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Practical Litigator: Third-party cases in hiding – The corporate relative case

By: Mark Mcgrath October 8, 2010

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Several years ago a prominent and weather-tested workers' compensation lawyer from down east approached me at a CLE where I had just finished a presentation on inadequate-security cases. He represented the estate of a young woman who had been murdered while working at a check-cashing store, leaving behind two young children.

The facts of the case were horrific. The woman was working alone on a Saturday morning and was found by a customer. Her head had been all but severed from her body. Her fingertips had been removed with surgical precision at the first finger joint. Although more than two years had passed since the crime, the police had no suspects.

The attorney could not escape the feeling that there was something in the case that would support either a *Woodson* claim or a third-party case.

I hadn't met him before, but he carried himself and spoke like a lawyer's lawyer; someone who knew his way around a courtroom; a guy who knew where the judges ate lunch, went to church and hunted dove. The kind of guy who ate big firm associates for lunch and then washed the bad taste out of his mouth with a few gallons of sweet tea.

I flipped through the correspondence file. On top I found five letters from some of the most prominent plaintiff firms in the state, indicating that they had reviewed the case and had not found a basis for pursing a third-party claim.

The circumstances of the murder were the stuff that nightmares are made of. Having a keen appreciation for the macabre and a deep-seated loathing for usurious, blood-sucking check-cashing companies, I agreed to take a look.

Not confined to typical scenarios

When we opened our firm four years ago, we pitched ourselves as the firm that would take a look at any workplace-injury case involving catastrophic injuries or death. This is still our guiding philosophy. Of the many workplace-injury cases we signed and resolved over those four years, every one of them had previously been declined by at least one firm. Most of them had been declined by several firms. And none of them were insignificant cases.

Most attorneys still cling to the notion that third-party cases arise in only a handful of situations. The scenario we see most often is where the referring lawyer believes that the injury may have been caused by a defective product. Another obvious fact pattern involves employees who are injured or killed by a negligent driver while they are on the job.

I am here to tell you, my friends, that this is but the tip of the iceberg. The universe of scenarios that are capable of spawning a third-party claim is infinite. Lawyers need to think outside the proverbial box when they are screening workers' compensation cases for potential third-party claims.

I am absolutely and utterly convinced that hundreds of millions of dollars in potential recoveries are being missed every year, simply because cases not involving obvious third-party negligence are simply worked up as comp claims and never hit the desk of a tort attorney who can review the case for potential third-party claims.

The undisclosed corporate relative

One such scenario is what I like to refer to as the hidden or undisclosed corporate relative case. As we plaintiff attorneys know all too well, corporations frequently camouflage themselves in an intricate shrub-work of corporate layers, levels and intersections. When a plaintiff is in the process of identifying proper defendants, this can be a most dangerous game; one slip in reciting the proper legal designation could spell disaster, especially if the statute of
limitations has run.

But this corporate gamesmanship can be exploited to great advantage when reviewing cases for potential third-party claims. Remember, the exclusive-remedy provisions of the Workers' Compensation Act apply only to the *employer*.

Under principles of agency, the exclusive remedy defense can also be invoked by a corporate relative who is alleged to be vicariously liable for the worker's injuries. Similarly, in the case of temporary workers who perform the same kind of tasks as employees of the hiring company and who are under the direction and control of the hiring company, the law may recognize dual employers, allowing both the temporary firm and the true employer to invoke the exclusivity provisions of the act.

But that is where the immunity afforded under the act ends. Any other person or corporation can be sued in tort so long as the plaintiff can identify an independent duty owed by the third-party, a breach of that duty and proximate cause.

Identifying an *independent* duty is central to this analysis. Alleging that the third-party is vicariously responsible for the negligence of the employer will get you nowhere, because the derivatively liable parties stand in the shoes of the employer and are able to invoke the exclusive-remedy provision.

What is an independent duty? Using our murdered-mother case, an employer is required to provide its employees with a safe workplace. With respect to the prevention of workplace violence, employers are required to exercise reasonable care in protecting their employees from violent crime, including the implementation of reasonable security measures. Sources of this duty include OSHA standards (including the general-duty clause), customs and practices of the industry at issue and North Carolina common law.

But the duty to protect employees while they are on the job is not unique to the employer. Other parties may assume obligations to protect employees at a facility by contract or through course of dealing. For example, if a security company contracts with a shopping mall to provide parking lot security, and the contract specifies that the duties assumed by the company are intended to protect customers and workers, a third-party claim might be asserted against the security company.

In real life contractual obligations and corporate networks are often invisible to the naked eye. Attorneys must rely upon their experience, knowledge of the industry and even their intuition to sniff out scenarios that might support a third-party claim.

In our murdered-mother case, the file was spare. It included police reports, a letter of condolence from the company, various e-mails regarding the company's involvement in the criminal investigation and a handful of other items. At first blush these materials led nowhere. Upon closer examination, however, we smelled pay dirt.

First we researched the employer, who we will refer to as Shylock, Inc. The store where the victim worked was part of a chain, one of many similar stores across the country bearing the name Shylock Check Cashing. Further research revealed that the store at issue was leased to a company identified as Shylock of North Carolina, Inc. We determined that this entity had no significant assets and served only a conduit for leasing property and processing payroll for the chain's N.C. stores.

The clues we gleaned from the referring lawyer's file were subtle. In one police report we found a fax number that we linked to an out-of-state company named Shylock Check Cashing, Inc. We determined that it was a holding company that owned the N.C. corporation and identical companies that had been incorporated in other states where

the company did business. Further research revealed that the holding company did have employees and did not do business or have appreciable contacts with the state of North Carolina. Our search continued.

We began to wonder: Would a sophisticated check-cashing business with hundreds of locations handling millions of dollars in cash every day operate without a functioning security department? Certainly not.

One of the documents we found in the file was an e-mail from an individual who identified himself as the security director of Shylock Check Cashing. In the e-mail he informed the detective investigating the murder that the company was in the process of retrieving various documents and data that had been requested by the police department.

Curiously, the domain name behind the e-mail address was different from the domain names associated with the other e-mails in the file, which were associated with the N.C. company. The domain name was "securityusa," and we concluded that it likely reflected the name of a corporate entity, perhaps the company's security consultant or vendor. When we researched whether there was a company named Security USA doing business in the United States we found one.

It required a good deal of looking but there it was, plain as day. Security USA was a foreign corporation. Its headquarters were located out of state. Its headquarters bore the same address as the corporate parent's headquarters. After some more searching we found a phone number bearing the same area code and prefix as Shylock Check Cashing, Inc., the national holding company.

When we dialed the number we both held our breath. A woman answered. In a voice that was clear as cold gin she said, "Shylock Check Cashing security department, may I help you?"

We had our third party. The joy and sense of accomplishment we felt at that moment rivaled anything my partner and I had enjoyed since our days on the gridiron.

We filed suit against Security USA and the national holding company. We issued a Rule 30(b)(6) deposition notice to both entities and domesticated corresponding subpoenas in the state where these entities were headquartered. When I arrived at the address for the deposition, a sign in front of the building said "Shylock Check Cashing."

The documents produced at the deposition included a security consulting services contract between Shylock Check Cashing, Inc. and Security USA. In it, Security USA assumed a duty to render and implement such security services as are necessary to prevent violent crime at Shylock facilities and to ensure and promote the health, safety, welfare and wellbeing of Shylock employees working in those facilities.

A little lower in the stack of documents we found two surveys that had been prepared by Security USA two years prior to the murder at issue in our case. The surveys assessed the security measures that were in place at all Shylock establishments in the United States and analyzed the crime data associated with those locations. The surveys concluded that virtually all of the stores were located in high-crime locations. The surveys also concluded that the security measures in place at all but two of the Shylock facilities were grossly inadequate to protect employees from violent crime.

Forcing these employees to work long hours, one report stated (and this is a rough paraphrasing of the language), handling large amounts of cash, with little or no protection of any kind from would-be criminals, exposes our employees to an unreasonable and unacceptable risk of serious injury or death. Unless corporate undertakes a meaningful review and assessment of the conditions prevailing at these locations, and implements meaningful improvements to the security measures that are currently in place, armed robberies will continue, and death or serious injury during one or more of these incidents is a virtual certainty.

The reports went on to identify 20 changes that should be made at Shylock stores to prevent or deter violent crime, and prevent Shylock employees from harm. Remarkably, all of those recommendations were ignored by the national holding company, depriving Security USA of the funds that were necessary to implement those recommendations and discharge its obligations to the employees of Shylock.

This was the last deposition taken in the case. The case, which the defendants had stoutly defended prior to this deposition, was amicably resolved a short time later.

Conclusion

When reviewing workers' compensation cases for potential third-party claims, think only one thing: damages. If the injuries are catastrophic or fatal, you owe it to your client to have the case reviewed exhaustively by a qualified attorney to determine whether compensation might be available from a negligent third party. These scenarios are rarely obvious and are easily missed.

And do not let one decline letter dissuade you. Remember the lesson to be learned from the case of the murdered check-cashing employee: the sixth time's a charm.

When my partner and I smoked out the responsible third party in the Shylock case, we quickly concluded that our triumph demanded an in-person meeting with the referring attorney. The news was simply too big, too glorious, to be delivered by telephone or e-mail. We spent the trip to his office exchanging scenarios, imagining what the referring attorney would say when we delivered the verdict. Oh, it was a glorious trip!

Inside his office, before my backside hit the chair, I blurted it out: "I am happy to report that after three weeks and hundreds of dead ends, we have identified a third party. The case looks solid." We sat back, beaming like two searchlights, waiting for the praise and glory to wash over us like a summer breeze.

He leaned forward, smiled faintly, knowingly. "Well, I told you that you would," is all he said.

He checked his watch, stood up, gathered an accordion file from his cluttered desk and slipped into a navy jacket which, from its style and drape, had clearly seen the inside of more courtrooms than my combined wardrobe would ever see.

"I hope that y'all didn't drive all the way down here just to tell me that," he said leading us from his office. "There's a good barbecue place on the way out of town you'll want to hit before you get back on the interstate." I detected a sly twinkle in his eye as he extended his hand, shook mine, turned and walked up the street.

Thinking glumly of the work we had ignored driving down, the ride home was a quiet one.

Editor's note: *McGrath is a partner with the firm of McGrath Podgorny in Research Triangle Park, where he focuses his practice on representing plaintiffs in catastrophic-injury cases, including cases arising from nursing home neglect and abuse, electrical injuries, inadequate security, medical malpractice and third-party workplace injuries.*

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