



Piercing the Corporate Veil, Alter Ego and Successor Liability

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Basic Principles

- A. Limitation of liability is a cornerstone of the law of corporations.
- B. Officers of a corporation or LLC are ordinarily not personally liable for the acts and obligations of the corporate form.
- C. Exception #1: Establish personal liability or co-obligation at the outset.
- D. Exception #2: Pierce the corporate veil.
- E. Exception #3: Alter ego and successor liability.

Exception #1: Establish Personal Liability or Co-Obligation of the Corporate Parent

- Advise your client to assess the creditworthiness of its business partner / counterparty.
 - Look at the party name on the contract
 - Verify viability and age of corporate form
 - Secretary of state search, D&B report, credit check
 - Assess web presence
 - Reference check
- Was this entity recently created for purposes of a single transaction?
 - Watch out for the single purpose entity shell

Exception #1: Establish Personal Liability or Co-Obligation of the Corporate Parent

- Advise your client to draft the contract in a manner advantageous to its business interests.
 - Co-obligor (one signature, double liability)
 - Reasonable attorney's fees in circumstance of breach
 - Interest, late fees
 - Acceleration clause
 - Jury waiver / class action waiver
 - No arbitration or mandatory mediation clause

Exception #2: Pierce the Corporate Veil

- New York – “Complete Dominion and Control”
 - A shareholder may be held liable for corporate debts under a veil-piercing theory upon a showing that he or she exercised “complete dominion and control” over the corporation. *Austin Powder Co. v. McCullough*, 216 A.D.2d 825, 826 (N.Y. App. Div. 3d Dep’t 1995) (citing *Matter of Guphill Holding Corp. v. State of New York*, 33 A.D. 2d 362 (N.Y. App. Div. 3d Dep’t 1970) *aff’d* 31 N.Y.2d 638)).

Exception #2: Pierce the Corporate Veil

- New York – Liberal Pleading Standard
 - “Veil piercing is a fact-laden claim” that is not well suited for resolution upon a motion to dismiss, or even a motion for summary judgment. *Damianos Realty Group, LLC v. Fracchia*, 35 A.D. 3d 344 (N.Y. App. Div. 2d Dep’t 2006); *First Bank of Americas v. Motor Car Funding, Inc.*, 257 A.D.2d 287, 294 (N.Y. App. Div. 1st Dep’t 1999).
 - A plaintiff is entitled to obtain necessary discovery to ascertain whether there are grounds to pierce the corporate veil and a complaint seeking to pierce the corporate veil should be upheld unless it is “totally devoid of solid nonconclusory allegations.” *International Credit Brokerage Co., Inc. v. Agapov*, 249 A.D.2d 77, 78 (N.Y. App. Div. 1st Dep’t 1998) (citing *Sequa Corp. v. Christopher*, 176 A.D.2d 498 (N.Y. App. Div. 1st Dep’t 1991)).

Exception #2: Pierce the Corporate Veil

- Florida – Three Part Test
 - (1) The shareholder dominated and controlled the corporation to such an extent that the corporation's independent existence was non-existent, and the shareholders were alter egos of the corporation;
 - (2) The corporate form must have been used fraudulently or for an improper purpose; and
 - (3) The fraudulent or improper use of the corporate form caused injury to the claimant. *Beltran v. Vincent P. Miraglia, M.D., P.A.*, 125 So.3d 855, 858 (Fla. 4th DCA 2013) (quoting *Seminole Boatyard, Inc. v. Christoph*, 715 So. 2d 987, 990 (Fla. 4th DCA 1998)).

Exception #2: Pierce the Corporate Veil

- Florida – Improper Conduct Requirement
 - The corporate veil will not be pierced absent a showing of improper conduct. *Dania Jai-Alai Palace, Inc. v. Skyes*, 450 So.2d 1114, 1121 (Fla. 1984).
 - An example of improper conduct is when a parent establishes a subsidiary as a mere instrumentality and a sham; and *the parent did so to mislead creditors and to avoid liability. Id.; Vantage View, Inc. v. Bali East Development Corp.* 421 So.2d 728, 733 (Fla. 4th DCA 1982).
 - Improper conduct is a jury question. *Seminole Boatyard, Inc.*, 715 So. 2d at 990.

Establishing a Corporate Form is Easy

- Corporate Formation
 - Consult secretary of state website in state of incorporation
 - File articles of organization
 - Purpose of corporate form can be “any and all lawful business”
 - Establish registered agent
 - Obtain EIN from the IRS
 - Operating and shareholder agreements are not filed online
 - Pay fee
 - Publication requirement in some states – i.e., New York
- This can all be done in one day

Establishing a Corporate Form is Easy

- New York – LLC / Corporation Publication



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Congratulations upon the formation of your LLC with the NY Department of State!

FIRST

My name is Joseph Johnson, and I'm a Sales Manager with Allstate Corporate Services Corp., one of the largest nationwide providers of business entity and LLC filing services. Our clients include thousands of law firms, accounting firms and business owners across the country that trust us to prepare and file all of their business entity and LLC filings efficiently, professionally and at the best possible prices.

SECOND

You have just filed your LLC's Articles of Organization with the NY Department of State and you now must complete the NY LLC Publication requirement and file the Certificate of Publication within 120 days to avoid having your LLC's authority suspended by the NY Department of State. (See next page for details of the NYS Laws if you don't already know this.) Every LLC that does not comply with this law is risking the personal liability of its owners and the corporate protection of its assets.

THIRD

Our Publication Fee for NASSAU COUNTY is \$440.00

This includes all publication and state filing fees with the completed and filed copies being delivered to your door. We don't nickel and dime you. We don't add on any exorbitant shipping fees or rush fees unlike some of our competitors.

LAST

I would like the opportunity to solicit your business and have our firm take care of your NY LLC Publication requirement and certificate of publication filing with the NY Department of State. **To give you an idea of our pricing, if we had formed this LLC for you we would have charged you \$315.00 for the LLC formation which would have included the NY State fee, our service fee and the LLC Corporate Outfit Kit with seal delivered to your door via UPS.** Let us provide you with an unmatched level of professional, efficient and cost effective service that has made us the only trusted source for thousands of other legal, accounting and business professionals.

The next step is simple. Please complete and return the attached order form with your payment information by email, fax or regular mail and we will immediately call you back to confirm the information and begin processing your order.

Sincerely,

Joseph Johnson

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ALLSTATE CORPORATE SERVICES

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NY State LLC / PLLC / LLP / LP PUBLICATION & FILING REQUIREMENT

This applies to **EVERY** LLC, LLP & LP - formed before **AND** after this new Law has taken effect.

On 06/01/2006, a new Law went into effect authorizing the **SUSPENSION of EVERY** LLC, LLP & LP that does not file the Certificate of Publication with the NY Department of State.

Every newly formed Domestic and Foreign LLC, PLLC, LLP and LP is **required to publish** a legal notice of its formation in two newspapers designated by the County Clerk and must also file a Certificate of Publication with the NY Secretary of State within 120 days of its formation.

All existing companies, as listed above, formed prior to June 01, 2006 are **also required to publish** said notice and file the Certificate of Publication by June 01, 2007.

Every company that doesn't comply with this law **will have its authority suspended** by the NY Secretary of State!

Don't risk exposing yourself to personal liability and having the LLC's assets not being protected under the corporate veil. Have Allstate Corporate Services publish and file the Certificate of Publication or if you are in doubt as to whether an entity is in compliance, call us & we'll check it for free.

The NYS Statutes that address the publication requirements are as follows:

Domestic LLC -	Section 206 LLCCL	Foreign LLC -	Section 802 LLCCL
Domestic PLLC -	Section 1203 LLCCL	Foreign PLLC -	Section 1306 LLCCL
Domestic LP -	Section 121-201 PL	Foreign LP -	Section 121-802 PL
Domestic LLP -	Section 121-1600 PL	Foreign LLP -	Section 121-1502 PL

***** Allstate Corporate Services can keep you in compliance by taking care of the entire NYS Publication Filing in accordance with the NYS Statutes. *****

The LLC / PLLC / LP / LLP Publication Requirement Filing Service Includes:

- Securing the necessary County Clerk assignment for publication
- NY State filing fees, Publication fees & our service fee
- Drafting & Filing the publication notices in accordance with the NYS Statute
- Securing & Filing the publication notices & affidavits with the NY Department of State
- Returning copies of the NYS Filing Receipt & Filed paperwork to client via UPS

The fee for the Publication Filing in NASSAU COUNTY is \$ 440.00

*** Please note that for this service, we require payment of the Publication Fees to be advanced by the client before we start the publication process. Please advise us that your payment has been sent in order for us to begin the process. Thank You. ***

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Maintaining a Corporate Form is Easy

- Corporate Form Maintenance
 - File annual report
 - Pay fees
 - Pay state taxes

Exception #3: Alter Ego and Successor Liability

- Scenario: defunct company now appears to be operating with a new name. Old entity will not honor obligations and asserts that new entity is not responsible for the obligations.
- Risk factors for successor liability
 - Suspicion: did nothing change other than the letterhead?
 - Continuity of ownership, control, same type of business, same location, same contact information?
- “Asset sale”
 - Ask to see documentation

Exception #3: Alter Ego and Successor Liability

- Legal Standard

Generally, when one company purchases the assets of another, the purchaser does not acquire the debts of the seller, except:

1. The purchaser impliedly or explicitly agreed to assume the liability of the seller;
2. The transaction was fraudulently entered into to avoid liability;
3. The transaction amounts to a de facto merger; or
4. The purchasing company is a mere continuation of the selling company.

Cargill, Inc. v. Beaver Coal & Oil Co., Inc., 424 Mass. 356, 359 (1997).

Exception #3: Alter Ego and Successor Liability

- Litigation Matters
 - Continuity of the enterprise?
 - Management, personnel, physical location, assets, and general business operations.
 - Continuity of shareholders?
 - Purchaser acquires company with shares of its own stock, and the stock becomes owned by shareholders of the seller – such that sellers become a “constituent part” of the purchasing company.
 - Seller promptly ceases operations, liquidates or dissolves?
 - Purchaser assumes certain obligations of the seller that are ordinarily necessary for the uninterrupted continuation of the seller’s business?
- Case by case basis: “no single factor is necessary or sufficient to establish a **de facto merger**.” *Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 712 F. Supp. 1010, 1015 (D. Mass. 1989).

Summary

- Veil-piercing, alter ego and successor liability claims are powerful tools that create enormous litigation leverage.
 - Amendments: if critical facts are discovered during the course of litigation, amended pleadings are generally allowed so long as the amendment would survive a motion to dismiss and the non-moving party is not unfairly prejudiced by the delay. Rule 15 – “The Court should freely grant leave when justice so requires.”
 - Claims usually survive dispositive motions because they are fact-based and usually contested.
 - Courts may require disclosure of corporate records not generally tendered in litigation.
 - Increased risk and heightened exposure can bring about a faster resolution.

Additional Questions / Information

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