



California Corporate & Securities Law

There Is No Alter Ego Liability When The Creditor Knows There Is No Corn In the Husk

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Ok, I admit *Fusion Capital Fund II, LLC v. Ham*, 2010 U.S. App. LEXIS 15962 (Aug. 2, 2010), does not deal with California law. The case caught my eye because it isn't all that often that you see an opinion interpreting Nevada corporate law written by Chief Judge Frank Easterbrook and joined by Judges Richard A. Posner and Michael S. Kanne. Moreover, Nevada's private corporation law has a special place in my heart because a large part of my legal writing oeuvre has been dedicated to Nevada law. In 1993, I wrote what I believe was the first treatise on Nevada's corporate law, *Nevada Corporation Law & Practice*. When the publisher was later acquired, I rewrote the book and it was published as *Nevada Law of Corporations and Business Organizations*. Both books are long out of print. However, I've teamed up with [Jeffrey Zucker](#) at [Lionel Sawyer & Collins](#) and a new Nevada Treatise will be published in the next several months. For those that are interested in Nevada corporations generally, this [article](#) in the *Los Angeles Lawyer* compares California, Delaware and Nevada law.

In the *Fusion Capital* case, the Seventh Circuit Court of Appeals applied NRS 78.747 to an alter ego claim against the majority stockholders and directors of a shell public corporation that was to be used in a reverse merger with a private company. NRS 78.747 provides that a stockholder, director or officer acts as the alter ego for a corporation if:

- the corporation is influenced and governed by that person;
- there is such a unity of interest and ownership that the corporation and that person are inseparable from each other; and
- adherence to the corporate fiction of a separate netity would sanction fraud or promote a manifest injustice.

Because the defendants conceded the first element and the second element was "amply supported" the Court of Appeals focused on whether the third element had been met. Because the purpose of the transaction was to engage in a merger with a shell company, the Court found that there was no injustice and hence no alter ego liability.

Please contact [Keith Paul Bishop](#) at Allen Matkins for more information kbishop@allenmatkins.com

<http://www.calcorporatelaw.com/>

Judge Easterbrook is a well-known scholar on corporate law issues. In 1991, he co-wrote with Daniel R. Fischel what I consider to be a classic analysis of corporate law, *The Economic Structure of Corporate Law*. The *Fusion Capital* opinion has some memorable turns of phrase, including:

- “A claim against Millenium isn’t worth the cost of mailing it to the courthouse”
- “As for the third element: there isn’t any fraud, because Fusion knew that Millenium is a husk without any corn inside.”
- “Fusion was not deceived, hornswoggled, misled, duped, hoodwinked, bamboozled, or snookered.”

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