# Is it risky to be a founder?

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By carrying out entrepreneurial activities, i.e. independent activities carried out at its own risk, aimed at systematic profit from the use of property, sale of goods, performance of works or provision of services, in conditions of market instability, exchange rate fluctuations and consumer demand, the company may experience signs of bankruptcy.

It is known that when a debtor is declared bankrupt and the bankruptcy estate is distributed, creditors do not receive the desired amount, according to the statistics of the Federal resource, creditors receive only 1/18 of the expected amount of money, which negatively affects the financial condition of the debtor. To the aid of creditors comes the institution of subsidiary liability, which serves as a means of protecting creditors.

According to the General rules, the founder (participant) of a legal entity or the owner of its property shall not be liable for the obligations of the legal entity. The fact of bankruptcy of the debtor is insufficient to attract the founder to subsidiary liability for the obligations of the debtor. However, if the causal relationship between the introduction of bankruptcy proceedings and the actions or omissions of the founder is proved, the founder is held liable for subsidiary liability.

The emergence of the institution of subsidiary responsibility in Russian law is associated with the Western trend - "piercing the corporate veil". The idea of the so-called "breaking the corporate veil" is an opportunity to assure the counterparty that if the company acts in a clearly unfair manner, then there is a possibility of protecting the rights of creditors by holding its participants liable for the obligations of the company.

The founder may be held vicariously liable for obligations arising after the expiration of the established term for convening, preparing and holding a meeting of participants, as well as the decision to compel the General Director to file for bankruptcy of a legal entity. In this period, which can be called the founder of the debtor's obligations begin after 10 days from the date when the person involved learned or should have learned about the failure of the head of the liquidation Commission of the debtor's obligation to apply to the court for bankruptcy.

Founders of General partnerships, peasant (farmer) farms, production cooperatives cannot escape from subsidiary liability, since subsidiary liability of such persons is fixed by the norms of the Civil code of the Russian Federation. The application of the arbitration Manager will be satisfied in one hundred percent of cases.

Not all founders of legal entities (except those mentioned above), in accordance with article 61.10 of the bankruptcy Law, but only those who independently had the right to dispose of more than half of the authorized capital of a limited (additional) liability company / shares of a joint-stock company or jointly with interested parties, may be brought to subsidiary liability.

The above article even contains the phrase "more than half", but the term "person controlling the debtor" refers to those who have 50 percent of the shares or the company, when there are only two parties in the company.

The courts in such cases formally refer to the criterion of participation, and if the participant could Express his will at the meeting of the company's participants, for example, oblige the General Director to file for insolvency (bankruptcy), but for some reason did not do so, then why should the creditors-contractors bear losses due to the passivity of the founder.

The formality of such participation should be pursued in the case when two participants of the society have the same strategy of its development or regression of the society. If in court it will be proved that as a result of actions of participants of society there was an outflow of a liquid asset at essentially underestimated price, absence of real Executive actions of the head at receipt by it of a salary that was established, for example, in Definition of the Supreme Court of the Russian Federation of 28.12.2018 No. 308-ES16-11233(2) on business No. A32-1011/2014 is revealed, courts lawfully come to a conclusion about attraction of both founders to subsidiary responsibility as on the person absence of interest on preservation of society in actions of founders.

In the case of the execution of one of the two founders of the powers of the sole Executive body, the concept of proof of recognition of the lack of causality between the actions of the founder and bankruptcy will be futile for him to avoid involvement attract to vicarious liability as the sole Executive body selects the strategy of development of society and his actions are the result of economic condition on a certain date (decision of the Twentieth arbitration appeal court from 12.11.2018 No. 20AP-5984/2018 on business № A68-2633/2017).

At the end of 2018, the fifth arbitration court of the court of appeal (far Eastern district) in the Decision of 18.12.2018 No. 05AP-8794/2018 in the case No. A24-6392/2017 created an ideal structure of the company: participants with equal shares in the company cannot be attributed to one group of persons by virtue of article 9 of the competition Law. This is primarily due to the fact that each of the participants can block decision-making at the meeting of participants and thus prevent the use of the right of another participant to exert a controlling influence on the society.

To date, the most popular reason for bringing the founder to subsidiary liability for the obligations of the debtor is the late filing of an application for bankruptcy of the enterprise. It should be borne in mind that the purpose of the founder is not to bring the enterprise to bankruptcy, but to create favorable conditions for business activities of the enterprise. It is assumed that the company constantly carries out current activities, so the presence of accounts payable at the enterprise, though for a short period of time, but there is. It is unacceptable to equate the non-payment of a particular debt with the insolvency of the enterprise. The creditor is always aware of the fact of default before him. However, this circumstance in itself does not indicate that the

creditor should simultaneously have information about the suspension of settlement operations of the debtor with other creditors. According to the legal positions of the Supreme Court of the Russian Federation in its decision of July 20, 2017 no. 309-17-1801, the debt in the amount of 300 000 rubles, as well as their failure to perform within 3 months from the date of occurrence is an insufficient basis for occurrence on the side of the debtor, through its head acting on appeal to the court with a bankruptcy application.

If such a participant proves that the appearance of signs of insolvency did not indicate objective bankruptcy and the participant, despite the financial difficulties, in good faith expected to overcome them in a reasonable time, made every effort to achieve such a result, such a participant, taking into account the General legal principles of legal liability, is exempt from subsidiary liability.

Thus, we can say that, despite the changes from July 2017, the presumption of vicarious liability of the party now automatically is expected if you cannot repay debt to creditors, but the court practice seeks to separate the concept of "party-debtor" and "the controlling person of the debtor" for bringing to subsidiary liability for the obligations of the debtor that is, those persons who have brought the company to bankruptcy.