Buried Treasure

Maximizing Recoveries by Locating and Collecting Hidden Corporate Assets

BY BRANDON L. PEAK

The only way to ensure corporate defendants understand the necessity of maintaining adequate insurance and capitalization is to file suit, pursue your claims and make them pay. While that requires additional time, money and hard work, it is the right thing to do for your clients.

One of the most disturbing threats confronting our clients is the trend of corporate defendants "going bare" and operating their businesses with little or no insurance. Some corporate defendants are attempting to disguise their assets and immunize themselves from collectible judgments and we, as trial lawyers, can stop this trend and successfully recover the full value of our clients' claims.

Recent Real-World Example

After requesting a decedent's medical records pre-suit from a nursing home, our firm received a letter from defense counsel stating that his client had only $100,000 in insurance coverage, reduced by defense costs. We thought that letter was odd for two reasons: 1.) We requested medical records and not insurance limits, and 2.) When our firm sued the same nursing home a few years earlier it had several million dollars in insurance coverage. In hindsight, the reason for the letter was obvious — to create the illusion that the nursing home had neither the available insurance nor assets to compensate our clients for their father's death, and to instill fear that if the clients didn't take the available insurance before it was eviscerated by defense costs, they may ultimately get nothing.

After further investigation, we found that following our firm's earlier case against the nursing home it underwent a corporate reorganization and transferred its real and personal property to new affiliated corporations. We also found the revenue stream of the nursing home was ceded nightly to its parent, a holding company that wholly-owned both the nursing home and its affiliates. The nursing home entity appeared on paper to have no significant assets and minimal insurance.

We knew something wasn't right and filed suit against the nursing home and its affiliated corporations, including the holding company and its individual shareholder, under the theories of alter ego, piercing the corporate veil and joint venture. During discovery we learned the plan to transfer the assets out of the nursing home and

obtain low insurance limits was hatched while the CEO of the nursing home (the sole shareholder of the holding company) attended a healthcare seminar at a large defense firm in Atlanta. The CEO testified that he was advised by speakers at the seminar that one way to discourage lawsuits was to create an off-shore captive insurance company with low insurance limits.

The CEO was advised to transfer ownership of the nursing home's real and personal property into separate, affiliated companies. Notes from a meeting about this reorganization make its purpose clear — creating a "[s]eparate operating co for real estate" will make it a "[d]ifficult source of funds for atty" and "[l]ow limits discourage suits." You can't make this stuff up. The CEO was specifically advised to obtain minimal limits and transfer the nursing home's assets out of the nursing home to evade tort liability.

But that wasn't all we discovered. We also found that despite the appearance of multiple independent corporations, the nursing home and its affiliates continued to operate as one, without regard to the new corporate formalities. For instance, money was transferred among the corporations as needed without interest, formal loan documents or terms of repayment. Funds from one corporation were used to pay for goods and services provided to other corporations. Employees and equipment were shared. Real estate was transferred without payment. Not only were the corporate formalities ignored, the sole shareholder used corporate funds to purchase multiple goods and services for himself and his family. Loans were likewise made to and from the shareholder without formal documentation or expectation of repayment. In reality, the "reorganization" had no apparent purpose other than to take assets out of the nursing home so they couldn't be recovered by aggrieved plaintiffs.

This story, fortunately, has a good ending. We were able to amass so much evidence of fraud, co-mingling and abuse of the corporate forms that the defendants didn't even move for summary judgment, and instead stipulated to plaintiffs' alter ego, piercing the corporate veil and joint venture claims to keep this damning evidence out of the trial. The case was thereafter resolved for a confidential sum.

Potential Theories of Relief

Potential theories of relief against a corporate defendant that has attempted to hide its assets include alter ego, piercing the corporate veil and joint venture claims.

Alter Ego/Piercing the Corporate Veil Claims

"The concept of piercing the corporate veil is applied in Georgia to remedy injustices which arise where a party has overextended his privilege in the use of a corporate entity in order to defeat justice, perpetuate fraud or to evade contractual or tort responsibility." *Baillie Lumber Co. v. Thompson*, 279 Ga. 288, 290, 612 S.E.2d 296, 299 (2005). To prevail in a piercing the corporate veil claim, the "[p]laintiff must show that the defendant disregarded the separateness of legal entities by commingling on an interchangeable or joint basis or confusing the otherwise separate properties, records or control." *Soerries v. Dancause*, 248 Ga. App. 374, 375, 546 S.E.2d 356, 358 (2001). "Under the alter ego doctrine in Georgia, the corporate entity may be disregarded for liability purposes when it is shown that the corporate form has been abused. In order to disregard the corporate entity because a corporation is a mere alter ego or business conduit of a person, it should have been used as a subterfuge so that to observe it would work an injustice." *Baillie Lumber Co.*, 279 Ga. at 289-90, 612 S.E.2d at 299.

With hard work, creativity and a little bit of luck, you will often find there is adequate money available to compensate your clients.

Fortunately for aggrieved consumers, "[t]he courts are constantly demonstrating a willingness to disregard the separateness of the entity of a corporation where such corporation has overextended its privileges in the use of the corporate entity to defeat justice, to perpetrate fraud, or to evade statutory, contractual or tort responsibility." *Bone Construction Co., Inc. v. Lewis*, 148 Ga. App. 61, 63, 250 S.E.2d 851, 853 (1978) (quoting Kaplan's Nadler, Ga. Corporation Law, 81-82, § 3-14). Whether the corporate veil should be pierced is a question for the jury. *Acree v. McMahan*, 258 Ga. App. 433, 435-36, 574 S.E.2d 567, 571 (2003).

While there are no specific elements a plaintiff must prove to prevail in an alter ego/piercing the corporate veil claim, there are several factors that constitute evidence the corporate veil should be disregarded. *See*, e.g., *Pope v. Professional Funding Corp.*, 221 Ga. App. 552, 472 S.E.2d 116 (1996) (affirming verdict piercing the corporate veil when there was evidence the shareholders transferred assets between corporations without adequate documentation and used funds from one corporation to improve real property owned by another corporation.); *Abbott Foods of Georgia, Inc. v. Elberton Poultry Co., Inc.*, 173 Ga. App. 672, 327 S.E.2d 751 (1985) (affirming jury verdict piercing the corporate veil when the shareholder paid himself several salary advances, made loans to himself for his personal benefit, bought stock in another company with corporate assets, used corporate funds to make loan and insurance payments on his personal automobile, and there was no functioning board of directors.); *Trans-American Comm., Inc. v. Nolle*, 134 Ga. App. 457, 214 S.E.2d 717 (1975) (holding that there was sufficient evidence for a jury to find that a holding company was used to drain the assets of its wholly-owned subsidiary when assets between the companies were pooled, there was one central bookkeeping office, employees were interchanged, and loans were made from one company to another without being repaid.); and *Anthony v. Gator Cochran Const., Inc.*, 299 Ga. App. 126, 128, 682 S.E.2d 140, 142-43 (2009) (affirming a jury verdict requiring related entities to pay

for the debts of the defendant because the related entities were operated as alter egos, "entwined" their finances, and would pay each other's invoices depending on which corporate entity happened to have capital at any given time).

Joint Venture Claims

Joint venture claims should also be carefully considered. "The theory of joint ventures arises where two or more parties combine their property or labor, or both, in a joint undertaking for profit, with rights of mutual control (provided the arrangement does not establish a partnership), so as to render all joint ventures liable for the negligence of the other." *Kissun v. Humana Inc.*, 267 Ga. 419, 420, 479 S.E.2d 751, 752 (1997). Factors to be considered when determining whether affiliated companies are being operated as a joint venture include the corporations sharing management, personnel, bank accounts, officers, directors, and shareholders. *See Farmers Warehouse of Pelham, Inc. v. Collins*, 220 Ga. 141, 149, 137 S.E.2d 619, 625 (1964); *see also Smith v. Hawks*, 182 Ga. App. 379, 385, 182 S.E.2d 669, 675 (1987).

Lessons Learned

As with all cases, I learned some important lessons that I won't soon forget.

Fight the Good Fight

Right now corporate clients are being advised to lower their insurance limits and divest themselves of assets to prevent your clients from fully recovering their damages. They are getting this advice, frankly, because it works. It is difficult for trial lawyers to expend the additional time, effort and money required to piece together the puzzle of why the corporate defendant lacks sufficient insurance or assets, and to reconstruct where those assets may have been improperly transferred. If we as trial lawyers become complacent and simply reject cases or accept low-limits without further investigation, we are bound to encounter more financial misconduct in the future. The only way to right the ship and ensure corporate defendants understand the necessity of maintaining adequate insurance and capitalization is to file suit, vigorously pursue your claims and make them pay. While that no doubt requires additional time, money and hard work, it is the right thing to do for your clients.

Follow the Money

It is essential that you get an accurate understanding of the corporate defendant's relationship with other corporations so that you can identify all available assets. Corporations are increasingly owned by holding companies who may also be receiving regular dividends and distributions. Some of these "distributions" may actually constitute fraudulent transfers made after your client's claim arose. Prior to filing suit, one quick way you can identify affiliated corporations is by searching the secretary of state's websites for entities that share the same officers or registered agent as the defendant. You should also carefully review the corporate defendant's website and, if it is publicly traded, the defendant's available financial statements.

After filing suit, you should vigorously pursue discovery and add additional defendants if necessary. Some things you should request in discovery include organizational charts, audited financial statements, financial affidavits or other loan documents provided to banks to obtain financing, check registers, credit card receipts, IOUs

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and similar records of debt, property deeds and rental/lease agreements. It is also advisable that you promptly depose either a 30(b)(6) witness, the defendant's accountant, or the defendant's Chief Financial Officer before the statute of limitations runs to get an understanding of who else may be financially responsible.

Consider Hiring a Forensic Accountant

If the case justifies it, you should also consider hiring a forensic accountant to assist you in understanding the defendant's finances. Not only can these experts assist you in locating assets, they can also assist you in compiling the evidence necessary to support your alter ego and joint venture claims. This is often money well spent.

Locate and Interview Former Employees

Former employees can be the key to your case. They can provide invaluable testimony about how the corporate defendant is operated and, in many cases, how the corporate form is being abused by either the shareholders or related corporate entities.

Conclusion

Faced with an uninsured or underinsured defendant with a bleak balance sheet, the urge for many lawyers is to reject the case or take whatever the defendant offers. Please resist the urge to do that before vetting your ability to pursue alter ego, piercing the corporate veil or joint venture claims. With hard work, creativity and a little bit of luck, you will often find there is adequate money available to compensate your clients for the injuries they have sustained. ●

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The author worked on this case with Matthew E. Cook, a partner in the Columbus, Ga. office of Butler, Wooten & Fryhofer, LLP and would like to thank Matt for his hard work and guidance during the case and assistance in editing this article.