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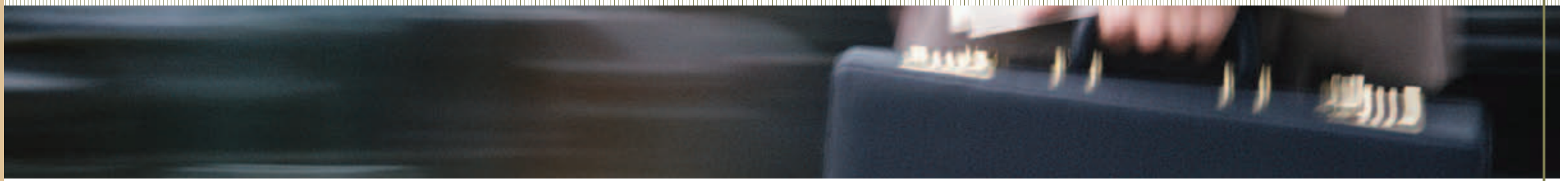
BUSINESS NOTES



PIERCING THE VEIL OF AN LLC – THE FOURTH CIRCUIT WEIGHS IN

The application of corporate veil piercing theories to limited liability companies is still in its early stages in Louisiana jurisprudence. In *Hollowell v. Orleans Regional Hosp. LLC*, the U.S. Court of Appeals for the Fifth Circuit became the first court applying Louisiana law to pierce the veil of a Louisiana limited liability company on an "alter ego basis," adopting from corporate veil piercing jurisprudence a non-exhaustive list of factors, namely: 1) commingling of corporate and shareholder funds; 2) failure to follow statutory formalities for incorporating and transacting corporate affairs; 3) undercapitalization; 4) failure to provide separate bank accounts and bookkeeping records; and 5) failure to hold regular shareholder and director meetings. 217 F.3d 379, 385-386 (5th Cir. 7/18/00); citing *Riggins v. Dixie Shoring Co.*, 590 So.2d 1164, 1168 (La. 1991). The court emphasized that the inquiry is in fact a "totality of the circumstances" test, and "courts are not limited to these five factors when invoking the alter ego doctrine." *Id.*, at 387, citing *Riggins*, at 1168.

Recently, in *ORX Resources, Inc. v. MBW Exploration, L.L.C.*, the Louisiana Court of Appeals for the Fourth Circuit employed the reasoning of *Hollowell* to pierce the veil of an LLC on an alter ego basis. 2009-0662 (La. App. 4th Cir. 2/10/10), 32 So.3d 931, *writs denied*, 2010-0530 (La. 5/7/10), 34 So.3d 862. ORX and MBW had entered into a joint operating agreement in order to develop an oil and gas lease, as well as a participation agreement which provided that MBW had a working interest in the land. Mark Washauer, MBW's managing member, signed the agreements on behalf of MBW. The well proved to be unsuccessful, and MBW allegedly did not pay its share of expenses under the joint operating agreement. ORX filed suit for breach of contract against both MBW and Mr. Washauer personally. *Id.*, at 932-933. Applying the *Riggins* factors, the court made the following findings:

(1) MBW's funds were commingled with the funds of Mr. Washauer and a separate company of his, as MBW did not have a separate bank account to transact its own affairs, and the only payments made to ORX under the agreement were made on MBW's behalf by Mr. Washauer and his separate company. *Id.*, at 937-938.

(2) Mr. Washauer failed to follow statutory formalities for incorporating by signing the agreements with ORX on MBW's behalf before MBW was recognized as an LLC by the Louisiana Secretary of State. *Id.*, at 938. The court apparently rejected Mr. Washauer's argument that he complied with the statutory requirements as a result of his acquisition of a working interest in the land (including oil,

gas and mineral leases) on behalf of MBW and the subsequent issuance by the Secretary of State of a certificate of organization to MBW. Mr. Washauer cited La. R.S. 12:1310.1, which provides that when immovable property is acquired by an individual-who is acting in any capacity for and in the name of any LLC-and the LLC is later issued a certificate of organization, the LLC's existence is retroactive to the date of acquisition of the interest in the immovable property. *Id.*, at 936-937.

(3) MBW was undercapitalized, as it never owned any assets apart from its working interest in the oil and gas wells related to the agreement with ORX. Furthermore, MBW never used its own capital to pay its expenses for the venture with ORX. *Id.*, at 938.

(4) MBW did not have a separate bank account to transact its own affairs. After issuing a check to ORX on MBW's behalf, Mr. Washauer "did not see the point in creating a checking account and getting a tax ID for a one time investment. He anticipated that the above-referenced check was going to be the last payment made relative to the [agreement]." *Id.*

(5) Although Louisiana LLC law does not require members or managers to hold meetings, keep minutes, or act through formal resolutions, the court found the fact that MBW had not had a meeting in over a year further evidenced that "Mr. Washauer was operating MBW at his leisure and discretion," and that the corporate veil should be pierced. *Id.*

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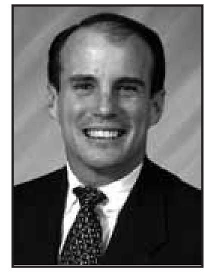
SUPREME COURT DECIDES LONG-AWAITED PATENT CASE

In one of its last acts before the summer recess, the United States Supreme Court issued its opinion in the long-awaited case of *Bilski v. Kappos* (S.Ct. 2010 80-964). In the *Bilski* case, the inventor was seeking to obtain a patent on a method of hedging risk. The Supreme Court found that the method was not patentable because it was merely an abstract idea. In earlier jurisprudence from the Court of Appeals for the Federal Circuit (CAFC), the CAFC had used a "machine-or-transformation test" to determine whether business methods were patentable. In *Bilski,* the Supreme Court refused to say that the machine or transformation test was the sole test for determining patentability, and the Court did not reject the machine or transformation test. Instead, the *Bilski* court stated that the machine or transformation test is a useful tool, but not the only tool, for evaluating whether an invention is proper subject matter for patent protection.

The Court stated that while various tests may be helpful, these tests cannot add or take away from the language of 35 U.S.C. §101. That statute states that the proper subject matter for a patent is "any new and useful process, machine, manufacture, or composition of matter." The Court did provide one other standard that can be used in determining whether a business method is patentable. The Court stated that there will be no patent protection for abstract ideas. Ultimately, the Court found that the method at issue in *Bilski* was an abstract idea and, on that basis, refused to allow the applicant to obtain a patent.

While the result of the *Bilski* case was not the clarification that many in the business and patent legal communities had been awaiting, the case is significant in that it did not pronounce a death sentence for so-called business method patents. Going forward, it appears that pure software-based methods will not be patentable. However, an invention may still be patentable subject matter even if it fails the machine or transformation test, so long as it is not an abstract idea. Proving a negative is always difficult. Therefore, patenting a business method will be possible, but will be an uphill climb.

It will become more important for inventors to evaluate their claiming strategy for inventions which involve business methods. If there is enough substance to the invention or the implementation of the method so as to avoid being classified as an abstract idea, then it is possible that the invention will be deemed proper subject matter. It will also be important to see what the CAFC does in applying the *Bilski* case going forward.



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