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Who's really running the nursing home?

A maze of corporate entities may obscure who actually operates the facility where your client was injured. But if you follow the money, you can find out who's in charge and hold them accountable.

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Also: [Ask detailed questions in depositions](#) by Nathan P. Carter

In the last five years, most of the nation's large nursing home chains have undergone major corporate restructuring. The goal: separating the chains' real property and assets from their operations to avoid financial liability for legal claims, including those alleging negligent care or abuse of residents. States like Arizona, California, Florida, and Texas—which have significant elderly populations—have been affected most by this trend, but homes in other states are following suit.

Nursing home corporate structures used to be different. In the 1990s, most of the national nursing home chains operated in a similar manner. These for-profit chains included Beverly Enterprises, Mariner, Extendicare, HCR Manorcare, Kindred, Genesis, and LifeCare. Most of them divided up the country and each state into regions, and each region contained a handful of nursing homes.

Typically, a regional vice president or manager would oversee the facilities in each region. Each facility's executive director or administrator would report directly to the regional head, who would in turn report to the next person in the hierarchy, who usually worked out of that chain's corporate headquarters.

At that time, it was apparent that the large chains owned and operated all the facilities—they made no attempts to hide it. Most facilities' names contained the name of the chain, as did their policy and procedure manuals, admission packets, promotional materials, and other documents.

After several major chains were hit with Medicare fraud investigations or were forced to file for bankruptcy protection, the business model began to change. Virtually all of these national chains have undergone extremely complex business transactions in which they were sold, merged, or parceled out into different entities—or otherwise drastically changed.

Now, it is difficult, if not impossible, to identify the entity that owns, operates, and controls any skilled nursing facility. A nursing home and its literature no longer bear the name of its owner and operator. The business model is focused on shielding the true corporate owners from liability or responsibility for their residents' injuries.

Most nursing home chains in Florida have set up a dizzying array of corporations designed to funnel money from one entity to another, so it is difficult to uncover all the responsible entities, much less to keep them in a lawsuit as named defendants.

In the typical corporate setup, a facility's real estate, buildings, and assets are "purchased" by an outside entity, usually a limited liability corporation (LLC). Most of the real estate is then placed into various forms of protected real estate investment trusts (REITs). The REIT owns the property passively and usually leases it out to other entities, creating an argument that the real estate owner has nothing to do with the activities on the property—and therefore no liability.

The purchasing LLC leases the facility to another holding entity, which may be another LLC. That LLC then enters into subleases with several entities that are created to operate the facility. Usually these are LLCs as

well. Therefore, the LLC acting as the licensee (or entity licensed with the state as the owner or operator) of the facility has no real assets, no property, and little to no insurance.

Typically, the licensee is bound by a “management agreement,” a “financial services agreement,” or an “ancillary services contract” to collect rent and other expenses from residents and forward as much of this money as possible up the chain to the controlling entities.

Presuit investigation

Nursing home chains often ignore the rules of discovery and refuse to turn over relevant documents in their possession. If you conduct your presuit investigation thoroughly, you may be able to catch the defendant in a blatant discovery violation and use it to your tactical advantage.

Before filing suit, gather as much information on the facility as you can find. The following sources may yield useful information:

- state Medicaid cost reports/home office reports and federal Medicare contracts
- the secretary of state’s Web site and uniform business reports that include names of LLC members or corporate officers/directors
- state licensure files, including applications to the state, change-of-ownership documents, and other related documentation
- for a publicly traded corporation, Securities and Exchange Commission filings and reports, 10ks or annual reports, statements of corporate officers, and stock values
- the facility’s admission packet, brochures, pamphlets, and other promotional literature
- Google searches on the nursing home facility and the entities that own or manage it (Searching all the names that appear in the Medicaid cost reports is a great starting point.)
- copies of court files, especially depositions, from other cases involving the facility you are investigating, as well as other facilities owned or managed by the same entities
- conversations with other attorneys who have previously brought claims against the facility
- conversations with former employees of the facility (if your state allows)
- the local property appraiser’s office or Web site regarding the facility site

From this information, you can construct a working chart of the corporate hierarchy operating the facility. As your case progresses, you can add to, edit, and improve this chart.

Formal discovery

Your first step in formal discovery should be to put together a series of requests for document production. My firm typically staggers these and sends them as the case progresses, because sending one massive set of requests may invite boilerplate objections.

This plan has another strategic advantage. If a defendant objects to several separate requests, you have the option of filing multiple motions to compel. This can send a message to the judge that the nursing home is not complying with discovery rules.

Request all the information you attempted to gather during your presuit investigation, because the documents the nursing home provides in discovery may not match what you have already obtained.

For example, in a recent case, my clients provided the admission package they signed when they put their mother in a facility. Its cover page displayed a large logo of the chain that was operating the facility. When the nursing home produced the admission package to me in discovery, the cover page had been ripped off. Fortunately, when we deposed the admissions coordinator in that case, she recognized the cover page and admitted that it was usually part of the package given to new residents.

My firm usually waits until later in the case to request certain additional documents. They include:

- copies of the master lease and any subleases
- copies of all management agreements, ancillary service contracts, and financial services agreements between the facility and all related entities
- all the facility's budget information, including the annual budget, monthly reports, budget variance requests, per-patient-day (PPD) data, and the staffing budget
- the governing body documentation and information (According to 42 C.F.R. §483.75(d) (2006), all facilities must have a governing body to establish and implement policies and appoint the administrator.)
- copies of bank documentation, promissory notes, loan applications, guarantees, and any other documents that relate to the capital that was borrowed—to set up the facility and its sister facilities—as part of the entire operation's management
- all e-mails between any and all staff in the facility and any outside entity or person

If you suspect that the defendant nursing home will deny that some documents exist, it may be wise for you to hold off on requesting them until after you depose the person responsible for custody of the documents, to confirm that they do in fact exist and to obtain the exact names of the documents. That way, the defense cannot object to a request or say that the documents do not exist. In fact, referencing the page and line where the deponent described the information you are requesting significantly improves the chances that the judge will grant your motion to compel.

Depositions

These cases are won or lost during the depositions. Keep in mind that you are trying to show that the facility is part of a larger chain and that the critical decisions are made at a higher level by people who work outside the facility. Also remember that you need to show that these decisions affect patient care both directly and indirectly, so you can establish the outside entities' duty to the nursing home's patients and liability for breach of that duty.

The best examples of corporate-level decisions that directly affect patient care are budgeting and establishing policy and procedures. By setting, monitoring, and controlling the budget, the corporate or "management" office directly controls the number of staff available to care for residents. The fewer staff working per shift, the less care each patient receives.

Also, when the corporate office creates, provides, and implements the policy and procedure manuals for the facility, they are clearly setting standards for all types of patient care. By failing to provide adequate policy and procedures for the facility, or by failing to ensure that policy and procedures are followed by staff, the corporate office breaches a duty of care to the residents.

This focus will help you avoid the defense argument that you are simply trying to "pierce the corporate veil." You are pursuing direct liability against outside entities for their own tortious conduct, not simply blaming high-level corporate officers for the actions of their employees.

The corporate officers may also be personally liable. Managing members of LLCs and directors of corporations are directly liable for their own tortious conduct and cannot hide behind corporate names and mazes. In *Canavan v. National Healthcare Corp.*, the court held that the managing member of the LLC managing company was personally liable for his negligent conduct in setting the facility's budget and staffing levels. (889 So. 2d 825 (Fla. Dist. App. 2004).)

It is wise to depose witnesses from the bottom up, casting a wide net. Start with the certified nurse's aides (CNAs) and other nursing assistants who took care of the patient in your case. Then focus on how the facility operates day to day. Usually, the corporate lawyers brought in to defend the outside entities and their executives do not even bother to attend the depositions of frontline staff. Fortunately, this allows you to uncover a lot of critical information about corporate involvement.

Nurses and assistants. The CNAs, licensed practical nurses (LPNs), and registered nurses (RNs) will probably tell you that "corporate nurses" come in at least once a month to review patient charts and talk with the staff. They may also conduct mock surveys, mock investigations, and staff meetings. The facility nurses often do not even know the names of the people who come in—they simply refer to them as "corporate."

In some cases, you will get lucky and the nurses' pay stubs will reflect the names of the outside companies. In Florida, however, most of these companies have become savvy enough to pay salaries through the licensee LLC. Request pay stubs for all employees you depose.

Try to cover every aspect of the facility's day-to-day operations with the CNAs, LPNs, and RNs. Ask who pays them, what the 800 numbers are for payroll or employee questions, who provides their benefits packages, who administers the health plan, who they answer to, who that person answers to, and who the administrator answers to.

Show the nurses and assistants copies of the policy and procedure manuals and have them acknowledge that these are in fact the facility's documents, that they dictate patient care and serve as a useful tool, and that patients are put at risk when these policies and procedures are not followed. They will agree that these documents directly affect patient care.

They may say the manuals are issued by one of the outside management companies. Even if it is not clear that the outside company developed the manual, the staff probably will tell you that they did not create it, but received it from "corporate."

Directors of nursing. The director and assistant director of nursing can be critical witnesses. They usually have a little more insight about how the facility is truly run.

Sometimes the director of nursing is paid on an incentive or bonus system. This can be fertile ground: Have the person explain his or her bonus plan in detail. It may hinge directly on keeping the resident census as high as possible and keeping the budget as low as possible. The budget criteria typically are enumerated in writing by somebody outside the facility. The director may also be able to verify that the administrator has to answer to an outside authority.

Facility administrator. The administrator's or executive director's deposition is absolutely critical, because it often reveals that the outside management companies and other entities actually operate the facility and therefore have a duty to protect residents.

When deposing the administrator, the key is to uncover how limited his or her autonomy and control of the facility are. Establish these limits by asking detailed questions. (See pages 56-57.)

Like the nursing director, the administrator may be on a bonus system controlled by someone outside the facility. The facility budget and staffing, which clearly affect patient care, may also be controlled from the outside.

Also, it is worth asking deponents for all their e-mail addresses. In some instances, the facility's administrator and director of nursing maintain e-mail addresses that include the name of the entity claiming it has nothing to do with the facility—for example, john.jones@managementcompany.com.

After deposing all the facility-level witnesses, continue to move up the chain. You must learn exactly whom the administrator deals with outside the facility. This will determine whom you depose at the corporate level: the person the administrator said he or she dealt with the most. This person may be a regional vice president.

Regional vice president or manager. When deposing this corporate figure, establish the extent of his or her involvement in and control over the facility. Also find out exactly what entity this person works with and to whom he or she reports. Usually, these corporate players work extensively by e-mail and will admit that they e-mail documents and reports back and forth between the corporate level and the facility level. You can then obtain these documents in a request to produce.

Corporate-level clinical nurses. Identify the people at the corporate level who deal with clinical and patient care issues. They are typically called "clinical resource nurses," "quality assurance consultants," or some other euphemism designed to downplay their involvement. Depose those who visited the facility and ask for details about exactly what their job entailed and what forms or written documents they created.

For example, if you have a case involving dehydration and bedsores, ask the patient care person: If you were in the facility reviewing charts on a regular basis, wouldn't it be part of your job to notice if patients were suffering from severe bedsores or significant dehydration? If so, wouldn't it also be part of your job to report those problems to XYZ Management Co.? And wouldn't your company then have a duty under the management/consulting contract to provide recommendations to the facility on how to improve these problems?

Chief financial officer. It is important to depose the CFO or the person with the most knowledge of the facility's financial operations, the management companies, and other companies. It may be worth the expense to hire a forensic accountant or other expert witness with knowledge of the health care industry. This expert can help analyze all the Medicaid cost reports and other documents before the corporate-level depositions.

In these depositions, you can usually establish that the local facility is paying the outside entities an exorbitant amount of money for all sorts of services. You can also show that all these outside entities are essentially the same entity. The same group of managers, directors, or officers often runs all the LLCs involved.

Also depose the other corporate executives that have been mentioned in your previous depositions. The state secretary of state's Web site may list member managers for each LLC. Depose as many as possible; with each, you can add more information to your chart, revealing a clear picture of how the facility operates.

With each corporate deposition, identify in detail every entity to which that witness belongs as a partner, member, manager, officer, or director. You might find an intricate web of companies that are all related. Get their mailing addresses. Most of them operate from the same address and sometimes even the same suite number.

You may want to consider sending an investigator to the address to take a picture of the building directory in the lobby. It can come in handy at trial when one of the corporate officers testifies under oath that he or she does not know where ABC Consulting Co. is located, when it is in fact in the same office where the officer works every day.

Discuss the facility's ancillary services. Nursing homes often contract with outside companies for psychotherapy, occupational therapy, wound care, and supplies, and these vendors are owned and operated by the same people operating the facility. Through the expert witnesses, you may be able to show that the facility is paying greater than market rate for these services, which helps defeat the arguments that they are arms-length transactions and that these are truly independent companies.

Find out who entered into these ancillary services contracts. Usually it is one of the upper-level corporate executives and not the facility administrator. This will help you show that the corporate executives find every possible way to bilk the facility out of profits while avoiding responsibility for patient care.

The facility in your case may be one of several owned, operated, and managed by the same group of entities. In depositions, ask how the other facilities are run. Obtain copies of the management contracts and other agreements with the sister facilities in the region. By showing that all the facilities are run in the same manner, by the same people, and with the same contracts and agreements, you can quash the claim that the nursing home is a stand-alone "mom-and-pop" operation.

The management companies sometimes have Web sites and promotional literature that tout their services to other facilities, describing the "excellent patient care" they provide and their "hands-on management techniques." Such examples can be devastating in the corporate-level depositions.

By the time you depose these executives, they may have claimed absolutely no involvement with the facility. They want to testify that they are simply providing "accounting services" or the like, but when their own Web site and marketing materials contain mission statements that talk about "providing quality patient care," you can nullify that argument.

Although nursing home litigation has become much more complicated and costly, it can still be rewarding. Careful case selection and tenacious discovery are the keys to success.

As trial lawyers who believe in protecting people from injuries caused by corporate greed, we have a professional and moral obligation to pursue these cases more than ever before. We need to prove to the callous nursing home industry that we will continue to protect the vulnerable elderly patients who cannot protect themselves.

Ask detailed questions in depositions

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Facility administrator

- Can you negotiate your own lease for the facility?
- Can you enter into contracts with outside vendors for supplies?
- What is the most money you can spend at one time?
- Can you implement your own policy and procedures?
- Can you create your own budget, or is it subject to outside review and approval? (Ask the administrator to explain this process in detail.)
- Can you borrow money from a bank to operate the facility?
- Do you have the authority to sign contracts to bind the company?
- Could you negotiate with another management company if you were not happy with the one running the facility?
- Are you a member, manager, or other officer of the parent company?
- Are you a member of the facility's governing body?
- Have you ever attended a governing body meeting?
- Do you have any ownership interest in the LLC operating as the licensee?
- Have you ever signed any Medicaid cost reports or other documents that were submitted to the state or federal government?
- Have you ever signed the plan of correction? (After the state agency conducts an annual survey and notifies the facility of deficiencies, the facility is required to respond with a formal document sometimes called a plan of correction.)
- Who provides the insurance plan for the employees?
- Who administers the health and payroll benefits?
- Who hired you, and who has the authority to fire you?
- Who approves and pays for the ads for job openings?
- Who determines the reimbursement levels for the facility?
- Who conducts comparative salary surveys?
- Who conducts benefit packet surveys in the community?
- Who conducts consumer satisfaction surveys?
- Who provides policy and procedure manuals for the facility?
- Who provides all the forms for the facility that are directly involved with patient care, including the medication administration record (or MARS), progress notes, requisition forms, and staffing charts?
- Who hires the medical director and pays his or her salary?
- Who signed the contract with the medical director?
- Do "corporate" nurses come to the facility on a regular basis and look at patient charts? If there were problems with patient care, would they know about them?
- Does the facility have formal risk-management protocols? Who sets them?
- How is risk management centralized, what is the hierarchy, and who is involved?
- Do you ever send incident reports to anyone outside the facility? Who, when, and why?

- If so, and you say you run this facility, why aren't you involved in this process? Why do you send confidential incident reports with confidential patient information to an outside entity?

Corporate-level deponents

- Go through most of the same questions and areas of inquiry with a corporate deponent that you covered with the facility administrator, establishing the administrator's true lack of authority.
- Establish a detailed hierarchy of the management-level company, and obtain a list of all titles or positions as well as the name of the person who holds each position. Also, get a detailed description of each person's role and responsibilities.
- Gather names of all corporate entities involved with the facility, and get details on what they do for the facility, what services they provide, who hired them, and who negotiated the contract. (The Medicaid cost reports will contain a list of "related party transactions" that will list several other entities about which you should inquire.)
- Get a detailed description of the entire organization. Ask what other facilities are also "managed" by this company, how many facilities, where they are located, and whether they all have the same management agreements and the same policy and procedures in place.
- Explore the relationship between your facility and that company. Ask when it began, who decided to hire the management company, who negotiated the terms, and who signed the contract. Usually no one from the facility had anything to do with these decisions, which is further evidence of outside control.
- Explore the terms and responsibilities under any management agreement or contract in place between the facility and the corporate office.
- Explore the details of the budget process. Ask the deponent to explain the process from start to finish, including how it is created, who is involved, what the main expenses are (staffing is key), who approves the final budget, who has authority to deviate from budget, and what budget variances there are (as well as how and by whom they are approved). Are there monthly reports or updates? Who creates them, and who receives them?
- You can use these same points to inquire about the policy and procedure manuals. Also ask: Do you expect staff to follow the policy and procedures you provide? Can they be disciplined for not following them? Do you agree that they affect patient care?

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