

Are Your Corporate Form and Your Insurance Coverage Providing the Protection You Need?

By: Brian J. Hunt, *Managing Principal of The Hunt Law Group, LLC*

The corporate form of a business entity determines whether its members will be held personally liable for obligations of the entity. The principal(s) can choose one of various corporate forms, including corporations, limited liability companies (LLC), limited liability partnerships (LLP), and general partnerships. Under Illinois law, shareholders of a corporation typically are not responsible for the debts of the corporation. Furthermore, members of an LLC and limited partners of an LLP are generally not held personally liable for the debts of the company. In contrast - - as a rule - - each general partner in a general partnership is potentially liable. This means that general partners are personally exposed for any obligations of their partnership.

However, the law only allows a claimant one bite at the apple, which is referred to as *res judicata*. This legal doctrine is a court's determination on whether to allow a second action to proceed. It is based on equitable principles of fairness and is intended to prevent multiple lawsuits between the same parties involving the same facts and issues.

Andrews v. Gonzalez (decided September 30, 2014) is the first Illinois case to find that the doctrine of *res judicata* does not protect general partners from being held personally liable for an unsatisfied judgment against their partnership.

In February 2007, William Andrews was injured in an automobile accident by an employee of G & G Cement Contractors (G & G), an Illinois general partnership owned by two brothers, Dagoberto and Jose Gonzalez. Andrews filed suit against G & G, the driver of the company car, and both Gonzalez brothers, alleging negligence in causing the accident. Jose Gonzalez died while the case was pending, and his estate was substituted as a defendant.

Following a trial, the jury returned a verdict against G & G and the driver, but found in favor of Dagoberto and the estate of Jose Gonzalez. The jury ultimately awarded Andrews \$3,092,000 in damages.

At the time of the accident, G & G was insured under a business auto policy issued by Century National Insurance Company (CNIC) with a policy limit of \$300,000. Ultimately, the circuit court ordered CNIC to pay the policy limit of \$300,000 plus interest to Andrews.

In July 2013, Andrews filed a new complaint seeking to recover the remainder of the judgment from Dagoberto's personal assets. Dagoberto moved to dismiss the complaint based on *res judicata*, arguing that Andrews's claim was barred because Dagoberto had already obtained a judgment in his favor in the personal injury lawsuit. Dagoberto argued that this was merely "an attempt to get a second bite of the apple." The circuit court agreed with Dagoberto and granted his motion to dismiss.

In reversing the circuit court's dismissal of Andrews's claim, the Appellate Court began by noting that Illinois courts have never directly addressed the issue of whether a judgment creditor may sue an individual partner to enforce the partnership's obligation when the partner

was named in the underlying action and found not liable. Thus, the Court looked to cases with similar rulings from Indiana and Ohio state courts and the U.S. Court of Appeals, Fifth Circuit.

The Appellate Court noted that an unsatisfied judgment against a partnership does not prevent a claimant from enforcing the individual liability of a partner. The Court reasoned that there are two ways to establish the liability of a partner: (1) by showing that an individual partner was liable, personally or vicariously, for an injury; and (2) by showing that partnership assets have been exhausted. The Court went on to state that it is impossible for a judgment creditor to prove that partnership assets have been exhausted until a judgment has been obtained against the partnership. The Court reasoned that this is not a situation where the claimant seeks two bites of the same apple, but instead, it involved two separate and distinct apples. The first apple being the liability of the trucking partnership (and any direct liability of Dagoberto) and the second apple being Dagoberto's responsibility for unsatisfied partnership obligations. Accordingly, the Appellate Court found that Dagoberto, as a general partner of G & G, was personally liable for the partnership's unsatisfied judgment.

Lastly, *Andrews v. Gonzalez* ought to stand as a reminder that carriers need to regularly evaluate their insurance coverage. G & G's insurance coverage was clearly insufficient for the exposures its drivers encountered. Carriers should look at awards made in the venues where they operate to determine whether their coverage is adequate. For example, Madison and St. Clair Counties, Illinois have been identified in 2014 as "judicial hellholes" by the American Tort Reform Foundation (ATRF), where substantial monetary judgments have been awarded. Additionally, as recently as 2011, Cook County, Illinois was also considered a "judicial hellhole" by the ATRF.

Andrews v. Gonzalez is an excellent example of why an entity must carefully choose its corporate form. Corporate forms such as a corporation, LLC, or LLP generally offer greater protections for individual members or partners. After choosing a form, an entity must be sure to observe the corporate formalities required so that courts will recognize its limited liability and its members will be shielded from individual liability.

In such matters, an ounce of prevention is worth more than a pound of cure.