personal and carry-on items through the device that scans them and it's your turn to walk through the backscatter X-ray scanner, let the agent know that you are opting out. You will be asked to step to the side, and the agent will call out, "male assist" or "female assist," as the case may be. You will then wait until an agent is free and tasked to collect you. You will be directed on a path

strip search flashed before my eyes. I was met with an impassive agent, however, who explained that false positives were routine, but that I would have to step into a small, private room for a more "personal" inspection.

So off we traipsed to a frost-encased cubicle for a more rigorous pat down. Once this was finished, a new swab was performed and a happy green signal

Who is whose alter ego, and does it matter?

By Christopher Land

Most litigators have doubtless encountered allegations of "alter ego" liability. Plaintiffs' attorneys might routinely include such allegations in complaints, and defense attorneys might roll their eyes on reading those complaints. Given the prevalence of the doctrine, attorneys on both sides of the bar should familiarize themselves with its application. However, there is considerable variance among attorneys and even courts in the language used to describe the relationship of the relevant parties.

Typically, there are three parties, the plaintiff and two others: the "wrongdoer" (often a subsidiary) who wrongs the plaintiff and the "target" (often a parent company) from whom the plaintiff seeks a remedy. The plaintiff must establish a unity of ownership and interest between wrongdoer and target and that an inequitable result would follow if the target were not held liable. *Laird v. Capital Cities/ABC, Inc.* (1998) 68 Cal. App. 4th 727. Legal writing diverges in describing the relationship between wrongdoer and target.

Some decisions characterize the *wrongdoer as the alter ego of the target.* E.g., *Sonora Diamond Corp. v. Super. Ct. (Sonora Union High Sch. Dist.)* (2000) 83 Cal. App. 4th 523. Other decisions describe the converse, the *target as the alter ego of the wrongdoer.* E.g., *NEC Elecs. Inc. v. Hurt* (1989) 208 Cal. App. 3d 772. This version makes the most intuitive sense because the plaintiff is pursuing the wrongdoer's alter ego instead of the wrongdoer itself. *Motores de Mexicali v. Super. Ct. (Resnick)* (1958) 51 Cal. 2d 172, falls in the former category but is described under the latter rubric in *NEC.* The dissent in *Minton v. Caveny* (1961) 56 Cal. 2d 576, follows the latter, as does the discussion of *Minton* in *Creative Labs, Inc. v. Max Group Corp.* (Cal. App.) 2009 WL 1153964.

Other decisions skate the issue by calling both parties alter egos of each other. *Brooklyn Navy Yard Cogeneration Partners, L.P. v. Super. Ct. (Parsons Corp.)* (1997) 60 Cal. App. 4th 248. Similarly, the *Minton* majority and *Tran v. Farmers Group, Inc.* (2002) 104 Cal. App. 4th 1202, simply apply the "alter ego doctrine" without distinguishing the parties.

What this variance means for attorneys is careful reading and analysis is needed, with care taken to ensure they analogize their client/opponent to the correct party in decisions. Opposing counsel on a new case might even consider agreeing in advance to describe the (alleged) relationship in a particular, consistent way throughout the litigation to promote clarity. Judges and clerks will likely appreciate it, too.

Further, it is important for plaintiffs' attorneys to at least name the wrongdoer, however characterized relative to the target, as a defendant. "Generally, the real party in interest should be made a party to the action so that the court's orders may be imposed directly." *Weisman v. Odell* (1970) 3 Cal. App. 3d 494. Omitting the wrongdoer has both practical and legal consequences, which attorneys defending the target can employ. As a practical matter (and based on experience), omitting the wrongdoer, i.e., suing only the target for something it did not directly do, is sure to *infuriate* the target, leading to a more aggressive defense.

Legally, omitting the wrongdoer impacts the "inequitable result" element of the alter ego doctrine. The absence of the wrongdoer does *not* mean that exonerating the target is inequitable to the plaintiff. *Laird.* Indeed, holding an innocent target liable might be found a result inequitable *to the target.* See *Watts v. Farmers Ins. Exchange* (2002) 98 Cal. App. 4th 1246.

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In addition, omitting the wrongdoer can obstruct the plaintiff's discovery. If the plaintiff requests that the target produce the wrongdoer's documents, then the plaintiff, as the propounding party, has the burden of proving that the target has control of them. See *United States v. Int'l Union of Petroleum & Indus. Workers* (9th Cir. 1989) 870 F.2d 1450. In the common scenario of target-parent company and wrongdoer-subsidiary:

* The target-parent does *not* have control over documents of a 43.8 percent-owned subsidiary. *In re Uranium Antitrust Litigation* (N.D. Ill. 1979) 480 F. Supp. 1138.

* Over 50 percent ownership might be the threshold to establish control. *In re Uranium.*

* More definitively, 100 percent ownership establishes control. *Gerling Int'l Ins. Co. v. Comm'r of Internal Revenue* (3d Cir. 1988) 839 F.2d 131.

In the reverse scenario of target-subsidiary, to find control over documents of the wrongdoer-parent, the two companies must be alter egos, be agent and principal, or meet similar tests. *Gerling.* That leaves a plaintiff in the circular position of having to prove alter ego in order to obtain discovery on alter ego. The safer practice is to include the wrongdoer as a party and propound discovery to it directly. This route best facilitates the exchange of information between the three parties and evaluation of the relationship between wrongdoer and target.

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