How to play the corporate shell game to help your comp client win

By MARK McGRATH

Probably the most common question I get from referring attorneys relates to the criteria for screening and identification of workplace-injury claims for potential third-party actions.

My short answer is this: There are only three criteria, and they are damages, damages and damages.

The rationale? Find a workplace-injury case involving death, severe burns, paralysis or other catastrophic injury, and I'll give you better than even odds that the negligence of a third party joined in causing the injury.

Even the most reckless employers typically require the concurring negligence of a third party to inflict death or serious injury upon their employees.

When reviewing files to identify potential third-party claims, I try to keep common third-party fact patterns in mind. One of the most common claim scenarios is what I have come to call the "corporate relative" case.

As any plaintiff's lawyer can tell you, sophisticated (and not-so-sophisticated) defendants have become extremely adept at playing the corporate shell game. How often have you pulled up the Secretary of State's Web site to locate the registered agent for Widgets, Inc., and immediately found a profusion of similarly named entities seemingly innocuous variants such as Widgets, LLC; Widgets, Limited Partnership; Widgets, Inc. of N.C.; Widgets, Inc. of Virginia; and so on?

The game pays dividends. Among other benefits, it provides defendants with an effective litigation smoke cover.

If you sue all of the Widget entities shotgun style, defense counsel will start making noise about Rule 11. If you name Widgets, Inc., instead of the proper defendant, Widgets of N.C., defendants will kindly ignore the error until the statute of limitations passes, and then hit you with a motion to dismiss.

Our courts are quite in love with this particular ploy, and have held that amendments to correct such errors will not relate back to the date of initial filing, no matter how intimately related the two entities might be at an organizational level, and regardless of whether the proper defendant had notice of the initial suit. Gotcha!

But I digress. Sometimes companies can get too cute, and sometimes, just sometimes, the corporate-balkanization tactic comes back and bites them where their britches meet the bench.

It is important to keep in mind that the exclusivity bar of the workers' compensation act protects only the specific corporate entity that employs the claimant. As long as the tort claim alleges an independent duty owed by a corporate relative (e.g., parent corporation, subsidiary, franchisor, franchisee) and an independent breach (i.e., not derivative or vicarious), the bar does shield from tort liability organizationally related, but legally distinct, entities.

For example, it has been held that a premises liability tort claim can proceed against the owner of a facility, even if the plaintiff's employer is a wholly owned subsidiary of the facility owner. Similarly, tort

claims were allowed to proceed against a corporate relative who assumed the employer's duty and responsibility for providing safety and security to persons working for the employer.

Consider the following facts: Your client was severely injured when he was shot while tending bar at the local Tarnations bar and restaurant. Tarnations is a national chain of country-and-western-themed restaurants, famous for its elaborate karaoke stages, NASCAR Sunday BBQ buffet and its largest draw, the Saturday night all-you-can-drink tequila special.

Your client was shot while attempting to break up a fight between two inebriated patrons on a recent Saturday night. While assisting the bouncer in dragging the two combatants into the parking lot, one pulled a gun, shot at the other and hit your client in the spine. He is paralyzed from the waist down and will never walk again.

Your client is employed by Tarnations of the Piedmont, Inc. You learn that Tarnations of the Piedmont has admitted liability under the workers' compensation act, and has been making indemnity and medical payments in a timely manner.

The client wants to know if he has rights or claims against other persons or entities. You tell him that you will look into it.

Several days of research reveal the following:

* The building and parking lot are owned by Tarnations Real Estate, Inc. Under the lease, TRE retains control over the parking lot, grounds and other common areas.

* The building is rented by Tarnations Restaurants of Delaware, LLC, under a lease with Tarnations, Real Estate, Inc.

* The bouncers and security staff working at the restaurant are employed by Tarnations Personnel, Inc.

* Tarnations of the Piedmont, the employer, appears to hold no assets, and is little more than a vehicle for processing payroll to workers at the restaurant.

* There is a management and operating agreement between Tarnations of Delaware, LLC, and an entity called Tarnations Food Services, which is responsible for maintaining and running the operations of the restaurant. Shift supervisors at the restaurant are employed by Tarnations Food Services.

* The restaurant is operated under a franchise agreement between Tarnations Food Services and Tarnations of Delaware.

* An entity known as Tarnations Security, Inc., has entered into a contract with Tarnations Food Services, pursuant to which Tarnations Security has agreed to provide crime-data research, on-site safety and security audits and assorted security-related services

This is a rather baroque example of the multi-party workplace-injury scenario, but it illustrates my point.

Except in rare cases, the operations of most enterprises are vastly more complicated than they first appear. Networks of contracts, verbal agreements, manners of dealing, business practices and customs run beneath the surface.

Third-party claims feast upon this complexity. In a word, the corporate shell game has provided us with a veritable third-party liability smorgasbord.

By way of example, suit could be pursued against Tarnations Personnel and Tarnations Security for the negligent provision of security services, against Tarnations Real Estate for negligent provision of security in the parking lot and common areas, and against Tarnations Food Services for failing to provide security inside the restaurant.

If the contracts and franchise agreement impose duties upon other Tarnations entities, these could provide a basis for liability as well. None of these claims would be subject to the exclusivity bar.

Finding a culpable and viable third-party corporate relative can be tricky. A few important things should be kept in mind.

In order for a corporate relative to be liable, you must identify an independent duty owed from that entity to the claimant. The liability cannot be established through principles of agency. For instance, alleging that a certain corporate relative controlled the operations of the employer or was otherwise derivatively liable for the employer's negligence under the principle of respondeat superior will fail.

Duties may arise out of property interests held by non-employer entities. Property owners and others in possession and control of the premises are subject to certain fundamental duties (duty to inspect, maintain, warn, repair, make safe, etc.) to persons who are present on their premises.

Remember that landlords who own but relinquish control and possession of property pursuant to a lease may still retain control over, and thus legal responsibility for, specific portions of the property, such as parking lots, lawns and other common areas. Duties may also arise out of a retained duty to perform repairs.

Identify tort duties that arise by contract, including the kinds of contracts described in our example. Be especially mindful of duty-creating or duty-shifting contracts, such as management agreements; franchise agreements; licenses; operating agreements; agreements for inspecting, maintaining and repairing the property; and agreements for providing services.

When reviewing relevant agreements identify and evaluate contractual attempts to impose legal characterizations such as "independent contractor" or "owner" (these are not dispositive), and carefully scrutinize attempts to delegate duties by contract (e.g., does the breach involve a non-delegable duty?).

Analyze how the business operated in the real world. Did a given corporate relative assume the duties of another? Was this formalized in any way, either expressly or by ratification?

Keep common corporate relationships in mind while you are reviewing a case. Typical relationships involve franchisor and franchisee, parent and subsidiary, co-subsidiaries and corporate relatives that are parties to incestuous contracts, and owner /independent contractor relationships.

Conclusion

Corporate defendants have elevated the corporate shell game to an art form, and the North Carolina appellate courts have rewarded these efforts at every opportunity. Entire lines of defendant-friendly opinions rest on the premise that corporate boundaries are sacred and inviolate.

Use the doctrine of corporate sanctity to your advantage. When the employer is ABC, Inc., every other entity in the land, including ABC, LLC, is fair game for a tort action as long as you can identify an independent and distinct duty owed by that entity to your client.

When screening your workers' compensation files for possible third-party claims, don't be afraid to take the challenge. Play the corporate shell game today!

There just might be a pea hiding beneath all of them.