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WHAT'S INSIDE

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Commentary: The Multi-Level Nursing Home Corporate Structure: Transparency, Accountability and Common Sense

Yao O. Dinizulu and Jennifer Matta of the Dinizulu Law Group examine the use of tangled ownership webs by for-profit nursing homes to hide their assets, and they suggest ways for potential plaintiffs to get around the schemes. **P. 3.**

Commentary: Federal Diversity Jurisdiction: Do You Know Where Your 'Principal Place of Business' Is?

Stephen Smerek and Cathy Kim of Winston & Strawn discuss the minimal-diversity requirement of the Class Action Fairness Act and examine how a corporation determines its "principal place of business," based on where the company is located and does business. **P. 9.**

Family Sues Sunrise Over Woman's Deadly Three-Story Fall

A Pennsylvania personal care home resident died after falling three stories from an unsecured window in the facility's dementia unit, according to a lawsuit filed against Sunrise Senior Living. *Malloy v. Sunrise Senior Living Mgmt.* (E.D. Pa.). **P. 13**

N.M. Home Is Sued Over Resident's Infected Bedsore

A nursing home resident's widow has sued a New Mexico facility, alleging that neglect by its staff caused her husband to develop an infected bedsore. *Rowe v. Red Rocks Nursing Operations* (D.N.M.). **P. 14**

Discovery Requests, Delay Did Not Waive Arbitration Rights

A nursing home did not waive its right to arbitrate a neglect lawsuit's claims despite failing to seek a stay of the proceedings and seeking depositions related to the enforcement of the arbitration pact, a Mississippi appeals court has ruled. *Manhattan Nursing & Rehab. Ctr. v. Williams* (Miss. Ct. App.). **P. 14**

Colo. Caregiver Admits to Abuse, Faces 20 Years in Jail

An ex-caregiver has pleaded guilty to an attempted-assault charge stemming from allegations that she neglected and mistreated a 65-year-old mentally disabled woman and then billed Colorado's Medicaid program for her services. **P. 15**

Nurse Aide Is Charged With Punching Patient

A former worker at a Massachusetts nursing home has been arraigned on criminal charges in connection with allegations that she punched and threatened an 83-year-old Alzheimer's patient. **P. 16**

Calif. Home's Pharmacy Boss Pleads No Contest in Forced-Drugging Case

A California nursing home's pharmacy director who was charged with forcibly administering psychotropic drugs to patients has pleaded no contest to a single felony count as part of a deal with prosecutors. *People v. Hayes* (Cal. Super. Ct.). **P. 16**

Calif. Regulators Fine Long-Term-Care Insurer $500,000

Conseco Senior Health Insurance Co. will pay the state of California $500,000 to settle charges that it engaged in unfair claims-handling practices concerning long-term care insurance policies. **P. 17**

Doctor Defendant's Care of Juror Caused Unfair Trial

The Montana Supreme Court has overturned a verdict in favor of the physician defendant in a malpractice lawsuit, concluding the jury probably was influenced in her favor because she provided medical assistance to an ailing juror. *Heidt v. Argani* (Mont.). **P. 18**

ALSO IN THIS ISSUE

Case and Document Index 19

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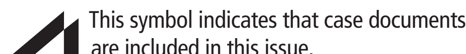
This symbol indicates that case documents are included in this issue.

TABLE OF CONTENTS

Commentary: By Yao O. Dinizulu, Esq., and Jennifer Matta, Esq.
The Multi-Level Nursing Home Corporate Structure:
Transparency, Accountability and Common Sense 3

Commentary: By Stephen Smerek, Esq., and Cathy Kim, Esq.
Federal Diversity Jurisdiction: Do You Know Where Your
'Principal Place of Business' Is? 9

Abuse & Neglect: *Malloy v. Sunrise Senior Living Mgmt.*
Family Sues Sunrise Over Woman's Deadly Three-Story Fall 13

Abuse & Neglect: *Rowe v. Red Rocks Nursing Operations*
N.M. Home Is Sued Over Resident's Infected Bedsore 14

Arbitration: *Manhattan Nursing & Rehab. Ctr. v. Williams*
Discovery Requests, Delay Did Not Waive Arbitration Rights 14

Criminal Conduct
Colo. Caregiver Admits to Abuse, Faces 20 Years in Jail 15

Criminal Conduct
Nurse Aide Is Charged With Punching Patient 16

Criminal Conduct: *People v. Hayes*
Calif. Home's Pharmacy Boss Pleads No Contest in
Forced-Drugging Case 16

Long-Term-Care Insurance
Calif. Regulators Fine Long-Term-Care Insurer $500,000 17

Jury Influence: *Heidt v. Argani*
Doctor Defendant's Care of Juror Caused Unfair Trial 18

Case and Document Index 19

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COMMENTARY

The Multi-Level Nursing Home Corporate Structure: Transparency, Accountability And Common Sense

By Yao O. Dinizulu, Esq., and Jennifer Matta, Esq.

An 86-year-old widow who suffers from dementia walks out a door left open by an employee at a corporate-run, for-profit nursing home. Her absence goes unnoticed for hours.

Later, long after dark, police show up at the home and tell the staff that the patient was found three blocks away, shivering. She was taken to the emergency room with a high fever, and she died days later.

Owners and operators of for-profit homes abuse their protection under corporate status by setting up multi-level corporate structures to hide assets and obscure responsibility.

Conventional wisdom would dictate that the nursing home was negligent and should be held liable in the patient's death. Unfortunately, families and regulatory agencies often fail when seeking to hold nursing facilities accountable for negligence, even when a death occurs, because of complex corporate structures that purposively obscure ownership.

A basic rule of law describes a corporation as "a distinct legal entity, separate from other corporations with which it may be affiliated."[1] Its officers, directors, shareholders and subsidiary corporations are shielded from the parent corporation's liability.

In far too many cases, owners and operators of for-profit nursing homes abuse their protection under corporate status by setting up multi-level corporate structures to hide assets and obscure responsibility. This game of hide-and-seek can make it nearly impossible for the families of nursing home residents who have been injured or who have died as a result of abuse and neglect to pursue legal actions and collect damages.

Moreover, in many jurisdictions nursing homes are not required to hold a minimal insurance policy. As a result, the licensee (the party to be sued) is underinsured and has no assets to draw from, and the nursing homes escape liability.

Today, there are well over 1.7 million elderly and disabled people living in more than 17,000 nursing home facilities.[2] Countless studies have shown that for-profit facilities are more likely to be plagued with problems than those owned and operated by nonprofit agencies. In particular, for-profit, corporate-owned nursing homes typically are understaffed and their workers woefully underpaid, resulting in high turnover. As a result, the people who care for some of society's most vulnerable citizens are inadequately and poorly trained.

A recent investigative series by the Chicago Reporter magazine found that blacks are disproportionately more at risk as a result of these complex structuring schemes.[3] According to the results released in the July/August 2009 issue, not one nursing home with 50 percent or more black residents received an "excellent" rating from the federal government in nine states: Arkansas, Connecticut, Indiana, Kansas, Kentucky, Missouri, Oklahoma, South Carolina and Wisconsin. In Illinois, just one home with more than 50 percent black residents received an "excellent" rating.

The Reporter's investigation concluded that abuse and neglect are most common in for-profit, corporate-owned nursing facilities. Unfortunately, the operators of these types of facilities have become extraordinarily savvy at dodging responsibility for injury or death resulting from staff members' negligence.

For-profit homes hide assets by setting up multiple corporate entities and providing misleading information about profits and losses. The American Health Care Association,

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an advocacy organization for the long-term-care industry, acknowledges that owners of for-profit nursing homes "began shielding themselves from liability … [by] setting up different organizational structures."[4]

How They Do It: The Multi-Level Corporate Structure

Owners begin by splitting the nursing home into two corporate entities. One holds the license; the other holds the real estate and other assets.[5]

The multi-level corporate structure then evolves into the following:

- Management companies that handle the day-to-day operation of the nursing homes, including all administrative duties, billing, accounting and negotiating for equipment and supplies;[6]
- Licensees, which are the actual nursing home owners and are legally responsible for all aspects of the facilities operations.[7] They often hold no assets other than the license;
- Landowners, which are separate business entities that own the real estate and other assets, then leased them back to the licensee.[8] The licensee is therefore paying the land owner for use of the land; and
- Lenders holding the mortgages on the land other assets. They often impose requirements on the facility.[9]

Each of these subgroups is often subdivided further. Some of the companies have neither employees nor offices, which enables executives to file regulatory documents without revealing their other corporate affiliations.[10] This is often accomplished through a partnership in which there will not be any filings with the applicable secretary of state.

At the same time, the nursing home license holder may also own the real estate, the management company, and even the suppliers and staffing agencies that do business with the facility.[11] One nursing facility divided control among as many as 15 companies and five layers of firms.[12]

The Consequences: Substandard Care, Enhanced Profits and Lack of Accountability

The complex ownership structure unjustly protects investors who profit while care at their facilities declines. As a result, owners escape financial liability to regulatory agencies and avoid residents' legal claims for abuse and negligence.[13] They also gain the ability to finance new transactions by paying inflated fees to companies they own or by borrowing money against facilities' real estate.[14]

In addition, nursing home owners drain assets by shifting them under the guise of paying a mortgage or rent and through administrative costs. A three-year study of cost reports conducted by the Dinizulu Law Group showed that one nursing home was paying almost $1.2 million in annual rent to a related entity holding the real estate.

The lender, the landowner and the management company often hold the assets, while the licensee is undercapitalized.

Within the same three years, the management company, also a related organization, increased its "professional fees" by 38 percent. Administrative costs, which were paid to a third related entity, increased 48 percent, the study revealed.

At the same time, the nursing home cut the number of staff and resident-related expenses, the study said. The total number of hours worked increased by just 3 percent, and total payroll expenses increased by 16 percent.

The average hourly wage of the home's nursing director increased by $9.06, while the certified nursing aides and orderlies only saw a 28-cent wage increase in the three-year period. The average hourly wage for registered nurses was actually cut by42 cents.

By the end of the three-year period, the nursing home went from being marginally profitable with about $770,000 to reporting a loss of almost $2 million. These numbers are telling. The nursing home's related entities were profiting at the expense of the residents' care.

"The first thing owners do is lay off nurses and other staff that are essential to keeping patients safe," Charlene Harrington, a professor at the University of California in San Francisco who studies nursing homes, told the New York Times. "Chains have made a lot of money by cutting nurses, but it's at the cost of human lives."[15]

The staff members are key to the success of the nursing home. Nurses and CNAs are primarily responsible for patients' care. They bathe, dress and feed them. It is the nurse and nursing assistant who administer medications, clean bedpans and make sure bedridden patients are frequently turned to prevent bedsores. Moreover, nurses and CNAs provide residents with emotional support.

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Yet the job of a nurse and CNA can be difficult and hazardous.[16] Nurses and CNAs often have to manually lift and turn residents, which can lead to back injuries. They are also exposed to infections, diseases and physical violence from residence.[17]

Furthermore, because nursing homes provide around-the-clock care, nurses and CNAs are often required to work nights, weekends and holidays.[18] Many of them are underpaid and overworked.

Nursing homes are currently experiencing shortages of nursing staff and high turnover rates, particularly among CNAs.

According to the AARP's Public Policy Institute, competition with other health care employers and other service industries may be partially responsible for the high turnover. Other contributing factors include low pay, limited advancement, poor management-employee relations and difficult work.[19]

Always remember the four distinct divisions: licensee, lender, landowner and management company. For each, identify the registered agent, the officers and the directors.

With high turnover, the quality of care declines as training is often put on the back burner. This is a particularly worrisome trend among CNAs, who are not required to have a high school diploma or previous work experience.[20]

Moreover, many nursing homes are deliberately understaffed to increase profitability. Annie Thornton, the nursing director at one such home, told the New York Times: "Those owners wouldn't let us hire people. We told the higher-ups we needed more staffing, but they said we should make do."[21]

In a 2007 report the Times analyzed records collected by the Centers for Medicare and Medicaid Services and determined that at 60 percent of homes bought by large private equity groups from 2000 to 2006, managers have cut the number of clinical registered nurses, sometimes far below levels required by law.[22]

For the most highly trained nurses, staffing was particularly low. According to the report, homes owned by large private investment firms provided one clinical registered nurse for every two residents, which is 35 percent below the national average.[23] The results are high profits and substandard care.

Operators avoid being held accountable for injuries and deaths in several ways, including by:

- Creating companies with the sole purpose of holding the assets;
- Failing to carry liability insurance; and
- Refusing to settle lawsuits, trying each one until the bitter end.

Florida plaintiff's lawyer Nathan P. Carter told the New York Times: "In one case, I had to sue 22 different companies. In another, I got a $400,000 verdict and ended up collecting only $25,000."[24]

What often happens is that the lender, landowner and management company hold the assets, while the licensee is undercapitalized. This leaves the licensee holding the legal liability with no resources from which to draw.

A licensee holding no insurance is virtually judgment-proof. Licensees are not required to have insurance policies that would be sufficient to cover injuries.

As Florida attorney Gregg Johnson explains:

> Recently, nursing home facilities have thrown up yet another impediment to residents seeking to hold them accountable for inadequate care: insufficient or, in some cases, a complete lack of liability insurance. Many facilities are going completely bare of insurance. Others maintain ridiculously low insurance limits with those limits sometimes inclusive of payment for costs of defense.
>
> For the average plaintiff and his attorney, this means that by the time the case is even investigated by the defense attorney, there is no money left to satisfy any judgment against the nursing home, regardless of how egregious the negligence by the facility may have been.[25]

As a result, the multi-level structure and lack of mandatory insurance requirements deter lawsuits. Plaintiffs often hit roadblock after roadblock, ending in a motion to dismiss the claims against the companies holding the assets.

The nursing home defendant, the "lender company," will argue that it is not reasonable to hold the company responsible for residents any more than it would be reasonable for a landlord who owns a building with Starbucks as a tenant to be held liable if a Starbucks customer is scalded by a cup of hot coffee.[26]

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The defense makes sense, except that the same people are also officers of the management company, landowners and even possibly the licensee. Careful preparation of a complaint and thorough discovery are essential to defeating this structure.

The Solution: Beating Nursing Homes At Their Own Game

To prepare a case, it is essential that plaintiffs' attorneys know the parties, including all corporate/limited-liability-company entities and their registered agents, officers and directors.

A bill now before the U.S. House of Representatives, the Nursing Home Transparency and Improvement Act, S. 647, would affect facilities across the country by requiring "transparency and accountability in the ownership and operations of nursing homes."

Once the parties are discovered, attorneys can press forward, but inevitably they will be met by motions to dismiss. To get around this, they must "pierce the corporate veil."

Corporations would be required to disclose the names of their owners, operators, financers and other related parties. Facilities that are part of chains would be required to submit annual audits, and purchasers would have to demonstrate that they are financially able to run facilities.[27]

Additionally, the law would require independent monitoring of chains, disclosures of how funds are spent, and accurate information about nursing staffing.[28] Unfortunately, until the bill is passed, preparation remains a daunting task. However, it is not impossible.

Attorneys should always remember the four distinct divisions: licensee, lender, landowner and management company. For each, they will want to identify the registered agent, the officers and the directors.

Making a chart is extremely helpful in determining the relationships, especially because identifying the registered agent, officer and directors may often establish a connection between the separate entities. If the registered agent, officer or director is another corporation, you will want to expand the chart further until you are able to identify individuals by name.

The licensee can be found by:

- Visiting the facility;
- Calling your state's nursing home licensing agency; or
- Checking your state's online information.[29]

Unfortunately, the licensee often does not reveal the corporate parent's name, so the attorney may need to search the local business directory or check with the secretary of state's office.[30] The directory will provide you with the registered agent, address, assumed names and officers of the companies. You will want to search every corporate/LLC entity you come across.

Another suggestion is to go to the office of the agency that licenses the home and ask to review the facility's public file. You should call ahead to make sure the office has the file for your facility. Look for applications filed with the state, change-of-ownership documents and other related material.[31]

The landowner can be often found through searching property records on the Web sites of local assessors or recorders or by visiting the appropriate office.[32]

One of the most important tools during preparation is the facility's Medicaid cost report, which is filed with the agency handling Medicaid reimbursement for the applicable state.[33] A list of state agencies can be found at www.statelocalgov.net/index.cfm.

Every nursing home that collects Medicaid payments is required to file annual reports. Cost reports often provide ownership information, including:

- The licensee and names of who owns the licensee;
- The parent company or chain;
- A list of "related facilities" under common ownership;
- Whether the real estate is owned or leased, and from whom; and
- "Related parties" with whom the home does business, which are often companies in which the owners of the licensee also have an ownership stake.[34]

Moreover, the cost reports provide a wealth of financial information, including staffing levels, lists of expenses, administrative salaries, and profit or loss figures.[35] All will be important in arguing the allocation of the expenses and the relationship between the parties.

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Once the parties are discovered, attorneys can press forward, but inevitably they will be met by motions to dismiss. To get around this, they must "pierce the corporate veil." Piercing the veil is "a procedural means of allowing liability on a substantive claim."[36] In the case of a nursing home, it could conceivably open up the lender, landowner and management companies to liability.

In addition to piercing, there is what is known as "direct participant" liability, which is possible even when piercing the corporate veil is not.

Each state is different with respect to rules regarding piercing the corporate veil. It is often a difficult task, where courts look to see whether there is sufficient "unity of interest" to justify disregarding the corporate form.

In Illinois, for instance, the courts consider the following factors when determining whether there is sufficient "unity of interest":

- Inadequate capitalization;
- Failure to issue stock;
- Failure to observe corporate formalities;
- Non-payment of dividends;
- Insolvency of the debtor corporation;
- Non-functioning of the other officers or directors;
- Absence of corporate records;
- Commingling of funds;
- Diversion of assets from the corporation by or to a stockholder or other person or entity to the detriment of creditors;
- Failure to maintain arm's-length relationships among related entities; and
- Whether, in fact, the corporation is a mere façade for the operation of the dominant stockholders.[37]

Courts are generally reluctant to pierce the corporate veil.[38] Moreover, nursing homes have been very clever in covering their tracks. With extensive investigation and discovery, however, it is possible.

In addition to piercing, there is what is known as "direct participant" liability, which is possible even when piercing the corporate veil is not.[39]

Direct participant liability "has long been recognized by courts and commentators alike as a basis for holding corporations responsible for meddling in the affairs of their subsidiaries even where the corporate veil remains impenetrable."[40] Liability is transaction-specific and limited to those instances in which "meddling is directly tied to the resultant harmful or tortious conduct of the subsidiary."[41]

For example, in *Forsythe v. Clark USA*, 836 N.E.2d 850 (Ill. App. Ct. 2005), the court upheld a negligence count based on a parent company's direct participation by making budget cuts and decreasing the number of trained staff at the risk of employees' safety.

In the *Forsythe* case, employees were killed in a fire when a worker, while servicing machinery he was neither trained nor qualified to operate, set off a spark. The defendant, the equivalent of a management company, had developed a business plan that reduced operating costs for training, maintenance, supervision and safety to increase the revenue of the parent corporation. The court held there was sufficient evidence of the company's "meddling" in the facility, which resulted in harm.

Although the case did not involve a nursing home, it is an example of how corporations can use budgets to meddle in the affairs of their affiliates.

In the context of nursing homes, direct participant liability could open up nursing-home-related entities to liability, especially where the funds are taken from patient care and are redefined as rent, administrative costs and undisclosed professional fees.

The homes' game of hide-and-seek can only go on for so long. With proper preparation and common sense, it is only a matter of time before the nursing home corporate structure is exposed and collapses, and transparency and accountability are achieved.

Notes

[1] *Forsythe v. Clark USA,* 836 N.E.2d 850, 854 (Ill. App. Ct. 2005).

[2] Nursing Home Transparency and Improvement Act of 2009, S. 647, Floor Statement at Introduction by Sen. Chuck Grassley, 110th Cong. (Mar. 19, 2009).

[3] Jeff Kelly Lowenstein*, Lower Standards,* Chi. Rep., July/August 2009, *available at* http://www.chicagoreporter.com/index.php/c/Cover_Stories/d/Lower_Standards.

[4] Bret Schulte, *A Bill Aims for Nursing Home Reform*, U.S. News & World Rep., July 7, 2009, *available at* http://www.usnews.com/articles/news/national/2008/02/22/a-bill-aims-for-nursing-home-reform.html

[5] Brian Olney, Knowledge As Power: Public Information as a Tool in Nursing Home Advocacy, 6, Presentation at the National Citizens'

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Coalition for Nursing Home Reform Annual Conference (Oct. 17, 2008), *available at* http://www.nccnhr.org/uploads/File/Olney_presentation_-_Knowledge_As_Power_-Public_Information_as_a_Tool_in_Nursing_Home_Advocacy.pdf.

[6] *Id.* at 8.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] Charles Duhigg, *At Many Homes, More Profit and Less Nursing*, N.Y. Times, Sept. 23, 2007, *available at* http://www.nytimes.com/2007/09/23/business/23nursing.html.

[11] Olney, *supra* note 5, at 11.

[12] Duhigg, *supra* note 10.

[13] Olney, *supra* note 5, at 4.

[14] *Id.*

[15] Duhigg, *supra* note 10.

[16] Steven Gregory, The Nursing Home Workforce: Certified Nurse Assistant, AARP Public Policy Institute (July 2001), *available at* http://www.aarp.org/research/ppi/ltc/nurs-homes/articles/aresearch-import-688-FS86.html.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] Duhigg, *supra* note 10.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] A Case for Mandatory Insurance for Nursing Homes, http://gunnlawblog.typepad.com/gunn_law_blog/2009/01/index.html (Jan. 22, 2009).

[26] Duhigg, *supra* note 10.

[27] Fact Sheet, National Citizens' Coalition for Nursing Home Reform, Support the Nursing Home Transparency and Improvement Act!, *available at* http://www.nccnhr.org/uploads/NursingHomeTransparencyActFactSheet31808.pdf

[28] *Id.*

[29] Olney, *supra* note 5, at 14.

[30] *Id.* at 15.

[31] *Id.* at 17.

[32] *Id.* at 18.

[33] *Id.* at 19-20.

[34] *Id.* at 19.

[35] *Id.* at 21.

[36] *Int'l Fin. Servs. Corp. v. Chromas Techs. Canada*, 356 F.3d 731, 736 (7th Cir. 2004).

[37] *Judson Atkinson Candies v. Latini-Hohberger Dhimantec*, 529 F.3d 371, 379 (7th Cir. 2008).

[38] *Id.*

[39] *Forsythe*, 836 N.E.2d at 647.

[40] *Id.* at 651.

[41] *Id.*

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COMMENTARY

Federal Diversity Jurisdiction: Do You Know Where Your 'Principal Place of Business' Is?

By Stephen Smerek, Esq., and Cathy Kim, Esq.

She has experience in a wide variety of litigation matters involving class actions, corporate disputes, real estate and land use, and employment and aviation law.

For federal diversity jurisdiction, including minimal diversity for class actions under the Class Action Fairness Act, a corporation is deemed a citizen of the state where it is incorporated and the state where it has its principal place of business.[1] While the state of incorporation provides a bright-line standard, determining where a corporation has its "principal place of business" can be much more challenging. Over the past several decades, the federal appeals courts have adopted different approaches to address this fundamental jurisdictional question.

While some observers have attempted to harmonize the multitude of decisions in this area, the divergence in recent cases has brought great uncertainty to a simple question: Where is my principal place of business? And while this legal inquiry may seem somewhat theoretical, the answer can have dramatic consequences for a corporation, potentially limiting its access to the federal courts. The U.S. Supreme Court has now waded into the issue, granting *certiorari* to review a 9th U.S. Circuit Court of Appeals decision involving Hertz Corp.[2] Whether the Supreme Court will finally introduce some clarity to the issue, or only spark further jurisdictional wrangling, remains to be seen.

The Split

On one side of the spectrum, the 7th Circuit has adopted the "nerve center" test for locating a corporation's principal place of business.[3] Under this approach, the court looks for the corporation's "brain" (where the "directing intelligence" of the company is located) and ordinarily finds it where the company has its executive headquarters.[4] In adopting this approach, the 7th Circuit recognized that other circuits had adopted what it perceived as a "vaguer standard," looking not only to the site of the company's headquarters but also to distribution of the company's assets and employees.[5] The 7th Circuit rejected these broader considerations, preferring a "simpler test" emphasizing that jurisdiction should be readily ascertainable by the parties.[6]

A corporation can have only one "principal" place of business for purposes of diversity jurisdiction.

Filling the middle of the spectrum are a wide range of decisions that dictate consideration of various other factors regarding a company's operations, in addition to its "nerve center," when determining where it has its principal place of business. Perhaps most closely aligned with the 7th Circuit, the 3rd Circuit has adopted what has come to be known as the "center of corporate activities" test.[7] Similar to the "nerve center" test, this formulation of the standard "requires courts to ascertain 'the headquarters of day-to-day corporate activity and management.'"[8] However, the 3rd Circuit's approach includes consideration of factors such as "physical location of employer's plants and the like, … which, while of 'lesser importance,' were of 'some significance' when … [determining] the center of corporate activity."[9]

The 5th, 6th, 8th, 10th and 11th circuits apply what they have deemed the "total activity" test to locate a corporation's principal place of business. This standard requires courts to consider both the corporation's "nerve center" and all relevant factors regarding its "place of operations."[10] Factors regarding the "place of operations" include the location of the company's business assets and employees, corporate records, and day-to-day operations.[11] In applying this more subjective standard, the courts have indicated that the relative importance of these potentially competing factors will vary depending on the nature of the corporation's activities.[12] Thus, a company's "nerve center" will predominate when it has

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"far-flung" operations, but its "place of operations" carries more weight when its activities are more centralized.[13] Nonetheless, under the "total activity" test, all factors relevant under both standards are considered.

Of course, while the results of the "total activity" test may be consistent with the "nerve center" test in certain cases, introducing additional relevant factors will necessarily lead to divergent results in other cases. For example, in *Shell Rocky Mountain Production v. Ultra Resources* a question arose regarding Ultra's principal place of business.[14] The District Court conceded that Ultra's corporate headquarters in Houston may constitute its "nerve center," but applied the "total activity" test to find that the company maintained its principal place of business outside Texas. The 10th Circuit affirmed, holding that "[i]rrespective of whether Houston constitutes Ultra's nerve center, an evaluation of Ultra's total activity convinces us that there is ample evidence to justify the District Court's conclusion that Ultra's principal place of business is either Wyoming or Colorado."[15]

The 1st, 2nd and 4th circuits have adopted a similar yet slightly different approach, recognizing the "nerve center" and "place of operations" tests as distinct tests to be considered and applied independently depending upon the circumstances of the particular case.[16] To be certain, whether this approach reflects a meaningful variation from the "total activity" test rests largely in its application and, in particular, on whether the courts will consider factors relevant to both tests when determining which test to apply in a specific case.

For example, decisions in the 2nd and 4th circuits appear to consider all the same factors underlying the "total activity" test in determining whether to apply the "nerve center" or "place of operations" test.[17] In this manner, demarcation of the appropriate test to apply becomes more or less outcome determinative; if the relevant factors favor application of the "nerve center" test, the principal place of business will almost assuredly be located at the company's executive headquarters. But if, on the other hand, the relevant factors dictate application of the "place of operations" test, the company's principal place will be found elsewhere.

Like the 1st, 2nd and 4th circuits, the 9th Circuit recognizes the "nerve center" and "place of operations" tests as two independent tests. The 9th Circuit, however, has affirmatively directed lower courts to first apply the "place of operations" test to determine if any state "contains a substantial predominance of the corporation's business activities" without considering where the company maintains its headquarters or other factors relevant to the "nerve center" test.[18] As detailed by the 9th Circuit, under this "substantial predominance" analysis, relevant factors include "the location of employees, tangible property, production activities, sources of income, and where sales take place."[19]

The 9th Circuit has also made clear that "substantial predominance" does not require the majority of a company's business activities be conducted in any one state, but it is satisfied if the level of activity in any one state is significantly greater than the activity in any other single state.[20] Again, whether these distinctions in the approach mandated by the 9th Circuit result in any meaningful difference in the ultimate outcome can be evaluated only through their application in specific cases. Two recent decisions, including the *Hertz* case now before the Supreme Court, highlight the unresolved nature of this issue for litigants in the 9th Circuit.

Now that the Supreme Court has granted review in* Hertz*, there is hope for a clear, standard to allow litigants and courts to determine a "principal" place of business.

In *Davis v. HSBC Bank Nevada* a California resident filed a state court class action against HSBC Bank and Best Buy, asserting claims for unfair business practices, false advertising and common-law fraud arising from the alleged failure to adequately disclose fees associated with credit cards offered by the defendants. The defendants timely removed the case to federal court under CAFA, and the plaintiff moved for remand. The District Court held that the substantial predominance of Best Buy's business activities occurred in California because "California has 15 percent more stores, 40 percent more employees and 46 percent more sales than Texas, the second highest state."[21] Accordingly, the court concluded that even though Best Buy may have its corporate headquarters in Minnesota, it had its principal place of business in California, and the judge granted the plaintiff's motion to remand for lack of minimal diversity.

This past February the 9th Circuit reversed the lower court's holding that because Best Buy is "a nationwide retailer with stores in 49 states, the District of Columbia and Puerto Rico," its business activities in California could not be said to "substantially" predominate over operations in other states.[22] The 9th Circuit concluded that "the statistics demonstrate that Best Buy Stores' California retail activities roughly reflect California's larger population." If Best Buy were determined to have its principal place of business in California on this basis, the court said, "nearly every national retailer — no matter how far-flung

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its operations — will be deemed a citizen of California for diversity purposes." In reaching its decision, the 9th Circuit emphasized that "when a corporation has operations spread across many states, the nerve center test is usually the correct approach."[23]

The court also distinguished the 9th Circuit's earlier decision in *Industrial Tectonics v. Aero Alloy*, noting that because the operations at issue in that case were "divided between only two states," they were "not so spread out that one must look to the corporate headquarters to find a principal place of business."[24] Thus, as applied in *Davis v. HSBC Bank*, the 9th Circuit's formulation appears largely consistent with the test applied in the 1st, 2nd and 4th circuits.

The 9th Circuit's contemporaneous decision in *Friend v. Hertz Corp.* went the other way. Decided four months earlier and just accepted for review by the Supreme Court, the *Hertz* decision purported to apply the same "substantially predominate" standard but reached the diametrically opposite result.

In *Hertz* the plaintiffs filed a state court class action for alleged violations of California's wage-and-hour laws. Hertz removed the case to federal court under CAFA, and the plaintiffs moved for remand. Applying the "place of operations" test mandated by 9th Circuit precedent, the District Court compared Hertz's business activities in California and Florida, the next largest state, finding the company had 2,299 employees in California compared with 1,602 in Florida, 273 locations in California compared with 155 in Florida, processed 3.8 million rentals per year in California compared with 2.2 million in Florida, and derived $811 million in annual revenue from California compared with $505 million in Florida.[25]

Based on these facts, and ignoring the fact that Hertz maintained its corporate headquarters in New Jersey, the District Court granted the plaintiffs' motion to remand. The court held that Hertz's business activities in California substantially predominated over its activities in any other state, that Hertz therefore had its principal place of business in California, and that there was thus no minimal diversity. The court expressly rejected Hertz's argument that where a corporation's business activities are spread among many states, no one state should be considered to substantially predominate. The court also expressly rejected Hertz's argument that the distorting impact of California's larger population must be considered.[26] This decision is hardly an anomaly; other district courts in California have reached similar conclusions, finding that national companies with headquarters outside California and far-flung operations spread across the country nonetheless have their principal place of business in California.[27]

On appeal the 9th Circuit summarily affirmed the District Court remand order in an unpublished decision. In direct conflict with the *Davis* case decided four months later, the 9th Circuit concluded that the lower court had properly applied the "place of operations" test and expressly rejected any argument that it must consider the comparative size of California's population to determine whether Hertz's activities substantially predominated in any one state.[28] In a hopeful sign for everyone seeking clarity regarding this issue, the Supreme Court granted Hertz's petition for *certiorari* in June.

The Need for a Clear, Uniform Standard

The *Hertz* case provides a clear illustration of the circuit split. While the 9th Circuit found that Hertz maintained its principal place of business in California, if sued in the 7th Circuit, the company would clearly be found to have its principal place of business in New Jersey, where it maintains its corporate headquarters. Indeed, while the analysis would be somewhat different in the various other circuits, if sued anywhere other than the 9th Circuit, Hertz would almost certainly be found to have its principal place of business in New Jersey. Of course, it is universally acknowledged that a corporation can have only one "principal" place of business for purposes of diversity jurisdiction. Now that the Supreme Court has granted review in the *Hertz* case, there is hope for a clear, uniform standard that will allow litigants and courts alike to readily determine where that is.

As the Supreme Court prepares to grapple with this issue, it must be remembered that a central principal underlying diversity jurisdiction is to avoid the effects of prejudice against outsiders.[29] Nonetheless, any careful analysis of this issue has to recognize that companies with operations in multiple states may enjoy positive associations — and not be at risk of prejudice — in many different states in which they operate, and perhaps even in some states where they have no operations.

Indeed, it would seem that a strong argument could be made that any potential prejudice directed against a corporation would more likely arise from its public reputation as a corporate citizen than from where it maintained its corporate headquarters or conducted the substantial predominance of its operations. In any event, because a company can have only one principal place of business, the conclusion that it would not likely be subject to prejudice in a particular forum obviously cannot be determinative.

Whatever test is adopted, and whether it is successful in finally resolving this issue or simply fosters further litigation, would seem to rest largely on the simplicity and clarity of its application. As the 7th Circuit recognized, a

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corporation's principal place of business should be readily determinable. Indeed, such clarity is necessary not only to give litigants some level of certainty regarding where they may bring or be subject to suit, but also to alleviate the burden on both the federal and state court system as litigants engage in protracted jurisdictional battles completely ancillary to the underlying claims. Will the Supreme Court meet this challenge? We can only stay tuned.

Notes

[1] 28 U.S.C. § 1332(c)(1).

[2] *Hertz Corp. v. Friend*, No. 08-1107, *cert. granted* (U.S. June 9, 2009).

[3] *See Wis. Knife Works v. Nat'l Metal Crafters*, 781 F.2d 1280, 1282 (7th Cir. 1986) ("The test in this circuit for principal place of business is 'nerve center'; and, to continue the neurological metaphor, we look for the corporation's brain, and ordinarily find it where the corporation has its headquarters" [internal citations omitted].). *Accord Krueger v. Cartwright*, 996 F.2d 928, 931 (7th Cir. 1993); *MetLife v. Cammon*, 929 F.2d 1220, 1223 (7th Cir. 1991); *Lyerla v. AMCO Ins. Co.*, 461 F. Supp. 2d 834, 836 (S.D. Ill. 2006).

[4] *Id.*

[5] *Wis. Knife Works*, 781 F.2d at 1282.

[6] *Id.*

[7] *See Kelly v. U.S. Steel Corp.*, 284 F.2d 850, 853-54 (3d Cir. 1960). *See also CGB Occupational Therapy v. RHA Health Servs*., 357 F.3d 375, 381 n.5 (3d Cir. 2004); *Mennen Co. v. Atl. Mut. Ins. Co.*, 147 F.3d 287, 291 (3d Cir. 1998).

[8] *Mennen*, 147 F.3d at 291 (quoting *Kelly*, 284 F.2d at 854).

[9] *Id.*

[10] *Teal Energy USA v. GT Inc.,* 369 F.3d 873, 876 (5th Cir. 2004). *Accord Shell Rocky Mountain Prod. v. Ultra Res.*, 415 F.3d 1158, 1162 (10th Cir. 2005); *Sweet Pea Marine v. APJ Marine*, 411 F.3d 1242, 1247 (11th Cir. 2005); *Capitol Indem. Corp. v. Russellville Steel Co.,* 367 F.3d 831, 836 (8th Cir. 2004); *Gafford v. Gen. Elec. Co.,* 997 F.2d 150, 162 (6th Cir. 1993).

[11] *See, e.g., Teal Energy*, 369 F.3d at 877.

[12] *See Capitol Indem. Corp*., 367 F.3d at 836.

[13] *See, e.g., Teal Energy*, 369 F.3d at 876 ("Generally, when considering a corporation whose operations are far-flung, the sole nerve center of that corporation is more significant in determining principal place of business. … [W]hen a corporation has its sole operation in one state and executive offices in another, the place of activity is regarded as more significant" [internal quotations omitted].).

[14] 415 F.3d 1158 (10th Cir. 2005).

[15] *Id.* at 1163.

[16] *See Diaz-Rodriguez v. Pep Boys Corp.*, 410 F.3d 56, 61 (1st Cir. 2005) (holding courts "should use either the nerve center test or the locus-of-operations test, depending on the characteristics of the corporation"); *Athena Auto. v. DiGregorio*, 166 F.3d 288, 290 (4th Cir. 1999) ("To determine where a corporation has its principal place of business, we have recognized two tests, the 'nerve center test' and the 'place of operations test.'"); *Felipe v. Target Corp.*, 572 F. Supp. 2d 455, 460 (S.D.N.Y. 2008) ("'Courts in the 2nd Circuit recognize two different tests for determining the principal place of business of a corporation,' the choice of which 'depends on the structure and nature of the corporation'" [quoting *Augienello v. FDIC*, 310 F. Supp. 2d 582, 590 (S.D.N.Y. 2004)].).

[17] *See Long v. Silver*, 248 F.3d 309, 314-15 (4th Cir. 2001) (holding that regardless of which test applies, the bulk of the company's corporate activity took place in New York, the company's "home office" was in New York, and thus the company had its principal place of business in New York); *Felipe*, 572 F. Supp. 2d at 460 (holding that the "nerve center" test was appropriate because Target is a large, national company with numerous stores throughout the country, and finding that Target had its principal place of business in Minnesota, where it maintained its corporate headquarters).

[18] *See Tosco Corp. v. Communities for Better Env't*, 236 F.3d 495, 500 (9th Cir. 2001) (citing *Indus. Tectonics v. Aero Alloy*, 912 F.2d 1090, 1092 [9th Cir.1990]). *See also Davis v. HSBC Bank Nev.*, 557 F.3d 1026, 1028 (9th Cir. 2009); *Friend v. Hertz Corp.*, 297 Fed. Appx. 690 (9th Cir. 2008).

[19] *See Davis*, 557 F.3d at 1028 (quoting *Tosco Corp.*, 236 F.3d at 500).

[20] *See id.* at 1029 ("The substantial-predominance test does not require that a majority of corporate operations occur in a single state. But the test requires a 'substantial' predominance, not mere predominance."). *Compare Diaz-Rodriguez*, 410 F.3d at 60 ("We now add that the principal place of business of a corporation that has the bulk of its physical operations in one state is to be determined under the locus-of-operations test, even if the corporation's executive offices are in another state.").

[21] *Davis*, 557 F.3d at 1029.

[22] *Id.*

[23] *Id.* (citing *Breitman v. May Co.*, 37 F.3d 562, 564 [9th Cir. 1994]).

[24] *Id.* (quoting *Indus. Tectonics*, 912 F.2d at 1093).

[25] *Friend v. Hertz Corp.,* No. C-07-5222-MMC, *order granting plaintiffs' motion to remand entered* (N.D. Cal. Jan. 15, 2008).

[26] *Id.*

[27] *See, e.g., Burgos v. United Airlines*, 2002 WL 102607, at *6 (N.D. Cal. Jan. 11, 2002); *Pirie v. Rite Aid Corp.*, No. 06-03105-GAF-JTL, *order on plaintiff's motions for remand and attorney fees entered* (C.D. Cal. Sept. 18, 2006); *Absher v. AutoZone Inc.*, No. 06-3170-SJO (SHx), *remand order entered* (C.D. Cal. July 28, 2006).

[28] *Friend v. Hertz*, 297 Fed. Appx. 690.

[29] *See Davis*, 557 F.3d at 1029.

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ABUSE & NEGLECT

Family Sues Sunrise Over Woman's Deadly Three-Story Fall

***Malloy et al. v. Sunrise Senior Living Management Inc. et al.,* No. 2:09 CV 03708, *complaint filed* (E.D. Pa. Aug. 13, 2009).**

A Pennsylvania personal care home resident died after falling three stories from an unsecured window in the facility's dementia unit, according to a lawsuit filed against Sunrise Senior Living.

Dorothy McRee had suffered from a brain tumor, and the staff at the Sunrise of Paoli personal care home in suburban Philadelphia noted that she tended to wander, was "unaware of unsafe areas" and required 24-hour direct supervision, according to the lawsuit.

In addition the windows in the facility's dementia unit "are meant to be equipped with safety clips to prevent them from opening more than 6 inches," the suit says.

However, the facility's staff left McRee unsupervised, and one of the unit's windows unsecured, the complaint says.

McRee's adult children Dorothy Malloy and James McRee filed the lawsuit Aug. 13 on behalf of their mother's estate in the U.S. District Court for the Eastern District of Pennsylvania.

Named as defendants are Sunrise Senior Living Management Inc. and its parent company, Sunrise Senior Living Inc.

According to its Web site, McLean, Va.-based Sunrise operates 415 "senior living communities" in the United States, Canada, Germany and the United Kingdom, including 23 personal care homes in Pennsylvania.

Personal care homes are Pennsylvania's version of assisted-living facilities.

The complaint says McRee was diagnosed with a brain tumor in June 2007 and moved in with Malloy a short time later. However, with the growth of the tumor, she became increasingly disoriented and prone to wandering and falling.

As McRee's condition worsened, her children became unable to provide the care and 24-hour supervision she required. Malloy admitted her to Sunrise of Paoli Dec. 4, 2008, for temporary respite care "with the intent of bringing her home when it was safe to do so," the complaint says.

According to the lawsuit, Sunrise promotes so-called "Reminiscence" units with safe and secure environments for dementia patients. The Paoli facility has such a unit.

Malloy specifically contracted with the facility for the provision of 24-hour direct supervision, the complaint says. In addition, a pre-admission evaluation conducted by the facility's staff noted McRee's need for such supervision, her children say.

The staff also allegedly noted Dec. 7 that McRee "was exhibiting wandering behavior" and had not been sleeping.

McRee fell from the window later that night or early the next morning, suffering internal bleeding and numerous fractures to her spine and ribs, according to the complaint.

When paramedics arrived at the scene around 5 a.m., she was conscious and continuously repeating the prayer "Hail Mary." She died at a hospital about six hours later.

McRee's children insist that she did not receive the required supervision prior to the incident.

They also say that during a Dec. 8 inspection by the Pennsylvania Department of Public Welfare, investigators observed "an outline of dust and dirt in the shape of a plastic safety clip" on the window, "although the clip itself was not present."

"This pattern of dust led the [DPW] to conclude that the clip had been removed from the window sometime prior to the night of the incident," the complaint says.

McRee's children say their mother remained conscious for a substantial amount of time following her fall, suffering significant pain and anguish before her death. They raised a survival claim on behalf of her estate.

They also seek punitive damages for the defendant's "reckless and wanton indifference" to McRee's safety.

At press time, Sunrise had not responded to the lawsuit.

Gerald A. McHugh Jr. and Martina W. McLaughlin of Raynes McCarty in Philadelphia represent McRee's estate.

See Document Section A (P. 23) for the complaint.

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ABUSE & NEGLECT

N.M. Home Is Sued Over Resident's Infected Bedsore

***Rowe v. Red Rocks Nursing Operations LLC,* No. 1:09-CV-0777, *complaint filed* (D.N.M. Aug. 10, 2009).**

A nursing home resident's widow has sued a New Mexico facility, alleging that neglect by its staff caused her husband to develop an infected bedsore.

Katherine Rowe says her husband, Jervis, was at heightened risk for bedsores and developed one earlier in his stay at the Red Rocks Care Center that required hospitalization.

According to the complaint Jervis then developed another bedsore, which became infected, necessitating another hospitalization, just three weeks after he returned to the Gallup home from the first stay.

Rowe filed her suit in the U.S. District Court for the District of New Mexico against Red Rocks Nursing Operations LLC, the facility's owner.

According to the complaint, Jervis, 75, entered the Red Rocks facility Feb. 20, 2008, for inpatient physical therapy following a stroke. Within a week, he developed a bedsore near his tailbone and had to be hospitalized. Rowe alleges the bedsore was successfully treated during the hospital stay.

Jervis was readmitted to Red Rocks May 1. However, three weeks later he was again transferred to a hospital, this time with a stage IV bedsore near his tailbone, according to the complaint.

A stage IV sore is one that extends through the skin and involves muscle, tendons and bone. Such sores can lead to life-threatening infections.

Rowe insists that her husband had developed such an infection and had to undergo surgical debridement of the wound.

The lawsuit raises counts for negligence and per se negligence based on violations of state and federal laws and regulations governing nursing care. She also raises a count for loss of consortium.

Jervis died Feb. 12, 2009. The complaint does not attribute his death to the infected bedsore.

Rowe accuses the Red Rocks staff of failing to assess her husband's condition adequately; monitor his condition for changes; truthfully record his condition in his medical file; and turn and reposition him to prevent the development of bedsores.

She also asserts that the facility did not have policies and procedures to prevent bedsores.

Rowe further alleges the Red Rocks center was understaffed and accuses its management of negligent staff hiring and retention policies. She says the facility failed to conduct adequate background and reference checks when hiring its employees.

She seeks compensatory and punitive damages.

At press time, Red Rocks has not responded to the complaint.

Jeffrey L. Baker and Renni Zifferblatt of the Baker Law Firm in Albuquerque, N.M., represent Rowe.

See Document Section B (P. 27) for the complaint.

ARBITRATION

Discovery Requests, Delay Did Not Waive Arbitration Rights

***Manhattan Nursing & Rehabilitation Center LLC et al. v. Williams,* No. 2008-CA-00925-COA, 2009 WL 2370783 (Miss. Ct. App. Aug. 4, 2009).**

A nursing home did not waive its right to arbitrate a neglect lawsuit's claims despite failing to seek a stay of the proceedings and seeking depositions related to the enforcement of the arbitration pact, a Mississippi appeals court has ruled.

The Court of Appeals further ruled that the Manhattan Nursing & Rehabilitation Center's failure to seek a prompt hearing on its motion to compel arbitration and its cancellation of a hearing once one was scheduled also did not waive its right to enforce the agreement.

The nursing home did not substantially participate in litigation, the panel said, and there was no proof on the record that its conduct caused an undue delay or prejudice to the plaintiff, Louise Williams.

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Williams filed suit Jan. 31, 2007, on behalf of her mother, Willie Mae Henderson, in the Hinds County Circuit Court for negligence and breach of contract.

According to the complaint, Henderson suffered a broken arm that went untreated while she lived at the Manhattan facility. She also allegedly suffered several bedsores, one of which became infected and resulted in the amputation of her leg.

Manhattan responded March 30 with a motion to compel arbitration or, in the alternative, dismiss the complaint. It did not, however, seek to stay the proceedings pending an arbitration, the opinion said.

In its motion the nursing home sought to enforce an arbitration clause in the admissions agreement signed by another daughter of Henderson, Mary Still.

Williams responded to the motion and filed affidavits from herself and Still. She then set the motion for a hearing.

After learning that the hearing had been set, Manhattan filed a notice cancelling the hearing because its attorneys were unavailable. It also requested to take the depositions of Williams and Still concerning their affidavit testimony.

Without holding a hearing on the arbitration issue, the trial court ruled that Manhattan had waived its right to enforce the arbitration agreement by:

- Failing to seek a stay of the proceedings;
- Not promptly requesting a hearing on its motion to compel;
- Cancelling the hearing set by Williams; and
- Seeking discovery.

Manhattan appealed.

The appeals court said that in order for a party to be found to have waived its right to arbitration, it must "substantially invoke the judicial process to the detriment or prejudice of the other party."

The panel found that the deposition requests were limited only to the issue of the enforceability of the arbitration agreement and could not be considered substantial participation in the litigation.

The court further held that Manhattan did file its motion to compel arbitration early enough in the litigation for it to be timely.

Meanwhile, there was no showing that the nursing home's conduct caused any detriment or prejudice to Williams, the panel held.

"No evidence of any delay or expense was shown by Williams," the panel said. "Williams also does not show any damage to her legal position, as the only action taken by [her] after Manhattan filed its notice to compel arbitration was her filing of the notice of hearing."

Thus, the appeals court sent the case back to the trial court for a hearing on the enforceability of the arbitration agreement.

Rebecca Adelman and Hardin Chase Pittman in Memphis, Tenn., represented Manhattan.

John F. Hawkins and Walter Andrew Neely of Hawkins, Stracener & Gibson in Jackson, Miss., represent Williams.

See Document Section C (P. 32) for the opinion.

CRIMINAL CONDUCT

Colo. Caregiver Admits to Abuse, Faces 20 Years in Jail

An ex-caregiver has pleaded guilty to an attempted-assault charge stemming from allegations that she neglected and mistreated a 65-year-old mentally disabled woman and then billed Colorado's Medicaid program for her services.

Tammera Deane Henritze, 38, entered into a plea agreement with prosecutors and faces between 10 and 20 years in prison, Colorado Attorney General John Suthers and Adams County District Attorney Don Quick said in an Aug. 18 joint statement.

The plea deal resolves allegations that Henritze failed to provide the woman with basic care and made her live in "squalid conditions."

According to prosecutors, Henritze worked as personal services provider for the victim, who had severe memory problems.

Investigators allegedly discovered the victim locked in a bedroom surrounded by rotting food, urine and feces. She was severely malnourished, authorities said.

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The victim was taken to a hospital and later placed in a nursing home, where her condition greatly improved, prosecutors said.

Authorities said the investigation was launched after the Adams County Department of Social Services received a tip from Henritze's former landlord about the suspected abuse.

Henritze pleaded guilty Aug. 14 in the Adams County Court to one count of criminal attempt to commit first-degree assault on an at-risk adult, a class-three felony. A sentencing hearing is scheduled for Oct. 26.

CRIMINAL CONDUCT

Nurse Aide Is Charged With Punching Patient

A former worker at a Massachusetts nursing home has been arraigned on criminal charges in connection with allegations that she punched and threatened an 83-year-old Alzheimer's patient.

Marie Michel, 54, of Medford, Mass., pleaded not guilty to one count of assault and battery on an elderly person and one count of threatening to commit a crime, Massachusetts Attorney General Martha Coakley said in an Aug. 14 statement.

Michel worked as a certified nurse aide at the EPOCH Senior Healthcare nursing home in Melrose.

According to authorities, the victim got out of bed and began to wander around her room at 4 a.m. Sept. 17, 2008. Michel came into the room, punched the woman twice in the chest and/or stomach, pushed her down on her bed and told her not to get up again, the charges say.

Authorities said the victim's roommate witnessed the assault.

EPOCH reportedly fired Michel after the incident.

Michel entered her plea Aug. 13 before Judge Dominic Paratore of the Malden District Court.

The judge released her on her own recognizance and ordered her not to have any contact with the victim or witnesses and barred her from working in patient care, according to Coakley.

Michel is due back in court Sept. 15 for a pretrial conference.

CRIMINAL CONDUCT

Calif. Home's Pharmacy Boss Pleads No Contest In Forced-Drugging Case

***People v. Hayes et al.*, No. BF12665B, *plea entered* (Cal. Super. Ct., Kern County Aug. 14, 2009).**

A California nursing home's pharmacy director who was charged with forcibly administering psychotropic drugs to patients has pleaded no contest to a single felony count as part of a deal with prosecutors.

Under the plea deal, Debbi Hayes, 52, received a one-year suspended jail sentence and will serve three years on probation. She pleaded no contest Aug. 14 to a felony count of conspiracy to commit an act injurious to public health.

To stay out of jail, Hayes will have to cooperate in the prosecutions of her alleged co-conspirators, Gwen Hughes and Dr. Hoshang Pormir, according to a Aug. 19 Associated Press report.

Hayes, Hughes and Pormir were charged in February with allegedly authorizing the use of medically unnecessary medications, also known as chemical restraints, on 23 residents of the Kern Valley Healthcare District's nursing home unit in Lake Isabella.

The drugs were given to the residents in order make them easier to handle, according to a criminal complaint and accompanying declaration filed in the Kern County Superior Court. *People v. Hughes et al.,* No. BF12665, 2009 WL 407292, *defendants charged* (Cal. Super. Ct., Kern County Feb. 18, 2009) (see *Nursing Home LR*, Vol. 11, Iss. 18).

Complications from the medications killed three patients and seriously injured one other, California Attorney General Jerry Brown said in a statement Feb. 18.

Hughes, 55, was the unit's nursing director and Pormir, 48, its medical director.

The Kern Valley Healthcare District is a nonprofit organization that operates a small community hospital, health clinic, pharmacy and 74-bed long-term-care unit.

According to the declaration, Hughes began using the psychotropic medications on patients when she took over as nursing director in September 2006. She immediately ordered that the staff give all Alzheimer's and dementia

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patients high doses of such drugs to make them more tranquil and easier to handle.

Hughes also ordered that residents who were argumentative, noisy or disruptive be given the drugs, the declaration says.

Nurses at the facility told investigators that Hughes threatened to fire them if they did not administer the drugs, according to the declaration.

Hughes also directed Hayes to fill prescriptions for the psychotropic medications, and Hayes complied without first obtaining a doctor's approval, prosecutors allege.

Pormir allegedly approved the use of psychotropic medications only after they had been administered for some time. He did so without first examining the patients and determining whether the drugs were medically necessary, the charges say.

At least two of the patients who refused to take the drugs were held down and forcibly injected, the declaration says.

According to prosecutors, some residents who were given the drugs became lethargic and had difficulty eating and drinking. Others became unresponsive.

Facility nurses also documented patient reactions, included drooling, severe tremors, falls, glazed eyes and slurred speech, according to the declaration.

A 91-year-old woman, an 85-year-old man and a 76-year-old man died from complications brought on by the drugs, prosecutors allege. In addition an 83-year-old man allegedly suffered severe injuries after taking the medications.

Hughes faces eight felony counts of elder abuse and two felony counts of assault with a deadly weapon. Pormir faces eight felony counts of elder abuse.

LONG-TERM-CARE INSURANCE

Calif. Regulators Fine Long-Term-Care Insurer $500,000

Conseco Senior Health Insurance Co. will pay the state of California $500,000 to settle charges that it engaged in unfair claims-handling practices concerning long-term-care insurance policies.

"Conseco's practices showed a callousness or carelessness toward vulnerable policyholders from whom it was more than happy to accept premiums month after month," state Insurance Commissioner Steve Poizner, said in a statement. "Conseco Senior appeared to violate its contracts and California law without much concern for the results of its actions."

The statement said the insurer is under new management and now is called Senior Health Insurance Co. of Pennsylvania.

In a stipulation and waiver filed with the commissioner, Conseco denied the allegations but said it was settling the case "solely to avoid the substantial cost of administrative proceedings and diversion of its management staff and other resources required for business operations."

The California Insurance Department charged Conseco with a laundry list of violations of state insurance law, including:

- Wrongfully denying claims;
- Excessive delays in paying claims;
- Failing to properly interpret policy provisions;
- Requiring claimants to submit irrelevant information;
- Failing to timely respond to policyholders' questions; and
- Ignoring communications from the Insurance Department.

Poizner's statement noted that the average age of Conseco's long-term care policyholders was 80.

In addition to the $500,000 fine, the insurer agreed to retroactively readjust certain claims back to Jan. 1, 2004, and pay them with interest.

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JURY INFLUENCE

Doctor Defendant's Care of Juror Caused Unfair Trial

Heidt v. Argani, **No. DA 08-0626, 2009 WL 2481022 (Mont. Aug. 14, 2009).**

The Montana Supreme Court has overturned a verdict in favor of the physician defendant in a malpractice lawsuit, concluding the jury probably was influenced in her favor because she provided medical assistance to an ailing juror.

The high court said that although Dr. Faranak Argani acted admirably under the circumstances, jurors likely were too prejudiced in her favor to be able to render a fair and impartial verdict.

According to the opinion, Amy Heidt sued Argani and her employer, Deaconess Billings Clinic, on behalf of herself, her four minor children and her husband's estate.

She alleged that her husband, Gerard, died from complications of a leaky aortic valve because Argani failed to timely refer him to have the valve replaced.

The case was tried in October in the Yellowstone County 13th Judicial District Court. Just as Heidt's attorney was giving a closing statement in which he mused on Gerard's thoughts as he lay dying, a juror began to feel faint.

Argani, another doctor present in the courtroom and three other jurors (all nurses) provided medical care to the ailing juror until paramedics arrived.

The trial reconvened, and an alternate juror was seated. Although the judge instructed the jurors not to let the events they had witnessed affect their verdict, Heidt moved for a mistrial. The judge took the motion under advisement, and the jury returned a verdict in favor of Argani.

The judge later denied the mistrial motion. He found that while there was "an irregularity in the proceedings," the trial on the whole was fair and the jurors were not influenced by the incident.

Heidt appealed to the state Supreme Court, which overturned the judgment and remanded for a new trial.

Acknowledging that the circumstances were rare events that only ever occur in malpractice trials, the high court cited cases in Illinois and New York in which the defendant doctors aided unconscious jurors during trial.

In one case the jury returned a defense verdict. In the other case the jury returned a verdict for the plaintiff with a modest award. The appellate courts overturned both verdicts, finding that the juries probably were unduly influenced in the defendants' favor by seeing them perform competently.

In *Reome v. Cortland Memorial Hospital,* 152 A.D. 2d 773 (N.Y. App. Div. 1989), the court said the "probability of injustice was more than substantial; it was virtually inevitable."

Here, the Montana Supreme Court said the effect on jurors who witnessed an actual drama in the courtroom, when compared with listening to testimony, had an "immeasurable" effect, regardless of whether the individual jurors admitted it or even consciously knew it.

Although no one could be blamed for the unforeseeable event, and everyone acted "admirably" in helping the ailing juror, based on the extraordinary events the jury witnessed, the trial judge should have granted a mistrial, the high court said.

See Document Section D (P. 36) for the opinion.

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CASE AND DOCUMENT INDEX

Heidt v. Argani, No. DA 08-0626, 2009 WL 2481022 (Mont. Aug. 14, 2009) 18
Document Section D 36

Malloy et al. v. Sunrise Senior Living Management Inc. et al., No. 2:09 CV 03708, *complaint filed* (E.D. Pa. Aug. 13, 2009) 13
Document Section A 23

Manhattan Nursing & Rehabilitation Center LLC et al. v. Williams, No. 2008-CA-00925-COA, 2009 WL 2370783 (Miss. Ct. App. Aug. 4, 2009) 14
Document Section C....32

People v. Hayes et al., No. BF12665B, *plea entered* (Cal. Super. Ct., Kern County Aug. 14, 2009) 16

Rowe v. Red Rocks Nursing Operations LLC, No. 1:09-CV-0777, *complaint filed* (D.N.M. Aug. 10, 2009) 14
Document Section B....27

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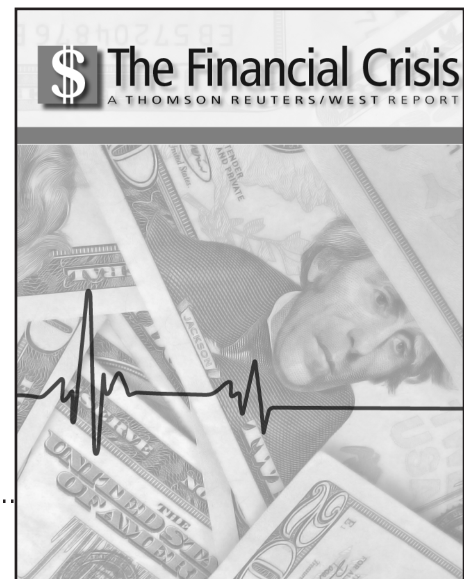

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