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Piercing the Corporate Veil

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Managing Partner
Outline

1. What it means to “Pierce the Corporate Veil”
2. Origin of the Doctrine
3. Circumstances where Doctrine Applies
4. Factors Courts consider
5. How to Protect the limited liability
6. Plaintiff’s Option:
   a. When to use the doctrine
   b. When not to use the doctrine
Outline

6. How to Pierce the Veil
   a. Alter-Ego Theory
      i. Corporate Formalities
      ii. Fraudulent Transfers
   b. Single Business Enterprise Theory
   c. Reverse Veil Piercing

7. Pre-Trial and Trial Issues

8. Defenses

9. Defendant’s options
What it Means to “Pierce the Corporate Veil”

• Decision by the court to hold owners, shareholders, or members of a corporation or LLC liable for corporate debts.

• Creditors can go after the owner’s home, personal bank accounts, investments, and other assets to satisfy the corporate debt (subject to exempt property rules, depending on jurisdiction).
CONSIDERATIONS OF ITS USE

During Trial:
• More recently, it has been used as a claim, entitling party trying to pierce the veil to discovery (pre-judgment);
• Equitable Doctrine - very fact based;
• Strong presumption against / Exception to rule;
• Tort/Contract theory - involuntary/voluntary creditor.

After Trial:
• Technically, a remedy; post-judgment issue.
ORIGIN OF DOCTRINE

Dutch East India Company (VOC) First Multinational Corporation:
- Ancestor of Modern Giant Business Firm;
- Handled a Multitude of Trading Products;
- Operated in an International Setting.

Old English Corporate Law:
- In 1856 Companies in England were given the ability to incorporate with limited liability.
Origin of Doctrine

Old English Corporate Law (cont’d):
- Incorporation was believed to be sought by large enterprises, however, it was used by small enterprises looking to avoid costs of untimely dissolution.

19th Century Corporate Law:
- Corporations were small democratically governed businesses where each member had a single vote.
ORIGIN OF DOCTRINE

19th Century Corporate Law (cont’d):
- Eventually this lead to large corporate groups where it became one share, one vote.

Railroads Influence on Corporate Laws:
- Supreme Court began to recognize corporations as a person for taxation purposes. *Santa Clara County v. Southern Pacific Railroad Company*, 118 U.S. 394 (1886).
Origin of Doctrine

• Today: “A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities” -

• Owners and Managers have limited personal liability for the company’s actions and debts.

• The people who own and run the corporation or LLC cannot usually be held personally responsible for the debts of the company.

• Allows more individuals to participate in business and promotes entrepreneurship; thereby enhancing the economy.
Origin of Doctrine

- Courts can ignore limited liability status of a corporation or LLC and hold its officers, directors, and shareholders or members personally liable for its debts.

  - Closely held corporations and small LLCs are most likely to have their veils pierced.
Entities Most Vulnerable to Veil Piercing

- Single-shareholder corporations;
- Closely held corporations;
- Parents and subsidiaries;
- Sibling corporations;
- Successor liability;
- When there is evidence of fraudulent activity.
General Liability vs. Limited Liability

**General Liability:**
- May be personally liable for debts of the company;
- Liability is not limited to just their investment;
- Personal assets may be attached.

**Limited Liability:**
- Not personally liable for debts of the company;
- Liability is limited to investment in the company;
- Cannot attach personal assets.
Circumstances Where Piercing the Veil Can Apply

• Inadequate capitalization:
  • “I know it when I see it” - Justice Stewart;
  • Arbitrary: based on Judge’s Opinion;
  • Some believe this is most important factor.

• Failure to observe corporate formalities:
  • Keeping Required Records:
    • Articles of Incorporation;
    • Bylaws;
    • Minutes, etc.
Circumstances Where Piercing the Veil Can Apply

- Commingling of corporate/personal funds:
  - Using corporate bank account for personal purchases.

- Overlap of officers/directors/personnel:
  - President, Vice President, and Board Members are the same for dissolved corporation and newly formed corporation.

- Common office space:
  - Multiple corporations operating out of the same office.
Circumstances Where Piercing the Veil Can Apply

• Business discretion each entity has:
  • Does business make decisions or are decisions made by parent corporation?

• Arms-length dealings:
  • Are all parties involved independent of each other?

• Undocumented inter-company loans:
  • Making loans from one company to another within the group without properly documenting the transaction.
Circumstances Where Piercing the Veil Applies

• Dissolution to avoid creditors:
  • Dissolving ABC corporation when there is a judgment against them and reopening as XYZ corporation operating in the same business with the same Directors and Managers.

• Bankruptcy to avoid creditors:
  • Filing for bankruptcy to avoid a judgment.

• Existence of fraud, wrongdoing, or injustice to third parties:
  • Where an individual is using a corporation to perpetuate fraud on a third party, or to prevent wrongdoing or injustice to a third party.
Factors to Consider in Making the Analysis
1. There is no real separation between company and its owners

• If the owners fail to maintain formal legal separation between their business and their personal financial affairs, a court could find that the corporation or LLC is really just a sham and that the owners are personally operating the business as if the corporation or LLC did not exist.
2. The Company’s Actions were wrongful or fraudulent

• If the owner(s) recklessly borrowed and lost money, made business deals knowing the business could not pay the invoices, the court could find financial fraud was perpetrated and lift its limited liability protection.
3. The company’s creditors suffered an unjust cost

• If a party who did business with the company was left with unpaid bills/court judgment, it may recur to the court, which will then try to correct this unfairness by piercing the veil.
4. There were fraudulent transfers.

- Often we can find evidence of the owners switching the business assets, contracts, etc. to a new entity. These transfers, which render the old entity insolvent (unable to pay its creditors) can be undone, or used to convince the court to both pierce the corporate veil, and to implead the successor entities (under a successor liability theory).
5. Failure to Follow Corporate Formalities

- There are certain requirements, or formalities, that should be present in all new corporations: hold scheduled meetings, hold special meetings, keep accurate records of meetings, exercise fiduciary duties, develop a planning routine, address company contract procedures, and follow company bylaws, articles of incorporation and other relevant corporate documents.
How To Protect the Limited Liability

• Maintaining the Corporate Form:
  • Proper formation;
  • Maintain all required corporate formalities;
  • Do not mix personal and company assets, money, bank accounts, etc.;
  • Separate personal and company expenses;
  • Do not let parent “control” the subsidiary;
  • Make a reasonable initial investment so that it is adequately capitalized;
  • Do not give a personal guarantee unless you have the capital to pay;
  • Pay taxes for the company;
  • File all required forms with the applicable Secretary of State;
  • Always sign company documents in your representative capacity.
Plaintiff’s Options

When to Use and When Not to Use the Veil Piercing Theory
When to Use It

• A Plaintiff should consider using the doctrine when:
  • It is the only source of collection;
  • Defendants have deep pockets;
  • Avoid consequences of bankruptcy;
  • Jurisdictional strategy;
  • Expand discover sources;
  • Encourage settlement (within bounds of ethical rules).
Single v. Multimember LLCs

**Single Member Limited Liability Company:**
- LLC with one member;
- IRS considers it a “disregarded entity”;
  - Taxed as a sole proprietorship (pass-through taxation).
- Some states do not allow single member LLC.

**Multimember Limited Liability Company:**
- LLC with more than one member;
- Must file a partnership tax return and comply with partnership taxation regulations;
- Protects assets of LLC from member’s creditors;
  - Creditor must seek a charging order.
Charging Orders

• An order from the court giving a judgment debtor the right to attach distributions paid by the LLC in which the debtor has an interest in.

• Protects the LLC from the creditors of the members - means that the creditors can only get distributions, but not actual ownership of the membership interests (unlike in a corporation).

• Does not protect single member LLCs. *See Olmstead v. Federal Trade Commission.*
Olmstead v. Federal Trade Commission, 44 So. 3d 76 (Fla. 2010)

- Creditors of the sole member in a single member LLC could go directly to the LLC and take the assets of the LLC;
- Single member LLCs in Florida no longer qualify for charging order protection;
- Did not affect corporate shield protection.
PROCEEDINGS SUPPLEMENTARY

• Creditor cannot satisfy a judgment through garnishment, attachment or writ of execution:
  o Initiate Proceedings Supplementary to Execution pursuant to § 56.29, Florida Statutes.

• Most comprehensive remedy for creditors:
  o Assists creditors to satisfy judgments by using equitable remedies against debtor rights and property not subject to garnishment, levy or attachment.
  o Example: creditor can seize debtor’s company or other assets.
§ 56.38, Florida Statutes:

(1) When any person or entity hold an unsatisfied judgment or judgment lien obtained under chapter 55, the judgment holder or judgment lienholder may file a motion and an affidavit so stating, and the unsatisfied amount of the judgment or judgment lien, including accrued costs and interest, and stating that the execution is valid and outstanding, and thereupon the judgment holder or judgment lienholder is entitled to these proceedings supplementary to execution.
When NOT to Use It

- Expense (need experts);
- Bankruptcy (proof of non-dischargeability);
- Tenancy by the entireties;
- Estoppel;
- Economic loss/gist of the action.
How to Pierce the Corporate Veil

- Three main theories:
  1. Alter Ego Theory;
  2. Single Business Enterprise Theory;
Alter Ego Theory

- Vertical veil piercing to reach the assets of the shareholders/members.
- Most common way of piercing the veil.
- Courts look at the extent of unity between the shareholders/members and the company.

If there was such unity between the company and the individual that the company was just a “hollow shell” used to perpetuate fraud, courts are more likely to pierce the veil.
The creditor of the corporation or LLC holds the shareholder/member personally liable for the debts of the corporation/LLC.
Factors Courts May Consider

- Commingling of funds;
- Representations that the individual will financially back the company;
- Diversion of company funds to the individual;
- Inadequate capitalization;
- Failure to keep corporate and personal assets separate;
- Failing to observe corporate formalities;
- Fraud.
CORPORATE FORMALITIES FOR CORPORATIONS

- Proper formation of the company;
- File Articles of Incorporation with Secretary of State;
- Elect Board of Directors;
- Appoint officers;
- Adopt bylaws;
- Issue stock;
- Shareholder Agreement;
- Annual meetings;
- Annual fees/reports to the State;
- Written and executed minutes;
- Minutes book;
- Shareholder Ledger.
CORPORATE FORMALITIES FOR LLCs

• Internal structuring more flexible than corporations:
  o No bylaws or Board of Directors;
  o May have members or managed by appointed manager(s);
  o May have officers (President, Vice President, Secretary, etc.) if preferred.

• Should have an LLC Agreement or Operating Agreement;

• Must register with Secretary of State;

• File Certificate of Formation or Articles of Organization;

• (Note, the additional flexibility of an LLC requires less formalities, which can be used against it for veil piercing).
The party seeking to pierce the veil will usually have to prove actual fraud – the corporate form is being used to perpetrate a fraud.

• Some states are requiring less than pleading fraud with specificity to proceed.
§ 726.105, Florida Statutes

Transfers Fraudulent as to Present and Future Creditors

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor’s claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(a) With actual intent to hinder, delay, or defraud any creditor of the debtor; or
(b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

1. Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
2. Intended to incur or believed or reasonably should have believed that he or she would incur debts beyond his or her ability to pay as they became due.
(2) In determining actual intent under paragraph (1)(a), consideration may be given, among other factors to whether:

(a) The transfer or obligation was to an insider;
(b) The debtor retained possession or control of the property transferred after the transfer;
(c) The transfer or obligation was disclosed or concealed;
(d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
(e) The transfer was of substantially all of the debtor’s assets;
§ 726.105, Florida Statutes

Transfers Fraudulent as to Present and Future Creditors

(2) In determining actual intent under paragraph (1)(a), consideration may be given, among other factors to whether:

(f) The debtor absconded;

(g) The debtor removed or concealed assets;

(h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
§ 726.105, Florida Statutes

Transfers Fraudulent as to Present and Future Creditors

(2) In determining actual intent under paragraph (1)(a), consideration may be given, among other factors to whether:

(j) The transfer occurred shortly before or shortly after a substantial debt was incurred; or

(k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.
Alter Ego Theory Florida Case Law

  - Norsan, a corporation of Defendant Norberto Sanchez, entered into a lease with Renda Broadcasting Corp.
  - Norsan failed to pay rent and Renda obtained a judgment against Norsan.
  - Sanchez confirmed on deposition that Norsan was merely a shell corporation with no bank account, assets, or any business.
  - Courts allowed Sanchez to be impleaded into the action due to “us[ing] an undercapitalized shell company [for his] personal benefit . . . .”
Alter Ego Theory: Case Law

  • Owner of multiple companies was commingling funds across companies.
  • Companies were determined to be alter egos of each other and the owner.
  • Alter Ego is when a court finds a corporation lacks a separate identity from an individual or corporate shareholder.
  • Judge pierced the corporate veil allowing for the owner to be personally liable for any judgment against the corporation.
Alter Ego Theory: Case Law

- **Gasparini v. Pordomingo**, 972 So. 2d 1053 (Fla. 3d DCA 2008)
  - Being a single shareholder is not sufficient to determine that the corporation is an alter ego of the person.
  - Even if the corporation is an alter ego the veil cannot be pierced if the corporate formalities are maintained.
Single Business Enterprise Theory

- Lateral Veil piercing to reach the assets of an affiliate company.
- May be used when there are two or more companies with integrated assets to achieve a common business purpose.
- Reaches the assets of an affiliate, parent, subsidiary, etc.
Factors Courts May Consider

- Common employees;
- Common offices;
- Centralized accounting;
- Payment of wages by one company to the employees of another company;
- Common business name;
- Services rendered by the employees of one company on behalf of another company;
- Undocumented transfer of funds between the companies;
- Unclear allocation of profits/losses between the companies.
Single Business Theory Enterprise: Texas


- In Texas, the courts have held that there is nothing inherently unjust or abusive about the single enterprise factors. There is no basis for imposing liability on an affiliate company in Texas.
Las Palmas Assoc. v. Las Palmas Ctr. Assoc., 1 Cal. Rptr. 2d 301 (Cal. Ct. App. 1991)

- California allows for liability to be established between two or more corporation under common ownership if one corporation is "but an instrumentality or conduit of another in the pursuit of a single business venture."
Single Business Enterprise Theory: Florida

- Florida Courts call this method of veil piercing the ”mere instrumentality” theory, because the parent corporation is seen as using the subsidiaries as mere instrumentalities to hide behind.
Mere Instrumentality Case Law

- Ocala Breeders’ Sales Co. v. Hialeah, Inc., 735 So. 2d 542 (Fla. 3d DCA 1999)
  - Ocala Breeder won a monetary judgment against Hialeah Park.
  - Hialeah Park had no known assets.
  - Ocala requested piercing against Hialeah, Inc.
  - Courts determined that Hialeah Park was a mere instrumentality of Hialeah, Inc.
  - Both were controlled by the same person and operated out of the same facilities.
  - Court pierced the veil to allow for Hialeah, Inc. to be responsible for contracts with Hialeah Park.
Reverse Veil Piercing

• Method to impose liability of an individual shareholder/member on a corporation/LLC in order to reach the assets of the company.

• Generally requires the same elements as traditional veil piercing:
  • Unity of interest between the individual and the company;
  • Fraud of some form or inequitable result for creditors.
A creditor of the shareholder/member is trying to hold the corporation/LLC liable for debts of the shareholder/member.

- California court held that reverse veil piercing was not a viable method of veil piercing under California law.

- When the debtor is an individual shareholder, the corporate form is not being abused to evade individual liability. The shareholder did not incur the debt through the corporate guise or misuse of the guise.

- Judgment creditor can enforce judgment against shareholder’s assets, including their shares in the corporation.

- Part of the rationale is that there is likely innocent shareholders who will be affected by one shareholder’s creditor attacking the whole corporation.
Reverse Veil Piercing: California


- Baldwin formed DE LLC (JPBI) owned 99% by him and 1% by his wife for exclusive purpose of “holding and investing Baldwin and his wife’s cash balances.”

- Curci was awarded judgment against Baldwin on $5.5 million personal debt and asserted that Baldwin held all the interest in JPBI, controlled JPBI’s actions, and was using JPBI as personal bank account (for his and his wife’s cash balances).

- He also set up many trusts and partnerships for the benefit of many family members, and loaned them over $42 million. He extended the deadline for repayment for no consideration when Curci won a judgment.
Reverse Veil Piercing: California

**Curci Investments, LLC v. Baldwin**, (2017) 14 Cal. App. 5th 214

- California Court held that *Postal Instant Press* was limited to its facts, and reverse veil piercing is a viable method to pierce the veil of an LLC.

- Unlike a debtor who has shares in a corporation, a debtor who has interest in an LLC cannot be forced to give their interest to a creditor.

- The creditor can only acquire a Charging Order, which places a lien on debtor’s economic rights to distribution.

- Here, there were no “innocent members” that may be prejudiced.
Reverse Veil Piercing: Case Law

• Liberty Synergistics, Inc. v. Microflo Ltd., 50 F. Supp. 3d 267 (E.D.N.Y 2014)
  o New York law recognizes reverse veil-piercing when a party seeks to hold a subsidiary liable for the actions of its parent or shareholders.

• In re Lehmann, 511 B.R. 729 (Bankr. M.D. Pa. 2014)
  o Only exceptional circumstances will warrant granting the unusual remedy of reverse veil-piercing, which will be allowed only to prevent fraud, illegality, injustice, or contravention of public policy.
Reverse Veil Piercing: Case Law

  • A claim for reverse-piercing of the corporate veil is appropriately granted only in the absence of adequate remedies at law.

  • The remedy is equally available, however, to hold the corporation liable for the debts of controlling shareholders where the shareholders have formed or used the corporation to secrete assets and thereby avoid preexisting personal liability.
Pre-Trial and Trial Issues with Veil Piercing

• Summary Judgment - can be fact-intensive;
• Trial by jury - roots in equity;
• Burden of proof - on the party trying to pierce the veil;
• Experts;
• Appeals;
• Service of Process.
TRIAL ISSUES WITH VEIL PIERCING

- Piercing the Corporate Veil is not a Cause of Action:
  - It is used as a way to collect on a judgment when the corporation is insolvent or unwilling to pay.

- Controlling Case in FL is *Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So. 2d 1114 (Fla. 1984)
  - Must show a form of “improper conduct.”
TRIAL ISSUES WITH VEIL PIERCING

- Not being able to cover the expenses of a company does not necessarily rise to the level of “improper conduct.”
• Courts define Improper Conduct:
  1) there is a misrepresentation;
  2) that causes the plaintiff to enter into a transaction; and
  3) the misrepresentation interferes with the corporation's performance of its obligation toward the plaintiff.
Defenses

• Elements not met:
  • The actions were not meant to deceive or purport fraud on the plaintiff.

• Defenses not specific to entity or theory:
  • Corporation followed corporate formalities.
Defenses

• Equitable defenses (unclear hands, laches, estoppel):
  • Unclean Hands: that the plaintiff is not entitled to relief because they have committed some sort of wrongdoing or are themselves liable for an offense.
  • Laches: bars relief where the party seeking relief has been guilty of excessive, unjustified delay in asserting rights.
  • Estoppel: (1) representation as to material fact that is contrary to a later-asserted position; (2) reliance on the representation; and (3) a change in position detrimental to the party claiming estoppel that is caused by the representation and reliance thereon.
Defenses

- Statute of limitations:
  - Piercing the corporate veil is not a cause of action, however, one may argue that piercing is a theory under fraud which carries a 4 year statute of limitations.

- Premature:
  - Post judgment remedy;
  - Must attempt to collect from corporation before filing against the shareholder or owner.
Defenses

• Wrong Forum:
  • Corporation may be registered in a different location than where cause of action occurred;
  • Need to properly serve owner to be able to collect judgment in the event the veil is pierced.

Veil Piercing remedy is an exception to the rule
Defendant’s Options

- Removal;
- Jurisdiction/Choice of law;
- Separate counsel;
- Joint defense agreement;
- Counterclaims.

- Affirmative defenses;
- Motion to dismiss;
- Defensive Discovery;
- Summary Judgment.
Summary

• Plaintiffs:
  • Conduct thorough investigations to identify possible veil piercing theories at trial or post-trial (collections) phases.

• Defendants:
  • Follow corporate formalities, maintain adequate records, and avoid appearance of impropriety:
    • Commingling funds;
    • Inadequate capitalization;
    • Fraud;
    • Etc.
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