

Helping Business Owners Avoid Personal Liability

By *Markus May*

A recent case gives detailed guidance about how business owners should run their companies as separate entities from themselves to avoid personal liability under the "piercing the corporate veil" doctrine.

Business owners risk losing their personal assets if they do not properly operate their businesses. An Illinois second district appellate case reminds business owners, and attorneys advising business owners, on how to operate businesses to avoid personal liability for corporate actions. In *Fontana v TLD Builders, Inc*¹ the court performed a detailed analysis of the "piercing the corporate veil" doctrine and ultimately held an individual liable for a corporate debt exceeding \$1 million.

This article reviews the *Fontana* analysis and suggests ways to help business owners avoid personal liability for business debts and torts. Much of the *Fontana* logic applies not only to individual shareholders but also to shareholders in a parent-subsidary or affiliated entity relationship.²

The "piercing the corporate veil" doctrine

A corporation is a separate and distinct legal entity from its shareholders, officers, and directors and a limited liability company is separate from its members. The general rule is that such individuals are not liable for the entity's debts.³

In fact, one reason many individuals use corporations or other limited liability entities to transact business is to avoid personal liability for the corporation's actions.⁴ By creating a limited liability entity to do business, an individual can generally engage in business without worrying about losing personal assets such as the family home or bank accounts in the event of a business loss or liability not covered by insurance.

However, there are exceptions to the general rule. One deals with piercing the corporate veil. Courts have held that when a business operates as the alter ego or business conduit of an individual or other entity, the corporate veil shielding the individual from liability can be pierced.⁵ Generally, courts are reluctant to pierce the corporate veil. Therefore, the burden is on the party seeking to do so to make a substantial showing that the corporation is really a dummy or sham for another entity or individual.⁶

To pierce a corporate veil, the movant must prove a two prong test: (1) there is such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, i.e., the corporation is the alter ego for the individual; and (2) adherence to the fiction of a separate corporate existence allows a fraud or promotes injustice or inequitable consequences.⁷ The piercing doctrine is therefore an equitable remedy used to impose liability for an underlying cause of action, such as a tort or breach of contract.⁸

Factual background of *Fontana*

TLD Builders Inc. was a company owned by Nicola DiCosola's wife Theresa as the sole shareholder. On September 24, 1999, Joseph and Angela Fontana hired TLD to construct a single-family home on some property the Fontanas owned in Clarendon Hills.

When the home was not completed, the Fontanas brought suit against TLD for breach of contract. The Fontanas also sued Mr. DiCosola as an individual for the contract breach and asked the court to pierce the corporate veil. He argued that since he was not a shareholder of TLD he could not be held liable for TLD's breach of contract. He further argued that the facts were insufficient to support a piercing claim even if a non-shareholder individual could be held liable.

Piercing the corporate veil against a nonshareholder

As a matter of first impression, the *Fontana* court examined whether the piercing doctrine could be used to hold a non-shareholder, such as Mr. DiCosola, liable for a for-profit corporation's acts.⁹ The closest Illinois case on point was *Macaluso v Jenkins*,¹⁰ where the corporate veil was pierced against a nonprofit corporation that did not have shareholders. Most of the language in cases and commentaries regarding the piercing doctrine references shareholders and does not specifically address non-shareholder individuals. The court also examined out-of-state law.

As a result of its analysis, the second district held that where a nonshare-holder individual exercises ownership control over a corporation such that their separate personalities do not exist and the corporation is a business conduit of the individual, the corporate veil can be pierced.¹¹ Therefore, a non-shareholder individual can be personally liable for a corporation's debts if the two-prong test for piercing the corporate veil is met.¹² Similarly, the veil between affiliated "sister" companies can also be pierced.¹³

Analysis of the factors used to determine if an alter ego exists

In determining whether a corporation is merely the alter ego of an individual, a court will look at a number of factors. It is important to remember that no single factor will generally be determinative and the cases that explain this doctrine tend to look at the totality of the circumstances.

The factors listed by the *Fontana* court are among the most expansive and include (1) inadequate capitalization, (2) failure to issue stock, (3) failure to observe corporate formalities, (4) nonpayment of dividends, (5) insolvency of the debtor corporation, (6) nonfunctioning of the other officers or directors, (7) absence of corporate records, (8) commingling of funds, (9) diversion of assets from the corporation by or to a stockholder or other person or entity to the detriment of creditors, (10) failure to maintain arm's-length relationships among related entities, and (11) whether, in fact, the corporation is a mere facade for the operation of the dominant stockholders.¹⁴

The *Fontana* court's analysis of these factors and practice pointers for the business advisor are set forth below.

Inadequate capitalization. Generally, a corporation should be properly capitalized at its inception to meet expected expenses.¹⁵ In determining whether TLD was adequately capitalized, the *Fontana* court relied heavily upon *Fiumetto v Garrett Enterprises, Inc.*¹⁶

As in *Fiumetto*, the *Fontana* court noted that shareholders need to put at risk reasonably adequate unencumbered capital to cover the corporation's prospective liabilities.¹⁷ It is inequitable to allow shareholders to set up flimsy organizations just to escape personal liability.¹⁸ To determine whether a corporation is adequately capitalized you must compare (1) the amount of capital to (2) the amount of business to be conducted and the obligations to be fulfilled. Note this is generally the amount of capitalization at the time the business was formed and not the amount of capitalization as the business has grown.¹⁹

With respect to initial capitalization, Theresa DiCosola did not demonstrate she wrote a \$1,000 check for an initial capital contribution to the company. Mr. DiCosola argued that personal loans to the company by Mr. and Mrs. DiCosola, a \$4 million line of credit and some encumbered homes held by the company as inventory showed TLD was adequately capitalized. The court disagreed and found the loans and line of credit were evidence the company was actually undercapitalized.²⁰

There is some uncertainty in the definition of what constitutes capitalization of a company. Some courts may recognize inventory, equipment, and lines of credit as part of the capitalization structure²¹ while other courts may not. If debt structure and inventory are considered as a part of capitalization, this will help a closely held company which started with \$1,000 capital and a large amount of debt.

In actual business practice, many small business owners provide an initial capitalization of a minimal amount such as one thousand dollars. Subsequently, the owners pay themselves salaries or dividends equal to the income of the company each year and retain very little in earnings. Under the *Fontana* and *Fiumetto* analysis, a small initial capitalization would not be enough to prevent this factor from being construed against the owner.

A lawyer defending such a claim would be wise to look at other authority such as *In re Estate of Wallen*,²² which states that you must look closely at the nature of the business to

determine whether it is undercapitalized and whether the company intended to minimize its assets to the detriment of its creditors. Additionally, *Browning-Ferris Industries of Illinois, Inc v Ter Maat*, provides that where a company is able to function on its own for many years, this is evidence the company is not undercapitalized.²³

As preventive steps, practitioners should advise clients about the danger of undercapitalization. However, many small business owners will want to take money out of the business as opposed to allowing it to sit in a corporate capital account for a rainy day. If that's the case with your client, remember that all the piercing factors need to be examined and try to ensure that as many of the remaining factors as possible fall in your client's favor.

Failure to issue stock. The stock was issued to Theresa DiCosola and therefore this factor was not addressed by the *Fontana* court. Clearly if the company does not issue stock that bears some weight in determining whether it is a separate entity from the individual alleged to be the alter ego; however this factor is usually not heavily relied upon.²⁴ This is one of the easiest factors to meet. Therefore, you should see to it that your client has properly issued stock certificates.

Failure to observe corporate formalities. The *Fontana* trial court found that TLD failed to observe the corporate formalities by (1) failing to attach legal descriptions of properties sold to the corporate resolutions approving the sale of those properties and (2) failing to adopt corporate resolutions authorizing payments on loans the DiCosolas made to TLD. The appellate court held that because Mr. DiCosola did not challenge the second basis of the trial court's finding, it alone was sufficient to support the finding that corporate formalities were not followed.²⁵

This is a troublesome finding for lawyers and corporations who maintain very streamlined corporate minutes. In *Fontana*, corporate resolutions were adopted each year appointing the directors and officers of the company. Further there were corporate resolutions specifically approving the purchase of various properties. The only failure of corporate formalities was the failure of the corporate resolutions to approve loan payments to the DiCosolas.

Though other courts may not be as strict as the *Fontana* court, *Fontana* is a warning that companies must be diligent in documenting and approving all material transactions of a corporation, especially loans and payments from and to shareholders or other entities. Attorneys who prepare annual minutes for their clients should take special note and advise clients to create minutes approving all material actions taken by the corporation.

Further, though ratifying corporate actions after the fact is not *per se* improper, *Fiumetto* indicates this could at least be a possible indication of neglect of the necessary corporate formalities.²⁶ Therefore, the best practice is for corporate boards to approve corporate actions before they occur or at the time they occur.

As for limited liability companies, Illinois statutes provide that the corporate formalities need not be followed. This provides some protection to the limited liability company members when it comes to this factor. However, limited liability company managers or members may wish to approve all company actions in writing as a matter of good business practice in any event. This would especially be true for anything that could be construed as self dealing.

Nonpayment of dividends. TLD paid no dividends to Theresa DiCosola.²⁷ The corporation generally operated at a loss and appears to have existed solely because of the infusion of cash from the loans by the DiCosola's as well as the line of credit from the bank. However, money flowed from the corporation into the DiCosola's personal checking account and this weighed heavily in the court's decision.²⁸

Note that in small companies, dividends are often not paid and this factor has been held not to be determinative where other countervailing facts are present.²⁹ In *Fontana*, if there were corporate resolutions authorizing the money transfers, whether as salary, dividends, or loan repayments, this factor probably would not have been construed against Mr. DiCosola.

The practice pointer here is that companies need to ensure that income is properly distributed in the form of dividends, salaries, loan repayments, or some other approved form of compensation.³⁰ Documentation about the rationale for the payment should be maintained in the corporate records.

Insolvency of the debtor corporation.

The *Fontana* court did not explicitly address this factor. A corporation will often be insolvent when a piercing the corporate veil claim is brought.

If a corporation is solvent (assets exceed liabilities), it could presumably pay its debts and the plaintiff could proceed directly against the corporation's assets without piercing the corporate veil. Therefore, this factor seems to be stacked against the debtor corporation whenever a piercing claim is brought. However, when the corporation is insolvent solely due to the underlying claim which leads to the piercing claim, this factor should not be construed against the individual.³¹ There is not much a practitioner can do in advising a client with respect to this factor.

Nonfunctioning of the other officers or directors. The trial court found that Theresa DiCosola was not an active director of the corporation. Though she apparently performed some actions on the corporation's behalf, the trial court found she did not have the real decision-making role in TLD. There was not enough evidence to overcome the trial court's findings in this regard and therefore the appellate court affirmed the finding.³²

The lesson here is that companies should not appoint board members or officers who are not actively engaged in making decisions for the company. Be especially wary of this

issue when a client desires to obtain a minority or woman owned business designation and no person fitting that description is active in the management of the company.

Absence of corporate records. TLD filed corporate bylaws, prepared resolutions and shareholder actions and filed all necessary paperwork with the secretary of state, filed all tax returns, and maintained a separate bank account and financial records. However, the company failed to document the terms of personal loans from the DiCosolas; the corporate tax returns did not document those loans; and there was no evidence of repayment of any indebtedness. There were no corporate records showing the amounts borrowed by TLD to purchase the properties.

Additionally, there were no written contracts with subcontractors, no written bids, no written change orders, no written work schedules, and no written record of any payments TLD made to subcontractors.³³ Based on these facts, the appellate court found the trial court's determination that TLD failed to keep and maintain corporate records was not against the manifest weight of the evidence.

If the trial court had made a contrary finding on the facts, the appellate court may not have overturned that ruling. However, the practice pointer here is that merely maintaining a corporation is not enough. There must be other written documentation regarding corporate actions and contracts with third parties.

Further, it is good business practice to document an entity's relationship with third parties to clarify responsibilities between the parties. Given the importance of this factor in many courts' rulings, clients should be advised to document all corporate actions and contracts in writing.

Commingling of funds. The *Fontana* court found that commingling of funds occurred because Theresa never received any wages, salary, compensation of any kind, or any dividends. However, funds were transferred from the business account into the DiCosola's personal checking account. The court held "[t]his money was not salary, wages, dividends, or distributions and, therefore, demonstrates the commingling of TLD's funds with DiCosola and Theresa's personal funds."³⁴

As is mentioned above, companies need to clearly document, preferably in the form of corporate resolutions, the payment of any funds to shareholders or other controlling individuals. Clients need to be informed of the necessity of maintaining separate bank accounts and not paying personal expenses from the business account. If business expenses are paid from a personal account, there should be documentation supporting the expense and any subsequent expense reimbursement to the individual.

Diversion of assets from the corporation by or to a stockholder or other person or entity to the detriment of creditors. This factor was not specifically addressed by the court in its analysis, but it did play a part in the second prong analysis discussed below. Not much needs to be said here - if this factor exists, it will obviously have a strong

bearing on a court's decision in piercing the corporate veil. Clients should be advised to not make preferential payments.

Failure to maintain arm's-length relationships among related entities. This factor was not directly addressed by the *Fontana* court. Just as with the diversion of assets, the failure to maintain arm's-length relationships indicates some form of sharp dealing or preferential treatment and has a strong bearing upon a court's decision to pierce the corporate veil.

However, merely operating several businesses out of the same location,³⁵ using a sweep banking account between related entities,³⁶ or using another company's trademark³⁷ is not necessarily enough to fail this test. Generally speaking, a corporation should not receive a benefit that it could not obtain on the market. For example, charging nonmarket rent under a real property lease may be seen as self dealing and not maintaining an arms-length relationship.

Using the corporation as a facade for the operation of dominant stockholders. This factor was not addressed by the *Fontana* court, because Mr. DiCosola was not a shareholder. The courts will generally look at all the factors as evidence to determine whether the corporation is a mere facade for the dominant shareholder.³⁸

This factor allows a court to find that a company is the alter ego for another entity when other factors are not met and a court determines it is appropriate to pierce the corporate veil. Generally, cases seem to hold this as the catch-all summation of the evidence showing that the corporate veil may be pierced.

Analysis of fraud, injustice, or inequitable consequences

The second prong of the piercing analysis requires a showing that the separate company existence allows a fraud, promotes injustice, or promotes inequitable consequences.³⁹ The *Fontana* court found that though the trial court did not address the second prong of the piercing test, this prong was satisfied.

After the Fontanas filed suit, TLD sold assets worth \$1.8 million and paid off various creditors. One of those creditors was Theresa DiCosola who was paid \$91,783 on an undocumented shareholder loan.⁴⁰ The DiCosolas also created a new business which began building homes after the lawsuit was filed. The DiCosolas did not perform any additional work with TLD after the lawsuit was filed.⁴¹ Based primarily on these facts, the court held that Mr. DiCosola reduced the assets of the company to the detriment of the Fontanas.

One troubling aspect of the case is the mention of the creation of a second corporation. There is an implication in *Fontana* that the DiCosola's should have continued working with TLD indefinitely after the suit was filed.

If, however, a corporation is failing with no chance of success, it makes business sense from a shareholder perspective to wrap up the old and begin a new corporation. Many business owners own more than one corporation. Setting up a new corporation, in and of itself, where no assets are diverted from the preexisting corporation, should not constitute fraud or an injustice.

Perhaps if TLD had been placed in bankruptcy, the court would not have mentioned the creation of a new company.⁴² However, where individuals set up flimsy corporations with limited chances of success, the corporate veil will be pierced.

For the attorney, the lesson is to advise clients to consult their legal advisor if in doubt about whether an action results in an injustice or inequitable result. Generally, clients should be advised to avoid giving related entities or shareholders preferential treatment in repaying loans or other monetary transfers after a lawsuit has been filed or if the company is not doing well.

Conclusion

The *Fontana* case provides a few surprises. Perhaps if TLD were in a different industry or had been in existence for a longer period, the result would have been different. If the payment to Mrs. DiCosola had been made to an unrelated third party owner, perhaps there would have been no personal liability for Mr. DiCosola. The overall take-away from this case is that self-dealing when a company is going under will result in a court being more likely to construe the facts to pierce the corporate veil.

For the attorney representing an ongoing closely held business, the lessons from *Fontana* do not depend on whether the court was right or wrong. The importance of documenting corporate transactions, especially those between a company and its shareholders or other individuals exercising some control over corporate actions, cannot be overemphasized.

Attorneys need to communicate to their clients the importance of maintaining the corporate formalities and documenting material transactions. If a corporate ship is sinking, the company's shareholders need to avoid any form of self dealing or risk having their personal assets sink along with the business assets. In corporate governance, an ounce of prevention is worth more than a pound of cure.

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1. 362 Ill App 3d 491, 840 NE2d 767 (2d D 2005).
2. For recent cases dealing with piercing the corporate veil against affiliates or parents, see: *Laborers' Pension Fund v Lay-Com, Inc*, 455 F Supp 2d 773 (ND Ill 2006); *K. C. Pharmaceuticals, Inc v Strieter*, 2006 WL 741383 (SD Ill 2006); *Judson Atkinson*

- Candies, Inc v Latini-Hohberger Dhimantec*, 2007 WL 674662 (ND Ill 2007).
3. *Fontana* at 500, 840 NE2d at 775.
 4. *Id.*
 5. *Id.*
 6. *Id.*
 7. *Id.* at 500, 840 NE2d at 776.
 8. *Id.*
 9. Though Mr. DiCosola was the company president, the court did not address the piercing doctrine with respect to his position as an officer of the corporation.
 10. 95 Ill App 3d 461, 420 NE2d 251 (2d D 1981).
 11. *Fontana* at 502, 840 NE2d at 777.
 12. An in-depth analysis of the court's reasoning is beyond the scope of this article.
 13. *Laborers' Pension Fund*, 455 F Supp 2d at 786.
 14. *Fontana* at 503, 840 NE2d at 778.
 15. Charles W. Murdock, *Piercing the corporate veil - In general*, 7 Ill Prac, Business Organizations § 8.9 (West 1996).
 16. 321 Ill App 3d 946, 749 NE2d 992 (2d D 2001). In *Fiumetto* summary judgment on a piercing claim was disallowed because the record needed to be construed in the plaintiff's favor.
 17. *Fontana* at 504, 840 NE2d at 779, relying on *Fiumetto* at 959, 749 NE2d at 1005.
 18. *Id.*
 19. Murdock, *Piercing the Corporate Veil* - (cited in note 15).
 20. *Fontana* at 504-505, 840 NE2d at 779.
 21. See the following cases where financing arrangements and inventory were considered in the amount of capitalization: *Jacobson v Buffalo Rock Shooters Supply, Inc*, 278 Ill App 3d 1084, 1089-1090, 664 NE2d 328, 332 (3d D 1996) (inventory and equipment considered); *Bankers Trust Co v Chicago Title & Trust Co*, 89 Ill App 3d 1014, 1020, 412 NE2d 660, 664-65(1st D 1980) (successful refinancing considered); *Gallagher v Reconco Builders, Inc*, 91 Ill App 3d 999, 1006, 415 NE2d 560, 564-65 (1st D 1980) (no credit line is a factor in inadequate capitalization).
 22. 262 Ill App 3d 61, 71, 633 NE2d 1350, 1359 (2d D 1994).
 23. 13 F Supp 2d 756, 766 (ND Ill 1998).
 24. *Strieter*, 2006 WL 741383 (SD Ill 2006).
 25. *Fontana* at 505, 840 NE2d at 780.
 26. *Fiumetto* at 960, 749 NE2d at 1006. Note: clients need to be advised to follow other corporate formalities such as signing a title next to their name in order to avoid other forms of potential personal liability.
 27. *Fontana* at 507, 840 NE2d at 781.
 28. *Id.*
 29. *Browning-Ferris*, 13 F Supp 2d at 766.
 30. Additionally, there may be Internal Revenue Service issues if a corporation never pays dividends yet continues to operate for years on end with bonuses to owners. The company's accountant or tax attorney should be consulted with respect to this issue.
 31. *Browning-Ferris*, 13 F Supp 2d at 766.
 32. *Fontana* at 505, 840 NE2d at 780.
 33. *Id.* at 506, 840 NE2d at 781.

34. *Id* at 507, 840 NE2d at 781.
 35. *Jacobson v Buffalo Rock Shooters Supply, Inc*, 278 Ill App 3d 1084, 1089-1090, 664 NE2d 328, 332 (3d D 1996).
 36. *Judson*, 2007 WL 674662 at 17.
 37. *Logal v Inland Steel Industries, Inc*, 209 Ill App 3d 304, 310-311, 568 NE2d 152, 157 (1st D 1991).
 38. *People v V & M Industries, Inc*, 298 Ill App 3d 733, 741-742, 700 NE2d 746, 752 (5th D 1998).
 39. *Fontana* at 507, 840 NE2d at 781.
 40. The payment was to Theresa and not to Mr. DiCosola. The court did not explicitly address why Mr. DiCosola could be held personally liable on a piercing claim when the payment was to Mrs. DiCosola.
 41. *Fontana* at 508, 840 NE2d at 782.
 42. Contemplating bankruptcy in and of itself is not a fraudulent or improper scheme. *Judson*, 2007 WL 674662 at 28.
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