

## Personal Liability and the Concept of “Piercing the Corporate Veil”

By Dan Ganter and Kip Peterson



The decision to form a corporation, limited liability company (“LLC”), or limited liability partnership (“LLP”) is generally driven by the desire to insulate oneself from personal liability. In general, the concept of limited liability means that an entity’s owners are not liable for its debts and obligations, absent a personal guaranty. This concept is supported by Minnesota law. For example, the Minnesota Business Corporation Act provides, “a shareholder of a corporation is under no obligation to the corporation or its creditors with respect to the shares subscribed for or owned...” Similar provisions are included in the Minnesota Limited Liability Company Act and the Uniform Partnership Act (1994). However, this shield from personal liability, known as the “corporate veil,” is not impenetrable. Under certain circumstances,

Minnesota courts will disregard the corporate entity by “piercing the corporate veil” and holding the entity’s owners personally liable for its debts and obligations.

In *Victoria Elevator Co. v. Meriden Grain Co.*, the Minnesota Supreme Court adopted a two-prong test for determining whether to pierce the corporate veil. The first prong of the Victoria Elevator test focuses on the shareholder’s relationship to the corporation and, specifically, whether the shareholder established and maintained the corporation sufficiently as a separate entity. In making this determination, the Court considered several factors, including insufficient capitalization for purposes of the corporation undertaking, failure to observe corporate formalities, nonpayment of dividends, insolvency of the corporation at the time of the transaction in question, siphoning of funds by the dominant shareholder, nonfunctioning of other officers and directors, the absence of corporate records, and the existence of the corporation as a mere facade for individual dealings. The second prong of the *Victoria Elevator* test requires a showing that piercing the corporate veil is necessary to avoid some element of injustice or fundamental unfairness. While the Court acknowledged that “[d]oing business in a corporate form in order to limit individual liability is not wrong,” it held that

“where the formalities of corporate existence are disregarded by one seeking to use it, corporate existence cannot be allowed to shield the individual from liability for damages incurred by those dealing with the corporation.”

The significance of this doctrine is of critical importance. Unfortunately, it is often overlooked. There are countless “do-it-yourself” resources available for individuals looking to form a legal entity such as a corporation, LLC, or LLP. However, these resources are very general by design and provide the individual with little meaningful guidance. As a result, the individual is often left unaware of the steps they should be taking to protect themselves. For example, ensuring reasonable consideration is paid for shares, establishing separate bank accounts for the entity, keeping the entity’s property separate from personal assets, and holding annual meetings are some of the actions that should be taken to help maintain the shield from personal liability. Ultimately, there is no substitute for the counsel of an experienced business attorney.

*The attorneys at Barna, Guzy & Steffen, Ltd. stand ready to work with you every step of the way. If you are interested in forming a legal entity, or need assistance with an existing entity, please contact Dan Ganter or Kip Peterson at (763) 780-8500.*



Pictured from left to right: Daniel D. Ganter Jr., Sandy L. Nelson, Mary Jo Schreiner, Kip R. Peterson

has been working as a legal secretary since 1998 and has been at BGS since 2003. She enjoys working with the attorneys in corporate and feels, “it is great to work for an attorney who is an expert in his field and cares about doing a terrific job for his clients.” Working with such a close knit group can feel like a second home, but when Mary Jo gets time away, she really enjoys spending it at the lake with her family.

very fortunate to work with such a unique group of talented and dedicated professionals.” Kip is an avid outdoorsman and motorcycle enthusiast and enjoys pursuing these activities outside of work.

### PARALEGAL

#### Sandy L. Nelson

Sandy has worked in the legal field for 26 years, 20 of them as a paralegal. Her career with BGS began 15 years ago when she joined the real estate team. Her position required knowledge of corporate law and three years later, Sandy became the combined real estate/corporate paralegal. When she is not busy at work, she enjoys raising and showing Afghan Hounds, with “some time left over for my husband, children and grandchildren.”

### SECRETARY

#### Mary Jo Schreiner

After working in varied areas of law such as family, estate planning and real estate, Mary Jo has settled into her role as BGS’ corporate law secretary. She

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#### Daniel D. Ganter, Jr

Dan is a shareholder at BGS. He has been an attorney in BGS’ Corporate Law area since 1985. Dan was admitted to the Minnesota Bar in 1985 after graduating with his J.D. from the University of Minnesota Law School. Dan focuses his practice on mergers and acquisitions, corporate law, and business counseling. Dan has experience working with clients in all stages of business ventures and says, “I enjoy getting to know and helping my varied clients, both sophisticated entrepreneurs and those just getting started.”

#### Kip R. Peterson

Kip focuses his practice on Corporate and Business law, including entity selection and formation, mergers and acquisitions, and the drafting and review of business related contracts. He began working at BGS as a law clerk and joined the firm as an associate after earning his J.D. from the University of St. Thomas School of Law in 2006. About working at BGS, Kip says, “I consider myself

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# IN BRIEF<sup>SM</sup>

## LAPTOP THEFT PREVENTION: An ounce of prevention is worth a pound of cure

By Bradley A. Kletscher



Your employee takes her laptop computer home to work on at night. During the night, your employee’s house or car is broken into, and the company laptop computer she was working on is stolen. It’s one of a company’s worst nightmares. Not only does the company face damage to its relationships with customers, employees, suppliers and others, but it may also face significant liability.

Unfortunately, theft of company laptop computers is increasingly common in the age of identity theft, and the sale of laptops in the secondary market. The Dallas Morning News compiled the following statistics from FBI information:

- 10% of laptops will be stolen within the first 12 months of purchase
- 90% of stolen laptops are never recovered
- 49% of companies have had laptops stolen in the past year
- 57% of corporate crimes are linked to stolen laptops
- 73% of companies lacked a laptop security policy three years ago

According to published reports, in the first months of 2006 alone, dozens of organizations were victimized by stolen laptops including the State of Minnesota, Fidelity Investments, the U.S. Department of Veteran Affairs, Aetna, ING, Boeing, Ernst & Young, the U.S. Department of Agriculture and the Internal Revenue Service. In each of these cases, it was reported that laptops were stolen from or lost by employees after being taken off company premises.

Experts predict that the pace of thefts will accelerate as laptops replace desktops to meet the needs of an increasingly mobile workforce. Progressive thinking employers are developing theft management strategies for laptops and other mobile devices containing sensitive information. Installing encryption software (programs that remotely disable computers and/or destroy data) and tracking devices are a couple of examples of how technology can be used to prevent the potential loss of data when a computer goes missing. While encryption software and tracking devices are important protection

devices for confidential information, employers still need laptop management policies.

### Employers Can Protect Themselves

Create laptop management policies addressing the following issues:

- *Storage requirements.* The policy should state expectations for storage in common situations, including in automobiles (laptops should be locked in the trunk), during flights (stowed in carry on bags), in hotels (in the safe), and at home (locked in a drawer or closet).
- *Eligibility to take computers off company property.* The policy should designate who is authorized to take laptop computers from company property, the procedure for signing out such computers, and the data that can be on the computer when so removed.
- *Discipline.* The consequences for failing to follow the company’s security policy should be outlined.
- *Procedure in event of laptop loss.* The laptop management policy should also establish processes to be followed when a laptop loss occurs. Quick reporting is essential. If the laptop was stolen because of its data, the criminal will move quickly to obtain the data. If the laptop was stolen at random, the quicker law enforcement is notified, the better the odds of recovering the computer. For these reasons, the laptop management policy should provide employees with a mechanism for reporting a loss 24 hours a day, 7 days a week.

### Liability For Loss

Several statutes have been passed dealing with stolen laptop computers. Most of these statutes deal with financial institutions (15 U.S.C. § 6801) and related entities. However, Minnesota has passed a statute which provides that:

Any person or business that conducts business in this state, and that owns or licenses data that includes personal information, shall disclose any breach of security of the system following discovery or notification of the breach of security of the data to any resident of this state whose unencrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person.

The disclosure must be made in the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement, as provided in paragraph (c), or with any measures necessary to determine the scope of the breach, identify the individuals affected, and restore the reasonable integrity of the data system.

“Personal information” means an individual’s first name, or first initial and last name in combination with any one or more of the following data elements, when either the name or the data elements is not encrypted: (1) Social Security Number; (2) driver’s license number or Minnesota identification card number; or (3) account number or credit or debit card number, in combination with any required security code, access code, or password that would permit access to an individual’s financial account. The notice required may be given by written notice to the most recent address, and electronic notice consistent with 15 U.S.C., section 7001. A company may also provide notice consistent with its own security policy. If more than 500 people are involved, there is also a requirement to report the issue to Credit Reporting Agencies.

The reason for having policies and procedures in place is also exemplified by a recent lawsuit. In 2005 suit was brought against Brazos Higher Education Service Corporation, Inc. In that case, Plaintiff Stacy Guin brought a negligence claim against Brazos after unencrypted nonpublic customer data contained on a laptop computer was stolen from an employee’s home during a burglary. *Guin v. Brazos Higher Education Service Corporation, Inc.*, 2006 WL 288483 (D.Minn. February 7, 2006). Guin’s negligence claim was rejected by the Court because Brazos had policies in place to protect the confidential information, trained the employee who had the computer stolen regarding those policies and the employee took the necessary precautions to secure his house from intruders. The important lesson from the suit is that laptop management policies are important for employers to avoid such claims.

In the age of computer data and stolen laptops, preparing for the unknown is essential. An ounce of prevention is worth a pound of cure. Develop your policies and get your ounce of prevention in place today.

For more information on the laws regarding employer or employee issues, call Bradley Kletscher at (763) 783-5113 or [bkletscher@bgs.com](mailto:bkletscher@bgs.com). Brad is a shareholder practicing employment law.

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## “Deny, Delay & Defend”

By John Buchman and Adriel Villarreal



Chances are that you or someone close to you has been the victim of a motor vehicle collision. If not, consider yourself fortunate because (1) you have not suffered any injuries, and (2) you have not had to make a claim against the at-fault driver's insurance company for your losses.

Recently, CNN broadcasting reported findings of an 18-month investigation into “minor-impact” (soft tissue) crashes around the country. Generally, “soft tissue” injuries are those injuries that cannot be objectively identified by imaging such as X-ray/MRI etc. These injuries occur as strains, sprains, bruising, stretching and swelling of the muscle/ligament tissue. These types of injuries are often debilitating, painful and permanent.

However, the results of the report confirmed what many collision victims have been stating for years. That is, “you will be in a fight for your life to get the insurance company to pay all the medical costs you incur – even if the accident was no fault of your own.” Large insurance companies have bought into the “take it or leave it approach.” Simply put, the strategy focuses on large corporate profits and requires adjusters to deny claims, delay settlements and defend in court. The result of the “take it or leave it approach” has served the auto insurance industry well by netting them billions in profits while at the same time hurting individual drivers.

### Record Profits but No Premium Reductions

Despite insurance companies making record profits, consumers have seen few premium reductions. Insurance companies continue to reap increased premiums while at the same time paying less.

In the CNN report, law professor Jeff Stempel appropriately states “if you have never heard of this strategy, it's because insurance companies don't want you to know that they are paying out less and less for minor crashes even while their profits soar and your premiums continue to rise.”

How does an insurance company handle such a claim? First, they make it so expensive that it has become impractically difficult to pursue the claim. A former insurance company attorney stated “the strategy is to make fighting the company so

expensive and so time-consuming that lawyers would start refusing to help clients.” Second, if a claim is made insurance adjusters are encouraged to “get rid” of claims quickly and cheaply sometimes offering as little as \$50.00 to settle a claim involving permanent injuries. Third, insurance adjuster/attorneys unduly delay settlement of these claims hoping that victims lack will power to endure the lengthy process. Quite often resolution of these cases can take from one to three years.

### The Rise of Collosus

Traditionally, an insurance adjuster would evaluate a claim and take into consideration medical reports, bills, doctors' notes, property damage, etc. Apart from this hard evidence the adjuster was free to use his/her experience, training, education and common sense likely resulting in fair value settlements. However, in the early 1990's insurance companies determined that they could increase profits by eliminating the individualized evaluation of meritorious claims; i.e. eliminate the adjusters' evaluation of the claim. The result: absurdly low settlement offers.

“Collosus” is one of many computerized claim programs used by insurance companies to reduce the amount of damages owed to a victim. Doing away with an individualized approach, adjusters now merely enter numbers and codes into the machine and await a so-called “fair” settlement amount. The insurance industry spent very little time training its claim adjusters on the new programs, often times only offering 1-2 days of formal training. The result was an almost immediate surge in profits because claim amounts were being diminished. Little account is taken of the actual injuries caused in the collision. The programs are continually recalibrated to adjust for economic market decline ensuring that large profits are maintained.

What this means? Clearly, it is to the consumers' benefit that the insurance industry continues to earn profits. Without profits the industry would dry up leaving society without any protection. However, the tides have turned leaving victims of motor vehicle collisions with little recourse.

### Insurance Industry Claims Unfounded

The insurance industry often claims lawsuits and verdicts are running rampant. However, the facts do not support this. Nationally, verdicts have not increased over the last ten years and personal injury lawsuits have decreased over the same period of time (Minnesota Supreme Court Study). However, by no fault of their own, collision victims are being left with little choice: either accept an unsatisfactory settlement or incur the expenses on their own. Very little attention is given to the victim who can no longer engage in normal daily activities without pain and discomfort. Simply put, large auto insurers have decided to ignore individuals in favor of higher premiums and skyrocketing profits.

Unfortunately, many of you may have been

dragged through this process perhaps with your claim or by the experience of a friend or family member. While it is a difficult choice to make, there are some auto insurance companies that have not completely abandoned injured victims. Take time to re-evaluate your insurance carrier, but most important be weary of their constant marketing message, which is that auto insurance claims are forcing premiums to rise. This message is effective in making people believe that most claims are without merit or are induced by fraud. The truth of the matter as reported by the 18 month investigation is that profits are soaring and that discouraging honest settlements, despite merit of such cases will further the status quo indefinitely.

### Your Rights Under Minnesota Law

Pursuant to the No-Fault Act Minn. Stat. §65B.51, a victim of a motor vehicle collision may not pursue a claim against the at-fault driver unless the claim is based upon negligence and one of the following four thresholds has been satisfied: (1) \$4000.00 in expenses for medical treatment (excluding cost of diagnostic x-rays) or (2) victim suffered a permanent injury or (3) victim suffered a permanent disfigurement, or (4) 60 days of disability.

Source: “Insurance companies fight paying billions in claims,” published 2/07/07 on Anderson Cooper 360 Blog, via [www.cnn.com](http://www.cnn.com).

If you have any questions regarding this article, or if you or someone close to you have been injured in an automobile accident, please contact one of the Personal Injury attorneys at Barna, Guzy & Steffen Ltd. Adriel Villarreal is an associate with the Personal Injury team and can be reached directly at 763-783-5177. John Buchman and Russell Crowder are shareholders and can be reached at (John) 763-783-5121 and (Russ) 763-783-5143.

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## BGS SERVICES

### Tax Records Retention

By William F. Huefner



Now that tax time has come and gone, I am frequently asked by clients how long they should retain their tax records. The shortest amount of time that you should retain your tax records is three years from the date in which the return is filed, or April 15th if the return is filed early. The general statute of limitations for the Internal Revenue Service to audit your tax return is three years from the date the return is filed. As a rule of thumb, the IRS generally does not pick up a new audit if there is less than eight months on the statute of limitations. However, in some circumstances, if there is an ongoing audit of one tax year, the IRS may request that you extend the statute of limitations on other open years so that they also may be audited. In some instances, the IRS can go back and audit up to six years if there is a substantial understatement of income or other special

circumstances. In addition, the IRS can audit any return that has never been filed. If a return is never filed, the statute of limitations does not begin to run until the return is filed.

As a practical matter, I tend to retain my personal tax returns for six years. I am not overly concerned about the IRS coming back and auditing my returns more than three years after the fact, however I tend to be more cautious than most. When I do destroy my returns, I usually still retain copies of information that may affect future tax returns, such as information related to the basis of stock purchase, improvements to the home and the like. This information may be useful in the future when assets are disposed of and you have to report the income.

Bill Huefner is a shareholder at Barna, Guzy & Steffen and practices Estate & Tax Planning, Probate & Trust Administration. If you have a question regarding Tax Planning, please contact Bill directly at 763-783-5160 or email [bhuefner@bgs.com](mailto:bhuefner@bgs.com).

### Have You Heard... By Susan E. Sheely



Have you ever heard that there is a three-day “cooling off” period for motor vehicle purchases? That if you get “swept away” and end up driving off the lot with that beautiful, brand new car you never knew you needed until the salesman started talking, you can take it back if you decide you made a mistake within the first three days. If you have heard this or believe it to be true, you are not alone. You are wrong, but certainly not alone.

Many people believe that there is a three-day “cooling off” period that applies to motor vehicle purchases in Minnesota. Unfortunately, as of today, that is not the case. Minnesota Statutes §325G.07 does provide for a mandatory three day “cooling off” period for “home solicitation sales.” As defined in Minnesota Statute §325G.06, a home solicitation sale is:

[the] sale of goods or services, by a seller who regularly engages in transactions of the same kind, purchased primarily for personal, family or household purposes, and not for agricultural purposes, with a purchase price of more than \$25, in which the seller or a person acting for the seller personally solicits the sale, and when the buyer's agreement or offer to purchase is made at a place other than the place of business of the seller . . .

Minn. Stat. §325G.06, subd. 2 (2006). The statute specifically excludes purchases of motor vehicles when the sale is made at a place other than the buyer's residence. Minn. Stat. §325G.06, subd. 2(f)(2006).

If you are an impulse auto purchaser, there may be help on the horizon, however. There is a bill currently pending in the Minnesota State Legislature that, if enacted, will establish a contract cancellation period for certain automobile purchases. As drafted, the proposed change would affect Minnesota Statutes §325F.662 and would require all dealers to offer a contract cancellation option on the sale of any used car with a sale price under \$40,000. This option would allow the consumer to return the vehicle without cause and without cost, except for a restocking fee of up to \$500, within the specified period of time. The dealer would have the discretion to determine the length of time during which the contract option may be exercised as well as the maximum number of miles that the vehicle may be driven and still remain eligible for cancellation under the contract cancellation option.

So, as of today, if you buy an expensive vacuum cleaner from a door to door salesman you can cancel the sale, in writing, within three business days. However, unless and until the applicable laws are amended, if you sign a purchase agreement to buy a car, you are legally bound to that contract. Happy driving!

Susan Sheely is an attorney with the Employment Law and Business Litigation practice group. Her practice includes assisting corporate and individual clients in resolving disputes prior to the commencement of litigation as well as litigating solutions in business, employment, construction and real estate matters. She can be reached at (763) 783-5171 or [ssheely@bgs.com](mailto:ssheely@bgs.com)

## BGS PEOPLE

### Board of Directors 2007

The shareholders at Barna, Guzy & Steffen, LTD. announce that Jeffrey S. Johnson has been re-elected President and Chairman of Barna, Guzy & Steffen.

Reappointed to officer positions within the Board of Directors were Charles M. Seykora as Treasurer and Russell H. Crowder as Secretary. William F. Huefner was also renamed to the Board of Directors for another term.

Newly elected to the Board of Directors was Bradley A. Kletscher.

Additional Board of Director Members for Barna, Guzy & Steffen are:  
Joan M. Quade and Darrell A. Jensen.

### BGS Welcomes...

Ms. Gay L. Lynch as  
Executive Director to the firm.

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