

Health Care Law

The Nursing Home Shell Game: Holding Wrongdoers Accountable

By David R. Cohen

In most areas of litigation, it is with relative ease that the practitioner can determine who should be named as the appropriate party defendants. The nursing home milieu is quite different. It is one of the very few areas of law where an entire industry has spent extraordinary sums of time and money to hide owners, managers, investors and other parties who directly or indirectly control care from the public, federal government and attorneys. This is not a mere assertion of opinion. Rather, it is a bipartisan finding of the United States Senate. Across the board, intermediate and national nursing home chains have gone through extraordinary lengths to avoid accountability. In more and more instances, the industry has boldly allowed many of its facilities to operate without any form of liability coverage, often boasting through counsel that it will never have to pay a judgment.

The good news for nursing home residents, their attorneys and the general public is that help is on the way. The Nursing Home Transparency and Improvement Act spon-

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sored by Senator Chuck Grassley was passed as a component of President Obama's health care bill.

The law is rather lengthy and it contains a number of provisions which will soon aid attorneys and the federal government in enforcing the applicable regulations pertinent to nursing home care: (1) Information must be provided to the public, identifying each member of the governing body; (2) Identifying each person or entity who is an additional "disclosable party" of the facility. A disclosable party is identified as any person or entity that exercises operational, financial or managerial control over the facility or a part thereof or provides policies or procedures for the operations of the facility or provides financial or cash management services to the facility, or leases or subleases real property to the facility or owns a whole or part interest equal to or exceeding 5 percent of the total value of the property, or provides management or administrative services; (3) The organizational structure of each additional disclosable party must be released; and (4) Even parties or entities with indirect interests must be disclosed.

Within 90 days of the enactment of this law, the secretary shall release in the *Federal Register* regulations enforcing the Nursing Home Transparency Act Law. The secretary shall provide guidance and technical assistance to states on how to adopt a standardized format to enforce these laws. Within one

year of the release of the final regulations, the Secretary of Health and Human Services shall make all of this information available to the public in accordance with the procedures established by the secretary.

However, until this law goes into effect, the task at hand for plaintiff and defense attorneys is often dizzying and riddled with pitfalls on both sides of the aisle. With competing perceptions and enunciated positions on the relationship (or lack thereof) of various entities standing behind the façade of an individual nursing home franchise, many defense attorneys frequently find themselves in positions of conflict, arguing in open court as to the appropriateness of dismissal of one of the many parties they represent on the one hand, while contemporaneously arguing that the parties are wholly distinct in interest and form from each other. The obvious question is how those two positions can be reconciled in an ethical manner. The findings of the United States Congress suggests that in many of these instances, there is no true distinction between these entities and thus it allow plaintiffs' attorneys to move forward with two distinct yet overlapping approaches to getting to the heart of the matter, whether or not the care received by the resident was appropriate or not and why the bad care occurred in the first instance.

The two theories in obtaining accountability when bad events and ensuing injuries occur are direct participant liability and piercing the corporate veil, but first one needs to find and name the parties.

There exist a number of sources of information, all of which must be accompanied by due-diligence efforts to uncover the parties and the careful use of fictitious party practice. Due diligence in this regard

is a moving target and involves a combination of various approaches of the investigation. In the first instance, a good starting point into any nursing home is, of course, its website. An additional step involves reviewing New Jersey's nursing home website. In this site, officers, owners and information about related nursing homes can be obtained. One would hope and expect that the calculus would end here. However, it doesn't. Through a public records request, attorneys should order what are known as "Cost Reports" both from Medicaid and Medicare, wherein ostensibly the nursing home's budget is reported. These documents are likewise helpful in determining the identity of a number of related entities to the nursing home itself.

Attorneys are well advised to also conduct docket searches to determine whether or not these particular facilities have been sued in the past, both in New Jersey and elsewhere, reaching out to other attorneys to learn about undisclosed parties. Through a public records request, counsel can also obtain the licensure files for nursing homes which are lengthy, and often provide detailed information not only helpful to understanding the facility, but identifying parties sometimes not present in all of the other documents.

Less familiar than the theory of piercing the corporate veil is that of direct participant liability. The basic thrust of this approach is to hold an individual or entity accountable for the implications and impact of its conduct upon subsidiaries, other parties and/or other entities. The theory is best exemplified in the seminal case of *United States vs. Best Foods*, 524 US 51(1998). This requires a specific link between what is generally the parent corporation, although it can link other types of entities to the ultimate harm suffered by the nursing residents. In *Best Foods*, the parent was held to be liable for the negligence committed by agents in the course of its business. The

Best Foods Court ruled that the parent need not have acted on its own, but that the parent would be directly liable for the subsidiaries' actions where the parent placed the subsidiary in such a position, such as they acted upon specific orders or received "instructions" from the parent.

In the wake of the *Best Foods* decision, a number of courts throughout the country have found nursing home parent corporations and other entities liable for the impact of their conduct upon residents. It should be noted that proofs are not easy in this regard and that defendants will generally resist providing discovery related to parents, the documents which demonstrate the relationship between the parties and the impact of decisions that parents, management corporations, stockholders, investors, REIT's and the like have upon the operations in nursing homes. Rest assured though, the impact is there and is significant.

As referenced above, organizational charts of nursing homes can be mind numbing. This is intentional. It is not a mere accident of the necessities of nursing home operations, nor is it essential for such organizations to provide care. Rather, it is an intentional attempt by many nursing home chains, facilities and other organizations to specifically avoid liability for conduct which occurs in the homes. By way of example, the interrelationship among various entities is not merely vertical, with a parent corporation, franchisee and perhaps one management company. There are a number of nursing homes operating in New Jersey with no fewer than 20 organizations standing above and often hiding behind the operation itself.

Obtaining corporate documents tends to shed some truth on the matter and there are a number of areas wherein attorneys can get closer to the truth of the interrelationship among these entities, working toward demonstrating a disregard for the corporate form.

By obtaining corporate documents, counsel will often find a number of items, suggesting a disregard for the corporate form:

- Evidence of the same individual signing both sides of a contract.
- Rental agreements among supposed distinct entities, wherein the annual rent ostensibly being paid from the entity to itself but populated by the same is at a value that exceeds the full value of the property itself.
- "Management fees" being paid from a nursing home to an entity populated by the same individuals wherein either little or no management services were provided or wherein the management fees are disproportionate to the amount of work performed.
- Nursing homes reporting that they are operating at a loss while at the same time ostensibly paying themselves significant sums of money from management fees which, again, are disproportionate to the work performed.
- Work provided by "outside contractors," without the option of public bid and for which prices are disproportionate to that which is customary for the work performed — wherein the outside contractor entity is owned and/or populated by the same individuals who own, operate or manage the nursing home itself.

Naming the proper parties and pursuing the proper entities and individuals in nursing home litigation is a task not fit for the faint of heart. Significant efforts pre-suit and throughout the litigation are essential to get past those issues and address the care which otherwise forms the basis of the litigation. Equally important is demonstrating how the corporate conduct of the various entities standing above, lateral to and behind the nursing home, along with the financial and profit-driven decisions, lead to the conduct and injuries suffered by nursing home residents. ■