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Clever Structuring Won't Save a Fraudulent Transfer in the Seventh Circuit

In a recent decision, *Continental Casualty Co. v. Symons*,[1] the Seventh Circuit Court of Appeals made clear that the structure of a transaction will not save it from being set aside as a fraudulent transfer if the facts warrant the transaction's avoidance. The court affirmed the United States District Court, which quashed an attempt by the owners of a family of companies to skim value from a creditor and instead direct that value to themselves. In its decision, the Circuit Court clearly evidences its willingness to look at substance over form, and to use the theory of alter ego and veil piercing as a compliment to fraudulent transfer law to reach shareholders who orchestrate an avoidable transaction.

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The Facts

In 1998, IGF Insurance Company ("IGF") agreed to purchase Continental Casualty Company's ("Continental") crop insurance business for a formula price to be calculated upon the exercise of a put or call by the seller or the buyer, respectively. Prior to the exercise of the put or call option, the parties agreed to share profits of the crop insurance business. In 2001, Continental exercised its put option and the resulting formula price was $25.4 million.

IGF was one of a myriad of companies based in Indianapolis which were directly or indirectly owned and controlled by the Symons family, including Alan and Doug Symons, and their father, Gordon.[2] From 1999 through 2002, the Symons' family of corporations were all undercapitalized and balance sheet insolvent, including IGF, when the Continental purchase obligation was factored in. Despite this, the Symons family received robust salaries, consulting fees and interest free loans totaling $12.6 million from members of the corporate group. Although each entity was separately incorporated, had a separate board of directors and a separate bank account, all of the mail went to a single location and concurrent board meetings were the norm.

Shortly before Continental exercised its put option, IGF decided to sell the crop insurance business, which was valued at $40 million. IGF negotiated with three potential purchasers, Archer Daniels Midland, the Westfield Group and Acceptance Insurance ("Acceptance"), all of which were willing to pay the approximate $40 million price. However, only Acceptance was willing to accept

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Alan Symons' deal structure. Symons proposed that $9 million be paid to two affiliate companies, Symons International and Goran (holding companies which did not provide crop insurance), in consideration of noncompete agreements, and a total of $15 million be paid over three years to another affiliate, Granite RE, for a reinsurance treaty. Only the balance of the purchase price, or $16.5 million, was to be paid to IGF directly.

On June 4, 2001, IGF sued Continental alleging that Continental misrepresented the profitability of the crop insurance business. On June 6, 2001, Continental sued the Symons corporate affiliates, including Goran, Symons International, Granite RE, IGF, and Doug, Alan and Gordon Symons personally, for breach of contract and nonpayment of the $25.4 million purchase price. IGF closed the sale of the crop insurance business to Acceptance later that same day.

The two lawsuits were consolidated and IGF's claims subsequently were dismissed. Continental amended its complaint to include allegations that the Symonses and the Symons corporate family fraudulently diverted the IGF assets to Gorman, Symons International and Granite RE, and asked that they be held liable under fraudulent transfer and alter ego theories.

The District Court Decision

After trial, the District Court entered a $34.2 million judgment against Gordon and Alan Symons, IGF and its parent IGF Holdings, Symons International, Goran and Granite RE. The District Court found that the defendants were liable for both actual fraud and constructive fraud under Indiana's Uniform Fraudulent Transfer Act (the "UFTA").[3] Regarding the allegations of constructive fraud, the court found IGF was insolvent at the time of the Acceptance purchase, and although the crop insurance business was worth $40.5 million, only $16.5 million was paid to IGF, with $15 million being diverted to Granite RE for a reinsurance treaty and $9 million being syphoned off by Goran and Symons International for noncompete agreements. This structure caused IGF not to receive reasonably equivalent value for the sale of the crop insurance business which, when coupled with IGF's insolvency, was sufficient to warrant avoidance.

Regarding actual fraud, the District Court found that the transaction triggered six[4] of the eight separate badges of fraud under Indiana law. While no single badge of fraud constitutes a showing of fraud per se, the presence of a number of the badges creates an inference of fraudulent intent. Based upon facts, the District Court held that the transaction was accomplished with the actual intent to

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hinder, delay or defraud creditors. The court also found that the parties were alter egos of each other, and that Alan, Gordon and Doug operated the businesses and a single business enterprise that was a mere instrumentality of the Symons family.

The Seventh Circuit Ruling

In an opinion authored by Judge Diane Sykes, the Seventh Circuit reviewed each of the District Court's findings and affirmed the District Court's decision in all respects. Regarding the issue of reasonably equivalent value, the Seventh Circuit analyzed in depth the evidence presented regarding the value of the noncompete agreements and the reinsurance treaty. The court found that evidence showed that because the Symonses would have had trouble getting a standard reinsurance treaty from the Federal Crop Insurance Corporation, Goran and Symons International would have been incapable of effectively competing against Acceptance in the crop insurance space. Moreover, the employees who had the capacity to compete with Acceptance were retained by Acceptance in connection with the purchase.[5] These facts rendered the noncompete agreements valueless.[6]

Regarding the reinsurance treaty, the court reviewed the testimony of Continental's reinsurance expert, who testified that the "pure premium" of the reinsurance, which is the minimum amount the reinsurer needs to collect to pay expected losses and break even, was $45,000. While the court noted that an analysis of the pure premium is not an apples to apples comparison to an actual reinsurance treaty, the $45,000 for pure insurance was nowhere near the $15 million price tag that Alan Symon required Acceptance to pay for the reinsurance treaty. The court concluded that the District Court did not err in its findings that the noncompete agreements and the reinsurance treaty did not constitute reasonably equivalent value, but instead were diversions of the sale proceeds for the crop insurance business.[7]

The court then turned to the question of which of the defendants would be liable for IGF's fraudulent transfer. Alan and Gordon[8] argued that they could not be liable as transferees of the fraudulent transfer as they were mere participants in the deal. On their part, Granite RE, Goran and Symons International argued that the money paid by Acceptance to each of them was never an asset transferable under the UFTA. The court noted that these were questions of first impression under Indiana law.

The defendants argued that the Indiana statute provides that fraudulent transfers may be recovered from the first transferee, and any subsequent transferees who took other than in good faith and for value.[9] Alan and Gordon argued that they fell into neither category. Moreover, they cited the Seventh Circuit case of *APS Sports Collectibles, Inc. v. Sports Time, Inc.*,[10] wherein the court found that there was no authority for the proposition that insider corporate officers could be liable under Illinois's UFTA when they indirectly benefitted from the transfer at issue.

Side stepping *APS Sports,* Judge Sykes took a different approach, relying on the Seventh Circuit's prior decision of *DFS Secured Healthcare Receivables Trust v. Caregivers Great Lakes, Inc.*[11] In that case, the court considered whether an individual corporate actor could be held liable under Indiana's UFTA under common law fraud principles for his personal participation in the fraud. The *DFS* court held that there was no case suggesting that veil piercing was impermissible under the UFTA. Liability of the officers or shareholders of the first transferee was a substitute for veil piercing and not an extension of who can be a "transferee" for liability purposes under the UFTA.[12] Relying on *DFS,* Judge Sykes confirmed that alter ego liability is an alternative remedy in connection with fraudulent transfers, not an expansion of the definition of "transferee" for liability purposes.[13]

Regarding the alter ego finding, the court noted that Indiana courts are reluctant to pierce the corporate veil, but will do so to prevent fraud or injustice to a third party. Continental, said the defendants, was a sophisticated party which was never misled and which knew what it was getting into when it sold the crop insurance business to IGF. Merely being unable to collect a judgement did not present the sort of case that warranted veil piercing. While acknowledging that Continental was a sophisticated industry player, Judge Sykes noted that Continental had no reason to believe that IGF would dump the crop business for half of its value, diverting the balance of the consideration paid away from it and to the owners. This, the court said, constituted the injustice to a third party.[14]

The court also discussed at length the factors that Indiana courts look to when considering whether to pierce the corporate veil, including undercapitalization, fraudulent representation by corporation shareholders or directors, cosmetic observance of corporate formalities, commingling of assets and common address,[15] and whether corporations are operated as one enterprise to cause fraud or illegality.[16] The court found that the District Court had carefully evaluated the relevant factors and properly had determined that Gordon and Alan used their control over the corporate empire to enrich themselves at

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Continental's expense.[17]

Nor was the fact that the businesses were regulated or that several of the members of the corporate empire were publically traded sufficient to shield them from veil piercing. While veil piercing is usually applied to closely held businesses, courts have not ruled out piercing the corporate veil of public companies.[18] The fact that the insurance industry is heavily regulated is also of no significance. The Symonses could not show that regulatory requirements prevented them from manipulating their companies.[19]

Finally, Goran, Symons International and Granite RE made what the court styled as a very formalistic argument, asserting that the money paid to them directly never belonged to IGF and therefore could not have been fraudulently transferred to them. As defined by the statute, a "transfer" is "disposing of or parting with and asset,"[20] and an "asset" is "property of a debtor."[21] If the debtor did not own something, they argued, he can't fraudulently transfer it. Citing its decision in *Boyer v. Crown Stock Distribution, Inc.*,[22] the court said that under fraudulent transfer doctrine, substance trumps form.[23] Moreover, the Indiana UFTA defines transfer as disposing of an interest in an asset, *whether the mode is direct or indirect*.[24] The object of the transaction was to divert money from IGF to the Symonses. The very structure upon which the defendants based their defense was fraudulent, evidencing why fraudulent transfer doctrine elevates substance over form.[25]

The court concluded that the District Court properly found that Granite RE, Symons International and Goran were liable under the Indiana UFTA. While the court declined to find that Alan and Gordon Symons were liable as transferees, they were properly found liable under an alter ego theory.

Significance

This case evidences that in the Seventh Circuit, clever structuring to avoid the strict language of the statute will not save an otherwise fraudulent transfer from avoidance. Simply put, substance will trump form. More importantly, the case demonstrates the court's willingness to couple alter ego and veil piercing theories with the doctrine of fraudulent transfer to sweep shareholders into the liability net, even if they are not the direct recipients of the fraudulent transfer. This decision is a call to lower courts to broadly apply the fraudulent transfer doctrine to protect innocent creditors from harm. It will be interesting to see how that call is answered.

[1] *Cont'l Cas. Co. v. Symons,* Nos. 14-2665, 14-2671, 15-1061, 2016 WL 1118566 (7th Cir. Mar. 22, 2016).

[2] Several of the entities were publically traded, although the Symons family directly or indirectly owned a majority interest in each of them.

[3] Ind. Code §§ 32-18-2-1 to 32-18-2-21.

[4] The six were: the transfer of property by a debtor during the pendency of a suit; the transfer of property that renders the debtor insolvent or greatly reduces his estate; a series of contemporaneous transactions which strip a debtor of all property available for execution; any transaction conducted in a manner differing from customary methods; little or no consideration in return for the transfer; a transfer of property between family members. *See Otte v. Otte,* 655 N.E.2d 76 (Ind. Ct. App. 1995).

[5]*Cont'l Cas. Co. v. Symons,* 2016 WL 1118566 at *4, *9.

[6] *Id.* at *8.

[7] *Id.* at *9-10.

[8] Gordon had passed away and his estate was substituted as a party.

[9] Ind. Code § 32-18-2-18(b).

[10] *APS Sports Collectibles, Inc. v. Sports Time, Inc.,* 299 F.3d 624, 630 (7th Cir. 2002).

[11] *DFS Secured Healthcare Receivables Tr. v. Caregivers Great Lakes, Inc.*, 384 F.3d 338 (7th Cir. 2004).

[12] *Id.* at 347.

[13] *Cont'l Cas. Co.,* 2016 WL 1118566, at *12. The Seventh Circuit certified this question to the Indiana Supreme Court but the case settled before the Supreme Court could consider the question. The Seventh Circuit nonetheless found that the District Court's alter ego findings were sufficient to support liability under a veil piercing theory. *Id.*

[14] *Id.* at *14.

[15] *See Aronson v. Price,* 644 N.E.2d 864 (Ind. 1994).

[16] *See Smith v. McLeod Distrib., Inc.,* 744 N.E.2d 459 (Ind. Ct. App. 2000).

[17] *Cont'l Cas. Co.,* 2016 WL 1118566, at *15.

[18] *Id.* at *16. Moreover, if there were a rule against public-company veil piercing, said the court, it would be justified by the concern for innocent third party shareholders. Here, Symons International and Goran, the public companies, were delisted from NASDAQ. *Id.*

[19] *Id.*

[20] Ind. Code § 32-18-2-10.

[21] Ind. Code § 32-18-2-2.

[22] *Boyer v. Crown Stock Distrib., Inc.*, 587 F,3d 787 (7th Cir. 2009).

[23] *Cont'l Cas. Co.*, 2016 WL 1118566, at *13.

[24] Ind. Code § 32-18-2-10.

[25] *Cont'l Cas. Co.,* 2016 WL 1118566, at *13.