

APRIL 2012 NEWSLETTER

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RECENT APPELLATE CASES FOR PRIVATE HELD BUSINESS OWNERS

A. PROTECTION FROM CORPORATE VEIL PIERCING OF
CORPORATIONS/LLCs

B. EMPLOYMENT AT-WILL PRESUMPTION IN PENNSYLVANIA

NEWS ALERT:

UPCOMING SEMINARS:

Joseph R. Pozzuolo, J.D., B.B.A. and Jeffrey S. Pozzuolo, J.D., M.B.A., B.S., B.A.

“How Middle Income Families Should Prepare for Retirement”

Wednesday May 23rd 1pm-5pm

Judith P. Rodden, Esquire and Lesley M. Ibanez, Esquire

“Commercial and Residential Real Estate Practice Today: From Agreement of Sale to Closing, with Ethics”

Wednesday June 13th 8am-12pm

These seminars are held at:
Penn State University, Cooperation Extension (Doylestown)
<http://bucks.extension.psu.edu/>
1282 Almshouse Road
Neshaminy Manor Center
Doylestown, PA 18901-2896

To Register or More Information: Theresa Bloom (215) 881-7402

A. Protection From Corporate Veil Piercing of Corporations/LLCs

Often times individuals will form privately held businesses as corporations or limited liability companies and enjoy the protection from personal liability that these formal entities offer. In the February, 2012 case of Walmsley v. Ehmman, the Superior Court of Pennsylvania stated that the corporate veil may be pierced by courts as a “means of assessing liability for the acts of a corporation against an equity holder in the corporation.” Notwithstanding this legal dictum, this Appellate Court decided against piercing the corporate veil and held that in Pennsylvania there is a strong presumption against piercing the corporate veil of an entity. The Court found that any inquiry into whether to pierce the corporate veil of a company must “start from the general rule that the corporate entity should be recognized and upheld, unless specific, unusual circumstances call for an exception.

In Pennsylvania, the courts will consider the following non-exhaustive list of factors when deciding whether to pierce the corporate veil of a company:

- (1) undercapitalization;
- (2) failure to adhere to corporate formalities;

- (3) substantial intermingling of corporate and personal assets; and
- (4) use of the corporate form to perpetrate fraud.

The court's main goal is to see if any justification exists for "disregarding the corporate form and the traditional insulation it provides from personal liability". Simply put, the court looks to see if an individual is abusing the corporation to further his/her own personal interest.

Based on the following legal analysis, in Walmsley, the Court did not pierce the veil of a limited liability company whose sole purpose was to own the stock of another entity.

1. Undercapitalization

The Court stated that the corporate formalities of a LLC "are few and, depending on the purpose of the LLC, it may not need to be capitalized at all." This Court found that when considering capitalization it must consider whether there was proper capitalization at the time of formation to meet the debts that may be expected to arise in the normal course of business. The Court noted that many companies may be undercapitalized if they suffer from a period of financial losses and this is not a per se reason to pierce the corporate veil. In Walmsley, the Court found that the LLC was established to hold the stock of another corporation and did not engage in any other business, therefore, no capital was required when the business had such a narrow scope.

2. Corporate Formalities

The Court first noted that the requirement to adhere to corporate formalities is

lessened for limited liability corporations (“LLC”) and closely held corporations. Corporate formalities include, but are not limited to, filing articles of organization or incorporation, obtaining a federal employee identification number, filing federal tax returns, and maintaining financial statements, bank accounts and executive office space. In Walmsley, the Court found the LLC “was not required to strictly adhere to corporate formalities” required of a C corporation. The court noted that it considers whether the lack of formalities is connected to misuse of the entity or led to harm the creditors of the entity when attempting to justify if the corporate veil should be pierced.

3. Intermingling of Corporate and Personal Assets

In Walmsley, the Court specifically noted that there were no intermingling of personal and corporate assets, even though the individual members of the LLC received tax benefits due to the structure of the LLC and the stock the LLC owned. However, the intermingling of assets is one of the important factors that privately held companies often ignore to their detriment. Courts look at whether intermingling exist as an indicator that individuals do not view the corporation or LLC as a separate entity and that the corporate form is being abused for the personal benefit of the shareholders/members. Therefore, it is wise to keep personal and business expenses and assets separate.

4. Perpetration of Fraud

In Walmsley, the Court did not find evidence that the LLC was used to perpetrate fraud on its creditors. However, if such evidence is found it is highly likely that the corporate veil will be pierced. Fraud is a clear indicator that the corporate form is being abused to the

detriment of others and therefore, the courts will not continue to grant the shareholders the personal protections offered by the formation of the entity.

If you have any questions on how to properly structure your business to avoid creditors being able to pierce the corporate veil of your privately held business and make you personally liable, please contact this office for further advice and counsel.

B. Employment At-Will Presumption in Pennsylvania

Courts in Pennsylvania have repeatedly upheld that in employment relationships there is a presumption of at-will employment. This means that an employee can be terminated at any time at the whim of the employer and that there is no definite term of employment. However, the law does prohibit employers from unlawful discrimination, such as, terminating employees on the basis of their race, ethnicity, religion, disability and sex. The presumption of at-will employment allows for employers to hire employees without a definite term of employment or any guarantee that employment will continue. This means, when you are hired in Pennsylvania the employer can terminate after a day, a week, a year, etc.

In the January, 2012 opinion in Edwards v. Geisinger Clinic, the United States Court of Appeals for the Third Circuit revisited Pennsylvania's presumption of at-will employment. The Court held that the presumption of at-will employment allowed the employment relationship "to be terminated at any time by either party for any reason or no reason." The plaintiff was a physician who needed a period of continuous employment over four (4) years to become board certified. During his interview process the physician specifically discussed this four (4) year requirement with his employer. The employer even sent an offer letter to the physician outlining that in order for continued employment with the employer he

was required to become board certified within four (4) to six (6) years of his date of hire. Upon commencing work, the physician entered into an employment contract with the employer which had a provision specifically stating the physician was an at-will employee of the employer.

The physician was terminated less than a year after he was hired. The physician then brought a breach of contract claim against his employer arguing that based on the interview process and offer letter the he had a contractual term of employment for a minimum of four (4) years. The Court held that this was not enough to override Pennsylvania's strong presumption of at-will employment. At most, the statements made during the interview process and in the offer letter merely evincing an employer's *hope* or *expectations* that the employment continues for a definite term are inadequate to overcome the at-will employment presumption. To overcome the presumption of at-will employment there must be "clear and precise evidence that the parties intended to enter an employment contract for a definite term."

Additionally, the fact that an employee did not read an employment contract containing an at-will provision does not alter the employment relationship because the presumption is in favor of at-will employment and ignorance or failure to read a contract does not negate the obligations created by the contract. Furthermore, handbooks and employer policies which states termination will not occur for certain reasons or unless there is just cause does not destroy the at-will presumption. A handbook or employer policy must contain express language that the employer meant to destroy the at-will presumption.

It is always important for employment contracts to contain express and clear provisions when drafted. Employers should always include either an at-will employment provision or a definite term of employment to employment contracts so there is clear and express

evidence of their intent. Otherwise, unnecessary and costly litigation may arise based on misunderstandings between expectations and actual contractual obligations in the employment setting.

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Deferred Compensation Rewards And Retains Key Employees

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Money Purchase Pension Plan Falls Out Of Favor

Why An Employment Contract Is Mandatory

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How To Look, Act And Sound Like A Professional Corporation

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Estate Planning

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Six Proven Estate Planning Techniques

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Divorce and Estate Planning

Remarriage Situations Can Raise Special Estate Planning Considerations

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Drafting The Durable Power Of Attorney For Wealth Protection Purposes

Why Living Wills Advance Directives Are An Essential Part Of Estate Planning

Special Needs Trust - An Estate Planning Tool For The Disabled

Adapt Estate Planning Strategies to Fit the Needs of Same-Sex Couples

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects. It is to provide insight into legal developments and issues. You should always consult with legal counsel before taking any action on matters covered in our updates.

This newsletter is courtesy of Pozzuolo Rodden, P.C.

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