



The liability of a parent company to a subsidiary's injured worker

When suits may be filed under the direct liability theory of negligent undertaking

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When your client is injured on the job while operating a machine or equipment, who can you potentially name as a defendant? Generally, your client's employer is not a viable defendant due to the workers' compensation exclusive remedy provision under Labor Code section 3602 of the Workers' Compensation Act. This provision precludes a civil action against the employer for workplace injuries. However, several exceptions exist that enable an injured employee to bring a civil action against his or her employer who does any of the following:

- Manufactures a defective product that injures the employee (Lab. Code, § 3602(b)(3);
- Fails to obtain workers' compensation insurance for the employee (Lab. Code, § 3600);
- Assaults an employee or ratifies an assault by a co-employee (Lab. Code, § 3602(b)(1));
- Fraudulently conceals the existence of the injury and its connection with the employment (Lab. Code, § 3602(b)(2)); or
- Knowingly removes or fails to install a manufacturer-required point of operation guard (Lab. Code, § 4558).

The manufacturer and retailer of the machine or equipment may also be appropriate defendants if there is a theory of a manufacturing defect, design defect, or failure to warn of a danger.

Subsidiary Companies

When your injured client is an employee of a subsidiary company, you should also explore whether the parent company of your client's employer could also be liable. For example, you can assert a claim against the parent company based on a theory of direct liability so long as the parent company did not have an employment relationship with your client at the time of injury.

This article will address the circumstances under which you may be able to file suit against the parent company of your client's employer under the direct liability theory of negligent undertaking.

The "exclusive remedy provision"

Labor Code section 3602, commonly referred to as the "exclusive remedy provision" of the Workers' Compensation Act, generally precludes civil actions by employees against their



employers for claims arising out of injuries occurring during the course and scope of their employment where the employer has provided workers' compensation benefits. To receive the protection of the exclusive remedy provision, there must be a finding that the entity seeking protection is the injured worker's statutory employer. Under the Workers' Compensation Act, liability is based on the existence of an employer-employee relationship and injuries occurring during employment, rather than on an act or omission by the employer. (*Shields v. County of San Diego* (1984) 155 Cal.App.3d 103, 111.) The issue of whether the parties have an employer-employee relationship for purposes of the Workers' Compensation Act is a question of fact requiring a determination based on the evidence. (*Jackson v. Pacific Gas & Elec. Co.* (1949) 95 Cal.App.2d 204, 208.)



But before you can proceed with a claim against the parent company of your client's employer, you will need to ascertain whether the parent company will potentially be able to avail itself of the exclusive remedy provision based on an employment relationship with your client. "The mere fact that a company may fall within the holdings of a parent corporation *does not, as a matter of law*, make the parent the employer of all the workers of those companies under its umbrella." (*Colombo v. State of California* (1991) 3 Cal.App.4th 594, 597 (emphasis added).) For workers' compensation purposes, "[an entity's] separateness from or oneness with the parent corporation depends upon the unique factual relationships in each case. The degree of separation between the parent and the subsidiary entity . . . is a factual matter." (*Ibid.*) The preeminent factor of an employment relationship is the right to control. (*Ibid.*)

Although you may feel confident that the subsidiary company was your client's employer, be aware that there are some circumstances where a person may have two statutory employers for the same job. This is commonly referred to as dual employment or special employment. Dual employment typically arises where two entities have the right to exercise control over the employee and the employee's work. (*Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 174; *Caso v. Nimrod Productions, Inc.* (2008) 163 Cal.App.4th 881, 888.) In addition to the right to control, there are other factors that must be considered when determining whether an employment relationship exists. (See, *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341.) The determination of whether an employment relationship exists will require a thorough factual analysis.

Potential direct liability

Under Labor Code section 3852, a plaintiff who has received workers' compensation benefits from his or her employer may pursue a civil action against third parties for their independent acts of

negligence. (*Waste Management, Inc. v. Sup. Ct.* (2004) 119 Cal.App.4th 105, 109.) "This rule applies even if the third-party tortfeasor is the parent company of the plaintiff's employer, as long as there are independent acts of negligence." (*Id.* at 111.) A parent corporation may owe a duty to the subsidiary's employee arising out of obligations independent of the parent-subsidiary relationship. (*Waste Management, supra*, 119 Cal.App.4th at 111.)

The key here is to identify *independent* negligent acts of the parent company of your client's employer. In other words, the parent company's acts must not merely be based on the imputed acts or omissions arising from its relationship with another entity. (*Shields, supra*, 155 Cal.App.3d at 110.) For example, a plaintiff may show that the parent corporation assumed a duty to act by undertaking to provide a safe work environment at the subsidiary's workplace. (*Waste Management, supra*, 119 Cal.App.4th at 110.) A plaintiff may also assert a products liability claim as an independent tort against the parent corporation for injuries occurring during work for the subsidiary. (See, *Gigax v. Ralston Purina Co.* (1982) 136 Cal.App.3d 591.) This requirement that a plaintiff show a parent company's independent duty rather than derivative liability is intended to preclude a plaintiff from obtaining a double recovery for the same act, which would undermine the central purpose of the workers' compensation system. (*Shields, supra*, 155 Cal.App.3d at 111.)

It is not unusual for parent and subsidiary companies to both be insured under the same workers' compensation policy. This should not raise a concern as long as there is a legal determination that the parent corporation is not your client's employer. An employee who has received workers' compensation benefits from his or her employer, the subsidiary, may still maintain a tort action against the parent company even if the same workers' compensation policy covers both the parent and subsidiary. (*Gigax, supra*, 136 Cal.App.3d at 601.)

"Good Samaritan" rule

After you establish that the parent company is not your client's employer, you need to have an independent theory of liability for the parent company rather than imputed liability based on the existence of the parent subsidiary relationship. Keep in mind that the parent company may try to argue that it was not your client's employer and therefore had no duty to your client, no duty to maintain a safe work environment at its subsidiary's work site, and no duty to maintain or repair the machine or equipment that injured your client. However, the parent company may become liable if it either assumes a duty that its subsidiary owed to its employees or if the parent company renders services that result in injury to your client. This is a theory of direct liability known as a negligent undertaking or the "Good Samaritan" rule. While there may be other independent torts you can allege against the parent company, this article focuses on the negligent undertaking by the parent company of the injured worker's employer.

The California Supreme Court has described the theory of negligent undertaking as follows: "The general rule is that a person who has not created a peril is not liable in tort for failing to take affirmative action to protect another unless they have some relationship that gives rise to a duty to act. However, one who undertakes to aid another is under a duty to exercise due care in acting and is liable if the failure to do so increases the risk of harm or if the harm is suffered because the other relied on the undertaking." (*Paz v. State of California* (2000) 22 Cal.4th 550, 558.)

A negligent undertaking claim requires evidence of each of the following five elements:

- 1) The actor undertook, gratuitously or for consideration, to render services to another;
- 2) The services rendered were of a kind the actor should have recognized as necessary for the protection of third persons;
- 3) The actor failed to exercise reasonable care in the performance of the undertaking;



4) The actor's failure to exercise reasonable care resulted in physical harm to third persons; and either

- 5) (a) The actor's carelessness increased the risk of such harm; or
 (b) The actor undertook to perform a duty that the other owed to the third persons; or
 (c) The harm was suffered because either the other or the third persons relied on the actor's undertaking.

(*Paz, supra*, 22 Cal.4th 550, 559; Restatement Second of Torts, section 324A.)

Negligent undertaking under section 324A subsumes the duty, breach of duty, proximate cause, and damages elements of a negligence action. (*Artiglio v. Corning, Inc.* (1998) 18 Cal.4th 604, 614.)

Negligent undertaking by the parent company

Depending on the facts, there are several theories of an undertaking by the parent company that you may be able to pursue to satisfy the first element. For example, the parent company may have undertaken responsibility to maintain a safe environment at the subsidiary's workplace. Alternatively, the parent company may have undertaken to inspect, maintain, safeguard, service and/or repair the machine or equipment that injured your client. Note that there is no requirement that the parent company receive any consideration for the duty or services it undertakes.

You will want to look for evidence of the following that may support a negligent undertaking by the parent company:

- The parent's safety representative's inspections of the specific instrument causing the injury;
- The parent's safety representative's inspections of the subsidiary's entire plant of which the instrument was a part;
- The parent's safety representative's knowledge of the machine operating procedures and the dangers associated with the procedures or the machine;

- The parent's approval or recommendations are sought by the subsidiary or are required by the parent to modify or develop the subsidiary's safety policies and procedures;
- The parent's approval or recommendations are sought by the subsidiary or are required by the parent to modify or develop procedures for operation of the subsidiary's machinery and equipment by its employees;
- The parent's maintenance, service, or repair of the machines and equipment at the subsidiary's workplace by its own employees or by hiring contractors;
- The parent's involvement in providing or developing safety training and policies for the subsidiary's employees;
- The parent's participation in OSHA investigations and independent investigations of workplace injuries at the subsidiary.

Elements two, three, and four of a negligent undertaking claim are essentially the same elements as the traditional duty, breach of duty and damages required in a negligence action. The fifth element, which relates to the proximate cause of the injury, can be satisfied in three different ways. One option is to show that the parent company's carelessness in performing its undertaking increased the risk of the harm to your client. Note that the California Supreme Court has found that the failure to alleviate a risk posed by a preexisting hazard is not equivalent to increasing the risk. (*Paz, supra*, 22 Cal.4th at 561.) The parent company's conduct must have increased the risk of harm. For example, the parent company may have modified the subject machine in such a way that it increased the danger to your client while operating the machine (e.g. removing a protective guard).

Alternatively, you can show that the parent company undertook or assumed a duty that the subsidiary owed to its employees. For example, the subsidiary, as your client's employer, has a non-delegable duty to provide its employees with a safe work environment. (Lab. Code, §

6400.) Although the parent company of an employer is not legally responsible for the work environment of its subsidiary's employees based solely on the existence of the parent-subsidary relationship, it may become responsible by *assuming* a duty to provide a safe work environment at the subsidiary's workplace. (*Waste Management, supra*, 119 Cal.App.4th at 110.)

Another option is to establish that your client suffered harm because the subsidiary relied on the parent company's undertaking. It would be ideal to obtain deposition testimony from the subsidiary's employees that they relied on the parent company to provide a safe work environment or to maintain and repair the subject machine. However, as a practical matter, it can be difficult to obtain this key testimony of reliance by the subsidiary because it is not uncommon for the parent company's attorneys to have unfettered access to the subsidiary's employees and to prepare them for their deposition. In fact, you may encounter testimony that the subsidiary did not rely on its parent. In this situation, you will need to either find evidence of conduct or documents showing reliance or pursue one of the other two options in element five.

Conclusion

When your injured client's employer is a subsidiary company, be sure not to overlook the potential liability of the employer's parent company. Negligent undertaking theory may be one of the avenues that you will be able to pursue because there are situations where a parent company will assume a role in protecting its subsidiary's employees from harm even though it is not legally required to do so.

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remedy doctrine. For more information on this article or a copy of Lancaster's helpful checklist of exceptions to the exclusive remedy rule and third party causes of action, please e-mail

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