

Reverse Veil Piercing and the Religious Rights of For-Profit Employers An Article Review

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Reverse veil piercing is not an obscure form of body art but an obscure legal doctrine related to corporate law. Stephen Bainbridge of the UCLA School of Law wrote an article called “Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of Incorporated Employers,” which can be downloaded at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2229414. Assuming that you are not a corporate law attorney, why should you care? Because this is potentially an important argument in the debate over whether the HHS mandate to provide contraceptive and abortifacient services should apply to employers who have religious objections.

In corporate law, a corporation has a separate legal personality from the individuals who own it, the shareholders. This legal structure is useful to keep the debts and obligations of the company separate from those of the individuals. The type of company discussed here is closely held (not public), so we’ll call the shareholders the owners. Separate corporate structure means that if the company fails, the owners lose the company, but not everything else they own. Sometimes, if a creditor believes that the owner was acting fraudulently, or improperly mixed personal and corporate finances, the creditor will try to go after the owner for the company’s debts. This is called “piercing the corporate veil.” It might be more accurate to call it “knocking down the corporate wall.”

Reverse veil piercing works the other way. It lets the individuals who own the corporation disregard the corporation’s separate legal existence and treat the company as the owners’ alter ego, or an expression of the owners’ personality. Of course, small or closely held companies are often in fact an expression of the owners’ personality.

As Professor Bainbridge says, the core question in the HHS mandate cases that involve for-profit companies is whether people who form a corporation lose their rights to free exercise of religion. They and their corporation are separate legal persons, so what rights does each have? Courts have not decided whether for-profit corporations themselves can exercise religion. Prof. Bainbridge observes that so far there has been no coherent doctrinal framework for dealing with the corporate form and when it should be ignored.

If reverse veil piercing were applied in the HHS mandate for-profit cases, the owners would ask the court to disregard the corporation’s separate identity and vindicate the owners’ constitutional rights. The owners’ personal beliefs would be applied to the company. Prof. Bainbridge suggests that a logical way to resolve these for-profit HHS mandate cases would be to analyze relevant factors to see whether reverse veil piercing

was justified in each particular case. He discusses a list of factors, including the number of shareholders, their religious beliefs, how the corporation is operated in terms of religion, and so on.

This proposed framework is an interesting and logical approach to the HHS mandate cases. Perhaps it will be applied as the cases move forward.