THE IMPACTS OF BANKRUPTCY AND JUDICIAL RECOVERY LAW REFORM ON THE LIABILITY OF MANAGERS OF COMPANIES UNDER JUDICIAL RECOVERY

REVIEW ARTICLE

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ABSTRACT

The responsibility of partners and administrators for the company's obligations in the context of Judicial Recovery and Bankruptcy has gained specific contours following the promulgation of Law No. 14,112/2020, which amended Law No. 11,101/2005 (the Recovery and Bankruptcy Law). Through bibliographic and qualitative research, this article aims to evaluate, from the perspective of fiduciary duties, the limits of administrators' responsibility regarding the company's obligations in recovery, through an analysis of the changes introduced by Law No. 14,112/2020 and their effects. Therefore, it is understood that mere non-compliance or any "bad decision" will not impose liability on administrators. It is essential for there to be a breach of fiduciary duties of diligence, loyalty, and information to trigger the accountability action or the incident of disregarding the legal personality, always in an exceptional manner, prioritizing the independence of the company's management and excluding the previously applicable jurisprudential application.

Keywords: Corporate insolvency, Judicial recovery, Responsibility of partners and administrators, Disregard of legal personality.

1. INTRODUCTION

This article focuses on the impact of the new bankruptcy and judicial recovery law when analyzing the responsibility of corporate administrators, especially when subject to a situation of judicial recovery.

The concept of Judicial Recovery can be defined as the convergence of various legal, social, and economic principles to reorganize and make the most of a company's structure and production capacity. In this context, Judicial Recovery aims to revive business activities, not only considering the financial aspect, but also with a social perspective, involving stakeholders such as employees, creditors, consumers, partners, and administrators.

The role of corporate administrators, distinct from that of the judicial administrator, is to represent the interests of the company in recovery, manage and implement measures to overcome the crisis.

With the backdrop of judicial recovery set and the subject of analysis defined, this research aims to evaluate, from the perspective of fiduciary duties, the limits of administrators' responsibility regarding the company's obligations in recovery, through an analysis of the changes introduced by Law No. 14,112/2020 and their effects.

This article will rely on bibliographic and qualitative research. Initially, the issue will be examined through the study of various concepts and theories, analyzing their different variables. Subsequently, a qualitative approach will be used to validate the hypotheses presented. This method is essential to gain an understanding of the problem's trajectory, its potential consequences, and potential solutions.

2. COMPANY MANAGEMENT AND ADMINISTRATORS' DUTIES

Administrators play a crucial role in a company, acting as the body responsible for managing its affairs, with their duties encompassing the interests of all stakeholders while always seeking to harmonize them in line with the company's social function.

This is because, in the words of Uinie Caminha (2017), administrators are "those who express the will of the corporation, not as representatives but as the corporation itself." There is, therefore, an organic legal relationship between the corporation and the administrator, where the administrator is not a mere agent of the corporation but a means of expressing its will (GATAZ, 2016, pp. 53-70).

The concept of administrators' duties and responsibilities comes with the expectation of active and upright behavior (BRASIL, 2002), indicating the duty to act diligently in managing the company's affairs while always observing the duty to act in accordance with the activities specified in the company's corporate purpose, aiming to generate profits for subsequent distribution to shareholders and partners (SCALZILLI; SPINELLI; TELLECHEA, 2019, p. 115).

The notion of probity to be applied here deserves attention because the reference to the Roman law concept of "bonus pater familiae" (MAGALHÃES, 2014, p. 167) indicates the need for diligent behavior by the administrator, beyond preserving the corporate assets, to carry out the corporate purpose and obtain profits for shareholders and partners, with a clear objective of multiplying the assets under their administration (EIZIRIK, 2015, p. 117). This naturally implies assuming the inherent risks of any business activity.

Despite Laws 6,404/76 and 10,406/2002 defining administrators' duties and responsibilities, there is no clear delimitation due to the multitude of situations faced daily in decision-making and management. Therefore, fiduciary duties serve as true guiding principles in the administration of the business by administrators (SCALZILLI; SPINELLI; TELLECHEA, 2019, p. 115).

Marcelo Vieira Von Adamek (2010, p. 113) teaches that the Brazilian legislator wisely conferred general and abstract concepts to the conduct and actions of administrators because, had it been otherwise, it would have led to the generation of more ineffective situations through an inflexible system.

Further delving into the subject, administrators' fiduciary duties can be divided into three categories: the duty of care (BRASIL. Lei 6.404, 1976, art. 153 and Lei 10.406, 2002, art. 1.010), the duty of loyalty (BRASIL. Lei 6.404, 1976, art. 155), and the duty to inform (BRASIL. Lei 6.404, 1976, art. 157). These duties arise from the nature of administrators' roles as fiduciary and organic in character, representing a "right-function" (BULGARELLI, 1998, p. 158).

Regarding the first duty, the duty of care, it can be affirmed that a company's administrator must employ, in the exercise of their functions, the care and diligence that a prudent and upright person typically uses in managing their own affairs. This is the legal concept of the duty of care, the first of the duties and seemingly the most relevant, as it supposedly underpins the others (BULGARELLI, 1998, p. 120), although it is difficult to characterize.

The duty of care, as mentioned, signifies an obligation of means, the care that should precede decision-making, and the constant preparation to assume the administrative position. This duty involves paying attention to business development, careful analysis of the company's data and information, and intervention when necessary for the benefit of social purposes.

The duty of loyalty, in turn, expressed in Article 155 of Law No. 6,404 (BRASIL, 1976), mandates that the administrator must serve the company with loyalty, introducing some prohibitions, always aimed at preventing the administrator from using their position to gain personal privileges at the expense of the company's interests.

Lastly, the duty to inform prescribes that the administrator must provide social information about the company to investors, employees, shareholders, business partners, and, in general, the community, as well as any material facts that have the potential to impact the company's business (BITTAR, 2010, p. 159). This information is essential for market oversight of the actual situation of the companies in it.

These duties are not rigid rules but function more as guides for administrative activities, establishing clear and explicit principles on how to make the best decisions, always prioritizing the company's interests.

3. ADMINISTRATORS' ACCOUNTABILITY AND THE BUSINESS JUDGMENT RULE

In light of the foregoing, it is possible to observe that management has clear duties towards the company, duties guided by the parameters of care, loyalty, and the obligation to inform. Therefore, in situations where administrators fail to fulfill these duties, they will be held accountable for the damages caused.

The civil liability of administrators falls within the broader context of general civil liability (ADAMEK, 2012, p. 94), and specific regulations for limited liability companies, public companies, partnerships, and simple commandite companies must also be considered, though these specifics are not the subject of the present analysis.

Nevertheless, legal provisions exist that specify that the liability of partners with limited liability and administrators would be contingent upon highly specific cases involving the initiation of a distinct procedure, which introduces the concept of the Business Judgment Rule, an important rule of corporate decision-making recognized in Brazilian law, which will be discussed below.

3.1 BUSINESS JUDGMENT RULE

The Business Judgment Rule is a rule originated in the United States that seeks to limit the scrutiny of the merit of administrators' decisions, even when these decisions have proven detrimental to business activities, in cases where administrators adhere to their duties (VERGUEIRO, 2015, p. 29).

The first point to note here is that this rule is not a blanket exemption but a standard for analyzing conduct that cannot be deemed negligent due to mere mistake and honest judgment errors (MAGALHÃES, 2014, p. 166). The administrator's liability is subject to an examination of the precautions taken prior to decision-making, presuming, for all intents and purposes, that their administration is always carried out in good faith and in the best interest of the company.

To apply this rule, as explained by Eizirik (2015, p. 125), its requirements have been developed: (i) the occurrence of a decision, with omissive conduct not protected by the rule; (ii) the absence of any financial interest or personal benefit in the matter by the administrator; (iii) compliance with the duty to inform before making the decision; (iv) the administrator pursuing the company's interest; and (v) the administrator acting in good faith.

When these specified elements are met, the decision made by the administration, even if it results in harm to the company, is protected by the Business Judgment Rule because the decision-making process is influenced by subjective variables that require an examination of its timing, market trends, and the parties involved (MAGALHÃES, 2014, p. 172). If the company is solvent, the focus will be on shareholders and/or stockholders, as well as profit maximization. However, in the case of an insolvent company, particularly in the process of Judicial Recovery or Bankruptcy, the focus should be on creditors.

4. ADMINISTRATORS' DUTIES IN JUDICIAL RECOVERY

From a contractualist perspective, administrators' duties are related to shareholders and stockholders, in an internal corporis or ab intus view (FRANÇA, 2014, p. 58). However, to expand their scope, it can be asserted that these duties deserve a somewhat broader interpretation, as little is indicated about the interests of other stakeholders such as creditors, employees, suppliers, and the entire community in which the company operates.

Therefore, even though shareholders or stockholders are the focus of administrators' compliance with certain standards, they are not the only ones, as previously noted (CEREZETTI, 2012, pp. 41-58), although there may be differing opinions (ADAMEK, 2012, p. 144).

Especially from this perspective, the stance of administration must necessarily change when dealing with a company in Judicial Recovery or Bankruptcy. To understand this shift in focus from shareholders and/or stockholders to creditors, as the law itself dictates fiduciary duties of administrators towards creditors, although there is a prevailing understanding of maintaining business administration, as will be seen below.

4.1 MAINTENANCE OF COMPANY MANAGEMENT IN JUDICIAL RECOVERY

The debtor company can continue to control its activities through its administrators, a measure that serves as an incentive to utilize the Judicial Recovery mechanism.

In fact, this is one of the premises used by the model law for the treatment of corporate insolvency made available by the United Nations Commission on International Trade Law (UNCITRAL) since 2013, which specifically addresses the obligations of directors and administrators during periods of pre-insolvency (UNCITRAL, n.d.).

The UNCITRAL model law clearly demonstrates a concern not to create excessive contingencies for administrators, making it possible to involve them in the process of crafting a solution to address the corporate crisis.

4.2 ADMINISTRATORS' DUTIES AND RESPONSIBILITIES TOWARDS CREDITORS

Law No. 11.101 (BRASIL, 2005) stipulates that the bankruptcy of the debtor will be declared if they transfer their establishment to a third party, whether a creditor or not, without the consent of all creditors and without retaining sufficient assets to settle their liabilities, except as provided in a Judicial Recovery plan (BRASIL. Law 11.101, 2005, art. 94, III), which is a clear example of fiduciary duties towards creditors in a state of insolvency, as also observed in Article 1.145 of Law No. 10.406 (BRASIL, 2002).

In another provision, the Recovery and Bankruptcy Law states that certain transactions will be ineffective concerning the bankrupt estate, even if the contracting party is unaware of the crisis, such as the sale or transfer of an establishment without the express consent or payment of all creditors at that time. Such transactions will only be valid if, within 30 (thirty) days, there are no objections from the creditors after being duly notified, either through judicial notification or by the official responsible for registering titles and documents (BRASIL. Law 11.101, 2005, art. 129, IV).

Due to the duty to inform creditors, which seems clear in the provisions analyzed here, for a business transaction to be considered effective, there is an indication that administrators have a duty of care and information towards their creditors when their decisions affect the rights of these creditors and pose a risk to their ability to collect their debts.

The same rationale is identified in tax legislation, which, in two distinct moments, indicates the succession of tax liabilities or the invalidity of legal transactions when the acts violate the right of the tax authority to see its tax claims satisfied. The first is indicated in Article 133, and the second in Article 185 and its sole paragraph, both of the National Tax Code, Law No. 5.172 (BRASIL, 1966).

Once again, the duty to act diligently inherent to the administrator of the debtor company is observed here when attempting to alienate or encumber assets, as well as the duty to inform the tax authority/creditor, under penalty of transferring their obligation to pay the tax to a third party or having such alienation or encumbrance of assets and income considered fraudulent, unless they have reserved sufficient assets or income to fully satisfy their debt.

In this context, the concept is closely related to the insolvency system. When the debtor chooses not to declare their insolvency or does not utilize the Judicial Recovery, Extrajudicial, or Bankruptcy systems and proceeds to alienate or encumber their assets against the interests of creditors, they become subject to structures of reprimand for fraud against creditors, civil liability, and possibly criminal liability.

Frost and Campbell (2006, p. 499), when analyzing the legal framework of American law concerning administrators' fiduciary duties, explain that during periods of financial health - normal and solvent periods - the duties are linked to the best interests and maximizing the financial results for shareholders/stockholders.

However, according to the authors, there is a need to adapt these duties, considering the position of the Delaware Court, in a way that the protection of other stakeholders can no longer be based on contractual premises, and the company's administration must focus on protecting the rights of creditors when faced with corporate insolvency and financial crisis (CAMPBELL; FROST, 2006, p. 500).

Neither Brazilian jurisprudence nor legislation address this issue. However, bankruptcy legislation enhances administrators' fiduciary duties (CEREZETTI, 2012, pp. 393-394) in a company undergoing Judicial Recovery, which also extends to the interests of other parties involved. In other words, even though the debtor and its administrators continue to manage the business activity subject to restructuring with state intervention, they must act considering the stakeholders.

Having outlined the duties of administrators and where they fit within the context of the insolvent company, it is necessary to understand the mechanisms used to hold these administrators accountable for conduct that goes against these duties.

5. ADMINISTRATORS' ACCOUNTABILITY AND CHANGES INTRODUCED BY LAW NO. 14.112/2020

Law No. 11.101 (BRASIL, 2005) represented, at the time of its promulgation, a significant advancement in Brazilian law toward a more sophisticated standardization, with a focus on preserving economically viable companies, involving their shareholders, creditors, employees, and business partners.

Without diminishing the positive changes introduced by the legislation, it became necessary to acknowledge that over the years, many aspects had become disconnected, making the use of the institute more complex and less effective.

For this reason, Law No. 14.112 (BRASIL, 2020) was promulgated, which became popularly known as the "New Bankruptcy Law." It brought significant changes to the existing regulations, including the prohibition of extending the effects of bankruptcy, which had been improperly applied by Brazilian jurisprudence, with the creation of the concept of "extension" as a means of instrumentalizing the piercing of the corporate veil within the bankruptcy process, but without respecting the necessary requirements for its application, resulting in significant uncertainty in bankruptcy proceedings.

To overcome this situation, Law No. 14.112 (BRASIL, 2020) added Articles 6-C and 82-A, putting an end to this controversy. It expressly stated that the extension of bankruptcy or its effects is prohibited, and the piercing of the corporate veil is allowed in accordance with the procedures determined by the Civil Code and the Code of Civil Procedure, as set out in Article 82-A, paragraph 1 of Law No. 14.112 (BRASIL, 2020). The attribution of responsibility to third parties due to the mere non-

performance of obligations by the bankrupt debtor or a company in Judicial Recovery is prohibited, as stated in Article 6-A of Law No. 14.112 (BRASIL, 2020).

The inclusion of Article 6-C (BRASIL. Law 11.101, 2005) in the same law aimed to curb the secondary liability of agents such as shareholders and administrators due to the mere non-performance of the debtor in an insolvency proceeding, as a simple breach of an obligation would not establish a commingling of assets for the purpose of piercing the corporate veil (SACRAMONE, 2021, p. 152).

Article 82-A of Law No. 11.101 (BRASIL, 2005), on the other hand, prohibited the practice of courts extending the effects of Judicial Recovery and Bankruptcy without the proper procedure.

Given these changes, it is necessary to analyze the piercing of the corporate veil in the context of Judicial Recovery and Bankruptcy proceedings, as well as the legal theories adopted in the Brazilian legal system to identify the possible effects of legislative changes in forensic practice.

5.1 THE PIERCING OF THE CORPORATE VEIL INCIDENT IN JUDICIAL RECOVERY AND BANKRUPTCY PROCEEDINGS

In order to prevent situations of abuse of corporate personality, especially in cases where the natural person behind the legal entity attempts to use limited liability to commit wrongdoing, the existence of the corporate veil piercing institute is necessary because imagining that all individuals will use legal personality in an ideal manner would not be very feasible (TOMAZETTE, 2014. 238).

Thus, considering that no principle is absolute, whenever the principle of patrimonial autonomy becomes an impediment or a disguise for these individuals to commit illicit acts or violate the rights of the company, it may be set aside by the judge to hold its participants directly accountable (ANDRADE JUNIOR, 2017, p. 2).

Nonetheless, piercing the corporate veil is an exceptional circumstance, to be used only in cases where it is completely proven that legal personality was used unlawfully or fraudulently (SILVA, 2014, p. 30). Furthermore, efforts have been made to establish more objective and secure criteria for its application, such as through the analysis of wrongful intent and commingling of assets (DRESCH; KLOCK, 2016, pp. 177-178).

Piercing the corporate veil is provided for in the Brazilian legal system with three applicable theories: the major theory, the minor theory, and reverse piercing. The major theory applies in civil and business relationships, while the minor theory applies in specific situations such as consumer, labor, and environmental legislation.

Reverse piercing is provided for in Article 133, §2 (BRASIL. Law 13.105, 2015), understood as the setting aside of the principle of patrimonial autonomy to hold the company accountable for the obligations of the shareholder, supporting labor, consumer, tax, and environmental relationships, among others. Particularly, it applies in family law, when the marriage or stable union bond is terminated, in which the division of common assets may result in fraud (COELHO, 2014, p. 68).

Minister Nancy Andrighi, in her ruling in Special Appeal No. 948.117/MS (BRASIL, 2010), emphasizes the importance of the judge acting with caution when applying corporate veil piercing, especially in its reverse form, always taking into account the social interest of the legal entity.

In the minor theory, if the corporate personality represents any kind of obstacle, it will be disregarded, regardless of intent, abuse of personality, or other requirements (DINIZ, 2014, p. 594). Here, the principle of patrimonial autonomy is ignored, with a greater emphasis on protecting those considered vulnerable (ANDRADE JUNIOR, 2017, p. 6), and the environment.

In the major theory, on the other hand, the measure is exceptional, and it is necessary for the diversion of purpose (subjective major theory) or the commingling

of assets (objective major theory) to be configured (BARROS, 2018, p. 6). It is characterized as a general rule that requires the concrete case to establish illicit acts between members of the business entity and its assets. It is applied to civil, commercial, or tax claims.

The Economic Freedom Act, Law No. 13.874 (BRASIL, 2019), which introduced some changes to the Civil Code, did not innovate in addressing the concepts of wrongful intent or commingling of assets but attempted to provide more detailed explanations of their meanings in its paragraphs and subsections. Paragraph 1 explains that wrongful intent is "the use of the legal entity with the purpose of harming creditors and for the practice of illicit acts of any nature," while paragraph 2 states that commingling of assets is the absence of a factual separation between the assets of the legal entity and its members (BRASIL. Law 13.874, 2019).

It is possible to extract two fundamental prerequisites for piercing the corporate veil here: fraud and illegality (KOURY, 2020, p. 63). As for illegality, Fábio Ulhoa Coelho suggests that this requirement is important in distinguishing the piercing of the corporate veil from other scenarios of shareholder or administrator liability, scenarios unrelated to the fraudulent use of patrimonial autonomy (COELHO, 2014, p. 68).

Regarding the effects of the decision that pierces the corporate veil, it is essential to highlight that the business entity is never depersonalized, dissolved, or terminated. Instead, the corporate veil is temporarily lifted to hold its members accountable (DINIZ, 2014, pp. 598-599).

Therefore, if there is a need to hold a shareholder accountable in the context of Judicial Recovery, it will be done exceptionally and must follow the corporate veil piercing procedure, respecting due process and the right to a defense.

6. CONCLUSION

In a zone of insolvency, it is required of the administrator to begin observing and acting in the interest of stakeholders, not merely focusing on corporate profits. It is in this context that the administrator's fiduciary duties of diligence, loyalty, and disclosure will be evaluated.

The breach of these duties from the perspective outlined will lead to the examination of the administrator's actions through a separate procedure, using the accountability action provided in Article 82 of Law No. 11.101 (BRASIL, 2005), thus exporting the idea born in the United States of America known as the Business Judgment Rule.

In this context of accountability, the legislative changes made by Law No. 11.101 (BRASIL, 2005), through Law No. 14.112 (BRASIL, 2020), establish that mere non-compliance or any "bad decision" will not attribute responsibility to the administrators. It is essential for the breach of fiduciary duties to occur for the accountability action or the corporate veil piercing incident, as the case may be, but always exceptionally, privileging the independence of the company's administration and excluding the previously applicable jurisprudence.

This article, therefore, seeks to analyze whether the conduct of administrators complies with the fiduciary duties established in Brazilian legislation, especially regarding the protection of creditors' rights. It also explores potential forms of accountability for administrators in case these duties are not fulfilled.

The scientific contribution of this article lies in the analysis of the fiduciary duties of administrators of publicly traded companies in a state of insolvency, filling a gap in Brazilian legislation, which lacks clear provisions on how administrators should act in an economic and financial crisis scenario.

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APPENDIX - FOOTNOTE REFERENCE

4. For example: REsp 1,266,666/SP, Reporting Justice Nancy Andrighi, 3rd panel, DJe 8/25/11; RMS 12,872/SP, Reporting Justice Nancy Andrighi, 3rd panel, judged on 6/24/02, DJ 12/16/02; and REsp 63,652/SP, Reporting Justice Barros Monteiro, 4th panel, DJ 8/21/00.

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