

PIERCING THE CORPORATE VEIL IN INSURANCE BAD FAITH CASES

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With insurance bad faith cases sprouting up everywhere, plaintiff lawyers have never enjoyed such a busy time. We continue to see multi-jurisdictional lawsuits commenced by plaintiff lawyers who specialize in such cases, utilizing local attorneys to do the local work when necessary. One common theme that seems to run through these cases, whether they are insurance bad faith or health maintenance organization's ("HMO") bad faith allegations, is that plaintiff attorneys seem to be trying to pierce the corporate veil in an effort to reach the corporate parent's pockets.

Defense attorneys have recently found themselves not only defending the insurer or HMO, but with more frequency, also defending the corporate parent. Generally, these types of lawsuits fall into the category of nuisance litigation, but because of the serious implications involved, they recently have been receiving a great deal of attention at the courthouse. In personam jurisdiction and various states long arm statutes must be analyzed carefully in an effort to determine whether there may be a joint enterprise theory, or a "doing business" theory which could ultimately prove hazardous to the financial health of the corporate parent. Even the United States Supreme Court has spoken out on this issue in determining whether a court has personal jurisdiction over a corporate parent of a subsidiary doing business in a state. An analysis of this issue follows.

Does the Court Have Personal Jurisdiction Over the Corporate Parent?

If a corporate parent has no contact with the forum state that would subject it to personal jurisdiction, courts will generally find that being the parent of a subsidiary doing business is not enough of a contact in the forum state. Reasonable notions of due process envisioned by the federal and state constitutions come into play in such a scenario. The United States Supreme Court has so held in *World-Wide Volkswagen Corp. v. Woodson*.¹ The United States Supreme Court held that to subject a parent corporation to a state court's jurisdiction when the parent had no contacts, ties or relationships to the state except through its subsidiary, would offend the principles of substantial justice and fair play and violation of the due process guarantees of the United States Constitution.

Oklahoma's Long Arm Statute

This review will deal with Oklahoma's Long Arm Statute and its effect vis-a-vis the United States Constitution relative to in personam jurisdiction. Similar statutes of other states would have the same effect, although the case law construing same will oftentimes produce differing results. The guidelines for determining at what point a nonresident corporation may be pulled into the jurisdictional clutches of a state court and subjected to in personam jurisdiction has been, at least in Oklahoma, a well-argued issue.

The issue has, over the years, been synthesized down to a few individual issues for a resolution to such a difficult problem. The Oklahoma law regarding nonresident corporate in personam jurisdiction can be memorialized in one sentence. Oklahoma courts may exercise personal jurisdiction over nonresident corporations when there are such "minimum contacts" with Oklahoma that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice as referenced by those ideals of due process, and the nonresident reasonably anticipates being haled into court in Oklahoma.²

Oklahoma's long arm statute may only extend in personam jurisdiction of Oklahoma courts to the limits allowed by the Federal Constitution.³ Under Oklahoma law, a single due process analysis is utilized to determine the extent of personal jurisdiction over a nonresident defendant, that being minimum contacts of a nonresident by "engaging in or transacting business" within the forum state.⁴ In this regard, "transacting business" means that a corporation must do or perform a series of acts which occupy time, attention, and labor of men for purposes of livelihood, profit, or pleasure.⁵ The performance of acts which will subject a nonresident corporation to in personam jurisdiction has been further described as marketing of products by advertising solicitation, collection accounts, and kindred functions.⁶ These factors are, of course, a qualitative and not quantitative measure of "minimum contacts."⁷ Further, there is no one rule which exists to

determine which actions or group of actions constitutes doing business within a state; the actions must be examined individually as to the character of each particular act and the factual basis for the action.⁸

In determining if a corporation has maintained sufficient contact with a forum state in order for that state to exercise in personam jurisdiction through its long arm statute, each case must be decided on its own facts.⁹ A nonresident corporation's activities within a state must be "substantial," "continuous," and "regular" as distinguished from "casual," "single" or "isolated" acts in order to constitute "engaging in or transacting business" so as to be found within the state for purposes of personal service.¹⁰

This continuous and substantial activity is best described in *Samuelson v. Honeywell*. *Honeywell* held that a corporate defendant's contacts with Oklahoma were not sufficiently "continuous and systematic" to support its exercise of jurisdiction.¹¹ The general test for determining whether a state may exercise personal jurisdiction under the federal Constitution is well established:

A court . . . may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum state. The defendant's contacts with the forum State must be such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' The sufficiency of a defendant's conduct must be evaluated by examining the conduct and connections with the forum state to assess whether the defendant has 'purposefully avail[ed] itself of the privilege of conducting activities within the forum State.' The nature of a defendant's contacts must be such that the defendant could reasonably anticipate being haled into court in the forum State. (*citations omitted*).¹²

Even stronger arguments AGAINST exercising in personam jurisdiction over a parent corporation are holdings from sister jurisdictions which state: "the mere presence of a wholly-owned subsidiary in a state is INSUFFICIENT to form a basis for the assertion of personal jurisdiction."¹³

Each analysis must include a review of where the parent corporation is domiciled and a review of where its true principal place of business is located, i.e., its "nerve center." Additional factors which must be weighed in such an analysis are: (1) whether the corporate parent has employees, offices, bank accounts, real property or personal property within the state which seeks jurisdictional authority over the parent; and (2) if the corporate parent does not offer products or services within the state, which is also an important issue to consider as is the location of its corporate records. If the corporate parent has no contacts which would constitute, by any measure of the imagination, substantial, continuous or regular contacts with the state in question, then personal jurisdiction by that state will generally be denied. When such contacts are lacking, the law is clear that the state cannot exercise personal jurisdiction over such an entity, although its subsidiary may be located and operating within that state.

Personal Jurisdiction and Attempts to "Pierce the Corporate Veil"

The factors utilized by courts in determining whether a plaintiff can "pierce the corporate veil" vary state by state. Oklahoma courts have spoken clearly on this issue as Oklahoma law requires ten factors for the court to review in order to determine if equity requires "piercing the corporate veil." These ten factors are as follows: (1) the parent corporation owns most or all of the stock; (2) the corporations have common officers or directors; (3) the parent provides financing to the subsidiary; (4) the dominant corporation subscribes to all the other's stock; (5) the subordinate corporation is undercapitalized; (6) the parent pays the salaries, expenses or losses of the subsidiary; (7) a great deal of business is with the parent corporation or assets of the former were conveyed to the other corporation; (8) the parent refers to the subsidiary as a division or department; (9) the subsidiary follows directions from the parent's officers or directors; and (10) legal formalities for keeping the entities separate are not observed.¹⁴

Once the operation of a corporate parent and its subsidiary is reviewed, weighing all ten factors, a court can make a determination of jurisdiction and whether the parent should be included in the litigation. An affidavit of an officer of the subsidiary will generally suffice relative to assertions and the ten *Oliver* requirements.

As can be expected, a corporation will, and has every right, to do some amount of business with its affiliates and parent, as well as anyone else, but the same does not constitute facts leading to piercing the corporate veil, unless the existence

of the “separation” is a pretense or sham. If the subsidiary is a free-standing corporation, operating pursuant to its own organizational documents, and the formalities for keeping the entities separate are observed, the court can see that no “sham” exists. Its own Board of Directors, bank accounts, financial statements, letterhead, employees, payroll and other indicia of corporate separateness, as well as maintaining its own minute books and financial reporting records, reflect that a subsidiary is not, and should not be, considered operating with its parent as one enterprise.

The Burden of Proving the Court May Exercise Personal Jurisdiction Rests Soundly Upon Plaintiff

It is well settled law that the burden of proof rests soundly upon the plaintiff when attempting to assert the existence of personal jurisdiction over a defendant.¹⁵ The plaintiff must direct the court’s attention to any matter of law which proves the corporate parent has had sufficient contacts with a state being mindful of due process requirements to hale the corporate parent into Oklahoma courts. If the parent has had NO continuous, regular or substantial business activities that could possibly amount to “engaging in or transacting business” within Oklahoma, it should be exempt from the state court’s jurisdiction and the plaintiff must move otherwise. If the plaintiff fails to illustrate any factor of Oklahoma’s “corporate veil piercing” requirements as established by *Frazier v. Bryan Memorial Hospital*,¹⁶ its attempt must fail.

Conclusion

If a parent corporation’s only connection with the State of Oklahoma is through its indirect downstream corporate subsidiary, which operates independently and under its own corporate structure and management, the courts have utilized restraint pulling out-of-state corporations into the state judicial net. With litigation against insurers and class actions in abundant supply, many of these rules will be challenged and more become difficult to maintain. Insurers should be mindful of these guidelines in seeking to ensure that its parent corporation does not find itself sitting alongside its subsidiary in court where both financial net worths are subject to the plaintiff.

Endnotes

1. 100 S. Ct. 559, 444 U. S. 286 (1980).
2. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980); *Hudson v. Hudson*, 569 P.2d 521 (Ok. Ct. App. 1976).
3. *Immuno Mycologies, Inc. v. Syntex Corp.*, 767 F.Supp. 112 (N.D. Okla. 1991); OklaStatAnn. Title 12 §2004(F).
4. *Samuelson v. Honeywell*, 863 F.Supp. 1503, 1505 (E.D. Okla. 1994).
5. *Walden v. Automobile Brokers*, 160 P.2d 400 (Okla. 1945), *overruled on other grounds*; *Central Life Assurance Soc. v. Tiger*, 57 P.2d 1182 (Okla. 1936); *Wills v. National Mineral Co.*, 55 P.2d 449 (Okla. 1936).
6. *Fawcett Publications, Inc. v. Morris*, 377 P.2d 42 (Okla. 1962).
7. *McClarín v. Boeing Airplane Co.*, 340 P.2d 455 (Okla. 1959).
8. *Marathon Battery Co. v. Kilpatrick*, 418 P.2d 900 (Okla. 1965).
9. *CMI Corp. v. Costello Construction Corp.*, 454 F.Supp. 497 (W.D. Okla. 1977); *Fawcett Publications, Inc. v. Morris*, 377 P.2d 42 (Okla. 1962), cert. denied 84 S.Ct. 964, 376 U.S. 513, 11 L.E.2d 968.
10. *Londa Mfg. Co. v. Saturn Rings, Inc.*, 503 F.Supp. 52 (W.D. Okla. 1980); *CMI Corp. v. Costello Construction Corp.*, 454 F.Supp. 497 (W.D. Okla. 1977).
11. *Honeywell* at 1504.
12. *Honeywell* at 1505.

13. *The State of Florida, Lawton M. Chiles, Jr., et al. v. The American Tobacco Company; American Brands, Inc., R.J. Reynolds Tobacco Company, et al.*, 707 So.2d 851, 855 (Fla. 4th DCA 1998); *Walt Disney Co. v. Nelson*, 677 So.2d 400 (Fla. 1996); *Quality v. International Air Service Co.*, 595 So.2d 194 (Fla. 3d DCA), dismissed, 605 So.2d 1265 (Fla. 1992).
14. *Oliver v. Farmers Ins. Group of Companies*, 941 P.2d 983, 987 (Okla. 1997) (quoting *Frazier v. Bryan Memorial Hospital Authority*, 775 P.2d 281, 288 (Okla. 1989)).
15. *Williams v. Bowman Livestock Equipment Co.*, 927 F.2d 1128 (10th Cir. 1991); *McClelland v. Watling Ladder Co.*, 729 F.Supp. 1316 (W.D. Okla. 1990); *All American Car Wash, Inc. v. National Pride Equipment, Inc.*, 550 F.Supp. 166 (W.D. Okla. 1981); *Carter v. Houston Chronicle Publishing Co.*, 514 F.Supp. 12 (W.D. Okla. 1980).
16. *Frazier v. Bryan Memorial Hospital*, 775 P.2d 281 (Okla. 1989).