation is a "dummy" for its individual stockholders who are in reality carrying on the business in their personal capacities for purely personal rather than corporate ends.<sup>30</sup> The court explained that in the former situation only the controlling corporate entity would be held liable, while in the latter situation the shareholders would be personally liable. The *Walkovsky* court held that the plaintiff need not necessarily show fraud in the organization of the corporation in order to hold the shareholders liable. Instead, a showing that the shareholders routinely comingled corporate and personal funds to accommodate their immediate and personal convenience would suffice to pierce the corporate veil and impose liability on such shareholders.<sup>31</sup> Notwithstanding the shareholder's obvious objective of minimizing their potential liability by fragmenting what was in effect a single operating unit,<sup>32</sup> the court found that this effort to

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law will regard the corporation as an association of persons." *Id.* at 255. In the second, Justice Cardozo, in *Berkey v. Third Ave. Ry.*, 244 N.Y. 84, 155 N.E. 58 (1926), explained:

We say at times that the corporate entity will be ignored when the parent corporation operates a business through a subsidiary which is characterized as an "alias" or a "dummy." All this is well enough if the picturesqueness of the epithets does not lead us to forget that the essential term to be defined is the act of operation. Dominion may be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent. . . . This is so, for illustration, though agency in any proper sense is lacking, where the attempted separation between parent and subsidiary will work a fraud upon the law.

*Id.* at 94-95, 155 N.E. at 61.

28. *E.g.*, *Fisser v. International Bank*, 282 F.2d 231 (2d Cir. 1960) (citing and following the *Lowendahl* criteria); *Brunswick Corp. v. Waxman*, 459 F. Supp. 1222 (E.D.N.Y. 1978) (same); *Hellenic Lines, Ltd. v. Winkler*, 249 F. Supp. 771 (S.D.N.Y. 1966) (same).

29. 18 N.Y.S.2d 414, 223 N.E.2d 6, 276 N.Y.S.2d 585 (1966). Plaintiff Walkovszky alleged that defendant Carlton was a stockholder of ten corporations, each owning two taxicabs insured against liability for the minimum statutory requirement of \$10,000 per vehicle. The plaintiff, injured by one of the defendant's cabs, sought recovery of an amount in excess of the individual corporation's capital. The defendant moved to dismiss the complaint on the ground that it failed to state a cause of action against him. *Id.* at 416, 223 N.E.2d at 7, 276 N.Y.S.2d at 587.

30. *Id.* at 418, 223 N.E.2d at 8, 276 N.Y.S.2d at 588.

31. *Id.* at 420, 223 N.E.2d at 10, 276 N.Y.S.2d at 590.

32. The plaintiff alleged that the corporations were "'operated . . . as a single entity, unit and enterprise' with regard to financing, supplies, repairs, employees and garaging. . . ." *Id.* at 416, 223 N.E.2d at 7, 276 N.Y.S.2d at 587.

avoid liability satisfied neither the corporate shell nor the fraud criteria because the corporation observed the minimum statutory requirements of form and liability insurance.<sup>33</sup>

Unlike the piercing the corporate veil doctrine, which permits the court to disregard the corporate entity for the purpose of finding liability, the fiduciary shield doctrine is concerned solely with the threshold issue of jurisdiction; namely, whether it is just to assert personal jurisdiction over a nonresident corporate employee who made his only meaningful contacts with the forum during the course of his corporate duties. Several courts maintain that it is unjust, because the contacts

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33. *Id.* at 420, 223 N.E.2d at 10, 276 N.Y.S.2d at 590. The court explained: "The corporate form may not be disregarded merely because the assets of the corporation, together with the mandatory insurance coverage of the vehicle which struck the plaintiff, are insufficient to assure him of the recovery sought." *Id.* at 419, 223 N.E.2d at 9, 276 N.Y.S.2d at 589. The court noted that piercing the corporate veil in this case would, in effect, substitute the court's assessment of what constitutes adequate corporate capitalization for that of the Legislature. *Id.* at 419, 223 N.E.2d at 9, 276 N.Y.S.2d at 590. However, in view of the court's alternative criterion for piercing the corporate veil, see *supra* note 31 and accompanying text, the plaintiff was given leave to serve an amended complaint. *Id.* at 421, 223 N.E.2d at 10, 276 N.Y.S.2d at 591. On appeal, the amended complaint was held to state a valid cause of action. *Walkovszky v. Carlton*, 23 N.Y.2d 714, 244 N.E.2d 55, 296 N.Y.S.2d 362 (1968).

For analyses of the criteria applied in *Walkovszky*, see Comment, *Application of Agency or Undercapitalization Theory to "Pierce Corporate Veil,"* 8 B.C. INDUS. & COM. L. REV. 981 (1967) (criticism of court's determination of adequate capitalization); Comment, *Tort Liability of Individual Shareholders of Cab Corporations*, 42 TUL. L. REV. 400 (1968) (discussion of plaintiff's theories justifying piercing the corporate veil); 55 ILL. B.J. 881 (1967) (criticism of court's unwillingness to examine the issue of corporate capitalization); 18 SYRACUSE L. REV. 875 (1967) (discussion of abusive use of incorporation to avoid liability).

In *Zubik v. Zubik*, 384 F.2d 267 (3d Cir. 1967), *cert. denied*, 390 U.S. 983 (1968), the plaintiff sought to pierce the veil of the defendant's undercapitalized corporation in order to hold its shareholders liable in tort for his injuries. There was evidence that the defendant had maintained a separate corporate existence. *Id.* at 272. The court refused to pierce, reasoning that the case of the injured tort claimant is distinguishable from that of the defrauded creditor: "the corporate form itself works no fraud on a person harmed in an accident who has never elected to deal with the corporation." *Id.* at 273.

The California Supreme Court, however, in *Minton v. Cavaney*, 56 Cal. 2d 576, 364 P.2d 473, 15 Cal. Rptr. 641 (1961), held that a corporate officer and equitable owner of a swimming pool corporation whose capital was "trifling compared with the business to be done and the risks of loss" could be held liable for the corporation's torts. The court found that inadequate capitalization and active participation in the conduct of corporate business were sufficient to allow the court to "disregard the corporate entity." *Id.* at 580, 364 P.2d at 475, 15 Cal. Rptr. at 643. As support for its opinion, the court relied upon *Automotriz Del Golfo de California, S.A. de C.V. v. Resnick*, 47 Cal. 2d 792, 306 P.2d 1 (1957), in which it held that in an action on a corporate debt, inadequate capitalization was a factor to be considered in determining that the shareholders had not maintained a corporate entity and thus were personally liable for the corporation's obligations. *Id.* at 796-97, 306 P.2d at 4.

that would satisfy personal jurisdiction requirements<sup>34</sup> benefitted the corporation and not the individual.<sup>35</sup> These courts will not require nonresident defendants to undergo the hardship of defending a suit in

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34. See *supra* notes 4 & 11.

35. See, e.g., *Lehigh Valley Indus. v. Birenbaum*, 527 F.2d 87 (2d Cir. 1975) (presence in forum benefitted corporation, not individual); *Wilshire Oil Co. v. Riffe*, 409 F.2d 1277 (10th Cir. 1969) (corporate activities not personal acts and therefore do not satisfy the "transacting business" criteria for finding personal jurisdiction); *Cawley v. Bloch*, 544 F. Supp. 133 (D. Md. 1982) (even tortious contacts as corporate representative insufficient to predicate personal jurisdiction); *State Sec. Ins. Co. v. Frank B. Hall & Co.*, 530 F. Supp. 94 (N.D. Ill. 1981) (fiduciary shield principles reflect recognition jurisdiction must comport "with fair play and substantial justice"); *Bulova Watch Co. v. K. Hattori & Co.*, 508 F. Supp. 1322 (E.D.N.Y. 1981) (same); *Grove Press, Inc. v. Central Intelligence Agency*, 483 F. Supp. 132 (S.D.N.Y. 1980), *rev'd on other grounds sub nom. Grove Press, Inc. v. Angelton*, 649 F.2d 121 (2d Cir. 1981) (unfair to subject individual to jurisdiction when employer derived primary benefit from acts in forum); *Louis Marx & Co. v. Fuji Seiko Co.*, 453 F. Supp. 385 (S.D.N.Y. 1978) (corporate officer acting on corporate business in jurisdiction not amenable to suit in personal capacity); *Idaho Potato Comm'n v. Washington Potato Comm'n*, 410 F. Supp. 171 (D. Idaho 1975) (same); *Hare v. Family Publications Serv.*, 342 F. Supp. 678 (D. Md. 1972) (jurisdiction over corporate employees and officers not predicated upon jurisdiction over corporation itself); *Fashion Two Twenty, Inc. v. Steinberg*, 339 F. Supp. 836 (E.D.N.Y. 1971) (same); *Path Instruments Int'l Corp. v. Ashi Optical Co.*, 312 F. Supp. 805 (S.D.N.Y. 1970) (New York long-arm not satisfied by conduct undertaken solely for corporation); *Willner v. Thompson*, 285 F. Supp. 394 (E.D.N.Y. 1968) (same); *Schenin v. Micro Copper Corp.*, 272 F. Supp. 523 (S.D.N.Y. 1967) ("transacting business" requirement not satisfied by activities undertaken on behalf of corporation); *Unicon Management Corp. v. Koppers Co.*, 250 F. Supp. 850 (S.D.N.Y. 1966) (absence of wrongdoing on part of defendants in their own individual capacity bars assertion of personal jurisdiction); *Hurleton Whittier, Inc. v. Barda*, 82 Ill. App. 3d 443, 422 N.E.2d 840 (1980) (personal jurisdiction criteria not satisfied by corporate representative's activities in forum); *Umans v. PWP Servs., Inc.*, 50 Md. App. 414, 439 A.2d 21 (1982) ("universal" rule that contacts by corporate representative insufficient to satisfy personal jurisdiction criteria); *Yardis Corp. v. Cirami*, 76 Misc. 2d 793, 351 N.Y.S.2d 586 (N.Y. Sup. Ct. 1974) (same); *LeVine v. Isoserve, Inc.*, 70 Misc. 2d 747, 334 N.Y.S.2d 796 (N.Y. Sup. Ct. 1972) (showing that defendant acted as corporate officer in forum insufficient to predicate personal jurisdiction); *Van Kleeck Creamery, Inc. v. Western Frozen Prods. Co.*, 24 Utah 2d 63, 465 P.2d 544 (1970) (full faith and credit to foreign judgment denied; improper assertion of personal jurisdiction over nonresident corporate officer). *But see* *Chancellor v. Lawrence*, 501 F. Supp. 997 (N.D. Ill. 1980) (nonresident corporate employees subject to personal jurisdiction where corporation's revenue, derived through activities in forum paid share of defendants' compensation, thus conferring benefit on defendants); *Merkel Assocs., Inc. v. Bellofram Corp.*, 457 F. Supp. 612 (W.D.N.Y. 1977) (fiduciary shield unavailable to nonresident individuals who commit business torts on behalf of corporate employers). See generally 3A W. FLETCHER, *supra* note 2, at § 1296.1 (general rules of jurisdiction over nonresident corporate fiduciaries).

At least one commentator is unimpressed with the court's search for fairness through the application of the fiduciary shield doctrine. As support for his position that the doctrine should be abandoned, Professor Sponsler cites the legitimate concerns of the state for anyone who enters its territory, the fact that employees do receive compensation for their activity in the forum state, and the likelihood both that the corporation indemnifies its employees' defense and liability judgment, and that the party seeking to defeat jurisdiction will probably eventually appear in the forum's courts as a witness in a similar suit against the corporation. Sponsler, *supra* note 3, at 364-65.



an alien forum,<sup>36</sup> notwithstanding the defendants' possible liability for the torts alleged.<sup>37</sup>

*Rene Boas & Associates v. Vernier*<sup>38</sup> is generally cited as the first case to apply the fiduciary shield doctrine.<sup>39</sup> The *Boas* court refused to extend its jurisdiction over a nonresident defendant whose contacts with the forum were entirely corporate.<sup>40</sup> The court, however, cited as pre-

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36. See *supra* note 11.

37. A corporate officer or employee who commits a tort in the course of his corporate activity may be held individually liable for the harm caused by a third party. *Polyglycoat Corp. v. C.P.C. Distrib.*, 534 F. Supp. (S.D.N.Y. 1982). See, e.g., *Laska v. Harris*, 215 N.Y. 554, 109 N.E. 599 (1915) (agent personally liable to plaintiff for false and fraudulent representations made on behalf of principal); *LaLumia v. Schwartz*, 23 A.D.2d 668, 257 N.Y.S.2d 348 (1965) (same); *Mendelson v. Boettger*, 257 A.D. 167, 12 N.Y.S.2d 671 (1939) (individual directors purporting to act on behalf of corporation liable to plaintiff for conversion); *Debobes v. Butterfly*, 210 A.D. 50, 205 N.Y.S. 170 (1924) (same). *Accord* *Natural Resources, Inc. v. Wineberg*, 349 F.2d 685 (9th Cir.) (corporate officer responsible for torts committed in the course of his corporate activities), cert. denied, 382 U.S. 1010 (1965); *Wyatt v. Union Mortgage Co.*, 24 Cal. 3d 773, 598 P.2d 45, 157 Cal. Rptr. 392 (1979) (directors and officers of corporation personally liable if they directly order, authorize, or participate in tortious conduct). See generally RESTATEMENT (SECOND) OF AGENCY § 354 (1957) (agent's liability for injury to third parties caused by negligence in fulfilling duty to principal); RESTATEMENT (SECOND) OF TORTS § 323 (1965) (agent liable to third parties for negligent performance of undertaking to render services to principal); 3A W. FLETCHER, *supra* note 2, at § 990 (officers and director personally liable for injury to third persons harmed in the course of business on a theory of misfeasance); *id.* § 1143 (corporate officer or agent personally liable for damages caused by fraud or deceit to persons directly injured thereby).

38. 22 A.D.2d 561, 257 N.Y.S.2d 487 (1965).

39. *Sponsler*, *supra* note 3, at 352. In two earlier cases, *Maternity Trousseau, Inc. v. Maternity Mart of Baltimore*, 196 F. Supp. 456 (D. Md. 1961) and *Odell v. Signer*, 169 So. 2d 851 (Fla. Dist. Ct. App. 1964), the courts sustained in personam jurisdiction notwithstanding the defendants' fiduciary shield arguments. The court in *Maternity Trousseau* asserted jurisdiction over a nonresident corporate officer based on its interpretation of Maryland's long-arm statute. The court's dicta, however, suggests that considerations of liability prompted the determination. 196 F. Supp. at 457-58. In *Odell*, the court citing *Maternity Trousseau*, reasoned that the defendant's personal liability for torts committed within the scope of employment established contacts sufficient to subject the defendant to personal jurisdiction. 169 So. 2d at 854. Similar reasoning has led one court to deny jurisdiction over nonresident defendants. In *Magidow v. Coronado Cattle Co.*, 19 Ariz. App. 38, 41, 504 P.2d 961, 964 (1972), the court refused to assert personal jurisdiction over two nonresident individuals because the plaintiff failed to show that the defendants had done, or had failed to do, any act which would give rise to personal liability.

The court in *Longines-Wittnauer Watch Co. v. Barnes & Reinecke*, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1969), however, emphasized that in construing the scope of New York's long-arm statute, the court is:

concerned solely with the problem of the court's jurisdiction over the person of a nonresident defendant and not with the question of his ultimate liability to a particular plaintiff; that issue is to be considered only after it is decided, on the basis of section 302, that the defendant is subject to . . . in personam jurisdiction. . . .

*Id.* at 460, 209 N.E.2d at 77, 261 N.Y.S.2d at 21.

40. 22 A.D.2d at 563, 257 N.Y.S.2d at 490.

cedent for its denial of jurisdiction two cases in which the courts refused to pierce the corporate veil.<sup>41</sup> Notwithstanding this ambiguous precedent, the Second Circuit, in *United States v. Montreal Trust Co.*,<sup>42</sup> acknowledged the fiduciary shield doctrine but found it inapplicable to the facts of the case.<sup>43</sup> The court found that the defendant's decedent had breached his fiduciary duty by diverting corporate funds during the course of his activities in New York.<sup>44</sup> The court reasoned that because the shield's rationale is to protect the corporate fiduciary from foreign jurisdiction predicated on activity undertaken to benefit the corporation, the defendant's diversion of corporate funds constituted personal business and was, therefore, a meaningful, personal contact with the forum sufficient to satisfy the criteria for asserting personal jurisdiction over a nonresident.<sup>45</sup> Similarly, in *Lehigh Valley Industries, Inc. v. Birenbaum*,<sup>46</sup> the Second Circuit considered the plaintiffs' allegations that the defendants had violated their corporate fiduciary responsibilities and were thus subject to jurisdiction in the forum notwithstanding the fiduciary shield doctrine.<sup>47</sup> The court held that in

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41. *Id.* (citing *Savoy Record Co. v. Cardinal Export Co.*, 15 N.Y.S.2d 1, 203 N.E.2d 206, 254 N.Y.2d 521 (1964) (agent signing contract on behalf of principal not personally liable for breach of the contract), and *Salzman Sign Co. v. Beck*, 10 N.Y.2d 63, 176 N.E.2d 74, 217 N.Y.S.2d 55 (1961) (corporate officer signing contract on behalf of corporation will not bind officer individually in the absence of explicit evidence of intent)).

42. 358 F.2d 239 (2d Cir.), *cert. denied*, 384 U.S. 919 (1966).

43. *Id.* at 243 (citing *Rene Boas & Assocs. v. Vernier*, 22 A.D.2d 561, 257 N.Y.S.2d 487 (1965)). The first use of the term "fiduciary shield" appears in *Montreal Trust*.

44. The court reasoned:

Klein could not have been acting in his role as a corporate officer when he allegedly directed a course of payments to his relatives and friends. It would be ironic, indeed, if the very corporations whose funds Klein is charged with diverting were to supply him with a shield against suit for tax liability allegedly incurred in connection with this purported breach of his fiduciary duty.

*Id.* The decedent Klein never personally entered New York in connection with the cause of action. He lived in Canada and worked through individuals in New York. The court determined that these individuals were Klein's agents for the purpose of diverting funds to his designees. Thus, their activities could form the basis for the assertion of personal jurisdiction over him. *Id.* at 244.

45. *Id.* at 243-44. Citing *Montreal Trust*, the court in *Krause v. Hauser*, 272 F. Supp. 549 (E.D.N.Y. 1966), held that conduct within New York that was in violation of a fiduciary duty and that furthered the defendant's individual interests constituted the transaction of personal business for purposes of applying § 302(a)(1). *Id.* at 552. *Accord* *Wilshire Oil Co. v. Riffe*, 409 F.2d 1277 (10th Cir. 1969) (allegation that acts perpetrated in violation of agent's fiduciary duty militates against use of fiduciary shield); *Topik v. Catalyst Research Corp.*, 339 F. Supp. 1102 (D. Md. 1972) (alleged breach of a fiduciary duty is recognized exception to fiduciary shield doctrine).

46. 527 F.2d 87 (2d Cir. 1975).

47. *Id.* at 92-93.

the absence of any facts which would justify the plaintiffs' allegations, the shield barred the assertion of personal jurisdiction.<sup>48</sup> Significantly, the court noted that the plaintiffs had failed to establish that the defendants manipulated the corporate entity for fraudulent or personal ends.<sup>49</sup>

Several courts have suggested that the fiduciary shield would be unavailable to a nonresident defendant who used his corporation as an alter ego.<sup>50</sup> In *Bulova Watch Co. v. K. Hattori & Co.*,<sup>51</sup> the court stated

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48. *Id.* at 93-94.

49. *Id.* at 93. The plaintiffs in *Lehigh* also attempted to establish jurisdiction over the defendants through § 302(a)(2), which permits the assertion of personal jurisdiction over a nonresident who commits a tortious act within the state. *Id.* at 92. The plaintiffs alleged that the defendants had wrongfully appropriated a business opportunity that belonged to them. The court found that the defendant had committed the allegedly tortious conduct in the forum while acting in his capacity as a corporate officer, and therefore refused to assert jurisdiction. However, the court indicated that the plaintiffs' theory of personal jurisdiction under § 302(a)(2) would have been successful had they alleged that the defendants disregarded their responsibility to the corporation and actually acted in their own interest. *Id.* at 92-93. If the plaintiffs had been able to do so successfully, however, they would have satisfied the § 302(a)(1) requirement that nonresident defendants "transact business" in the forum.

50. *See, e.g.,* Puerto Rico Maritime Shipping Auth. v. Almogy, 510 F. Supp. 873, 876 (S.D.N.Y. 1981) (network of corporations forming defendant's alter ego will not raise fiduciary shield); Warren v. Dynamics Health Equip. Mfg. Co., 483 F. Supp. 788, 793 (M.D. Tenn. 1980) (jurisdiction denied because plaintiff did not offer evidence to support contention that defendant was corporate alter ego); Testa v. Janssen, 482 F. Supp. 1195, 1199 (W.D. Pa. 1980) (jurisdiction denied because plaintiffs did not contend defendant was alter ego of corporation); Lamar v. American Basketball Ass'n., 468 F. Supp. 1198, 1203 (S.D.N.Y. 1979) (must be inference that corporation is doing business as defendant's alter ego); Quinn v. Bowmar Publishing Co., 445 F. Supp. 780, 786 (D. Md. 1978) (fiduciary shield excepted where corporation is facade for defendant's individual activities); Willner v. Thompson, 285 F. Supp. 394, 397 (E.D.N.Y. 1968) (jurisdiction not asserted without allegation that corporation is defendant's alter ego); Magidow v. Coronado Cattle Co., 19 Ariz. App. 38, 42, 504 P.2d 961, 965 (1972) (fiduciary shield intact as plaintiffs did not support alter ego allegation with facts). *See also* Dudley v. Smith, 504 F.2d 979, 982-83 (5th Cir. 1974) (stockholder may be in privity with his corporation such that judgment against latter is res judicata as to former if two are found to be alter egos). *But see* Minton v. Cavaney, 56 Cal. 2d 576, 364 P.2d 473, 15 Cal. Rptr. 641 (1961) (although the court was willing to pierce the corporate veil and hold the corporate secretary-director liable for corporate tort, the judgment was not binding upon him unless he controlled litigation leading to judgment). *Cf.* Andrulonis v. United States, 526 F. Supp. 183, 187 (N.D.N.Y. 1981) (systematic activities of subsidiary or agent in New York may subject foreign principal to personal jurisdiction); *Bulova Watch Co. v. K. Hattori & Co.*, 508 F. Supp. 1322, 1334 (E.D.N.Y. 1981) (jurisdictional balancing assessing fairness of asserting jurisdiction over nonresident requires examination of foreign parent-local subsidiary relationship); Finance Co. of Am. v. Bankamerica Corp., 493 F. Supp. 895, 903-09 (D. Md. 1980) (personal jurisdiction asserted over nonresident corporate principal who substantially controls subsidiary in forum); Energy Reserves Group, Inc. v. Superior Oil Co., 460 F. Supp. 483, 490 (D. Kan. 1978) (long-arm statute authorizes jurisdiction over nonresident corporation owning affiliated corporation that committed acts at direction of or for benefit of principal in forum). *But cf.*

in dictum what *Montreal Trust*<sup>52</sup> and *Lehigh Valley Industries*<sup>53</sup> implied; namely, that the equitable purpose of the fiduciary shield doctrine would be subverted by its application to nonresident defendants who had used the corporate form for personal benefit.<sup>54</sup> Three Maryland courts<sup>55</sup> applied the *Bulova* dictum and disregarded the fiduciary shield. In one case the defendant had not maintained the corporate form.<sup>56</sup> In another, the defendant's partnership had established the corporation to hold title to real estate for the partnership's benefit.<sup>57</sup> In the third, the defendant had created and dominated his corporation for

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Ferrante Equip. Co. v. Lasker-Goldman Corp., 26 N.Y.2d 280, 283, 258 N.E.2d 202, 204, 309 N.Y.S. 913, 916 (1970) (mere status as controlling stockholder insufficient to justify piercing corporate veil to assert jurisdiction without additional alter ego showing). See generally 3A W. FLETCHER, *supra* note 2, at § 1296.1 (personal jurisdiction generally not available over nonresident directors, officers, or agents acting in forum); 4 C. WRIGHT & A. MILLER, *supra* note 4, at § 1069 (methods of obtaining jurisdiction over parent corporation through subsidiary's acts in forum).

51. 508 F. Supp. 1322 (E.D.N.Y. 1981).

52. 358 F.2d 239 (2d Cir. 1966). See *supra* notes 41-44 and accompanying text.

53. 527 F.2d 87 (2d Cir. 1975). See *supra* notes 45-48 and accompanying text.

54. 508 F. Supp. at 1348. The court reasoned:

As the term "fiduciary shield" suggests, this is an equitable doctrine. It should be followed not with mechanically [*sic*] but with a sound exercise of discretion. If, for example, the parent lacked sufficient assets to respond or if it were a shell utilized by an individual defendant for his own benefit, the balance of fairness might be tipped and jurisdiction over the individual might lie.

*Id.*

55. *Holfield v. Power Chem. Corp.*, 382 F. Supp. 388 (D. Md. 1974); *Groom v. Margulies*, 257 Md. 691, 265 A.2d 249 (1970); *Harris v. Arlen Properties, Inc.*, 256 Md. 185, 260 A.2d 22 (1969).

56. *Groom v. Margulies*, 257 Md. 691, 703, 265 A.2d 249, 254-55 (1970). In *Groom*, the court distinguished the issue of jurisdiction from that of liability. It rejected the nonresident defendant's argument that because the defendant could not be held personally liable for his corporation's torts in the forum, the court could not assert personal jurisdiction over him. The court explained that the liability defense "goes to the merits of the case, not to the power of the court to make the adjudication." *Id.* at 703-04, 265 A.2d at 255.

Three weeks after the Second Circuit decided *Marine Midland*, the Maryland Court of Special Appeals held that personal jurisdiction was properly exercised over a nonresident defendant whose only contacts with the forum were the activities of his corporate alter ego. *Feldman v. Magnetix Corp.*, 50 Md. App. 308, 437 A.2d 895 (1981). The court was careful to note, however, that its holding did not "intimate anything with respect to a forum state's 'Long Arm' *in personam* jurisdiction over an individual who is, as an agent, just one small cog in the machinery under a large and multifaceted corporate entity." 50 Md. App. at 312, n.2, 437 A.2d at 897 n.2. Cf. *Umans v. PWP Servs., Inc.*, 50 Md. App. 414, 421, 439 A.2d 21, 25 (1982) (no jurisdiction where *Groom* and *Feldman* alter ego exception to fiduciary shield was not indicated by facts of case).

57. *Harris v. Arlen Properties, Inc.*, 256 Md. 185, 260 A.2d 22 (1969). The court explained that jurisdiction over the nonresident partnership will lie when the partnership created the corporation and totally controlled activity in the forum solely to accomplish its own objectives.

the sole purpose of carrying out his marketing plans.<sup>58</sup>

There is a minority view which holds that a corporate fiduciary's tortious activity within the forum defeats the fiduciary shield and forms the basis for the assertion of personal jurisdiction.<sup>59</sup> In *Merkel Associates, Inc. v. Bellofram Corp.*,<sup>60</sup> the court in dictum stated that such an assertion of personal jurisdiction would not conflict with the equitable purpose of the shield.<sup>61</sup> The court noted that a corporation is presumed to be law-abiding. Because it would not authorize its employees to commit a tort, the individual employee who commits torts in the forum does so on his own behalf, thus satisfying the criteria for asserting personal jurisdiction.<sup>62</sup> Several courts have criticized this position as both largely unprecedented and unfair when the tort with which the individ-

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58. *Holfeld v. Power Chem. Co.*, 382 F. Supp. 388 (D. Md. 1974). The defendant was president, member of the board and majority stockholder in the corporation. The court's finding of an "unmistakable identity of interest" between the defendant and the corporation, the *Harris* precedent, and the significant forum state's interests at issue convinced the court to disregard the fiduciary shield doctrine. *Id.* at 394.

Although the cases cited *supra* notes 55-57 and accompanying text interpret Maryland's long-arm statute, CTS. & JUD. PROC. § 6.103 (1980), they should also serve as authority for courts interpreting New York's long-arm statute. Maryland's long-arm was modeled after the UNIF. INTERSTATE & INT'L PROCEDURE ACT § 1.03, 13 U.L.A. 466 (1980). *Carter v. Massey*, 436 F. Supp. 29 (D. Md. 1977). New York's § 302(a) was modeled after Illinois' long-arm statute, ILL. REV. STAT. ch. 110, § 17 (1956). New York Advisory Comm. Rep. (N.Y. Legis. Doc., 1958, No. 13), N.Y. Civ. Prac. Law § 302 (Consol. 1978). Illinois' long-arm was the model for the UNIF. INTERSTATE & INT'L PROCEDURE ACT, 13 U.L.A. 467 (1980). Both New York and Maryland limit their *in personam* jurisdiction by requiring that nonresident defendants' minimum contacts relate to the cause of action in the suit.

59. *See, e.g., In re Mid-Atlantic Toyota Antitrust Litig.*, 525 F. Supp. 1265, 1270 (D. Md. 1981) (fiduciary shield inapplicable where corporate officer has allegedly committed personal or business tort within forum); *Donner v. Tams-Witmark Music Library, Inc.*, 480 F. Supp. 1229, 1234 (E.D. Pa. 1979) (corporate officer's business tort in forum sufficient to establish personal jurisdiction); *Merkel Assocs., Inc. v. Bellofram Corp.*, 437 F. Supp. 612 (W.D.N.Y. 1977) (dictum) (fiduciary shield unavailable to individuals who commit business torts on behalf of their corporate employers); *Oxmans' Erwin Meat Co. v. Blacketer*, 86 Wisc. 2d 683, 692, 273 N.W.2d 285, 289 (1978) (corporate agent not shielded from personal jurisdiction if he, as agent of corporation, commits tort in forum). *Cf. Grove Press, Inc. v. Central Intelligence Agency*, 483 F. Supp. 132, 135 (S.D.N.Y. 1980) (tortious acts of government officers will predicate an assertion of personal jurisdiction under § 302(a)(2)), *rev'd on other grounds sub. nom. Grove Press, Inc. v. Angleton*, 649 F.2d 121 (2d Cir. 1981).

60. 437 F. Supp. 612 (W.D.N.Y. 1977).

61. *Id.* at 618-19. The court specifically applied the facts of the case to § 302(a)(2), which authorizes jurisdiction over nonresident individuals who commit tortious acts in the state. The court refused to assert jurisdiction over the defendants because the plaintiffs failed to allege facts that would indicate that the defendants had committed torts in New York. *Id.* at 620.

62. *Id.* at 619.

ual is charged is also directly attributable to his corporate employer.<sup>63</sup>

The Second Circuit Court of Appeals, in *Marine Midland Bank, N.A. v. Miller*,<sup>64</sup> held that the fiduciary shield doctrine will not defeat the assertion of personal jurisdiction over a nonresident defendant who acts in the forum through a corporate alter ego.<sup>65</sup> The court distinguished the issue of shareholder liability for torts committed by an individual acting in a corporate capacity from the issue of amenability to personal jurisdiction under the New York long-arm statute predicated solely on those acts.<sup>66</sup> Although misfeasance in the forum may subject the corporate officer or employee to liability,<sup>67</sup> it does not necessarily support the assertion of personal jurisdiction. The fiduciary shield's purpose, the court explained, is to prevent the unfair situation of subjecting a nonresident defendant to personal jurisdiction predicated solely on acts he undertook for the benefit of his employer.<sup>68</sup>

The court limited the fiduciary shield to equitable applications, with fairness as the ultimate test of appropriateness.<sup>69</sup> Relying on its decision in *Montreal Trust*,<sup>70</sup> the court found that the activities raising the shield were actually undertaken for the corporation's benefit and not

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63. See, e.g., *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 902 (2d Cir. 1981) (*Merkel* opinion not prevailing view; alleged tort of negligent misrepresentation consisted merely of support for corporate misstatements); *Cawley v. Bloch*, 544 F. Supp. 133, 136 (D. Md. 1982) (even tortious acts committed on behalf of corporation do not subject individual to personal jurisdiction); *State Sec. Ins. Co. v. Frank B. Hall & Co.*, 530 F. Supp. 94, 97 (N.D. Ill. 1981) (*Merkel* minority view; Illinois follows majority as expressed in *Marine Midland*); *Bulova Watch Co. v. K. Hattori & Co.*, 508 F. Supp. 1322, 1347 (E.D.N.Y. 1981) (jurisdiction over nonresident defeated because defendants were acting as agents of a corporation when they committed tort); *Fashion Two Twenty, Inc. v. Steinberg*, 339 F. Supp. 836, 841-42 (E.D.N.Y. 1971) (same).

64. 664 F.2d 899 (2d Cir. 1981).

65. *Id.* at 903-04. In *Marine Midland Bank, N.A.*, the plaintiff argued that jurisdiction over Miller could be predicated upon his tortious activity in the forum, as authorized by § 302(a)(2). Brief for Appellant at 8-19, *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899 (2d Cir. 1981). The court, in holding that § 302(a) was the appropriate authority, refused to assert jurisdiction under § 302(a)(2). *Id.* at 902-03. The court rejected the *Merkel* dictum, explaining that it was the minority view and that "given the rationale for the fiduciary shield doctrine . . . it is obvious that the doctrine should be applied where the tort alleged is negligent misrepresentation and the statements attributed to the corporate agent consisted of no more than confirmations and reiterations of the corporation's own statements." *Id.* at 902-03.

66. *Id.* at 903.

67. See *supra* note 37.

68. 664 F.2d at 902.

69. *Id.* at 903.

70. 358 F.2d 239 (2d Cir.), cert. denied, 384 U.S. 919 (1966). See *supra* notes 41-44 and accompanying text.

for the individual's advantage.<sup>71</sup> The court observed that it had suggested in *Lehigh Valley Industries*,<sup>72</sup> that the fiduciary shield doctrine would not protect a nonresident corporate fiduciary from an assertion of personal jurisdiction if the facts of the case indicate that he acted in the forum for his own benefit or to the detriment of the corporation. The court rejected the *Merkel* dictum and declined to predicate jurisdiction upon the plaintiff's allegations that the defendant had committed a tort in the forum. The court reasoned that the tortious activity alleged was indistinguishable from the corporate business that prompted defendant's presence in the forum.<sup>73</sup>

To determine whether the fiduciary shield should preclude jurisdiction, the court found it necessary to examine not only the loyalty of the employee to his employer, but also the relationship between the two.<sup>74</sup> The court cited *Bulova Watch*,<sup>75</sup> in which Judge Weinstein found that a court should assert jurisdiction over an individual stockholder if he undercapitalized the corporation or used the corporate form as a shell for his own benefit. The court explained that the criteria for applying the fiduciary shield to defeat personal jurisdiction begins and ends with an examination of the corporate form. If the corporation functions merely as a shell for its owners, then the corporate activity accrues to their own benefit and it is equitable to predicate personal jurisdiction upon this activity.<sup>76</sup> The showing that the corporate form was used to commit fraud, which a number of courts have found necessary to pierce the corporate veil to fix liability upon shareholders,<sup>77</sup> is irrelevant to the assertion of personal jurisdiction over one of the corporation's fiduciaries. The court held that a prima facie showing that the corporation is a shell for the defendant is sufficient to defeat, at least temporarily, a pretrial motion to dismiss for lack of personal jurisdiction.<sup>78</sup>

The Second Circuit, in *Marine Midland*, clearly distinguished the issue of asserting personal jurisdiction over nonresident corporate

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71. 664 F.2d at 903.

72. 257 F.2d 87 (2d Cir. 1975). See *supra* notes 45-48 and accompanying text.

73. 664 F.2d at 903.

74. *Id.* at 902-03. See *supra* notes 58-62 and accompanying text.

75. 508 F. Supp. 1322 (E.D.N.Y. 1981). See *supra* notes 50-57 and accompanying text.

76. 664 F.2d at 903.

77. *Id.* See *supra* notes 19-27 and accompanying text. But see notes 29-33 and accompanying text (fraud not necessarily required to pierce corporate veil to hold dominating shareholder liable for corporate torts).

78. 664 F.2d at 904.

fiduciaries from the issue of holding shareholders liable for torts committed through the corporation's agents.<sup>79</sup> By carefully delineating the test for piercing the corporate veil, and then contrasting it with the standard for applying the fiduciary shield doctrine,<sup>80</sup> the court both reestablished the integrity of the fiduciary shield doctrine and facilitated the assertion of personal jurisdiction over nonresident corporate fiduciaries by withholding the shield's protection from those fiduciaries who use the corporation as an alter ego. Shielding from jurisdiction nonresident corporate fiduciaries who were the primary beneficiaries of the business that was conducted in the forum through a corporation which had no independent existence debases the equitable purpose of the doctrine.<sup>81</sup> Additionally, by rejecting the plaintiff's arguments that jurisdiction could be predicated on the defendant's alleged tortious activity in the forum,<sup>82</sup> the court recognized the true purpose of the fiduciary shield doctrine. Nonresident corporate officers, directors, and employees whose activities benefit only the corporation and subject the corporation to jurisdiction and liability, should not have to undergo the hardship of defending themselves against allegations of misfeasance in an alien forum.<sup>83</sup> Such parties potentially would have been subject to personal jurisdiction had the court predicated jurisdiction over Miller upon his alleged tortious activity, thereby gutting the equitable nature of the fiduciary shield doctrine. Furthermore, underlying the court's opinion is the recognition that the theory of in personam jurisdiction pertains to the legal and social benefits the defendant enjoys when he transacts business in the forum.<sup>84</sup> The lower court's requirement of an

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79. *Id.* at 903.

80. *Id.*

81. *See supra* note 63 and accompanying text.

82. 664 F.2d at 902-03. *See supra* notes 63 & 65. In dismissing the plaintiff's *Merkel* based arguments in favor of asserting personal jurisdiction, the court may have limited further the fiduciary shield doctrine's applicability. Arguably, the court's dicta suggests that only those corporate agents whose torts consist of carrying out tortious activity per the corporation's intention shall be shielded from assertions of personal jurisdiction.

83. *See supra* notes 37, 63 & 65.

84. *See supra* notes 5 & 11.

By preserving, rather than disregarding, the fiduciary shield doctrine, the Second Circuit's analysis may reflect a perceptive reading of the Supreme Court's several opinions relating to personal jurisdiction over nonresident defendants. The Second Circuit's emphasis on who actually benefits from the activity in the forum parallels the Supreme Court's concern that the minimum contacts with the state which would support an assertion of personal jurisdiction over the defendant were sufficient to satisfy "traditional notions of fair play and substantial justice." In other words, subjecting a nonresident defendant to a foreign state's jurisdiction to respond to an action that arose



additional showing of fraud,<sup>85</sup> which the Second Circuit found necessary to pierce the corporate veil,<sup>86</sup> bears no relationship to the fact that the defendant was the chief beneficiary of his alter ego's activities in the forum.<sup>87</sup>

The *Marine Midland* court faced an unusual fact situation. Defendant Miller appeared to preserve the corporate form, albeit as a shell.<sup>88</sup> There was no showing, as in *Montreal Trust*, that he had breached his fiduciary obligation to the corporation. Therefore, the court shifted its inquiry from the benefits the corporation received from the defendant employee's activities in the forum, to the identity of those who controlled and benefitted from those activities. The court's approach was logical and supported by dicta in other decisions.<sup>89</sup> *Marine Midland* will be persuasive precedent for courts faced with the challenge of defeating an inequitable application of the fiduciary shield doctrine.<sup>90</sup>

The assertion of personal jurisdiction over the nonresident must be fair to both the defendant and the plaintiff. The unwitting plaintiff should not be forced to pursue his suit in a distant forum because defendant transacted his business under a corporate name. The defendant did not find it onerous to transact what appeared to be his own business in the forum. He therefore availed himself of the forum's privileges and responsibilities. The rationale supporting a finding of in

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out of activity undertaken by him but unrelated to his personal interest arguably does not comport with "fair play and substantial justice." See *Iowa ex rel Miller v. Internal Energy Management Corp.*, 324 N.W.2d 707, 711 (Iowa 1982) (court states in dictum that fiduciary shield doctrine is a constitutional due process limitation on jurisdiction). But see *supra* notes 11 & 14.

85. 512 F. Supp. 602, 604 (S.D.N.Y. 1981).

86. See *supra* notes 20-32 and accompanying text.

87. 664 F.2d at 903.

88. *Id.* at 902.

Unfortunately, nowhere in the opinion does the court explicitly state what must be pleaded and proved to make a prima facie showing that a corporation is actually a "shell" or "alter ego." It appears the court will examine the scheme of ownership of the corporation, the adequacy of its capitalization in relation to the scope of its activities, and the method in which its funds are maintained and disbursed. *Id.* at 904. Apparently, the court will look for personal domination of the corporation to the extent that the corporation has no identity apart from the fiduciary controlling it. See *supra* note 58 and accompanying text.

89. See *supra* notes 49-53 and accompanying text.

90. In *Cawley v. Bloch*, 544 F. Supp. 133 (S.D. Md. 1982), the court cited *Marine Midland* as dispositive of the *Merkel* dicta. See *supra* note 63 and accompanying text. Similarly, the court in *Sharp Elecs. Corp. v. Hayman Cash Register Co.*, 1982-2 Trade Cas. (CCH) ¶ 64,803 (D.N.J. May 20, 1982), refused to assert personal jurisdiction over a nonresident fiduciary defendant because the facts alleged did not satisfy the alter ego fiduciary shield exception established in *Marine Midland*.

personam jurisdiction is satisfied and the fiduciary shield remains intact to protect those it was intended to shield. Accordingly, it was just that the forum subjected him to its jurisdiction.

*K.M.K.*