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STEPHENSON SNOKHOUS & FOURNIER

Strategy

NEWSLETTER

ALTER EGO

COULD MY PERSONAL ASSETS BE AT RISK IF MY BUSINESS IS UNABLE TO PAY A CREDITOR IN FULL?



Creditors often try to recover from business owners if a business is unable to pay them in full, but Texas law is making lawsuits against entity owners more difficult to win.

It is commonplace among closely-held businesses to form an entity with only one shareholder or member. Until the mid-1990s, this structure put a Texas business owner at some considerable risk for personal liability and for potential tort claims under the legal theory of 'alter ego'. However, amendments to the Texas Business Corporation Act as well as a recent Texas Supreme Court

decision have put a halt to most alter ego lawsuits. Now, in most cases, a complainant must prove actual fraud when seeking to hold a shareholder or owner of a Texas entity liable to a company debtor on a contractual obligation.

Unfortunately, that does not mean Texas business owners can be complacent about keeping up with corporate formalities and appropriate recordkeeping. For purely tort claims, a business entity owned by a single individual still has broad legal exposure to potential alter ego liability. Other types of claims, such as ERISA litigation, can result in individual exposure as well.

To reduce this risk, it is important for the business owner to separate his personal finances and accounting from the business books and records. He must maintain distinct records for each business he owns. If there are several separate operating entities, the owner must take precautions to prevent one entity from having liability for obligations of another. To the extent practicable, the owner should hire separate employees, maintain separate offices, undertake separate accounting, and maintain separate business names. Even when an owner has only one business entity, it is always vital to maintain clear entity books and records that are up-to-date and segregated from the individual or family

books and records. Sloppy or inadequate record keeping may justify piercing of the corporate veil. Observing entity formalities such as keeping minutes and maintaining stock or ownership records is also required. None of these precautions will prevent liability in the case of fraud, nor will they stop a creditor from bringing a lawsuit, but they are critical to proper management of a closely held business.

Of potentially greater import to protect a business owner from personal liability is the requirement to make periodic filings and pay taxes as required by the Texas Secretary of State and Comptroller. Limited partnerships are especially likely to miss their required Secretary of State reports because these forms are only due every four years. Calls to the Secretary of State (512) 463-5555 and the Comptroller (800) 252-1386 can be made to determine whether your business' required filings and payments are current.

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er	7.34	+1.13	+1.1
Express Prtnr:	5.91	+0.06	+9
Express Y:	24.42		
hip	7.0		
ICoB	11.48	+0.29	
ICAB	16.17	+0.02	
NwPersp	21.66	+0.13	
WashB	21.68	+0.24	
Amer Skn	29.06	+0.19	
JanCap			
Mrc			

IRS CIRCULAR 230 NOTICE

OUR CLIENTS ARE ASKING ABOUT A NEW DISCLOSURE THAT APPEARS IN MANY OF OUR OUTGOING EMAILS AND LETTERS.

The Internal Revenue Services began in June 2005 to require all tax advisors, including our firm, to provide a written notice to clients in connection with all written Federal tax advice. Treasury Department Circular 230 is applicable to attorneys (including our firm), accountants and other tax professionals who practice before the IRS.



This disclosure in no way affects the content of our advice to you in any other way. It is simply a new disclosure required by the IRS.

From time to time when you receive a legal opinion, memorandum, letter or email from us or your other tax advisors you may see the following paragraph near the end of the correspondence:

IRS Circular 230 Disclosure: U.S. Treasury Regulations require us to inform you that this communication (including attachments) is not written or intended to be used, and cannot be used, by any person for the purpose of (i) avoiding tax penalties, or (ii) promoting, marketing or recommending to another person the tax treatment of any transaction or matter.

Sometimes we are asked to provide specific tax advice that is intended to be used for promoting, marketing or recommending to another person the tax treatment of a transaction or matter. This might happen in connection with a private offering of securities where our advice is used to market an equity investment. Or, it could occur when our client is acquiring an established business and is negotiating with the seller the structure of the transaction based in part on the tax treatment it will receive. In those sorts of communications, generally the Circular 230 notice we include in our correspondence will be slightly different.

If Circular 230 indicates that the disclaimer is not sufficient, our written discussion of a Federal tax issue must comply with the requirements in the Circular of a "covered opinion". Because of the increased costs of preparation of a "covered opinion", we will discuss your options before preparing one. It is our intention to continue to deliver to you the highest quality services in a cost-efficient manner.

We understand that the IRS Circular 230 notice is new to most of our clients and that until it becomes familiar there will be questions and concerns about its meaning and intent. We will be happy to discuss with you on a case-by-case basis its impact on our tax advice to you.







LEGAL TALK

TIP #1: *Protecting Your Trade Name*

Before using a new brand or business name, conduct a thorough check to see if it is the same as or similar to any other business brand. You can easily check: (a) business directories such as the yellow pages, (b) the internet through an internet search engine, (c) the United States Patent and Trademark Office (<http://www.uspto.gov/>), and (d) an accredited domain name registry such as www.networksolutions.com. Depending on the amount you want to spend and the importance of the name, you can usually protect the name by registering the logo with the Patent and Trademark office, registering an internet domain name (if you will have an online presence) and registering it as an assumed name in every state where you conduct business.

JOINT OWNERSHIP OF A BUSINESS

DISPUTES BETWEEN MULTIPLE OWNERS OF A BUSINESS CAN CAUSE CHAOS AND DISRUPTION TO THE OPERATION.



Proper advance planning can help a business prepare for the possibility that the owners might not always agree.

When a business is controlled by two or more owners, it can be prudent to include provisions relating to the sale of the business and dispute resolution in the organizational documents. Often, the owners will want to incorporate a buy-sell provision. This provision allows one owner eventually to purchase the interest of the other, but neither owner will know at the outset who will be the buyer and who will be the seller.

The best joint venture exit occurs if the venturers agree and their interests are aligned. If they both want to liquidate their investment at the same time, they can simply sell. However, things are not always so simple.

There are several exit strategies joint owners should always consider for their business documentation. These include reviewing mandatory liquidation clauses to be sure they are not too broad. Agreements, bylaws and regulations generally must not require the company to be liquidated when most of the owners would prefer to continue operating. Joint owners should also consider adopting a right of first refusal or repurchase option upon the sale of the ownership interest of a key employee of the business.

Many businesses elect to incorporate a put/call provision in their agreements that can be triggered if disagreements among the owners make it impossible to continue owning the venture together. Under these provisions, one owner selects a price at which he is willing to buy or sell his ownership interest and the other owner chooses whether to buy or sell. An alternative to a put/call provision is a clause providing for a closed auction where the owners bid against each other for ownership of the business.

Joint owners also must consider whether to include dispute resolution requirements in their company's agreements. These could include mediation and/or arbitration, appointment of an expert to decide certain types of disputes, and a litany of specific actions and decisions that require a supermajority or unanimous vote.

With each of these strategies there are pros and cons to be considered depending on the variables of the specific business.

PERIODIC TAX PLANNING

Would you like to receive periodic tax planning letters? To add your name to our mailing list, please call Cynthia at (713) 629-9494 or email us at office@stephensonlaw.com.



Q: “What kind of entity should I choose for my new apartment rental business?”

A: “A limited liability company can be a good way to go for a small company, but limited partnerships are also common in Texas because of franchise tax considerations. You should consider all the options including C-corps and S-corps. Choice of the state where you form your business will be influenced by whether you are going to do business just in Texas or more widely. Our firm can serve as a registered agent in Texas as well as handle the company organization.”

Q: “Can every non-profit organization solicit tax-deductible donations?”

A: “No. There is a difference between being a non-profit and being eligible to receive tax-deductible donations. Contributions to many types of non-profits are not tax deductible. The IRS maintains a list of eligible organizations. You can search this list online at: <http://apps.irs.gov/app/pub78>”

DIRECTORS' DUTIES: Loyalty and Good Faith

LOYALTY

A director or manager is prohibited from self-dealing and cannot derive a personal benefit from a company transaction. A director must refrain from placing himself in a position where his personal interests conflict with his directorial obligations to the business.

GOOD FAITH

Directors must fully inform themselves and use reasonable business judgment when making material decisions for their business. Failure to use ordinary care can result in a director being personally liable to owners of the business.

BUSINESS ORGANIZATIONS

NEW CODE WILL MODERNIZE, SIMPLIFY AND STANDARDIZE TEXAS ENTITY LAWS.



Major changes to Texas' business organization statutes occurred January 1, 2006. On that date, the new Texas Business Organizations Code took full effect. This new code is an effort by the Texas legislature to bring together and harmonize various Texas statutes dealing with the legal form of business entities. All businesses formed beginning in 2006 are required to adopt the provisions of that new Code. Existing businesses can decide to be governed by the new Code during the period

from 2006 through January 1, 2010, and beginning in 2010 the Code will apply without exception to all Texas entities.

All businesses engaging in transactions in 2006 and beyond (whether or not they elect to be governed by the Code) will notice changes in filings made with the Secretary of State as well as in contract provisions. Watch for a more detailed article in our next newsletter with specific advice for business owners who might want to consider electing to be governed by the Code in 2006.



Useful Brilliance

Laws alone can not secure freedom of expression; in order that every man present his views without penalty there must be spirit of tolerance in the entire population.

Albert Einstein
US (German-born) physicist (1879-1955)

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