



When workers' comp is not the exclusive remedy

While an employer is likely protected by the exclusive remedy doctrine, the parent or related companies may not be

BY GEORGE ELLARD AND
EUSTACE DE SAINT PHALLE

The Veen Firm, Inc.

Has California used the Privette peculiar risk principles to expand the [Workers' Compensation] exclusive remedy doctrine as a defense in order to protect a negligent parent corporation when an employee of its subsidiary has been injured?

Your potential client has been injured at work. You learn that her employer is part of a group of different corporations that all work together, each doing a different task. Your injured employee works for Company A (a plumbing contractor). Company A uses pipes manufactured by Company B when providing services as a plumber. Company A rents vehicles and equipment from Company C. Company A, Company B and Company C are all owned by Company D. Company D manages the three different companies, providing accounting services, invoicing services and the safety programs for Company A, Company B and Company C. Company D is owned by Mr. Big Shot who also individually owns all of the equipment and vehicles that Company C rents to Company A.

Doney v. TRW

The case of *Doney v. TRW, Inc.* (1995) 33 Cal.App.4th 245 is often misapplied by defendants for the proposition that an injured employee cannot sue an employer's parent or sister corporation for negligence when the parent or sister corporation is

part of a joint enterprise providing services to benefit each entity because it would amount to alter ego liability and a vicarious liability action against the parent corporation. Plaintiffs should fight such a misinterpretation of the *Doney* case as both more expansive than the actual holding in the case and contrary to long-established California law. This interpretation contradicts established case law known as the *Gigax* doctrine.

In *Doney*, a wrongful death action was brought against the employer's corporate parent by the heirs of employees who died during a murderous rampage by a third party at the corporate employer's offices. The corporate parent was sued under an alter ego theory, because the heirs could not maintain a civil action against the employer since the exclusive remedy doctrine acted as a shield to all civil claims.

The Court addressed the issues of "whether the owner of a corporation can be held vicariously liable under the equitable doctrine of alter ego for damages suffered by the employees of the corporation in the course of their employment where the corporation has satisfied its obligation to these employees by securing the payment of workers' compensation benefits." (*Downey* at 250-51.)

The court in *Doney* explained that "each of the justifications offered by the California Supreme Court in *Privette* for refusing to permit the imposition of vicarious liability is equally applicable here" since the alter ego doctrine is an equitable theory of vicarious liability. (*Id.* at 251.) The holding of the case is "an employee

of the corporation cannot utilize the doctrine of alter ego to hold the owner of the corporation liable in tort for a workplace injury where the corporation has ensured the payment of workers' compensation benefits." (*Id.* at 252.)

Direct theory of liability

California Law holds sister and parent corporations are not protected by the exclusive remedy doctrine when there is an independent direct theory of liability and the defendant is not the employer.

Any attempt to interpret the holding of the *Doney* case expansively to preclude a claim against a separate entity or individual with independent duties outside the employment relationship and separate from those of the employer is contrary to the *Gigax* doctrine. An injured employee is entitled to bring a separate action against a parent corporation based on an independent tort. (*Gigax v. Ralston Purina Co.* (1982) 136 Cal.App.3d 591, 598-599.)

In *Gigax*, an employee was injured by a defective conveyor belt while at work. The conveyor belt was manufactured by the parent corporation of the employer. The employee alleged independent theories of negligence and products liability against the parent corporation/manufacturer. The Court of Appeal held that the plaintiff could maintain such an independent theory of liability against the parent corporation. (*Id.* at pp. 598.) The reason is the corporate parent is not the employer and can have independent duties to the injured person that are not based on vicarious liability.



A corporation can wear multiple hats, and therefore owe duties separate and apart from their role as a parent or sister company of the “employer.” If a corporation chooses, it can put all ownership and activities under one roof (or hat) as an employer and get the benefits of the exclusive remedy doctrine. In the alternative, a corporation can choose to divide its assets, services and duties up into different entities performing different services. There are advantages and disadvantages to each. The first scenario protects against civil cases when an employee is injured, but exposes all assets to third party liability. The second scenario protects against third party liability, but exposes the different corporations to third party liability when one corporation negligently causes harm to the employee of a sister or subsidiary corporation.

When the issue on summary judgment is a parent corporation’s claim of immunity from common law tort liability for injuries to the employees of a kindred corporation, “[s]uch a question usually is one of fact for a determination by the trier of fact. This is particularly true where the facts as to the employment relationship are in conflict.” (citations omitted.) (*Gigax v. Ralston Purina Co.*, *supra*, 186 Cal.App.3d 591, 598-599.) (emphasis added.)¹

California law therefore does not limit the liability of a tortfeasor who does not occupy the reciprocal status of employer-employee. (*Gigax v. Ralston Purina Co.*, *supra*, 186 Cal.App.3d 591, 598.) “This basic precept of the law is not negated by the fact that the ‘person other than the employer’ is not a stranger but has entered into a consensual legal relationship with the employer. (citations omitted.)” (*Ibid.*)²

Gigax and “right of control”

In *Gigax*, the California Appellate Court was first presented with the issue of a parent corporation’s claim of immunity from common law tort liability for injuries to an employee of a related corporation.

The issue was framed there as being whether the parent corporation was the injured employee’s statutory employer that would make worker’s compensation the exclusive remedy for the employee. *Gigax* held that “...the preeminent factor to be considered in determining the factual question of the employer-employee relationship is ‘the right of control.’” (*Ibid.*) (Emphasis added.)

The “right of control” was held to consist of various factors to determine whether one corporation is separate and distinct from the other and therefore not an employer. To dispose of a case on summary judgment by simply accepting an employer’s label such as a “division” of the parent is inappropriate. (*Id.* at pp. 599, 606-607.) The factors to be considered include whether the corporations are separate in function and identity, whether they have separate books of account and profit-loss statements, whether the parent controls the subsidiary’s operations or employees, whether the parent directs the details of the subsidiary’s work, and whether the parent paid the employee’s wages. (*Id.* at pp. 600-602, 605, 606.)

Thus, under California law, separate (but related) individuals or corporate entities can be held liable if there is an independent basis for negligence and the individual or entity is not the plaintiff’s employer.

Alter ego is no shield to independent liability

California law does not permit a defendant to use the alter ego theory as a shield to liability for independent acts of liability.

California law holds that the alter ego theory cannot be used as a shield by a defendant to exonerate itself from liability. Rather, the alter ego theory is only properly used by a plaintiff to pierce the corporate veil. The reasoning behind this limited use of alter ego is to prevent a corporation from becoming a chameleon and dodging liability as a negligent parent or sister corporation may attempt to do. Case law squarely supports that such an assertion by a defendant is improper.

(See, Vol. 14 California Forms of Pleading and Practice, Chapter 161; *Disenos Artisticos E Indus. v. Costco Wholesale* (9th Cir. 1996) 97 F.3d 377, 380; *United Continental Tuna Corp. v. U.S.* (9th Cir. 1977) 550 F.2d 569, 573.)

For example, in *Disenos Artisticos E Indus. v. Costco Wholesale*, *supra*, 97 F.3d 377, a Spanish corporation copyright owner of a product had a contract with several other Spanish companies to manufacture and sell its product. The copyright owner and the other companies were all subsidiaries of a Spanish parent corporation. The issue on appeal was whether the parent (which owned the product under a contractual agreement with the manufacturers) also owned the copyright by virtue of its parent corporation status. If the parent were deemed to also own the copyright by virtue of its corporate parent status, the parent and the subsidiary copyright owner could maintain a copyright infringement action against Costco retail stores in the United States.

The trial court granted summary judgment for copyright infringement against Costco in favor of the parent and subsidiary, but the Ninth Circuit reversed. The Ninth Circuit Court of Appeals held that the parent corporation was attempting to pierce its own corporate veil in an effort to show it also owned the copyright that was actually owned by the subsidiary, and such a use of the alter ego theory was improper.

The Ninth Circuit reasoned that: ...a corporation is not entitled to establish and use its affiliates’ separate legal existence for some purposes, yet have their separate corporate existence disregarded for its own benefit against third parties. Generally, the corporate veil can be pierced only by an adversary of the corporation, not by the corporation itself for its own benefit. *United Continental Tuna Corp. v. United States*, (9th Cir. 1977) 550 F.2d 569, 573; Harry G. Henn & John R. Alexander, *Laws of Corporations and Other Business Enterprises* §



149, at 347 (corporateness is rarely disregarded” for the benefit of the shareholders). (emphasis added.)

(*Id.* at p. 380.)

Likewise, in *United Continental Tuna Corp. v. United States* (9th Cir. 1977) 550 F.2d 569, 573, a corporation’s affirmative use of alter ego to pierce the corporate veil was determined by the Ninth Circuit to be an inappropriate use of that doctrine. There, a fishing vessel was owned by a Philippine corporation, but 99 percent of the corporation was owned by American citizens. The fishing vessel collided with a US Navy vessel, and the fishing vessel sank. The corporation sued the United States under the Public Vessels Act. Summary judgment was granted against the corporation because it failed to satisfy the reciprocity provision of the Act in that the corporation could not establish that the Philippine government allowed US nationals to sue in its courts under similar circumstances. On remand for other reasons, the corporation sought to pierce its own corporate veil by showing that 99 percent of its owners were American citizens and status as an American ship owner would allow suit to proceed under the Act.

The Ninth Circuit rejected this argument on the primary grounds that the corporation sought to pierce its own corporate veil for its own benefit. The Ninth Circuit noted that there was no authority to allow such a procedure. It held that:

The reasons for disallowing such a practice are obvious, the corporation could receive the benefits of the corporate structure when it was to its benefit to claim such an existence. On the other hand, the corporation could disregard the commensurate liabilities when such existence was not favorable simply by pointing to its ‘significant contacts’ with the United States.

(*Id.* at p. 573.)

Thus, any attempt by a parent or sister corporation to avoid liability by basing its argument on the alter ego theory is

contrary to California law and should not be permitted.

No “windfall” to injured worker

California law holds that the assertion of a civil case when workers’ compensation benefits are provided is not a “windfall” to the injured worker.

Some defendants in litigation are attempting to argue that the holding and principles asserted in the *Doney* case should be read expansively to preclude any sister or parent corporation liability because the plaintiff has already been provided workers compensation benefits and to permit a civil case would “give those employees an unwarranted windfall.” (*Id.* at 253.)

As everyone who practices in this area knows, workers’ compensation benefits are completely inadequate and California case law prevents the possibility of any double recovery. California law is wedded to the proposition that in the circumstances where an employee is injured on the job and the injury is caused by a third party, the employee may bring a civil tort action for full compensation of his injuries.

Additionally, if the employer has paid medical and disability benefits to the employee, the employer may intervene in the civil tort action against the third-party tortfeasor for benefits paid to its injured employee. In these circumstances, the trial Court is required to ensure no possibility of a double recovery to the injured employee (or double payment by the third-party defendant). To that end, the proper trial procedure is to present plaintiff’s wage loss claim to the jury via special verdict, and in the event that plaintiff recovers a wage loss, the Court must address a potential medical and disability credit to the third party and workers’ compensation carrier in a post-trial hearing.

The fact that an employee is entitled to receive workers’ compensation benefits from an employer for disability payments and medical expenses from an on-the-job injury does not prevent that employee

from suing a third party for personal injury damages for the same injury. (*Scalice v. Performance Cleaning Systems* (1996) 50 Cal.App.4th 221, 225, citing *Dafonte v. Up-Right, Inc.* (1992) 2 Cal.4th 595, 598.)

Labor Code section 3852 provides statutory authority for that proposition:

The claim of an employee ... for compensation does not affect his or her claim or right of action for all damages proximately resulting from the injury or death against any person other than the employer. Any employer who pays, or becomes obligated to pay compensation, or who pays, or becomes obligated to pay salary in lieu of compensation ... may likewise make a claim or bring an action against the third person. In the latter event the employer may recover in the same suit, in addition to the total amount of compensation, damages for which he or she was liable including all salary, wage, pension, or other emolument paid to the employee or to his or her dependents. The respective rights against the third person of the heirs of an employee claiming under Section 377.60 of the Code of Civil Procedure, and an employer claiming pursuant to this section, shall be determined by the court.

The employer’s action against the third party can be in intervention to recoup the benefits paid to the employee. (See *Scalice v. Performance Cleaning Systems, supra*, 50 Cal.App.4th 221; *Dafonte v. Up-Right, Inc., supra*, 2 Cal.4th 595.)

Conclusion: Many avenues

Based on the factual scenario provided above there are numerous possible independent causes of action that could be brought against entities that are not plaintiff’s employer and should not be precluded as vicarious liability claims under an alter ego theory of liability. There are numerous other possibilities for a direct cause of action and those provided below are not intended to be an exhaustive list but rather illustrative of the possibilities.



MAY 2011

- Injured Employee can potentially sue Company B for product liability or negligence.
- Injured Employee can potentially sue Company C for negligent maintenance, repair and/or provision of defective equipment.
- Injured Employee can potentially sue Company D for negligence related to the management of B and C or for its own negligence related to the activities or providing safety.
- Injured Employee can potentially sue Mr. Big Shot related to negligent maintenance, repair and/or provision of defective equipment.

Eustace de Saint Phalle is an attorney with The Veen Firm P.C. in San Francisco.



de Saint Phalle

He focuses his practice on civil litigation in a variety of areas, including industrial accidents, product liability, exceptions to workers' compensation, premises liability, professional malpractice, medical malpractice, auto accidents, maritime accidents, as well as business disputes and copyright violations. Contact him at St.Phalle@VeenFirm.com. See also, www.veenfirm.com.

George Ellard is a trial attorney at The Veen Firm P. C., San Francisco. He has significant experience representing the severely injured in products liability, construction site, premises liability, aviation and professional



Ellard

negligence matters. He is an "AV" rated lawyer who has handled cases throughout California and is a former Naval Officer.

Endnotes

¹ It is well established that pursuant to Labor Code § 3852, an employee injured while at work for his or her employer retains the right to pursue any common law remedies against a third party tortfeasor. Labor Code section 3852 states:

"The claim of an employee... for compensation does not affect his or her claim or right of action for all damages proximately resulting from the injury or death against any person other than the employer..."

² The *Gigax* holding is significant because it has remained in place as the seminal California case on this liability issue.

