THE ENTITY IS A CORPORATION BECAUSE IT HAS A BOARD OF DIRECTORS AND OFFICERS.

WHO WOULD MAKE THAT ARGUMENT?

Kissinger & Fellman, PC v. Affiniti Colorado, LLC

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I have written several times bemoaning that courts and litigators do not understand Colorado entity law found in title 7 of the Colorado Revised Statutes. These cases include incorrectly applying Colorado law to a limited liability company formed under Delaware law,[1] and incorrectly applying corporate law to limited liability companies formed in Colorado.[2]

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1 *Martin v. Freeman*, 2012 COA 21 (Colo. App. 2012) discussed in Lidstone, *Piercing the Veil Is Again Addressed In the Colorado Court of Appeals* (as published by the Business Law Section of the Colorado Bar Association in February 2012).

2 *Sheffield Services Company v. Trowbridge,* 211 P.3d 714 (Colo. App. 2009) holding that the common law veil piercing doctrine applies to non-member managers of LLCs, discussed in Lidstone, *Piercing the Veil of an LLC To Impose Liability On Managers* (Business Law Section (CBA) newsletter, November 2009).

McCallum Family LLC v. Winger, 2009 WL 3465332 (Colo. App. 10/29/2009) holding a non-shareholder, non-officer, non-director of a Colorado corporation liable as an "equitable owner" under a veil-piercing theory, discussed in Lidstone, *More on Piercing the Veil* (Business Law Section (CBA) newsletter, December 2009).

Colborne Corporation v. Weinstein, 2010 WL 185416 (Colo. App. 1/21/2010), reversed *Weinstein v. Colborne Foodbotics, LLC*, 302 P.3d 263 (Colo. 2013) interpreting C.R.S. § 7-80-606(2) to recognize that an LLC is not a corporation, discussed in Lidstone, *Are LLC's Corporations? The Supreme Court Answers "No."* (Business Law Section (CBA) newsletter, June 2013), available at https://ssrn.com/abstract=2207735.

Stockdale v. Ellsworth, 2017 CO 109 (Dec. 18, 2017); discussed in Lidstone, *Wrong Law Applied, Wrong Words Used, But the Correct Result Reached*, Business Law Section (CBA) newsletter (December 2017).

Gagne v. Gagne, 2019COA42 (March 21, 2019), discussed in Lidstone, "*Your Honor – an LLC is Not a Corporation; Mr. and Ms. Litigator, Your Help Is Needed,*" Business Law Section (CBA) newsletter (April 2019), also available at https://ssrn.com/abstract=3370048.

I have not faulted all judicial decisions in the area of business entities. The Colorado Supreme Court reached the correct result in *Weinstein*[3] (where the Supreme Court held that an LLC should not be judged by principles of corporate law) and in *Sedgwick*[4] (where the Court of Appeals held similarly). As I said in my April 2019 article discussing the *Gagne* case, "[a]lthough not in a manner that affected the proper outcome of the [*Gagne*] case, this type of judicial mistake [applying corporate law incorrectly] leads to bad precedent for business lawyers and future litigants and needs to be addressed." It is my belief that when the law is clear, it should be understood by the litigators and the courts and properly applied.

The incorrect interpretation of Colorado corporate law unfortunately has occurred again at the Court of Appeals level in a manner that results from a lack of judicial understanding of Colorado business law and which can only be confusing to future courts and litigants. In *Kissinger & Fellman, PC v. Affiniti Colorado, LLC*,[5] the Court of Appeals:

- Accepts the implication that an entity in question ("EAGLE-Net") is a "corporation" subject to the Colorado Business Corporation Act (the "CBCA") when no corporation existed; and

- Incorrectly applies the CBCA and the Colorado Corporations and Associations Act (the "CCAA") even assuming (incorrectly in this case) that EAGLE-Net was a corporation.

This case is an example of improper application of the law of business entities in Colorado by judges and litigators who apparently did not understand the law themselves.

Summary of the Case

The case was not a corporate law case to begin with. Instead, the questions the court should have answered were two-fold:

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3 *Weinstein v. Colborne Foodbotics, LLC*, 302 P.3d 263 (Colo. 2013).

4 *Sedgwick Props. Dev. Corp. v. Hinds*, 2019 COA 102 (July 3, 2019) discussed in Lidstone, *Sedgwick Props. Dev. Corp. v. Hinds; An LLC Is Not A Corporation*, Business Law Section (CBA) newsletter (October 2019), also available at https://ssrn.com/abstract=3471359.

5 *Kissinger & Fellman, PC v. Affiniti Colorado, LLC*, Case No. 2019CA574, 2019COA147 (Sep. 12, 2019), *cert. denied* April 13, 2020.

- Whether the attorney-client privilege in the facts at issue survived the termination of a "business" that was not a corporation, LLC, or other reporting entity under Colorado law,[6] and

- Whether any person previously associated with the business acting for the client could assert the attorney-client privilege.

The trial court found, and the Court of Appeals affirmed, that the attorney-client privilege between EAGLE-Net and its attorneys did not survive in the case at issue and could not, therefore, be asserted to protect attorney-client communications.[7] The opinion reviews decisions involving corporations in two other jurisdictions and concludes (wrongly in my judgment) that this is "the trending majority view."

The Court of Appeals' determination that the attorney-client privilege did not survive the apparent termination of EAGLE-Net's business and operations may have been the correct result in this case when recognizing that EAGLE-Net was not incorporated and was not otherwise a "reporting entity." My concern derives from the fact that the Court of Appeals attempted to interpret the question based on its incorrect assumption that EAGLE-Net was a corporation because it "had a board of directors [and] officers."

What Is An Intergovernmental Entity?

The opinion first (in ¶ 2) describes EAGLE-Net as "Fellman's now-dissolved corporate client." In footnote 1 to the opinion, the Court of Appeals states that EAGLE-Net is "an intergovernmental agency for the purpose of resolving immunity [under the Colorado Governmental Immunity Act (CGIA)], and we make the same assumption since it does not affect the outcome." Neither the opinion nor the parties apparently identify what this "intergovernmental agency" is or what form it takes. As described below, the "intergovernmental agency" was not a corporation formed under Colorado law since no articles of incorporation (or any other organizational document) were ever filed with the Colorado Secretary of State. At best, EAGLE-Net is an unincorporated entity that is not a reporting entity.

[6] The term "reporting entity" is defined in C.R.S. § 7-90-102(58) as an entity "as to which a constituent filed document is on file in the records of the secretary of state." In Colorado, the term "reporting entity" does not include, for example, a general partnership that is not a limited liability partnership.

[7] The Court of Appeals recognized that the attorney-client privilege ordinarily survives the death of a human client. *Wesp v. Everson*, 33 P.3d 191, 200 (Colo. 2001) (citing *Swidler & Berlin v. United States*, 524 U.S. 399 (1998)).

June 30, 2012 EAGLE-Net financial statements[8] repeatedly describe Eagle-Net as "[a] Colorado Intergovernmental Agency" rather than a corporation. The term "intergovernmental agency" appears in the Colorado Revised Statutes just five times. The term "intergovernmental entity," also used in the opinion, appears in Colorado Revised Statutes just two times. None of the statutes are particularly informative, but C.R.S. § 38-35-201(6) suggests that at least in some circumstances an "intergovernmental agency" is considered a "unit of local government in Colorado." None of the statutory occurrences of the term "intergovernmental entity" or "intergovernmental agency" refer to the entity/agency as a corporation or other reporting entity.

EAGLE-Net was not a corporation and should not have been treated as such. The CBCA and the CCAA were not applicable.

Whatever an intergovernmental entity is in the context of EAGLE-Net or this case, it is clearly not a Colorado corporation. The Court of Appeals' only effort to determine the nature of EAGLE-Net's existence is found in its footnote 1 which provides the Court of Appeals' full (but nonsensical) explanation of its opinion that EAGLE-Net is a corporation subject to the CBCA:

> Because no one disputes that EAGLE-Net had a board of directors, officers, and members, we refer to it as a "corporation" for purposes of this appeal.

Under Colorado law, it is undisputable that a "corporation is incorporated when the articles of incorporation are filed by the secretary of state or, if a delayed effective date is stated pursuant to section 7-90-304 in the articles of incorporation as filed by the secretary of state and if a statement of change revoking the articles of incorporation is not filed before such effective date, on such delayed effective date. ***The corporate existence begins upon incorporation***."[9]

It is a simple concept: A corporation does not exist under Colorado law before the corporation is incorporated by filing articles of incorporation with the Colorado Secretary of State. Recognition of this concept would have made the Court of Appeals' work much simpler.

In reviewing the Secretary of State's records, no corporation or other entity named "EAGLE-Net Alliance" ever existed. While the Colorado Secretary of State's records reflect four different filings to reserve "EAGLE-Net Alliance" as a tradename, those tradename reservations were not associated with any entity and no statement of tradename required by C.R.S. § 7-71-101

8 Available with subscription from www.dnb.com.

9 C.R.S. § 7-102-103(1) [*emphasis supplied*].

was ever filed.[10] Even if filed, a tradename statement does not create an entity. It merely provides the person making the filing (individual or entity) the right to use the tradename.

There was never any corporation (or other Colorado reporting entity) known as EAGLE-Net Alliance. Period. End of story. The CBCA that the Court of Appeals erroneously applied in its decision is not applicable in any manner to EAGLE-Net.

It Must Be A Corporation Because It Has A Board of Directors

In footnote 1 to the opinion, the Court of Appeals gives its analysis of why it believed that EAGLE-Net was a corporation and therefore subject to the CBCA:

> "Because no one disputes that EAGLE-Net had a board of directors, officers, and members, we refer to it as a 'corporation' for purposes of this appeal."

It should go without saying that many entities in Colorado have officers and boards of directors. Informal clubs and associations are frequently governed by "officers" and a "board." Any group of people can have a board of directors. A limited liability company (formed by filing articles of organization with the Colorado Secretary of State under C.R.S. § 7-80-203) can have a board of directors.[11] An unincorporated association of persons can have a board of directors, as can a partnership. C.R.S. § 29-1-203(5) suggests that an "intergovernmental entity" can have a board of directors." Generally, a "board of directors" simply means a group of people selected to give direction and governance to an activity. Having a board of directors is not indicative that the entity in question is a corporation where no incorporation of the entity has otherwise occurred.

An entity or other person may describe its management structure in a number of ways: board of directors, managers, board of kahunas, or simply a "board." This description has absolutely no relevance to the form of entity that it actually is. Even a corporation is not required to have a board of directors, but it can have a governance structure under any other name.[12]

The Secretary of State's records conclusively show that EAGLE-Net was never incorporated and was not a Colorado corporation. With no statutory or factual support and no

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[10] Four different tradename reservations for EAGLE-Net were filed in the Secretary of State's records, three of which were never renewed (2010, 2011, 2012). The fourth (Secretary of State ID# 20161146687) expired on June 7, 2017.

[11] For example, a manager-managed limited liability company is not required to have managers; it could have a board of directors. See Lidstone and Sparkman, "*Limited Liability Companies and Limited Partnerships in Colorado*" (CLE in Colorado 2019) at § 3.2.3, p. 35, "A Third Way – LLCs Without Statutory Agents."

[12] C.R.S. § 7-108-101(1) provides that: "Except as otherwise provided in its articles of incorporation, each corporation shall have a board of directors." The articles of incorporation can provide for a board of idiots as its governing body if it chooses, rather than a board of directors.

intelligible explanation, in this case the Court of Appeals panel chose to apply corporate law to something that is not a corporation under Colorado law.[13] The Court of Appeals decision to do so was simply wrong.

The Court of Appeals' Next Erroneous Findings

Based on the Court of Appeals' erroneous decision to apply the CBCA to a person that was not a corporation under Colorado law, the Court of Appeals proceeds to compound its error by misinterpreting the CBCA several more times.

On page 14 of the Opinion, the Court of Appeals states its conclusion that "*The Attorney-Client Privilege Does Not Survive a Corporation's Dissolution If All Proceedings Have Been Concluded and No One Remains to Act on the Corporation's Behalf.*"

There Is No Evidence That A Dissolution Occurred. Even assuming that a corporation is involved (which is not the case), the Court of Appeals made no finding that a dissolution occurred and that all proceedings had been completed. The Court also made no finding that no person remained to act on the entity's behalf. Those findings would have required much more work that the Court chose not to exert.

Where a corporation is involved, dissolution must be set forth in the Secretary of State's records by filing articles of dissolution after proper corporate procedures have been taken.[14] Nothing relating to a dissolution of EAGLE-Net Alliance was filed in the Colorado Secretary of State's records – perhaps because EAGLE-Net Alliance was never incorporated in the first place. From the record, it appears that the intergovernmental agency simply stopped doing business. The Court of Appeals does not suggest how cessation of business constituted a dissolution.

Even Where A Corporate Dissolution Occurs, The Existence Of A Corporation Does Not End Upon Dissolution. Furthermore, the Court of Appeals missed another point that is fundamental to the CBCA. Where a corporation otherwise existed and dissolution actually occurs,

[13] Admittedly in the early days of corporate law, there was a distinction between a *de jure* corporation (one formed in accordance with the law) and a *de facto* corporation – which at least required an "attempt in good faith to form a corporation according to the requirements of law." Henry Winthrop Ballantine, "*Ballantine on Corporations*" (1946 Ed. Callaghan and Company) at § 23 [Essentials of a de facto corporate existence]. Statutes adopted in the 1950s based on the Model Business Corporation Act eliminated the concept of *de facto* corporations, recognizing only *de jure* corporations – those formed in accordance with law. In Colorado, *see* C.R.S. § 7-102-103 and -104 and their predecessors under the Colorado Corporation Code found in (now repealed) § 7-2-104.

[14] C.R.S. § 7-114-103 describes the article of dissolution that must be "deliver[ed] to the secretary of state [] for filing." C.R.S. §§ 7-114-101 and -102 describes the corporate procedures that must be followed.

the existence of a corporation does not end upon its dissolution. C.R.S. § 7-114-105(1) clearly states:

> "(1) A dissolved corporation continues its corporate existence but may not carry on any business except as is appropriate to wind up and liquidate its business and affairs."

The statute provides no end to its corporate existence following corporate dissolution. Where a corporation (or other Colorado domestic entity[15]) has dissolved, Part 10 of the CCAA[16] provides a procedure for reinstatement of a dissolved corporation or other domestic entity.

Upon reinstatement, C.R.S. § 7-90-1005 makes it clear that the reinstated entity (that is, the formerly dissolved entity) continues in existence as if it had never been dissolved. Specifically, C.R.S. § 7-90-1005 states:

> (1) Subject to subsection (2) of this section, upon reinstatement, the existence of the entity shall be deemed for all purposes to have continued without interruption; the entity resumes carrying on its business or conducting its activities as if dissolution had never occurred; any debt, obligation, or liability incurred by the entity or an owner or manager of the entity before or after the dissolution shall be determined ***as if dissolution had never occurred***; and, if the entity was, at the time of its dissolution, a limited liability limited partnership, it continues, upon reinstatement, to be a limited liability limited partnership. [*Emphasis supplied.*]
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> (2) The rights of owners and other persons arising by reason of reliance on the dissolution before those persons had notice of the reinstatement shall not be adversely affected by the reinstatement.

Thus, where a corporation (or other Colorado entity) dissolves, there are people[17] able to act on its behalf to reinstate the corporation on the records of the Colorado Secretary of State if desired. Even if not reinstated the corporate existence continues.

Who Can Assert the Corporate Attorney-Client Privilege? The real issue in this case was whether the counsel for EAGLE-Net Alliance could assert the attorney-client privilege on behalf

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15 "Domestic entity" is defined in C.R.S. § 7-90-102(13).

16 C.R.S. § 7-90-1001, *et seq.*

17 These people include the owners who have the right to vote on reinstatement under C.R.S. § 7-90-1002(1)(a) as well as the last known board of directors.

of his client since there apparently was no other person who (based on the Court's opinion) claimed the right to do so. That, of course, does not mean that there was no one with the right to do so. The Court of Appeals just never asked that question and the attorneys involved did not apparently ask the question either.

The Court of Appeals accurately noted that, where a corporation is involved, the attorney-client privilege is held by the corporation. Colorado law specifically recognizes that the corporate attorney-client privilege held by a corporation merging into another entity follows the merging corporation and becomes held by the other entity unless a contract provides to the contrary.[18] The Court of Appeals' opinion, in ¶ 32, accurately states that the "corporation's privilege is held by its managers, who often change over time. Thus, no individual manager can be assured that future managers will not waive the privilege and reveal confidences."[19]

The Court of Appeals accurately cites *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 345-9 (1985) when it says:

> There, the Court considered whether a bankruptcy trustee could waive a dissolved corporation's attorney-client privilege in bankruptcy proceedings. Id. It noted that because directors and managers change, and the right to assert or waive the privilege applies only to current directors and managers, "[d]isplaced managers may not assert the privilege over the wishes of current managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties." Id. at 349.

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[18] C.R.S. §7-90-204(1)(a): "When a merger is effective: (a) Every merging entity merges into the surviving entity and the separate existence of every merging entity ceases. All of the rights, privileges, ***including specifically the attorney-client privilege***, and powers of each of the merging entities, all real, personal, and mixed property, and all obligations due to each of the merging entities, as well as all other things and causes of action of each of the merging entities, vest as a matter of law in the surviving entity and are thereafter the rights, privileges, powers, and property of, and obligations due to, the surviving entity." [*Emphasis supplied.*]

[19] In using the term "manager," we hope that the Court of Appeals intended to use the term as defined in the CCAA, C.R.S. § 7-90-102(35.7)(f): "An officer or director of a corporation . . .."

However, the *Kissinger* court then makes the unsupportable leap that, because management can change their minds as to the disclosure of attorney-client communications, this "undermin[es] this reason for presuming a 'posthumous' privilege following a corporation's dissolution."[20]

Rather than undermining the privilege, it supports the continuing applicability of the privilege with the understanding that the managers (or other decision-makers where "managers" no longer exists), at any time, can waive the privilege.

The Court Of Appeals Failed To Understand The Statute of Limitations Applicable To Claims Against A Dissolved Corporation. In further explaining why the Colorado Court of Appeals did not think that the attorney-client privilege should apply to a dissolved corporation, the Court of Appeals made another erroneous statement at ¶ 34 that:

> Further, unlike an individual, whose estate can be sued civilly, once a corporation is fully dissolved, any suit brought against it must be filed within two years. § 7-90-911, C.R.S. 2018.

This is an erroneous interpretation of the CCAA. Section 7-90-911 is entitled "disposition of known claims by notification." As stated in § 7-90-911(2), if the corporation (or other entity subject to the CCAA) has provided notice to a potential claimant, "unless sooner barred by any other statute limiting actions, any claim of that person against the dissolved domestic entity will be barred if an action to enforce the claim is not commenced by a deadline that is stated in the notice, which deadline shall not be less than two years after the delivery of notice."

Section 7-90-912, which provides for notice by publication, provides that "unless sooner barred under section 7-90-911 or under any other statute limiting actions, the claim of any person against the dissolved domestic entity is barred unless the person commences an action to enforce the claim within five years after the publication date of the notice or within four months after the claim arises, whichever is later."

Under Colorado law, where a dissolved corporation has failed to provide notice under either § 7-90-911 or § 7-90-912, the right to sue a dissolved corporation for debts extends for the

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20 As described in an article discussing the *Silverado Bank* litigation following the 1987 financial collapse, the author said: "In the aftermath of a failed bank, . . . counsel should be thoughtful about its responses to the agencies' [discovery] requests. . . . The FDIC as receiver is also in the position to assert that it now holds the right to request documents from the failed institution's lawyers without the use of a subpoena because it now stands in the shoes of the bank." *Failed Financial Institution Litigation: Remember When*," Willkie Farr & Gallagher LLC, avail at:https://www.willkie.com/~/media/Files/Publications/2008/10/Failed%20Financial%20Institution%20Litigation%20%20Remembe__/Files/FailedFinancialInstitutionLitigationpdf/FileAttachment/Failed_Financial_Institution_Litigation.pdf (last visited April 13, 2020). See the settlement of a Denver federal district court case which raised, but did not resolve, this issue at https://www.latimes.com/archives/la-xpm-1991-05-30-fi-3943-story.html.

entire statute of limitations attributable to the cause of action.[21] Thus the Court of Appeals' interpretation of an absolute two-year bar is simply wrong.

Conclusion.

The Court of Appeals attempted to apply corporate law in its decision in the *Kissinger & Fellman* case where corporate law was wholly inapplicable since no corporation was involved.

Even assuming (wrongly) that a corporation was involved, the Court of Appeals then proceeded to misinterpret and misapply the CBCA and the CCAA to the situation before it.

As in other business law cases, this opinion is not the sole responsibility of the courts or the judge who wrote the opinion. Our judges have to devote their attention to many areas of the law: criminal, commercial, family, personal injury, tax, real estate, business entities, etc. No person can be an expert in all of these areas, or perhaps even in a few. The litigators presenting these cases have an obligation to develop an expertise in the laws they are presenting to the courts, and to explain them clearly and honestly. Or to use an expert within their own firm or an outside expert to assist them in doing so.

[21] Statutes of limitations for civil matters vary from one year to six years, depending on the nature of the cause action. See, e.g., C.R.S. §§ 13-80-101 through -103.5.