Navigating the Corporate Structural Maze:
The Keys to Discovering Recoverable Assets

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Representative Ownership Models

Over the past few years, the nursing home industry has seen a significant diminishment in liability insurance coverage. Because of rising insurance costs, many nursing homes carry only limited insurance, such as an aggregate policy that provides for $1 million coverage for the entire year. And an increasing number of nursing homes carry no liability insurance at all. With little or no insurance money to cover claims, it has become increasingly necessary for victims of nursing home abuse and neglect to look to the assets of the nursing homes owners/operators in order to satisfy judgments won against these homes as a result of injuries suffered.

When dealing with small, individually-owned "mom and pop" facilities, finding the assets of the owner/operator is usually relatively easy and straightforward. In these cases, the licensee of the facility is usually the "mom and pop" themselves, readily exposing their own individual assets to satisfy judgments against them as owner/operators of the subject facility. Other small operators may set up a limited liability company, corporation, or other entity to serve as licensee of the facility in an attempt to shield the owner/operator from liability. Even under these circumstances, it is usually not very difficult to reach the assets of the individual owners by "piercing the corporate veil" or establishing alter-ego liability.

The real difficulty in locating and recovering the assets to cover claims against nursing homes usually begins when a plaintiff's attorney is dealing with large nursing home chains, owned and operated by large public corporations. In these situations, the parent companies of nursing home chains will purposefully set up various complex corporate structural models in an attempt to shield themselves and their assets from liability. One of the most popular structures is for the parent company of the nursing home chain to create a separate limited liability company to serve as the licensee of each of its nursing homes. Most of the time, none of these facility-licensee limited liability companies have any assets, nor do they have any offices or officers separate and distinct from the parent company.

Additionally, in between the parent company and each of the facility licensee limited liability companies are usually one or more layers of intermediary corporations and limited liability companies that serve as "direct owners" of the facility limited liability companies. These intermediary companies provide management and other ancillary services to the nursing homes. Under this model, the parent company existing three or four rungs up the ladder from the nursing home can and will contend that it is only an "indirect owner" of the nursing homes and has absolutely nothing to do with the operations of each of the facilities. Nothing could be further from the truth. All the while the nursing home limited liability companies funnel any assets it obtains to the various holding companies above it in the form of payments for various things including rental payments for the land on which the home sits or "management services."

The one advantage that plaintiff's attorneys have when it comes to nursing home owners that are public companies is that no matter how complex the corporate structure, these companies are essentially required to disclose the ownership of the nursing home in securities filings and other public documents. So while it may take some digging and a little hard work, most of the time the ownership model utilized by a public parent company can be discovered, analyzed, and understood.

Unfortunately, the same cannot be said for a second and even more complex and secretive ownership model that occurs when private investment firms acquire nursing home chains from public companies and "take them private." Under this model, the true owners and operators of the nursing homes are obscured by the very fact that there are no reporting requirements requiring their disclosure to the public, in contrast to public companies which are essentially required to disclose their corporate structures in public findings. Adding to the secrecy already secured through private ownership, private investment firms then create Byzantine corporate structures that make it extremely difficult for plaintiff's attorneys, and even government regulators, to know who owns and operates a nursing home, if one company is responsible for multiple nursing homes, and where the assets of the nursing home are located.

A great example of a corporate structure created by a private investment firm is shown by this chart (Exhibit "1"), which is an actual organizational chart produced during a Rule 30(b)(6) deposition of a large multi-state nursing chain that had just been "taken private." The names of the entities have been blacked out to protect the not so innocent. Looking at the chart, you can see the parent holding company at the top. You also see anywhere between two and four layers of entities such as "management" companies, "administrative services" companies and other companies between the parent company and the facilities. Yet even more significant than these layers between parent and facility are the two separate and distinct branches of entities extending from the parent company.

Looking at the left side of the chart, we see the left branch of companies, ending in the entities at the bottom labeled "facility real property". This signifies that all the real property on which the nursing homes sit are owned by the entities which form the left branch of the corporate structure. Now, looking at the right side of the chart, we have a "right branch" of companies, ending at the bottom with the "licensees". This signifies the limited liability companies or other entities that hold the state license to operate the facilities. Typically, the entities on the left owning all the real property

will lease the land to the "independent" entities on the right (who often times will sublease the property to other "independent" operating entities). Under this model, all the operating entities on the right funnel payments from government sources and patients that should be utilized for patient care to the left branch of entities in the form of rental and other payments, leaving the operating branch with little or no assets. At the same time, the left side, which owns all the assets, claims that it only owns the real estate on which the facility sits and leases that land to "independent" companies, and therefore bear no responsibility or liability for patient care.

How Do We Find the Assets?

With these ownership models in mind, the question then becomes, how do we prove that the parent company, or whatever other entity holding the assets, is responsible for the operations of the facility and therefore liable for injuries and deaths suffered by nursing home patients so that we can reach these assets to satisfy judgments against the nursing home.

Here, the biggest mistake made by plaintiff's attorneys is to attempt to hold the parent company liable for the acts of the nursing home as the employer of the nursing home personnel through the theory of vicarious liability. In most situations, this will be extremely hard to do when there are several layers between the parent company and the nursing home, with intermediate entities issuing paychecks, etc. Instead, the easiest way to reach the assets of the parent company is to focus on the bad acts of the parent companies themselves that led directly to the injuries suffered by the plaintiff nursing facility resident.

Thus, it is important to distinguish between an employer's vicarious liability (pursuant torespondeat superior) arising from an employee's tortious acts, and an employer's direct liability for its own acts independent of its employees. In the first instance, we hold the employer liable, not because it actually caused the harm nor because it is morally culpable, but because policy reasons compel us to.[1] In the second instance, the employer's liability derives from nothing more than the traditional application of tort law. This conclusion is not at all surprising: a person is always liable for his or her own tortious acts.[2] In the case of an employer, its direct tortious act can take two forms: it can do something personally, or it can direct an employee to do the act. In either instance, the law recognizes that we are dealing with a direct act and that, therefore, direct - not vicarious - liability applies.

When harm stems from an employer's direction or authorization to perform a tortious act, the employer is being held liable, not vicariously (for the wrongs of its employee), but directly (for its own wrongs). Although the distinction between liability stemming from directing an employee and liability stemming from respondeat superior is a subtle one - and one that undoubtedly invites confusion - an employer's liability based on acts it has directed is really nothing more than an application of the perennial doctrine of qui facit per alium facit per se.[3] This point was precisely (and perhaps more eloquently) made in Maberto v. Wolfe, 106 Cal. App. 202, 206, 289 P. 218 (1930):

Appellant urges the nonapplicability of the doctrine of respondeat superior to the situation presented here and cites authorities in which such doctrine is considered. In the present case, however, appellant is held liable under the principle of qui facit per alium facit per se. The distinction in these doctrines is clearly expressed by the Supreme Court of South Carolina in Sams v. Arthur, [(1926)] 135 S. C. 123[, 128-29] [133 S. E. 205-207], wherein it is said: "The principle qui facit (per alium facit per se) must not be confounded with that of respondeat superior. It is a common misconception to attribute the liability of a master for the delicts of his servant in every case to the principle of respondeat superior. The servant may cause injury in doing the very thing that the master directs him to do. In that case the master is held liable because the law holds that the act is that of the master although done through the servant, under the principle qui facit per alium facit per se. He is therefore held responsible for his own act. But, on the other hand, the servant may cause an injury while engaged within the line or scope of his employment in doing an act which the master has not directed him to do or has specifically directed him not to do. It is the act of the servant, not the master, and the latter is held responsible on grounds of public policy; the liability in such case being expressed by the phrase respondeat superior. The principle is entirely distinct from that of qui facit and owes its origin to an entirely different source; the one to public policy and the other to the fixed principle of law and justice."

Thus, it should always be argued by plaintiff's counsel that the parent company itself is responsible for plaintiff's injuries through its own misconduct - namely that it instituted, established, implemented, and compelled compliance with policies and procedures at the facility level (namely chronic understaffing and under-funding of the facilities) which resulted in the injuries suffered by plaintiff. The case must not become a case about a rogue nursing home employee whose bad acts caused plaintiff's injuries, but rather a case about a rogue company whose direction and control of its facilities caused the injury.

But how do we show this control and direction by the parent company? In the case of public companies, sometimes this can be as easy as using the parent company's own words against it. In the case of public company nursing home owners, most of the time they like to advertise to investors and prospective investors uniform management and control of facility operations by the parent company because uniform control often leads to increased profitability. Yet in litigation, the parent company will claim that each facility is independently owned and operated.

Take, for instance, the situation recently encountered in litigation against a large nursing home chain. In order to try and evade liability, the parent company submitted a declaration from its general counsel wherein the general counsel declared that each of the subject nursing homes were independently operated. This is an actual quote from the declaration, with the name of the company redacted. The General Counsel declared, "Although [Doe Company] provides certain corporate-level services to the facilities owned by [Doe Licensee], including marketing support, each facility is separately operated."

Yet in securities filings submitted to the United States Government, the defendants declared under penalty of perjury that the very opposite is true - that [Doe Company] exerts uniform control over its facilities and that the defendant facilities are run by [Doe Company] "as a single unit." Defendants' government filings confirm that rather than just providing "marketing support", as [general counsel] falsely declared, [Doe Company] exerts uniform control over its facilities by mandating its facilities' compliance with corporate-wide policies and procedures relating to virtually every aspect of its facilities' operation, including but not limited to resident care, compliance with state regulatory requirements, marketing, admission criteria and procedures, clinical procedures, and budgetary matters. Indeed, in its 2006 10-K annual report submitted under penalty of perjury to the United States Securities and Exchange Commission, Defendants directly contradict the sworn declaration of [general counsel] and represent as follows (actual excerpts from 10-K):

- "Our operations are organized into a number of different direct and indirect wholly owned subsidiaries, primarily for legal purposes. We manage our operations as a single unit. Operating policies and procedures are substantially the same in each subsidiary. See,Exhibit "2", excerpts from the [parent company] 2006 10-K annual report submitted to the United States Securities and Exchange Commission.
- "We have centralized various functions that are provided from our corporate office. Our human resources, legal, purchasing, internal audit, accounting and information technology support functions located in [Anytown] support our nursing, assisted living and other long-term care operations. At our corporate offices, senior management provide overall strategic direction, seek development and acquisition opportunities, and manage the overall long-term care business. Human resources implements corporate personnel policies and administers wage and benefit programs. Accounting, finance, internal audit, billing and collection, accounts payable, payroll, general finance and accounting, and tax planning and compliance are centralized in [Anytown]."
- "Senior departmental staff, for their respective nursing and assisted living organizations, are responsible for the development and implementation of corporate-wide policies pertaining to resident care, employee hiring, training and retention, marketing initiatives and strategies, risk management, facility maintenance and project coordination."
- "The regional office staff is responsible for overseeing all operational aspects of our facilities and compliance with company standards involving resident care, rehabilitative services, recruitment and personnel matters, state regulatory requirements, marketing and sales initiatives, internal control and accounting support, and participation in state associations."
- "Our corporate clinical services department establishes corporate nursing and quality of life standards, monitors issues and trends in the industry and implements our policies and procedures."
- "Our corporate quality and clinical service personnel are responsible for monitoring and communicating adherence with our policies and standards, and state specific regulations to ensure ongoing compliance and quality of care. Our regional quality and clinical service teams are instrumental in the continuous and on-going auditing of care and service delivery systems. They also provide direction, orientation and training for our professional and service staff in our facilities." (See, Exhibit "2", excerpts from [Doe Company] 2006 10-K annual report).

Thus, in this situation, the parent company was put between a rock and a hard place. Obviously, it cannot claim in litigation that each facility is separately and independently operated when it is representing to the government and prospective investors that its facilities are operated as a single unit - at least not without perjuring itself as to its earlier filing.

At this point, you may be asking, "But what about public companies who did not make these types of representations in their securities filings, or private companies with no securities filings at all? How do we show ownership, direction, and control by the parent companies in these situations?"

There are various other ways to show control and direction by the parent companies. In many ownership models, there will exist "management" or "consulting" agreements between the facility and parent company wherein the parent company basically contracts for control and direction of the nursing home. Other public filings such as cost reports filed

with state agencies will show exorbitant payments from the nursing home to the parent company for leasing the land or the provision of "management services" etc. And perhaps the most powerful evidence of corporate control may be found during the discovery process, including depositions of facility administrators who will testify that virtually every aspect of the operation of the facility, including budgeting, staffing, and the implementation of policies and procedures relating to patient care all emanate from the corporate parent, and no decisions relating to the facility's operation can be made without the parent's direction and approval.

Obviously, there can be little doubt that proving corporate liability and reaching these corporate assets can be much more difficult in the case of private investment firms, especially those with ownership models having one branch owning all the assets and one branch holding the licenses as discussed above. However, many of the same discovery tools discussed above will also apply to the private investment firm situation. Also, more creative tactics must be explored in these situations. One such tactic that we have been developing and may utilize, and admittedly, we don't know how successful it will be, is utilizing the Washington Uniform Fraudulent Transfer Act. Under the separate branches model discussed above, you may be able to go after assets of the property ownership branch by bringing a cause of action under the Uniform Fraudulent Transfer Act, RCW 19.40.011, et seq. For instance, let's assume that the licensee of the facility transfers all its assets to the ownership entities under the guise of lease payments, etc. It is possible to make a strong argument that these payments were made for the sole purpose of evading liability to present and future creditors, and therefore constitute fraudulent transfers under the Act.

RCW 19.40.041 provides, in pertinent part:

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) With actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(ii) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

Transfers between affiliate companies to shield assets has a "badge of fraud", especially when both companies share leadership. Glimcher Supermall Venture, LLC v. Coleman Co., 739 N.W.2d 815 (S.D. 2007) (interpreting RCW 19.40.041). You can also show that a transaction was fraudulent by showing a lack of good faith in the transfer. A lack of good faith can be shown with an "intent to take unconscionable advantage of others."Sparkman & McLean Co. v. Derber, 4 Wn. App. 341, 481 P.2d 585 (1971).

Conclusion

Nursing homes, quite frankly, do not want to be held liable for wronging the people under their care. They've set up a shell game which helps them minimize that risk. Using these tactics, and the information provided today, we can tear down this shell game and hold those truly responsible for the pervasive substandard care provided at Washington nursing homes. We can obtain awards to help remedy the grievous injuries suffered by vulnerable nursing home patients in the State of Washington.

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[1]The historical policy justifications supporting vicarious liability was encapsulated inHinman v. Westinghouse Elec. Co., 2 Cal.3d 956, 959, 88 Cal. Rptr. 188 (1970), (quoting Prosser: "Although earlier authorities sought to justify the respondeat superiordoctrine on such theories as 'control' by the master of the servant, the master's 'privilege' in being permitted to employ another, the third party's innocence in comparison to the master's selection of the servant, or the master's 'deep pocket' to pay for the loss, 'the modern justification for vicarious liability is a rule of policy, a deliberate allocation of a risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business. They are placed upon the employer because, having engaged in an enterprise which will, on the basis of past experience, involve harm to others through the torts of employees, and sought to profit by it, it is just that he, rather than the innocent injured plaintiff, should bear them; and because he is better able to absorb them, and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large.'")

[2]Indeed, the only question even worth asking here is: How can a corporation act personally? Here too, the answer is fundamental: the actions of a "managerial employee" in a "policy-making position" are imputed to the principle for the purposes of fixing liability. See Egan v. Mutual of Omaha Ins. Co., 24 Cal. 3d 809, 822, 169 Cal.Rptr. 691 (1979); Kuchta v. Allied Builders Corp., 21 Cal. App. 3d 541, 549-50, 98 Cal.Rptr. 588 (1971); Davis v. Local Union No. 11, Int'l Bhd.. of Elec. Workers, d16 Cal. App. 3d 686, 94 Cal. Rptr. 562 (1971).

[3]"Qui facit per alium facit per se" translates to, "he who does [something] through another does it through himself." Merriam-Webster Unabridged Collegiate Dict. (2003). In other words, when an employee is merely an instrumentality through which the employer achieves its ends, it is the employer (and not the employee) who is actually engaging in the act.