

News & Types: Corporate, Finance & Acquisitions Update

Another Corporate Veil Piercing Case – Sham Transactions Make Affiliates and Individuals Vulnerable

5/17/2016

Practices: Corporate, Finance & Acquisitions, Litigation

Suddenly courts in Illinois are issuing corporate veil piercing decisions. In our last [update](#), we highlighted an Illinois Court of Appeals decision that demonstrated the carelessness of a business owner in failing to take even basic precautions to respect corporate formalities and distinguishing his own assets from those of his multiple businesses. (*Steiner Electric Company v. Manisalco and Sackett Systems, Inc.*, 2016 IL App (1st) 132023, March 2, 2016)

The Seventh Circuit Court of Appeals has issued another corporate veil piercing case. While lacking the egregious facts of the *Steiner* case, it also illustrates a failed scheme that resulted in piercing the corporate veil. (*Continental Casualty Company v. Alan Symons, et al.*, 7th Circuit Court of Appeals, Nos. 14-2665, 14-2671 and 15-1061, March 22, 2016)

The Symons family ran a multinational insurance empire. Its companies were interrelated and operated out of Indianapolis, Indiana. IGF Insurance Company (IGF) was the main component. It was publicly traded. Affiliated companies included Goran Capital, Inc. (Goran), Symons International Group, Inc., and Granite Reinsurance Co. (Granite Re). Through a complicated web of shareholdings and interlocking boards and officers, all companies were controlled by members of the Symons family, namely, Gordon and his sons Alan and Doug. So even though IGF was a public company, it was, in fact, controlled by the Symons family.

In February 1998, IGF purchased a multi-peril crop-insurance business from Continental through a "Strategic Alliance Agreement." The price was to be determined at either side's option by the exercise of a put or call. In January 2001 Continental exercised its put option. Under the agreed formula, IGF owned Continental \$25.4 million. In addition, through the Strategic Alliance Agreement, IGF owed Continental more than \$4 million in shared profits.

Around this same time, IGF decided to sell the crop-insurance business. IGF did very well in the buying and selling of this business, eventually selling it to Acceptance Insurance Company for \$40.5 million.

But even this profit did not satisfy IGF. It wanted to keep even more. So, in a structure that the Symons family, particularly Alan Symons, insisted upon, the \$40 million payment from Acceptance was divided as follows:

- \$16.5 million to IGF;
- \$9 million to IGF's parent companies, Symons International and Goran; and

- \$15 million to Granite Re.

So what was the reason for these payments to Symons International, Goran and Granite Re? The \$9 million to Symons International and Goran were in consideration for noncompetition agreements. The \$15 million payment to Granite Re was for a reinsurance treaty, under which Granite Re would cover a share of the insurance policies issued by the crop-insurance business.

Of course, the \$16.5 million received by IGF was far below the amount owed by IGF to Continental for the crop-insurance business. In fact, as the district court found, IGF was actually insolvent. Other Symons controlled companies were in similar dire straits. Goran and Symons International were balance-sheet insolvent in 1999, 2000, 2001, and 2002.

In contrast, during this time, members of the Symons family were prospering through salaries, consulting fees and loans from the family companies. Alan, Doug, and Gordon all received unsecured, interest-free loans from Symons controlled entities. At the end of 2001, the amount due from directors and officers was \$12.6 million. Between 1998 and 2002, each member of the Symons family collected more than \$2 million in salary and consulting fees from Granite Re, Goran and Symons International.

The result of all this is that Continental was never paid the \$25.4 million owed by IGF. So, obviously, Continental sued, right?

Actually, no. In a head-scratching move, IGF sued Continental on June 4, 2001 alleging that Continental had misrepresented the profitability of the crop-reinsurance business. Note that this was just days after IGF entered into the agreement with Acceptance under which Acceptance agreed to purchase the same crop-reinsurance business for \$40.5 million, giving IGF around \$15 million profit.

So Continental filed a counterclaim against IGF for breach of contract and against members of the Symons family and the corporations they controlled for fraudulent transfer. While the case was pending, Gordon Symons died and Doug Symons filed for bankruptcy. So Gordon's estate became a party and Doug's case was stayed.

The district court looked at the facts in detail and concluded that Symons International, Goran, Granite Re, Alan Symons and Gordon Symon's estate were liable to Continental. The district court's order was 136 pages and the Appeals Court acknowledged that the case reflected a "long and complicated factual and procedural history." The 7th Circuit affirmed in a 34 page opinion written by Judge Sykes. (IGF's claim against Continental was disposed of on summary judgment and not appealed.)

So how did the district court find the Symons' family companies and Symons' family members liable to Continental?

- **Breach of Contract.** The Strategic Alliance Agreement was ambiguous. IGF, Symons International and IGF Holdings were all parties to the Agreement. Clearly, IGF Holdings had the primary payment obligation to Continental under the Agreement. But Symons International had obligations to take actions to "make effective the transactions contemplated by this Agreement" and to "use all reasonable effort . . . to consummate the transactions contemplated by this Agreement." So the district court concluded, and Judge Sykes agreed, all the IGF affiliates, IGF, IGF Holdings, and Symons International, were also obligated to

Continental.

- **Indiana Uniform False Transfer Act.** This was a more difficult analysis. Did IGF transfer or divert assets to avoid paying Continental? The district court concluded that the funds transferred to the IGF affiliates, \$15 million to Granite Re and \$9 million to Symons International and Goran, represented sham transactions. The noncompete agreements with the two holding companies (Symons International and Goran) were sham agreements because these companies were not competitive threats. The true value was in the IGF employees who were staying with the business after Acceptance Insurance Company acquired it. So the acquirer of the crop-insurance business, Acceptance Insurance Company, received no benefit from these noncompete agreements. They represented a diversion of funds that rightfully should have gone to IGF. The court cited the well-known case of the businessman-author-historian, Conrad Black, who served jail time for defrauding his companies by receiving personal payments for worthless noncompete agreements. The court also noted that Symons International and Goran were insolvent, which left them incapable of acquiring a competing business. This took care of \$9 million that Continental did not receive.

In contrast, the reinsurance treat was not worthless. Continental brought in two experts who testified as to the value of the reinsurance treaty. Although complicated, the bottom line was that the reinsurance treaty was vastly overpriced. On this basis, the payment to Granite Re of \$15 million for the reinsurance treaty also represented a fraudulent transfer. So Continental had successfully asserted liability against the IGF affiliates – Symons International, IGF Holdings, Goran and Granite Re.

- **Individual Claims.** But what about Alan Symons and the estate of Gordon Symons? They were not direct beneficiaries of the misdirected payments. But they could be held liable under an alter-ego theory. This involved a discussion of factors similar to the Risk Management Update cited earlier. Almost all of the Symonds companies were undercapitalized as of 1999. Corporate formalities were "entirely cosmetic." The Goran and Symons International boards met at the same time and place on 18 separate occasions between March 1997 and May 2001. Alan Symons was the principal representative of IGF, IGF Holdings, Symons International, Goran and Granite Re during the negotiations with Acceptance Insurance Company. It was Alan Symons who insisted on the complex payment structure in the sale of the crop-reinsurance business to Acceptance Insurance Company. All the Symons' controlled companies used intercompany loans, purchases, sales, securities, real estate, mortgages and other investments to move funds and assets among affiliated companies. In fact, IGF, Superior and Pafco (which were other Symons controlled companies) were losing money in 2001 while, at the same time, paying over \$40 million to their holding companies in management and service agreements. Finally, Goran, Symons International, IGF, IGF Holdings, Pafco and Superior all shared the same address in Indianapolis, Indiana.

So Continental prevailed over all of the Symons controlled entities and Symons individual family members still in the case. Of course, there are negative lessons to learn in the way the Symons operated their companies and their efforts to divert payments that should have gone to IGF (and eventually IGF's creditor Continental). But it's also hard to see how the Symons family were not satisfied with a \$15 million profit through a lucrative

series of transactions but sought to push the envelope to get even more. Perhaps the root of this complicated case is the greed of individual Symons family members.