

**Personal Liability of Corporate Officers and Directors for Tortious Conduct:
An Overview of Florida Law**

By

Douglas B. Lang, Esquire

Generally, under Florida law officers of a corporation are not liable for corporate acts simply by reason of the officer's relation to the corporation¹. However, it is well-settled, that individual officers and agents of a corporation may be held personally liable for their tortious acts, even if such acts were committed within the scope of their employment or as corporate officers.² A corporate officer or representative of a defendant corporation is not shielded from individual liability for his own torts.³ Fraud in the inducement is a recognized intentional tort that can subject a corporate officer to individual liability.⁴

In *Roth*, the plaintiff alleged that the president of the defendant corporation made material misrepresentations that fraudulently induced him to purchase a racing boat. The appellate court ruled that "[a] corporate officer may be individually liable for torts committed even while acting as the representative of the corporate entity."⁵

Fraud is not the only tort that can subject a corporate officer to individual liability. In fact, Florida courts have made clear that there is no need to allege fraud⁶, or physical injury. . . . A corporate officer may not be held individually liable on a contract unless he signed in an individual capacity, or unless the corporate veil was pierced or the corporate entity should be ignored because it was found to be formed or used for fraudulent purposes, or where the corporation was merely the alter ego of the shareholder.⁷ Nevertheless, officers or agents of a corporation may be held liable for their own torts even if such acts are performed within the scope of their employment or as corporate officers or agents. This is so even if no argument is advanced that the corporate form should be disregarded.⁸ In *Florida Specialty, Inc. v. H 2 Ology, Inc.*⁹, the Court held that Brandvold, the sole shareholder and corporate officer of *H 2 Ology* could be individually liable for actually committing the tortious act at issue by *negligently* causing Brine Plus solution to flow onto the public street of Western Way Circle and damaging the property of plaintiff.

Recently, in *Estate of Canavan v. National Healthcare Corp.*¹⁰, the trial court granted a directed verdict in favor of a member of an LLC that operated a nursing home. The trial court accepted the LLC member's argument that he could not be held personally liable as a managing member of the LLC, or as an officer of the corporation that was manager of the LLC, without piercing the corporate veil.

The appellate court reversed on the basis that *negligence is tortious conduct* which is not shielded from personal liability. Hence, it was not necessary to pierce the corporate veil in order to keep the alleged individual tortfeasor/member in the lawsuit as an individual party defendant. The court cited *Fla. Specialty, Inc. v. H 2 Ology, Inc.*¹¹, to support its conclusion that officers of a corporation may be personally liable for their own torts even if their acts are performed as corporate officers.

In the *Canavan* case, the plaintiff sued for damages suffered by the decedent while residing in a nursing home operated by 1620 Health Partners, L.L.C., a Florida limited liability company. The manager of the LLC was a corporation, Southern Hospitality Developers, Inc. An individual named Roger Friedbauer and his wife were members of the LLC. They were also the only "principals or shareholders," to use the court's words, of the LLC and corporation. The corporation had no full-time employees. The plaintiff sued the LLC, the corporation, and Roger Friedbauer, personally.

The plaintiff successfully argued that it had presented evidence that Roger Friedbauer was *negligent* in that he was responsible for approving the nursing home's budget, that he functioned as the sole member of the governing body of the nursing home, that federal law¹² makes the governing body legally responsible for establishing and implementing management and operation policies, that he ignored complaints of inadequate staffing while cutting operating expenses, and that the pressure sores, infections, and other medical problems suffered by the decedent were the direct result of understaffing of the nursing home. The appellate court granted the decedent's estate a new trial against Roger Friedbauer.

It also is not necessary that the corporate officer commit the fraud or misrepresentation himself as participation in a civil conspiracy will satisfy the requisite legal standard. In *Nicholson v. Kellin*,¹³ the individual director of a corporation was sued for fraud even though the director had never met the plaintiffs/investors. Nevertheless, the complaint alleged that the director had orchestrated the false representations made to the plaintiffs and had also allowed his name to be associated with the representations made. The complaint alleged that the corporate directors were conspiring with others to defraud the plaintiffs. The Fifth District Court of Appeals held that the complaint stated a cause of action for fraud against the individual defendants,

finding that the allegations were sufficient to implicate the individuals in the conspiracy.

C. Fraudulent Conveyances

1. Florida

Under Florida's Uniform Fraudulent Transfer Act (UFTA) a transfer is fraudulent if made "*without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.*" ¹⁴.

*A transfer made by a debtor is also fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent*¹⁵.

In addition, the UFTA (Section 726.105, Fla. Stat.) provides in pertinent part:

Transfers fraudulent as to present and future creditors.--

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(a) With actual intent to hinder, delay, or defraud any creditor of the debtor...

(2) In determining actual intent under paragraph (1)(a), consideration may be given, among other factors, to whether:

(a) The transfer or obligation was to an insider.

(b) The debtor retained possession or control of the property transferred after the transfer.

(c) The transfer or obligation was disclosed or concealed.

(d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.

(e) The transfer was of substantially all the debtor's assets.

(f) The debtor absconded.

(g) The debtor removed or concealed assets.

(h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.

(i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

(j) The transfer occurred shortly before or shortly after a substantial debt was incurred.

(k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

It is not necessary for the creditor to prove an actual intent to defraud in order to prevail under Section 726.105(2)¹⁶. The existence of badges of fraud create a prima facie case and raise a rebuttable presumption that the transaction is void.¹⁷

To utilize the protections of chapter 726, however, a plaintiff must show that he or she has a "claim" which qualifies the party as a "creditor."¹⁸ As defined in section 726.102, a "claim" is broadly constructed and "means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."¹⁹ Thus, as is universally accepted, as well as settled in Florida, "A 'claim' under the Act may be maintained even though 'contingent' and not yet reduced to judgment."²⁰ The Uniform Fraudulent Transfer Act defines insolvency as follows: "A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation."²¹ This is referred to as the "balance sheet" test.²² Succinctly stated, any transfer made without receiving reasonable value in exchange or while insolvent will likely be attacked as a fraudulent transfer.

D. Liability of Corporate Directors

Parenthetically, directors of a corporation are generally not personally liable to creditors for breach of fiduciary relationship, nor are they liable for mismanagement or waste of assets.²³ However, corporate directors can be subject to liability to the corporation's creditors under various circumstances. Section 607.0834, Florida Statutes, provides that directors can be held personally liable to the corporation's creditors for their actions taken while directors especially with regard to dissolving the corporation.²⁴

In *Arnowitz v. Equitable Life Assurance Society of the United States*²⁵, the Third District affirmed a trial court's decision to hold a director of a dissolved corporation liable to a corporate creditor under section 607.144(1)(c), because

the director "assented to a preferential distribution of the corporate assets without making adequate provision for a corporation obligation on a lease."²⁶ Id. at 605-606. The court held:

We cannot agree that because the corporation was apparently current on the lease payments at the time of its dissolution that it had no further responsibility to make provision for future lease payments for which it was liable in the event the successor tenant defaulted. No such provision was made, and, accordingly, upon the successor-tenant's default, the subject corporation was liable, as was the defendant, as the corporation's sole director.²⁷

IV. Conclusion

Corporate officers may be individually liable under Florida and law for negligence and/or fraud committed in their corporate capacities. Corporate officers can also be held personally liable for fraudulent transfers or where the corporate veil is pierced. Conversely, corporate directors generally have no personal liability except for actions taken during dissolution of the corporation.

¹ See *Checkers Drive-In Rests., Inc. v. Tampa Checkmate Food Servs., Inc.*, 805 So. 2d 941, 944 (Fla. 2d DCA 2001).

² *Orlovsky v. Solid Surf, Inc.*, 405 So. 2d 1363 (Fla. 4th DCA 1981).

³ *Roth v. Nautical Eng'g Corp.*, 654 So. 2d 978 (Fla. 4th DCA 1995).

⁴ See *La Pesca Grande Charters, Inc. v. Moran*, 704 So. 2d 710 (Fla. 5th DCA 1998).

⁵ 654 So. 2d at 979; see also *Segal v. Rhumblin Int'l, Inc.*, 688 So. 2d 397 (Fla. 4th DCA 1997) (finding that director of defendant corporation may be individually liable because complaint alleged that he had orchestrated the false representations made to the plaintiffs and had also allowed his name to be associated with the representations made); *Brinker v. W.P. McDevitt & Assocs., Inc.*, 693 So. 2d 712 (Fla. 4th DCA 1997) (reversing dismissal of fraud in the inducement claims where the plaintiff alleged that two individual defendants fraudulently induced him to enter into an employment contract with their insurance agency for the purpose of bringing his "book of business" into the agency and that defendants never intended to let him retain ownership of the "book" or pay him its value if his employment should be terminated) (citing *Lou Bachrodt Chevrolet, Inc. v. Savage*, 570 So. 2d 306 (Fla. 4th DCA 1990), *rev. denied*, 581 So. 2d 165 (Fla. 1991); *Alexander/Davis Properties, Inc. v. Graham*, 397 So. 2d 699 (Fla. 4th DCA 1981); and *Roth*, 654 So. 2d 978).

⁶ *Fenick v. Robertson*, 406 So. 2d 1263, 1264 (Fla. 4th DCA 1981)

⁷ *Ryan v. Wren*, 413 So. 2d 1223, 1224 (Fla. 2d DCA 1982)

⁸ *Adams v. Brickell Townhouse*, 388 So. 2d 1279, 1280 (Fla. 3d DCA 1980)

⁹ 742 So. 2d 523 (Fla. 1st DCA 1999)

¹⁰ 2004 Fla. App. LEXIS 10998 (Fla. 2nd DCA, July 23, 2004, Case No. 2D02-2438)

¹¹ 742 So.2d 523 (Fla. 1st DCA 1999)

¹² 42 C.F.R. Sec. 483.75(d) (2002)

¹³ 481 So. 2d 931 (Fla. 5th DCA 1985)

¹⁴ § 726.106(1), Fla. Stat. (2002)

¹⁵ Section 726.106(2), Fla. Stat.

¹⁶ *Woodell v. Transflorida Bank*, 717 So. 2d 108 (Fla. 4th DCA 1998) (explaining that because of the difficulty in proving actual intent to defraud creditors, section 726.105(2) provides that

fraudulent intent may be presumed from evidence of "badges of fraud"); *Munim v. Azar*, 648 So. 2d 145, 152 (Fla. 4th DCA 1994) (same)

¹⁷ *Stephens v. Kies Oil Co., Inc.*, 386 So. 2d 1289, 1290 (Fla. 3d DCA 1980)

¹⁸ See § 726.102(4), Fla. Stat. (2002)

¹⁹ § 726.102(3), Fla. Stat. (2002).

²⁰ *Cook v. Pompano Shopper, Inc.*, 582 So. 2d 37, 40 (Fla. 4th DCA 1991); see also *Money v. Powell*, 139 So. 2d 702, 703 (Fla. 2d DCA 1962) ("In this state contingent creditors and tort claimants are as fully protected against fraudulent transfers as holders of absolute claims.").

²¹ § 726.103(1), Fla. Stat.

²² See, e.g., *In re McElroy*, 228 B.R. 791, 794 (M.D. Fla. 1999) (interpreting similar definition of insolvency under Bankruptcy Act to be "balance sheet" test).

²³ *Skinner v. Hulsey*, 103 Fla. 713, 138 So. 769 (1931).

²⁴ See, e.g., *Fearick v. Smugglers Cove, Inc.*, 379 So. 2d 400 (Fla. 2d DCA 1980) (holding that the complaint stated a valid cause of action against two individuals who were directors at the time of the corporation's dissolution, in their capacities as Trustees, for property owned by the dissolved corporation pursuant to sections 607.144, 607.297 and 607.301); *In re Behr Contracting, Inc.*, 79 B.R. 84, 87 (Bankr. M.D. Fla. 1985) (finding that an individual who was a director at the time of the [fraudulent] transfers was "responsible and liable as a director" under sections 607.111 and 607.144) (emphasis added).

²⁵ 539 So. 2d 605 (Fla. 3d DCA 1989)

²⁶ *Id.* at 605-606.

²⁷ *Id.* at 606.

See, e.g., *In re McElroy*, 228 B.R. 791, 794 (M.D. Fla. 1999) (interpreting similar definition of insolvency under Bankruptcy Act to be "balance sheet" test).