



LEGAL BRIEFING

Alter Ego Liability: How to Collect a Debt from an Insolvent Corporation*By Shawn E. Cowles*

The current economic downturn has strained corporate finances, depleted cash reserves, and generally made credit difficult to obtain. As a result, many companies cannot pay their debts. Before writing off a debt owed to you, it is important to consider whether the debt may be collected by piercing the corporate veil of an insolvent corporation to obtain payment from its shareholders.

Corporate laws were enacted to encourage capital investment, create new jobs and stimulate economic growth. California law allows a corporation to accumulate capital from investors and limit the liability of these investors if the corporation operates legitimately. However, if the business operates as a shell corporation and is used by shareholders to manipulate and deceive creditors, the limited liability protection will be removed.

When will a court pierce a corporate veil in order to find this so-called "alter ego" liability? A corporate veil will be pierced when: (1) a unity of interest exists between the corporation and its shareholders such that their separate personalities no longer exist; and (2) an inequitable result will occur because the actions of the shareholders are unfair to the corporate creditors.

California law has identified many alter ego factors that assist the court in determining when the corporate veil should be pierced, including: commingling funds of the shareholder and the corporation; using the corporation as a conduit for the affairs of the shareholder; disregarding corporate formalities and failing to maintain adequate corporate records; failing to adequately capitalize a corporation and the absence of corporate assets; diverting corporate assets for the shareholder's benefit and to the creditor's detriment; using a corporate entity as a subterfuge for illegal transactions; and misrepresenting the identity of the responsible ownership and management.

Alter ego liability is generally defined by looking at the following areas:

Control: Does control of the corporation reside in one or a small number of shareholders? The more diverse and diluted the control, the less the risk of shareholders being held liable under this theory.

Undercapitalization: Was the corporation adequately capitalized at its inception and were adequate amounts of capital retained in the business for the benefit of creditors?

Commingling: Do the shareholders treat corporate assets as their own rather than those of the corporation? The crux of the matter is distinguishing between legitimate shareholder transactions versus evidence of commingling.

Corporate Formalities: Were corporate formalities followed by issuing stock in exchange for cash or other assets; appointing directors and officers and having annual elections; holding meetings of the shareholders and board of directors; keeping minutes of these meetings and maintaining adequate corporate books and records?

Alter ego liability generally attaches to the shareholders of a corporation. However, the members of a limited liability company, and the limited partners of a limited partnership, may also possess alter ego liability.

Alter ego liability is a complex area of the law that is not subject to bright-line rules. Therefore, it is important to consult with an attorney specializing in this area when considering whether to pierce a corporate veil.

Shawn Cowles is a partner in our Newport Beach office specializing in construction, insurance and complex business litigation. He may be reached via e-mail at shawn.cowles@ndlf.com.

**New Employment Legislation Takes Effect***By Thomas H. Reilly*

The New Year brings new challenges for California employers. The following California laws affecting the workplace took effect on January 1, 2009, or as otherwise indicated:

1. Assembly Bill 10. This bill, which took effect on October 1, 2008, extends the overtime exemption under Labor Code section 515.5 to eligible computer professionals who are paid an annual salary of not less than \$75,000 for full-time work.

2. Assembly Bill 2075. This bill amends Labor Code section 206.5 and makes it a misdemeanor for an employer to require an employee, as a condition for being paid, to sign a statement of the hours he or she worked during a pay period that the employer knows to be false.

3. Senate Bill 940. This bill, which took effect on July 22, 2008, provides that employees of temporary services employers must be paid weekly and that wages for work performed by such employees during a calendar week must be paid no later than the regular payday of the following calendar week. Employees of

temporary services employers who are dispatched to work for a client on a day-to-day basis or to a client engaged in a trade dispute must be paid at the end of each workday.

Recent changes to federal laws will also affect California employers:

1. ADA Amendments Act of 2008 ("ADAAA"). The ADAAA amended the Americans With Disabilities Act of 1990 to provide a more expansive definition of what constitutes a disability. The ADAAA also mandates that determination of whether impairments substantially limit a major life activity must be made without considering mitigating measures, such as medications, hearing aids or prosthetics. The ADAAA also provides that individuals may seek protection under the ADA if they are subjected to discrimination because of "an actual or perceived impairment." Although the California Fair Employment and Housing Act already provides these protections, the ADAAA will increase attention and exposure in this area.

2. FMLA Amendments / National Defense Authorization Act. Effective January 28, 2008, covered employers with 50 or more employees must provide an eligible employee who is the spouse, child, parent or next of kin of a service member with up to 26 weeks of FMLA leave to care for a service member who sustains an injury or illness while on active

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Congratulations to **John E. Bowerbank**, **Ryan M. Manning** and **Leonard Polyakov** on being elevated to partner in our Newport Beach litigation group. The three men specialize in business, real estate and construction litigation, Bowerbank and Manning also handle insurance law, and Polyakov practices in land use and eminent domain.

We are proud to report that eight lawyers from our Newport Beach headquarters have been listed in the "Southern California Super Lawyers" sixth annual peer-review survey, published in the February 2009 issue of Los Angeles Magazine and in Southern California Super Lawyers Magazine.

Making the list since its original publication in 2004 were co-founding partners **Greg Dillion**, a real estate litigator, and **Tom Newmeyer**, a business lawyer, as well as litigation partner **John O'Hara**, while Dillion was recognized in the roster of Orange County's "Top 50 Super Lawyers" for the sixth time. Also named again to Super Lawyers were real estate-transactional partners **Mike Cucchissi** and **Jane Samson**, and construction litigation partners **Joe Ferrentino** and **Mark Himmelstein**. Shopping center expert and business litigator **Cheryl Van Steenwyk** made the list in her first full year with the firm.

Partner **Mark Himmelstein** was named to the "Who's Who in Home Building" for 2008 by Builder & Developer Magazine.

Newmeyer & Dillion is pleased to have been named one of the "Top Places to Work" in 2008 in an Orange County Register survey of the firm's employees.



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duty in the Armed Forces. Effective January 16, 2009, covered employers must also provide an eligible employee with up to 12 weeks of FMLA leave for a "qualifying exigency . . . arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation."

3. American Recovery and Reinvestment Act. Effective March 1, 2009, covered employers with 20 or more employees must advance 65 percent of the applicable COBRA premium for workers who are terminated between September 1, 2008, and December 31, 2009. New COBRA notices from the Department of Labor must be sent to employees involuntarily terminated during this time period. Employers can recover the COBRA subsidy as a tax credit on their payroll tax submissions. The subsidy program only applies to coverage periods on or after March 1, 2009.

In light of these significant changes, this is an excellent time for California employers to review and revise their policies and handbooks to ensure compliance with state and federal laws.

Thomas Reilly is a partner in our Newport Beach office specializing in representing employers in labor and employment matters. He may be reached via e-mail at tom.reilly@ndlf.com.

UPCOMING EVENTS

**West Coast Casualty's
16th Anniversary Construction Defect Seminar**
May 14 & 15th, 2009
Disneyland Hotel, Anaheim

Partner **Joe Ferrentino** participates in a panel entitled "How Current Market & Economic Forces May Impact Construction Defect Litigation," and partner **Greg Dillion** speaks on a joint presentation contrasting CD insurance from both a policy holder's and insurer's perspective. Information at www.westcoastcasualty.com.

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About Newmeyer & Dillion LLP

Newmeyer & Dillion LLP, originally formed in 1984, is comprised of creative, highly motivated business attorneys who possess outstanding credentials, training and experience in their respective fields of practice. The firm represents a wide variety of clients, which include national and local financial institutions, real estate development companies, manufacturers and service organizations, as well as individuals.

Litigation

- *Business*
 - Unfair Competition/Trade Secret
 - Business & Professions Code §17200
 - Partnership Dissolution
 - Lender Liability
 - General Business Disputes
- *Real Estate*
 - Construction
 - Real Estate Finance
 - Environmental Warranty
 - Title
 - Inverse Condemnation and Eminent Domain
 - Government Tort Claims
 - Regulatory Takings
- *Labor & Employment*
 - Wrongful Termination
 - Employment Discrimination
 - Sexual Harassment
- *Insurance & Risk Management*
 - First and Third Party Coverage
 - First and Third Party Bad Faith
- *Products Liability*
- *Appellate Practice*

Business Arrangements

- Formation, Structuring, Maintenance and Evaluation of Business Entities (Corporations, Limited Liability Companies, General Partnerships, Limited Partnerships, Joint Ventures)
- Shareholder, Partnership and Stock Option Plan Agreements
- Purchase and Sale of Businesses
- Business Dissolutions
- Employment and Independent Contractor Matters
- Licensing and Franchising Arrangements

Corporate Finance, Securities and Mergers & Acquisitions

- Venture Capital Financing
- Mergers, Acquisitions, and Leveraged Buyouts
- Public and Private Securities Offerings
- Federal Securities Law

Real Estate Transactions

- Acquisition, Development, Option, Sale and Lease of Real Property (Residential, Retail, Multifamily, Office, Industrial, Agricultural)
- 1031 Like-Kind Exchanges
- Master Planned Community Developments and Community Associations
- Department of Real Estate and Other Regulatory Filings
- Construction Related Matters
- Military Base Reuse
- Due Diligence

Real Estate Lending & Finance

- Documentation of Real Estate, Personal Property and Unsecured Loans
- Coordination of Loan Transactions for Borrowers

Land Use/Environmental

- Development Agreements
- Mitigation Agreements
- Subdivision Map Act
- Environmental Permitting