SCOTX Ruling Confirms Individual Liability for Corporate Owners Who Commit Torts

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This article has been published in the *PLI Chronicle: Insights and Perspectives for the Legal Community,* https://bit.ly/49KsHti.

In Texas, as most other states, it is long settled that corporate agents are personally liable for their own tortious or fraudulent conduct—even if the conduct was done in their capacity as a corporate agent. Section 21.223 of the Texas Business Organizations Code, however, provides that shareholders can be liable for corporate obligations only in certain limited circumstances.

Prior to the Texas Supreme Court's recent decision in *Keyes v. Weller,* 692 S.W.3d 274 (Tex. 2024), a split had arisen regarding whether Section 21.223 applied to limit the direct liability of a shareholder for their own tortious conduct in their capacity as a corporate officer or agent. Most courts had held that it did not, and that the statute's application was limited to attempts to impose liability on a shareholder through veil piercing or alter ego theories. Other courts, however, had held that Section 21.223 applied to any attempt to hold a shareholder liable for their own tortious conduct even in their capacity as an officer or agent, as long as the claim related to a corporate obligation.

Keyes resolved the split and held that Section 21.223 does not limit an individual shareholder's liability for their own tortious acts committed while acting as a corporate officer or agent. Yet in resolving this split, the court left open other important issues regarding how and when Section 21.223 limits shareholder liability for conduct committed not as a corporate agent, but as a shareholder. These open issues may impact practitioners addressing cases in which a party seeks to hold a shareholder or officer liable for corporate obligations.

Individual Liability of Corporate Shareholders and Corporate Agents Under Texas Law

Texas common law has long provided that corporate agents are personally liable for their own fraudulent or tortious conduct, even when they are acting on behalf of their corporate principal. *Miller v. Keyser,* 90 S.W.3d 712, 717 (Tex. 2002); *Weitzel v. Barnes,* 691 S.W.2d 598, 601 (Tex. 1985); *Leyendecker & Assocs. v. Wechter,* 683 S.W.2d 369, 375 (Tex. 1984); *JJJJ Walker, LLC v. Yollick,* 447 S.W.3d 453, 470 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

At the same time, Texas common law has also provided that corporate shareholders, officers, and directors are generally shielded from liability for corporate obligations. *Keyes,* 692 S.W.3d at 278; *Willis v. Donnelly,* 199 S.W.3d 262, 271 (Tex. 2006). In response to expansion of common law veil piercing and alter ego theories, in 1989, the Texas legislature amended Article 2.21 of the Texas Business Corporation Act in an effort to take a "stricter approach to disregarding the corporate structure." *Keyes,* 692 S.W.3d at 278 (quoting *SSP Partners v. Gladstrong Invs. (USA) Corp.,* 275 S.W.3d 444, 445 (Tex. 2008)). Today, these statutes are found at Sections 21.223-21.225 of the Texas Business Organizations Code.

Section 21.223 protects shareholders from liability for a corporation's contractual obligations unless the shareholder caused the corporation to be used for perpetrating an actual fraud for the direct personal benefit of the shareholder. TEX. BUS. ORGS. CODE §21.223(b). And Section 21.224 provides that Section 21.223 is the exclusive method for holding a shareholder liable for a corporate obligation and that it preempts any common law basis for veil piercing. *Id.* at §21.224.

Over the years, however, courts applying Texas law divided on which standard applies to a person who is both a shareholder and serves as an officer or agent of the company.

The majority of courts had held that Section 21.223's application turned on whether the claimant was attempting to hold a person liable for their conduct as an agent rather than their conduct or status as a shareholder. *Keyes,* 692 S.W.3d at 280. Those courts held that shareholder status alone did not entitle a person to the protections of Section 21.223 for direct liability for their own conduct in their capacity as a corporate agent. *See, e.g., Id.* at 280, n.9 (citing cases); *Bates Energy Oil & Gas v. Complete Oilfield Servs.,* 361 F. Supp. 3d 633, 672-73 (W.D. Tex. 2019). Furthermore, they held that Section 21.223's protections only applied when a claimant sought to hold a shareholder liable via a veil piercing theory.

Other courts held that Section 21.223 applied to any attempt to impose tort liability on a shareholder so long as the claim at issue arose from or related to corporate obligations. *Keyes,* 692 S.W.3d at 280 (discussing *TecLogistics, Inc. v. Dresser-Rand Grp.,* 527 S.W.3d 589 (Tex. App.—Houston [14th Dist.] 2017, no pet.); *Texas-Ohio Gas, Inc. v. Mecom,* 28 S.W.3d 129 (Tex. App.—Texarkana 2000, no pet.); *R.P. Small Corp. v. Land Dep't, Inc.,* 505 F. Supp. 3d 681,

698-99 (S.D. Tex. 2020); *Saeed v. Bennett-Fouch Assocs.,* 2012 WL 13026741, at *3 (N.D. Tex. Aug. 26, 2012)). According to their rulings, shareholders were entitled to the protection of Section 21.223 even if the claimant sought to hold them directly liable for their own alleged tortious conduct as a corporate agent.

Faced with this division over the Section 21.223's scope of protection, the Texas Supreme Court granted review in *Keyes v. Weller.*

The Court Resolves the Split in *Keyes v. Weller*

David Weller, as sole member of his aviation consulting services company, IntegriTech Advisors LLC, negotiated the terms of an employment relationship with Mary Alice Keyes and Sean Leo Nadeau, who are both owners and corporate agents of MonoCoque Diversified Interests LLC. Weller accepted the terms and began working for MonoCoque on January 13, 2018. A few weeks after he began employment, Weller was presented with a term sheet containing (among other things) revised compensation and bonus provisions. The term sheet changed the agreed-upon bonus from 2% of companywide gross revenue to 2% gross revenue based upon the level of activity Weller put into each sale.

Over the next few months, the parties exchanged drafts of the documents but could not reach an agreement, and Weller did not sign. Keyes and Nadeau did not pay Weller any revenue payments, and he resigned on May 29, 2018. MonoCoque, through its attorney, responded to a demand from Weller saying that his employment was at will and that he was not owed further payment. Weller filed suit, asserting breach of contract and fraud allegations and invoking the Texas Securities Act. In addition to other claims against MonoCoque, Weller alleged that Keyes and Nadeau were personally liable for their fraudulent and tortious conduct as agents of MonoCoque.

Keyes and Nadeau moved for summary judgment on the claims against them individually on the grounds that Section 21.223 shielded them from liability because their conduct was performed in their capacity as corporate agents. On this basis, the trial court granted summary judgment. The court of appeals reversed, holding that "Section 21.223's limitations on corporate owners' liability apply when claimants seek to hold such owners liable for corporate obligations by piercing the corporate veil, but that the statute does not abrogate longstanding common law that 'individuals are directly liable for their own tortious conduct—even if committed in the course and scope of their employment.'" *Keyes,* 692 S.W.3d at 499. In reaching its conclusion, the court of appeals acknowledged the split of authority regarding this issue.

The Texas Supreme Court affirmed the court of appeals, siding with the majority of courts that had addressed the issue. It held that Section 21.223 has no effect on the common law principle that corporate agents are personally liable for their own tortious conduct. The court's analysis focused on how it interpreted Section 21.223. It determined that the statute's language and history "confirm that the statute's focus has always been, and continues to be, on the liability of shareholders for matters relating to corporate contractual obligations—not the liability of corporate agents for their own misconduct." *Id.* The court thus concluded that

> *In sum, we do not understand Section 21.223 to shield a corporate agent who commits tortious conduct from direct liability merely because the officer or agent also possesses an ownership interest in the corporation. Accordingly, we hold that Section 21.223 has no effect on the independent common-law principle that corporate agents who direct or engage in tortious conduct are personally liable for that conduct. Keyes, 692 S.W.3d at 282.*

Practitioners, however, should take into consideration the observations made by the concurring opinions of Justice Bland (joined by three other justices) and Justice Busby regarding the questions left open by *Keyes.*

Justice Busby, in his concurring opinion, agreed "that Section 21.223 of the Texas Business Organizations Code does not limit the direct liability of a shareholder for his own tortious acts committed as a corporate officer or agent." *Id.* at 283. He then noted that "[t]he Court quite properly does not address under what circumstances Section 21.223 would limit the direct liability of a shareholder for tortious acts not committed as a corporate officer or agent—an issue neither briefed by the parties nor before us in this case." *Keyes,* 692 S.W.3d at 284 (emphasis in original). Justice Busby further stated "that courts and counsel must consult the statutory text and parts of the Court's opinion to guide a proper analysis of that issue in future cases." *Id.*

In Justice Busby's view, the text of Section 21.223 "gives no significance to the defendant's role—that is, the capacity in which he acts—when committing the tort alleged." *Id.* Or, as he explained, whether Section 21.223 applies does not turn on "which 'hat' the defendant shareholder wears" because "his role or capacity has no relevance in determining whether the statute applies." *Id.* "A…relevant question will be—as the Court's opinion and Justice Bland's concurrence note—whether that particular liability relates to a corporate contractual obligation or is simply direct liability for his own tortious acts." *Id.*

Justice Bland, in her concurring opinion joined by three other justices, stated that she joined the court's opinion because "summary judgment was improper because the officer defendants adduced no evidence demonstrating that the statements made to the plaintiff

about company employment were in an owner's role rather than as corporate officers acting on behalf of the company." *Id.* at 284-85. But Justice Bland wrote to "emphasize this distinction," explaining that "Section 21.223 remains a shield against a suit seeking to impose liability based on shareholder conduct for matters relating to a corporate contractual obligation unless the shareholder directly benefits from the transaction." *Id.* As she stated, "the law imposes individual liability only in 'extraordinary circumstances.'" *Id.* (quoting *Sagebrush Sales Co. v. Strauss,* 605 S.W.2d 857, 860 (Tex. 1980)). She then emphasized that Section 21.223 has displaced common law veil piercing. *Id.* at 285.

Justice Bland further noted that the "Court's opinion appropriately distinguishes the role of the shareholder from that of a corporate officer and concludes that Section 21.223, standing alone, does not shield conduct unrelated to the shareholder role." *Id.* at 287. Her opinion then goes on to state that "when a shareholder acts pursuant to the rights or obligations of *ownership,* the shareholder is not acting as an agent of the corporation." *Id.* She also remarked that it is "doubtful" that a shareholder "could ever be liable for a matter *relating* to a contractual obligation of the company" in the absence of a direct personal benefit as required by Section 21.223. *Id.* (emphasis added). Justice Bland concluded that

> *A defendant's ownership interest in a business organization is not alone sufficient to conclude Section 21.223 applies. But if the defendant establishes that the conduct alleged is shareholder conduct, not an act of the corporation itself, then the defendant may invoke Section 21.223, subject to the specific parameters governing the type of business organization involved. Id.*

The Texas Business Courts and Fifteenth Court of Appeals Could Answer the Questions Unresolved by *Keyes*

The newly created Texas Business Courts and Fifteenth Court of Appeals (which has appellate jurisdiction over orders and judgments of the Business Courts) may provide an avenue for resolving the issues left open by *Keyes.* The Business Courts have jurisdiction over actions "regarding the … internal affairs of an organization" as well as actions "seeking to hold an owner or governing person of an organization liable for an obligation of the organization" under Section 25A.004(b)(2, 6) of the Texas Government Code; this applies if the amount in controversy exceeds $5 million, unless a party to the case is a publicly traded company or majority owned by a publicly traded company, in which case there is no minimum amount in controversy.

The Business Courts and Fifteenth Court of Appeals will have the opportunity to establish standards for determining whether conduct should be attributed to a defendant in their role as a shareholder or as a corporate agent. Similarly, these courts will have the opportunity

to address the open questions discussed by the concurring opinions in *Keyes* regarding the scope of Section 21.223's protections for shareholders with respect to their conduct as shareholders.

Takeaways

Keyes confirms that, under Texas law, individuals are personally liable for tortious conduct that they direct or engage in as corporate agents—even if they are also shareholders. What *Keyes* leaves open, however, is to what extent Section 21.223 protects shareholders from liability for their own conduct. The concurring opinions of Justices Bland (joined by three other justices) and Busby merit careful attention for those facing this open issue in other cases.

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