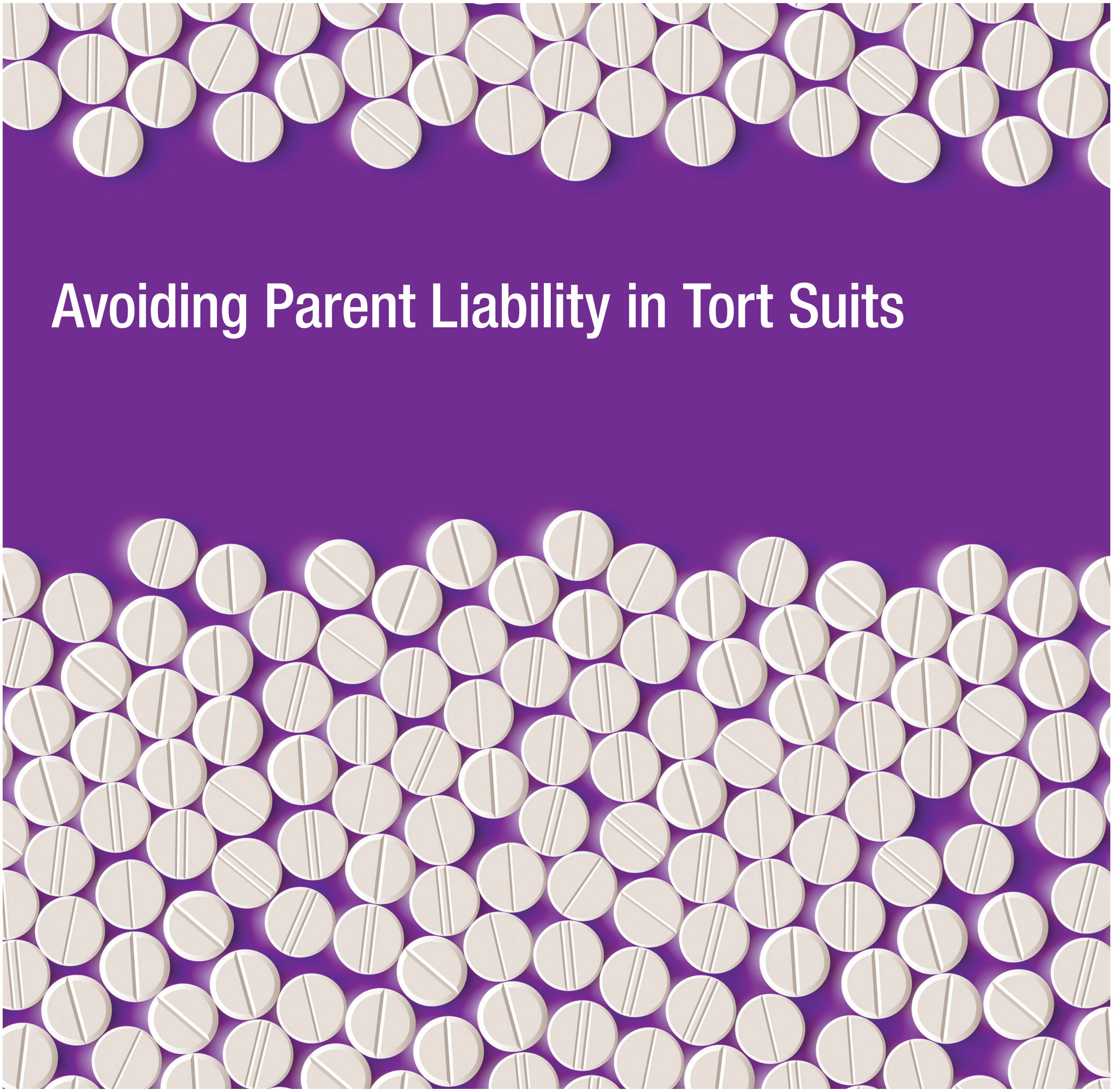
By Jessica D. Miller and Geoff M. Wyatt



Avoiding Parent Liability in Tort Suits

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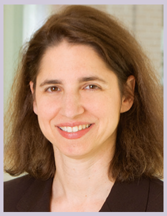

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A growing trend among plaintiffs in mass tort litigation is naming not just the manufacturer, but also its parent company or companies as defendants. Plaintiffs have turned to this tactic both in an attempt to destroy diversity—and thus keep cases in state court and out of federal multi-district litigation ("MDL") proceedings—and to add deeper pockets for purposes of justifying large punitive damages requests. Basic principles of corporate law nearly always dictate that such claims against parent companies have no merit, and the great weight of authority is against parent company liability in product liability suits. Nevertheless, these tactics occasionally succeed. And even when parent companies are ultimately excused from litigation, defendants may have invested significant litigation resources in defending against allegations of parent company liability. Thus, parent companies and their attorneys should take steps before and during litigation to create opportunities for an early exit from litigation by parent companies.

This article addresses potential risk areas for creating liability for parent companies and potential pre-litigation steps that can be taken to minimize exposure to such risks, particularly in the area of product liability. It also addresses steps to take once litigation is filed in order to extinguish such claims in a timely manner.

Before Litigation: Minimizing Risk of Parent Liability

Before the onset of litigation, parent companies can minimize potential exposure for their subsidiaries' products by carefully structuring their relationships with subsidiary companies. In this section, we examine four key areas of risk: (1) a parent's exercise of significant control over subsidiary affairs; (2) a parent's involvement in the production of a subsidiary's products; (3) a parent's involvement in the promotion of a subsidiary's products; and (4) the subsidiary's use of the parent's name or logo on the product or its packaging.

Control Over the Subsidiary

First and foremost, parents should make certain that they and their subsidiaries operate as truly separate companies. The law generally affords a "presumption" of corporate separateness, *e.g.*, *Freudensprung v. Offshore Technical Servs., Inc.*, 379 F.3d 327, 346 (5th Cir. 2004), but parents should be wary of losing the benefit of that presumption by exerting too strong an influence over subsidiaries' affairs. Specifically, plaintiffs in some cases have argued that a parent's control of a subsidiary is so overwhelming that the two are in fact acting as one company, and that the court should therefore "pierce the corporate veil" and assign liability to the parent for the subsidiary's actions.

Courts may place particular emphasis on equitable considerations, such as whether the parent has transferred resources from the subsidiary, leaving it unable to pay an adverse judgment.

Courts consider a variety of factors in deciding whether to pierce the corporate veil, including: "(1) the amount of stock owned by the parent of the subsidiary; (2) whether the entities have separate headquarters; (3) whether corporate formalities are observed; (4) whether the entities maintain separate accounting systems; and (5) whether the parent exercises complete control over the subsidiary's general policies or daily activities." *Id.* Courts may place particular emphasis on equitable considerations, such as whether the parent has transferred resources from the subsidiary, leaving it unable to pay an adverse judgment. *von Grabe v. Sprint PCS*, 312 F. Supp. 2d 1285, 1298 (S.D. Cal. 2003) (citing *Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1393-94 (9th Cir. 1984)).

Parent companies should take these factors into account in structuring their affairs with their subsidiaries. Note that none of these factors is in itself dispositive—a parent might, for example, share several directors with a subsidiary and nevertheless be deemed sufficiently separate to enjoy the protection of the corporate veil. *E.g.*, *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1160 (5th Cir. 1983). Rather, in structuring corporate affairs, parent companies should be aware that the more control they exert over subsidiaries as measured by factors like these, the greater the risk that a court will determine they are liable for claims involving a subsidiary's products or conduct.

Involvement in the Manufacturing Process

Parent companies should also consider the extent of their direct involvement (if any) in the manufacture of their subsidiaries' products. Plaintiffs in some cases have argued that liability should be imposed on the parent on a theory of concert of action, aiding and abetting, or conspiracy where there is some evidence of substantive involvement in a subsidiary's product line.

Courts are generally skeptical of such claims, noting that allowing liability for concert of action and the like could easily work an end run around the corporate veil. *E.g.*, *Pizza Mgmt., Inc. v. Pizza Hut, Inc.*, 737 F. Supp. 1154, 1166 (D. Kan. 1990); *In re TMJ Implants Prods. Liab. Litig.*, 880 F. Supp. 1311, 1319–20 (D. Minn. 1995). But some courts have nevertheless allowed such claims to proceed beyond the dispositive motion stage, underscoring another possible area for exposure, depending on the type and degree of involvement by the parent. In *American Copper and Brass, Inc.*, 452 F. Supp. 2d 821 (W.D. Tenn. 2006), for example, the court concluded that it would be proper to exercise personal jurisdiction over a parent with no connections to the forum if the plaintiff plausibly alleged a conspiracy between the parent and subsidiary with respect to the subsidiary's conduct, and it noted that courts have taken different stances on the propriety of such claims. *Id.* at 829–30. Similarly, in *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020 (Del. Ch. 2006), the court acknowledged but rejected the line of cases expressing reluctance to hold parents liable based on a conspiracy theory. It reasoned that parents would receive sufficient protection from Delaware's requirement of scienter for liability in civil conspiracy or aiding and abetting, which makes "liability of a parent… turn on the more appropriate notion of the parent's own culpability for the harm caused to a plaintiff." *Id.* at 1036–44.

Based on this mix of case law, the viability of claims against parents for their alleged involvement in the manufacture of their subsidiaries' products might turn on the controlling substantive law as much as anything else. Nevertheless, parent companies seeking to minimize litigation risk should be aware that aggressive plaintiffs might try to identify parental involvement in the affairs of their subsidiaries as a basis for seeking recovery against the parent.

Promoting a Subsidiary's Product

Parent companies may also put themselves at risk for liability by engaging in extensive promotional efforts on behalf of their subsidiaries. A plaintiff alleging that such promotions included misrepresentations on which he or she relied may be able to persuade a court to allow a fraud-based claim against the parent to proceed to trial.

Although courts have also expressed skepticism of these sorts of claims—particularly where the statements from the parent were more general in nature and not clearly designed to induce purchases of a particular product, *see, e.g.*, *In re TMJ*, 880 F. Supp. at 1317–18—a few courts have been receptive, at least at the dispositive motion stage, where some allegation has been made of a particular representation on which the plaintiff relied. In *Atel Marine Investors, LP v. Sea Mar Management, L.L.C.*, for example, the plaintiff alleged that it was induced into entering a contract with a chartering company based on fraudulent representations that were orchestrated entirely by the parent company. No. 08-1700, 2009 U.S. Dist. LEXIS 120102, at *3–4 (E.D. La. Dec. 23, 2009). In light of the allegation that the parent company had itself orchestrated the alleged fraud, the court concluded that there were at least sufficient minimum contacts to assert personal jurisdiction over the parent, scuttling the parent's effort to remove itself from the litigation at an early stage. *See id.* at *10–13; *see also, e.g.*, *Lay v. DePuy Orthopaedics, Inc.*, No. 3:11-cv-03590-K, 2014 U.S. Dist. LEXIS 97743, at *10–12 (N.D. Tex. July 18, 2014) (denying motion to dismiss parent company where the plaintiffs argued that the parent had helped broadcast promotional material regarding an allegedly defective product, despite lack of evidence of reliance).

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Again, most cases reject personal jurisdiction and liability under similar circumstances. But the risk of liability may increase if a parent company speaks with the intention that potential customers rely on the message in choosing to purchase a subsidiary's product. Thus, parent companies seeking to minimize risk of exposure to liability might wish to stay out of the business of promoting their subsidiaries' products or even exercising significant editorial control over the subsidiaries' own promotional efforts.

The Subsidiary's Use of the Parent's Name or Logo

One other area of potential risk involves the subsidiary's use of the parent's name. Under a variety of theories, including the "apparent manufacturer" doctrine and various agency arguments, plaintiffs have argued that a parent should bear some liability where the subsidiary makes use of the parent's name either on the product or in accompanying packaging, instructions, or other materials.

Typically, something more than the mere mention of the parent company or the mere use of its logo has been required to allow such claims to proceed. *See, e.g.*, *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1461 (2d Cir. 1995) (holding that the mere reference to the parent company in marketing materials for a subsidiary's product was not sufficient to give rise to parent liability). Nevertheless, some courts have allowed claims against a parent to proceed based on little more than the use of the parent's name on the product where it was shown that the use of the parent's name was intended to cause buyers to rely on that representation as an assurance of the product's quality. *See, e.g.*, *Lou v. Otis Elevator Co.*, 933 N.E.2d 140, 147 (Mass. App. Ct. 2010). In *Brandimarti v. Caterpillar Tractor Co.*, 527 A.2d 134 (Pa. Super. Ct. 1987), for example, the court concluded that a Caterpillar subsidiary's use of the Caterpillar name on equipment it manufactured was enough to create a question of liability for the parent despite the fact that Caterpillar played no role itself in the product's manufacture. *Id.* at 139–40. Another court rejected parent company liability based on shared use of a name, but rested its ruling on the absence of any evidence that the plaintiffs were misled by or otherwise relied on the name, suggesting that a different outcome might follow in a case where such evidence was proffered. *TMJ Implants*, 880 F. Supp. at 1321.

Thus, parent companies trying to minimize the risk of exposure in advance of litigation should consider the extent to which the parent's name or logo is associated with a subsidiary's products. In many cases, merely pointing out the relationship between the manufacturer and its parent company is unlikely to give rise to parent liability. But plaintiffs may be more apt to try to claim parent liability in cases where the parent's name is attached to a subsidiary's product in a way that is designed to stand for an assurance of quality, particularly where the plaintiff claims to have been induced to purchase the product on that basis.

Responding When Parent Companies Are Named as Defendants

Even the most ambitious precautions cannot guarantee that a parent will not be named in litigation involving a subsidiary's products because parents are often named for reasons that have little to do with their actual involvement in the subsidiary's affairs. For example, a plaintiff might name a parent company based in a different state from its subsidiary in an attempt to block removal to federal court where the plaintiff and the parent are located in the same state. A plaintiff might also name the parent as a defendant in the hopes of pressing for an inflated punitive damages verdict where the parent's assets or profits are significantly more extensive than the subsidiary's. Or a plaintiff might name a parent mistakenly or on (erroneous) "information and belief" that the parent has played a role in manufacturing or promoting the subsidiary's product.

Attorneys representing a parent company named in litigation involving subsidiaries' products should undertake a careful assessment of the plaintiffs' purpose in including the parent as a party. In some cases, particularly where the parent has been named erroneously, and especially if the parent is willing to identify the proper defendant, an attorney might be able to reach an agreement with the plaintiff to voluntarily dismiss the parent from the suit before any significant proceedings take place.

Voluntary dismissals are less likely, at least in the early going, if the plaintiff has named the parent for litigation-related purposes such as securing a state forum or pursuit of punitive damages. In these cases, the parent's attorneys have a number of tools at their disposal to attempt to obtain an early win for the parent. If the plaintiff's apparent purpose is to block removal to federal court, for example, removal should still be strongly considered. As noted, the presumption afforded to the corporate veil makes most courts skeptical of parent liability, giving good ground in many cases to remove on a theory of fraudulent joinder. Indeed, courts have rejected remand motions on precisely this ground in a number of cases. *See, e.g.*, *Lopienski v. Centocor, Inc.*, No. 07-4519 (FLW), 2008 WL 2565065, at *4 (D.N.J. June 25, 2008) (concluding that Johnson & Johnson was fraudulently joined in personal injury suit alleging that a subsidiary's prescription drug was defective, explaining that the parent has no role in making or selling the drug and that the plaintiff's allegations were "no more than a strained attempt at linking the two entities" based solely on their corporate affiliation).

If the plaintiff's apparent purpose is actually to impose liability on the parent—either to increase punitive damage exposure or identify additional potential payors in the event the subsidiary turns out to be judgment proof—early dispositive motions should be strongly considered on at least two grounds. First, the parent may have a strong argument that the court lacks personal jurisdiction over it. *See, e.g.*, *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). Most notably, a parent that acts largely or exclusively as a holding company and has few or zero operations outside the state in which it is headquartered could very well argue that it lacks minimum contacts with the state where a lawsuit is brought. This is so even if the subsidiary has extensive contact with the state; generally, a subsidiary's contacts are not attributed to the parent for purposes of determining minimum contacts. *See, e.g.*, *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 773–74 (5th Cir. 1988).

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Parents with significant activities in the forum state might have "minimum contacts" with the forum for personal jurisdiction purposes, but they might remain beyond the jurisdiction of the forum's courts if those activities are unrelated to the issues in the lawsuit. As one case explained, "due process demands something like a 'proximate cause' nexus" between the parent's activities in the forum and the plaintiff's lawsuit in order to allow the exercise of personal jurisdiction over the parent. *Negron-Torres v. Verizon Commc'ns, Inc.*, 478 F.3d 19, 25 (1st Cir. 2007) (citation omitted). In that case, for example, the fact that Verizon Communications, a parent company, had some contact with Puerto Rico did not justify the exercise of personal jurisdiction because the plaintiff's claim was aimed at a subsidiary's disconnection of 911 service, a particular event that the plaintiff could not trace to the parent company's contacts to Puerto Rico apart from general and conclusory allegations that the parent had failed to exercise sufficient oversight over the subsidiary. *Id.*

A personal jurisdiction defense, if viable, should be asserted early and often in order to avoid any potential argument of waiver. Early motions are advantageous for other reasons as well. Notably, the parent need not wait for broad discovery to develop facts relevant to the jurisdictional question. Even at the motion to dismiss stage, the parent is permitted to present evidence that is relevant to jurisdictional questions—evidence that courts must credit to the extent they contradict factual assertions in the pleadings (unless, of course, the plaintiff responds with conflicting evidence of his or her own). *See, e.g.*, *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1214 (11th Cir. 1999) ("The plaintiff bears the burden of proving by affidavit the basis upon which jurisdiction may be obtained… if the defendant challenging jurisdiction files affidavits in support of his position.") (internal quotation marks and citation omitted). Thus, parent companies should strongly consider supporting motions to dismiss based on the lack of personal jurisdiction with evidence showing the parent's lack of involvement with the product or connection to the forum—evidence that will often take the form of affidavits or declarations from corporate officers describing the parent company's relationship with the subsidiary and the parent's lack of involvement with the product at issue.

Second, even if a motion to dismiss for lack of personal jurisdiction is not appropriate or for some reason denied, the parent might also wish to consider moving for summary judgment. The merits of a claim against a parent are generally subject to serious challenges absent compel-

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ling evidence of extensive involvement by the parent in the manufacture, sale, or promotion of the product that allegedly injured the plaintiff. This may be so even if the plaintiff prevailed against the parent on a jurisdiction-based motion to dismiss, as the plaintiff's burden on the personal jurisdiction question increases as the case proceeds toward trial. *See, e.g.*, *Travelers Indem. Co. v. Calvert Fire Ins. Co.*, 798 F.2d 826, 831 (5th Cir. 1986) (Where "the plaintiff avoids a preliminary motion to dismiss by making a prima facie showing of jurisdictional facts, he must still prove the jurisdictional facts at trial by a preponderance of the evidence.") (citation and internal quotation marks omitted). That burden is no lighter in cases where the plaintiffs have joined the parent merely to flash the parent's large net worth or profits in front of the jury. It is well established that a parent's assets are irrelevant to deciding whether to award punitive damages—or how much to award—against a subsidiary. *See, e.g.*, *In re Welding Fume Prods. Liab. Litig.*, MDL No. 1535, No. 1:03-CV-17000, 2010 WL 7699456, at *48–49 (N.D. Ohio June 4, 2010) (excluding expert's opinions regarding parent company's financial condition because "the relevant financial data must be specific to the defendant, not its parent"). Thus, if the parent has no real connection to the case, it should be dismissed regardless of the plaintiff's purpose in naming it.

Conclusion

In short, courts are generally skeptical of claims of parent liability for good reason: such claims are often frivolous and undermine well established protections that have long been afforded to corporations under U.S. law. They can cause tremendous headaches for clients as litigation costs mount in attempting to get the claims dismissed, and in some cases, what begins as a mere irritation can metastasize into a serious litigation risk if not properly managed. Thus, companies with subsidiaries that face a risk of tort liability should consider whether their operations could be structured more optimally to narrow the ground for plausible argument that the parent should be liable for the subsidiary's conduct. Any claim made against a parent in litigation that appears directed at the subsidiary's product or conduct should be met with immediate scrutiny and, in most cases, litigated aggressively from the earliest stages.