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Protecting Nursing Home Companies: Limiting Liability Through Corporate Restructuring

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ABSTRACT: Nursing homes face two potential risks: exclusion from the Medicare and Medicaid programs; and financial liability through Medicare and Medicaid overpayments, false claims, and negligence actions. Given the current budget crisis and the scrutiny of nursing homes, the magnitude of these risks is only expected to increase. The authors address the increasing risks that nursing homes face and propose the creation of single-purpose ownership entities and single-purpose operating entities to minimize risk. In addition, they examine recent cases to show what factors the courts use to allow the United States and private plaintiffs to pierce the corporate veil. The authors conclude by showing how restructuring can reduce the unnecessary risks of exclusion and financial liability.

A corporation is an autonomous entity "separate and distinct from its shareholders, directors and officers, and generally, from other corporations with which it may be affiliated." . . . This autonomy shields parties related to a corporation from the liabilities of that corporation. . . . Indeed, one of the primary purposes of the corporate form is to insulate shareholders from financial liability for a corporation's debts. . . . . Equity, however, has created a device called "piercing the corporate veil," which prevents purveyors of fraud and injustice from hiding behind the corporate form of organization. . . . Using this

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> device in appropriate circumstances, courts will disregard the separate identities of corporations controlled by a common parent.[1]

In that concise statement, the Seventh Circuit outlined the essential purpose of the corporate form of doing business, and the circumstances in which the protections of that form will be denied to its owners. The creation of the legal concept of a corporation is viewed by many as one of the essential factors that fueled the Industrial Age and permitted the accumulation of resources to advance undertakings beyond the capacity of the wealth of individuals. Whether it was a corporation formed for the exploration and development of the New World or a corporation formed for the mass production of automobiles, the corporate form allowed the accumulation of wealth from a large number of investors without exposing their personal fortunes to loss if the venture failed. The corporation was invented for the express purpose of limiting the liability of investors to the amount of their investment. Thus, the use of the corporate structure to create insulation from liability is hardly a perversion of the corporate form; rather, it is an application of its primary purpose.

Business Organizations

Recently, the principles underlying the corporate form of doing business have expanded to apply to other forms of legal entities, such as limited liability companies and limited liability partnerships. Today, business enterprises can select among various legal forms to pool resources and limit the liability of investors.

In the context of nursing home ownership and operation, legal entities such as corporations, limited liability companies, and limited liability partnerships can be formed to benefit nursing home companies by limiting the financial liability and Medicare and Medicaid exclusion exposure of the real-estate investors and business owners. For example, the business entities that result from restructuring can help a nursing home operator avoid unnecessary exclusion of all Medicare and Medicaid providers currently owned by the same entity, in the event that any one of them is excluded from the Medicare or Medicaid programs. The business entities can also prevent litigants from obtaining judgments against related companies, and the owners personally, in proceedings alleging Medicare or Medicaid overpayments, false claims, or negligence.

In addition to providing a shield to protect against exposure to risk, the creation of multiple asset-holding entities can affirmatively benefit a nursing home company. For example, commercial lenders and private investors often are more willing to lend to owners of real estate that are not engaged in the actual operation of nursing homes. Further, acquisition and divestiture of individual nursing homes often can be more easily accomplished if the assets are held in a single-purpose entity (SPE). The focus of this Article, however, will be limited to the avoidance of risk by use of multiple SPEs.

Due to the risks associated with exclusion from the Medicare and Medicaid programs and being named a defendant or respondent in a lawsuit or administrative proceeding, nursing home companies should seek to carefully protect the assets of their owners. One way to accomplish this is to divide the business into real-estate investment and nursing home operations. This can be achieved by forming SPEs to own the nursing home real estate, and separate SPEs to operate the nursing home business. Numerous SPEs may be less attractive as defendants than a single company with multiple operating interests and multiple real estate holdings. Moreover, upon the unfortunate occasion of receiving a notice of intent to exclude, a nursing home that is operated by a SPE is more easily divested. Further, it is divested without the impendent substantial losses often associated with having to divest a number of homes that happen to be owned by the same entity that owns the home to be excluded.

Ultimately, any decision to restructure must be made based on an assessment of the nursing home company's business goals. That assessment involves a balancing of acceptable risk with acceptable costs. Fortunately, restructuring need not be an "all or nothing" exercise. Restructuring can be undertaken at a variety of different levels, depending on the individual company's balancing of risk and cost.

For example, a company could decide to restructure down to the individual facility level by forming real property SPEs to own each piece of real estate that is used as a nursing home, and by forming a corresponding number of operating SPEs to lease and operate the nursing homes. Alternatively, a company could decide to subdivide its operations into subsidiaries that own and operate only a certain number of facilities each, based upon the level of risk the company is willing to accept. In addition, a company could elect to place all of its real estate in a real property SPE, but operate each facility through an operating SPE. In effect, any restructuring should be customized to the particularized needs of each company.

Finally, in order to preserve the integrity of the restructuring, nursing home companies must continue to eschew unnecessary and avoidable risk. The sanctity and independence of the business entity must be preserved because litigants and the government may attempt to disregard the legal structure of a SPE to collect judgments and overpayments against owners and related companies. Whatever form they take, nursing home business entities must adhere to statutory formalities, preserve the distinction between the business entity and those individuals or entities with ownership or control interests, be adequately capitalized, and avoid even the appearance of siphoning revenues to individuals or entities with common ownership or control.

I. Two Risks Facing Nursing Homes: Exclusion and Financial Liability

There are two types of exposure that nursing homes seek to avoid: exposure to exclusion from the Medicare and Medicaid programs and exposure to financial liability. The first type of exposure, exclusion exposure, is premised upon federal law that authorizes the Secretary of the United States Department of Health and Human Services (DHHS), acting through the Office of Inspector General (OIG), to exclude a provider from federal healthcare program participation upon the occurrence of certain events.[2] Under this authority, the DHHS Secretary may exclude a provider and its related entities when the provider has violated certain laws.

The second type of exposure, financial exposure, is that liability which makes the assets of owners vulnerable to claims made upon the business entity. It arises most frequently in the context of tort liability; that is, liability that generally stems from negligence-based actions against nursing homes. Financial exposure, however, can also occur in the regulatory context. This refers to liability that stems from Medicare and Medicaid overpayments, fraud, or false claims.

A. Exposure to Exclusion from the Medicare and Medicaid Programs

The Social Security Act vests in the Secretary of DHHS both mandatory and permissive exclusion authority.

Under the mandatory exclusion provisions, the DHHS Secretary must exclude certain individuals and entities from participation in federal healthcare programs for at least five years if, among other things, the individual or entity is convicted of "a criminal offense related to the delivery of an item or service" under the federal Medicare program or under any State healthcare program.[3]

Under the permissive exclusion provisions, the DHHS Secretary may exclude additional individuals or entities from participation in federal healthcare programs.[4] In addition to excluding the individuals or entities that engaged in the prohibited conduct, the DHHS Secretary may exclude entities owned[5] or controlled[6] by a sanctioned individual or entity, even if those entities have been convicted of nothing.[7] As such, the DHHS Secretary may exclude an entity from federal healthcare-program participation if a five-percent owner of the stock or assets or an officer, director, partner, agent, or managing employee is sanctioned.[8] Moreover, the exclusion cannot be circumvented by having the excluded individual or entity transfer or sell the interest in the entity to an immediate family member or sibling.[9] To avoid application of these provisions, the ownership or control interest must be transferred to an unrelated entity or person.

Thus, if all of the company's nursing homes are owned and operated by a single company and that company is excluded from the Medicare and Medicaid programs based on the conduct of just one of the nursing homes, the company's nursing home real estate and operations are at unnecessary risk of exclusion. All of the nursing homes could be excluded from the Medicare and Medicaid programs. Furthermore, to avoid permissive exclusion attaching to the real estate owned by the company, the real estate would have to be transferred out of the company. This type of a divestiture can result in substantial loss of value in the asset, especially because many such divestitures must be accomplished on very short notice and under very adverse conditions.

B. Exposure to Financial Liability

Exposure to financial liability has specific meaning in the context of structuring nursing home organizations. Certainly every business entity has some form of financial liability exposure based upon contractual obligations, potential negligence actions, employment-related litigation, tax law matters, and other risks that occur in the ordinary course of conducting a business. The financial exposure that a nursing home operator is most concerned with, however, is the liability exposure particular to operators of nursing homes.

1. Medicare and Medicaid Overpayment Liability

A Medicare fiscal intermediary may suspend payments to or recoup payments from the individual or business entity that enters into an agreement with the Medicare program to provide services to Medicare beneficiaries. This can occur if, for example, it finds fraud, misrepresentation, incorrect payments, payments for unnecessary services, or overpayments related to that Medicare provider.[10] The fiscal intermediary has no authority, however, to suspend payments to or recoup payments from entities *other than* the provider for allegations raised against that provider.[11] Thus, the fiscal intermediary may not recoup overpayments from another entity merely because it is affiliated with the provider by common ownership or control.

Under many states' laws, the state Medicaid agency similarly may suspend payments to or recoup payments from a provider if it finds fraud or overpayments related to that provider.[12] Generally, the Medicaid agency's authority is limited to recouping overpayments from the provider only, and the agency cannot recoup from or offset against other entities merely because they are affiliated with the provider by common ownership or control.[13]

Federal and state governments' efforts to aggressively recover overpayments from providers are expected to increase in the future. Recent reports indicate approximately $8 billion is owed to the federal government in Medicare overpayments at a time when Medicare spending is on the rise and budgets are being cut.[14] Both the General Accounting Office and the OIG have noted the Medicare program's lack of progress in collecting debts, such as provider overpayments.[15] States also are facing shortfalls in Medicaid budgets, and the fiscal outlook for states does not appear to be improving.[16] They project worsening budget conditions, and many are looking at new methods of controlling Medicaid deficits, such as increasing fraud and abuse control and increasing third-party liability collections.[17] Given these pressures, it is expected that federal and state governments will aggressively pursue overpayment liability, which has the potential to cause cash-flow problems of enormous magnitude for any nursing home that might be targeted, as well as any successor or assignee of such a provider.

2. False Claims Liability

The federal False Claims Act and its whistleblower provisions create liability for Medicare and Medicaid providers who knowingly submit false or fraudulent claims for payment to federal healthcare programs.[18] The False Claims Act also has been used as a mechanism for prosecuting nursing home providers that receive Medicare and Medicaid payments, but that allegedly provide substandard quality of care.[19] The government can threaten a company with monetary penalties of enormous magnitude because the False Claims Act authorizes penalties of between $5,500 and $11,000 per false claim, as well as treble damages.[20] One nursing home company recently paid approximately $176 million to settle criminal and civil false-claims allegations related to its billing practices.[21] Another nursing home company recently paid $104.5 million to settle civil false-claims allegations for, among other things, failing to provide care, inadequate staffing, improper care of decubitus ulcers, and failure to meet residents' dietary needs.[22]

In addition, many states have false-claims statutes that create additional liability for Medicaid providers who knowingly submit false or fraudulent claims for payment to the state Medicaid program.[23] Moreover, several states have false-claims statutes that contain whistleblower provisions.[24]

Nursing homes' exposure to false-claims allegations is not expected to wane in the near future. Recent reports indicate that dollars spent by the federal government for anti-fraud enforcement activities are well-invested.[25] Recent reports also suggest that similar returns could result from investigating and prosecuting Medicaid fraud and enhancing state whistleblower provisions.[26] As a result, it is expected that federal and state governments will aggressively pursue Medicare and Medicaid false-claims actions, and nursing homes will remain ever-popular targets.

3. Malpractice/Negligence Liability

Plaintiffs may bring lawsuits against nursing home companies seeking damages under a variety of tort theories. More than a few judgments against nursing homes have been based on specious allegations. Nonetheless, the reality is that nursing homes are unsympathetic defendants. Nursing homes care for those with little or no potential for improved health outcomes and those with unavoidable negative outcomes, and they rely primarily on public funds from the Medicare and Medicaid programs for payment. Nursing homes, however, are often viewed as nothing more than vehicles for mistreating and profiting from the elderly and fragile.

As a result of their image, nursing homes are relatively easy targets for plaintiff's attorneys, who can reap extremely high jury verdicts that include punitive-damage awards. For example, one jury recently awarded approximately $2.8 million in actual damages and $310 million in punitive damages to the family of a nursing home resident who suffered malnourishment and bed sores while residing at the nursing home.[27]

Recent reports estimate the number and amount of nursing home liability claims to be on the rise. Claims against nursing homes have tripled from 4.6 claims per 1,000 beds in 1991 to 14.5 claims per 1,000 beds in 2002.[28] Moreover, the average size of a claim has tripled from $63,500 in 1991 to just under $200,000 in 2002.[29]

The financial reality of these claims is a "multi-billion dollar a year cost to the nursing home industry."[30] The insurance industry has responded to the increase in the number and amount of claims by raising premiums and restricting the availability of general and professional liability insurance.[31] Recent reports indicate that nursing home liability-insurance premiums have sharply increased in recent years—some nursing home operators experienced increases of 143% from 2001 to 2002.[32] Furthermore, in those states in which the losses were highest, such as Florida and Texas, nursing home liability insurance often is not available.[33]

As a result of the increase in insurance premiums and the unavailability of coverage, many nursing homes significantly decreased their coverage and many are without any coverage at all. This phenomenon places the nursing home's assets at greater risk: In the event of a malpractice or negligence judgment against the nursing home, judgment creditors will pursue all available assets of the nursing home company to satisfy the judgment.

If all of the company's nursing homes are owned and operated by one company and if there is a substantial recoupment action against one of the nursing homes, a False Claims Act treble-damages award against another, and a punitive-damages verdict against a third, the assets and operations of all of the nursing homes are potentially in jeopardy. The nursing home company would bear the responsibility for the liabilities incurred as a result of the conduct of the three facilities, as well as the ongoing operations of all of the facilities. Assuming the liabilities all related to the poorest-performing nursing homes in the portfolio it is likely that, unless the company has substantial reserves, operating revenues derived from the other nursing homes would become necessary to satisfy the creditors.

Furthermore, the creditors would look not only to the operating revenues to satisfy the judgments, but would also aggressively pursue all available assets, including real estate, owned by the company. Instead of isolating the risk at the facility level and with the operating entity, the company has exposed its real estate and operating assets to the financial liability associated with only a subpart of its nursing home operations. Finally, in the event the judgments preclude the company from satisfying its monthly mortgage payments, the real estate may be unnecessarily at risk of liens or foreclosure, and the company at risk of a foreclosure on a pledge of its stock or membership interests.

II. Structuring to Reduce Risk: Separating the Real-Estate Investment from the Nursing Home Operations

These risks—exclusion and financial liability in the form of Medicare or Medicaid overpayments, false-claims settlement or treble-damages awards, and punitive-damages verdicts—arise as a result of the operation of the nursing home business. Individually or in the aggregate, they can lead to a crisis for any nursing home company. Restructuring can help reduce the overall risk.

Dividing the nursing home business into real-estate investment and nursing home operations will reduce the nursing home company's exposure to risks associated with owning and operating one or more nursing homes. The degree to which this reduction of risk can be maximized will be a function of how elaborate a corporate structure the particular company is willing to create. The ultimate structure would consist of forming a real property SPE to hold each piece of real estate, as well as a separate operating SPE for each nursing home business. Thus, a nursing home company currently owning and operating ten nursing homes would form twenty entities: ten real property entities that would own and lease the real estate to the ten nursing home operating companies that would obtain the licenses and Medicare and Medicaid certifications.

While a company can modify its particular mix of real property and operating entities to suit its individual needs, the analysis of the structures is identical in all situations. This discussion, therefore, will focus on a structure that employs a maximum division of real estate and operating interests, although lesser groupings will be subject to the same general principles. In all instances, there is an emphasis on separating the ownership of the real estate from the ownership of the operating entity that holds the license and Medicare and Medicaid provider agreements. This is normally achieved by having the operating entity lease the facility from the real-property entity. This can be accomplished even where there is identical ownership and control between and among the real-property entity and the operating entity.

III. Legal Entities with Limited Liability

The structure discussed earlier is successful due to the protections accorded investors who form legal entities to pool resources and carry out their business endeavors.

Most individuals who own nursing-home operating companies that participate in the Medicare and Medicaid programs form legal entities, such as corporations, limited liabilities companies, or limited liability partnerships, to protect the individual owners from personal liability for the overpayment, malpractice, and false-claims liabilities attributable to the acts or omissions of the operating company/provider. Although certain jurisdictions, such as New York, have restrictions on for-profit corporate ownership of healthcare providers, this is the prevailing method of nursing home ownership in the United States.[34]

A. The Corporation

As a general rule, under the law in every state, a corporation is a legal entity separate from its shareholders. Thus, individuals who own the stock of a corporation are not personally liable for acts or omissions of the corporation, and parent corporations that own the stock of a subsidiary are not liable for acts of the subsidiary.[35] The policy served by creating a separate corporate identity to insulate shareholders and parent corporations from liability is the promotion of commerce and industrial growth.[36]

B. The Limited Liability Company

Recently, the limited liability company has become an increasingly popular vehicle for business owners.[37] Limited liability company statutes generally are flexible and allow the business owners, or members, substantial freedom to operate their business pursuant to the limited liability company operating agreement.[38] The company is managed either by the members directly or by a board of managers, thereby allowing the separation of ownership and control in a manner similar to a corporation.[39] Furthermore, the limited liability company form of doing business offers its members tax benefits akin to a partnership, and offers its members and managers limited liability akin to a corporation.[40]

As with the corporate form of doing business, limited liability company formation statutes provide that the members and managers of a limited liability company are not personally liable for the liabilities of the company.[41] Under Delaware's Limited Liability Company Act, for example, except as otherwise set forth in the statute,

> the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company, and no member or manager of a limited liability company shall be obligated personally for any such debt, obligation or liability of the limited liability company solely by reason of being a member or acting as a manager of the limited liability company.[42]

The limited liability principles applicable to corporations and limited liability companies exist whether the owners, members, or shareholders are individuals or other legal entities, such as corporations or limited liability companies.

IV. Holding Owners Liable

Notwithstanding these legal protections, in matters involving lawsuits against companies with few assets, injured parties may attempt to "pierce the veil" and hold the principals, owners, or related companies personally liable for the obligations, acts, or omissions of the company.

A. Piercing the Corporate Veil

Generally, the corporate veil may be pierced and liability may attach if a shareholder or parent corporation so controls the operation of the corporation or subsidiary corporation as to make it a mere adjunct, instrumentality, or alter ego of the shareholder or parent corporation—and fraud or injustice would result if the corporate form were upheld.[43] Despite this general rule, however, corporate veil-piercing is subject to different standards, depending on whether federal law or state law is applied.

B. *Liability of Limited Liability Company Members and Managers*

In the limited liability company context, notwithstanding the protections accorded members and managers under formation statutes, courts may hold members and managers responsible for company liabilities on other grounds. A member or manager may be personally liable to the limited liability company for the member's or manager's failure to comply with statutory requirements or pursuant to the company operating agreement.[44] For example, under Delaware's Limited Liability Company Act, a limited liability company "shall not make a distribution to a member to the extent that at the time of the distribution, . . . all liabilities of the limited liability company . . . exceed the fair value of the assets of the limited liability company."[45] A member who receives a distribution knowing that it was made in violation of the statute is liable to the limited liability company for the amount of the distribution.[46]

In addition, courts may hold members and managers personally liable by applying the "piercing the corporate veil" doctrine to the limited liability company form of doing business. Some states' limited liability company acts specifically authorize the application of the corporate veil-piercing doctrine in the limited liability company context.[47] Even in those states with limited liability company statutes that do not specially authorize the application of the corporate veil-piercing doctrine, some courts are willing to pierce the veil of the limited liability company.[48]

Despite the willingness of many courts to pierce, there are arguments against applying corporate veil-piercing principles to limited liability companies.[49] One rationale is that the limited liability company statutes expressly define circumstances in which the member or manager will be held liable. For example, limited liability company statutes impose liability on members and managers for withdrawing funds and making distributions from struggling companies, particularly where the distributions would exceed the fair value of the assets of the company.[50] It is unnecessary, therefore, to pierce the veil of the limited liability company based on undercapitalization, a factor commonly applied in corporate veil-piercing cases.[51] The same result can be reached against members of limited liability companies by applying the statute.[52]

A second rationale for not applying corporate veil-piercing standards to limited liability companies is that "many of the organizational formalities applicable to corporations do not apply to [limited liability companies]."[53] Thus, while failure to follow formalities is a frequent factor in corporate veil-piercing cases,[54] it is inappropriate to pierce the veil of a limited liability company on this basis. Furthermore, some limited liability company statutes specifically preclude liability of members and managers for failure to adhere to management formalities.[55]

At least one state legislature appears outwardly to have recognized that veil-piercing in the context of corporations and veil-piercing in the context of limited liabilities companies may not completely overlap. Four years after it was enacted, Illinois' Limited Liability Company Act was amended to remove language from the original act that held a member of a limited liability company "personally liable . . . to the extent that a shareholder of an Illinois business corporation is liable in analogous circumstances under Illinois law."[56] As amended, the act now provides that "the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company."[57] Moreover, members are now liable if "(1) a provision to that effect is contained in the articles of organization; and (2) a member so liable has consented in writing to the adoption of the provision or to be bound by the provision."[58]

Limited liability companies are relatively new structures[59] and, as a result, jurisprudence in this area is unsettled.[60] If statutory requirements are satisfied, therefore, defendant members or managers of limited liability companies may benefit by arguing that the statute controls on the particular issue and common law piercing principles are inapplicable to the analysis.

V. The Standards and Factors Applied in Veil-Piercing Cases

The arguments asserted in support of veil-piercing are identical, whether made against corporate shareholders, parent corporations, or members or managers of limited liability companies. As such, this Article draws no further distinction between limited liability companies and corporations.

A. *The Federal Standard in Medicare Overpayment and False Claims Veil-Piercing Cases*

More and more frequently, the United States attempts to pierce the corporate veil and recover from owners and related companies for Medicare overpayments and violations of the False Claims Act.[61] When addressing Medicare veil-piercing cases, federal courts generally apply a federal common law standard fashioned by the Third Circuit in *United States v. Pisani*.[62] The *Pisani* court concluded that "a uniform federal rule" was needed because application of state law could "frustrate specific objectives of the Medicare program."[63] The specific objectives identified by the court were "prompt reimbursements to providers," paying providers no more than their "reasonable costs," and "uniformity in the Medicare program."[64] The court found that application of state common law, which required proof of fraud,[65] would frustrate the goals of the Medicare program. This conclusion was reached because a provider could circumvent the objectives of the Medicare act by implementing ploys to obtain overpayments, avoid repaying them, and keep few or no records for the Medicare program to audit, making it difficult for the Medicare program to prove fraud.[66]

The *Pisani* court identified the following factors to consider when determining whether to hold an owner or related company liable for Medicare overpayments to or false claims of a provider company:

> First is whether the corporation is grossly undercapitalized for its purposes. Other factors are "failure to observe corporate formalities, non-payment of dividends, the insolvency of the debtor corporation at the time, siphoning of funds of the corporation by the dominant stockholder, non-functioning of other officers or directors, absence of corporate records, and the fact that the corporation is merely a facade for the operations of the dominant stockholder or stockholders." . . . Also, the situation "must present an element of injustice or fundamental unfairness," but a number of these factors can be sufficient to show such unfairness.[67]

Applying these factors, the court concluded that Pisani, the sole shareholder, president, and registered agent of Eaton Park Nursing Home, was personally liable for Medicare overpayments made to the nursing home.[68] The court found that Pisani "followed no corporate formalities, operated the corporation with his personal funds, loaned large sums to the corporation and then repaid the loans to himself with corporate funds while the corporation was failing, and kept the corporation undercapitalized by loaning it money instead of investing equity in it."[69]

Although most federal courts apply the laundry list of factors identified by the *Pisani* court in determining whether to pierce the corporate veil, some federal courts apply the following three-factor test: "[T]he veil may be pierced only if the parent and subsidiary lacked independence, the principals conducted their affairs with a requisite degree of 'fraudulent intent,' and failure to pierce the veil would work substantial injustice."[70] This test seems to require proof of fraud, which the *Pisani* court found would frustrate the goals of the Medicare program by allowing a defendant to encourage overpayments and circumvent the repayment procedures. The cases, however, reveal that courts will infer fraud or intentional wrongful conduct from the facts of the case.[71]

Notwithstanding federal courts' routine application of federal common law in Medicare veil-piercing cases, "when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision."[72] As will be addressed, some states have more-stringent requirements for piercing the corporate veil—such as a showing of fraud—that benefit defendants. Thus, in every case the choice of law should be considered carefully, even if the plaintiff is the United States and the allegations relate to Medicare overpayments or false claims. This is particularly true when the defendant is not a corporation, but a limited liability company, because limited liability company members can argue that veil-piercing is inapplicable and the liability of members should be determined based on the state law under which the limited liability company is formed.

B. State Standards

State Medicaid agencies often attempt to pierce the corporate veil and recover from owners and related entities for Medicaid overpayments.[73] In addition, private plaintiffs frequently attempt to pierce the corporate veil and recover in tort from owners and related companies.[74]

In veil-piercing cases, depending on state choice of law rules or agreements between the parties as to choice of law, a court may apply the law of the state in which the facility is located or the law of the state in which the defendant company is formed.[75] Once again, choice of law should be carefully considered, due to the differences in states' application of veil-piercing standards.

No common standard exists among the various jurisdictions, and the factors that courts apply differ from state to state and case to case.[76] Nonetheless, factors commonly applied by state courts include the following: failure to observe corporate formalities; inadequate capitalization; commingling of assets; siphoning of funds; nonpayment of dividends; unjust loss or injury; and improper conduct, fraud, or illegality.[77] These factors often boil down to two categories: (1) unity of interest or no separate personality, and (2) fraud or injustice.[78]

Courts vary in the number of factors considered and the weight assigned to those factors in determining whether or not to pierce the corporate veil. The courts' discretion is reflected in the large, murky body of case law.[79] For example, some jurisdictions require a finding of fraud before piercing the corporate veil.[80] Other courts will infer the indicia of fraud from the facts of the case.[81] Finally, some courts do not require fraud or indicia of fraud, but simply a showing of injustice.[82]

C. *Discussion of Veil-Piercing Cases*

The following cases demonstrate under what circumstances the United States and private plaintiffs will attempt to pierce the corporate veil to recover Medicare overpayments, false claims, and malpractice judgments.

1. Owners Personally Liable for Medicare Overpayments

In *United States v. Bridle Path Enterprises, Inc.*, a Massachusetts federal district court held the owners of a home health agency personally liable for the Medicare overpayment debt of the provider, Bridal Path.[83] For cost year 1993, the Medicare fiscal intermediary determined that Bridal Path had received an overpayment of $231,568.[84] Bridal Path never requested an administrative hearing to challenge that determination.[85] Bridal Path made payments toward the overpayment until July 1997, when it sold all of its assets to Prism Home Care, Inc. (Prism), and notified the Medicare program that it was terminating its Medicare participation.[86] At the time of the sale and voluntary termination, $64,807.84 was outstanding on the overpayment liability.[87]

The United States sought to hold Bridle Path's owners personally liable for the Medicare overpayment, on the grounds that

Bridle Path was defunct and had little or no assets to satisfy the debt.[88] Noting there was "no single 'litmus' test" for determining whether to pierce the veil, the court looked at three factors: (1) the corporate identity; (2) the injustice that would result from not piercing the veil; and (3) the fraudulent intent of the defendants.[89]

Due to the number of checks Bridle Path wrote in 1996 and 1997 to its owners, their home health agency, and their real-estate holding company, the court found that the owners did not treat Bridle Path as a separate corporate entity.[90]

> During 1997, [the owners] made numerous sizeable payments to themselves from [Bridle Path]'s operations and payroll accounts, either directly or through one of their other companies. There is no evident rational business purpose to these payments, especially since [Bridle Path] was operating at a severe net loss at the time. In July 1997, when [Bridle Path] received an infusion of cash from its asset sale to Prism, the defendants used $68,573.36 of this income to pay for renovations to their personal residences. The defendants also funneled a generous portion of the proceeds into their own pockets in the months immediately following the sale. In contrast, the defendants did not apply any of the $750,000 Prism paid for [Bridle Path]'s assets to the Medicare debt. Such wrongful diversion of corporate assets at a time when the corporation was failing, and in fact dissolving, justifies piercing the corporate veil.[91]

Unfortunately, there is little discussion of why Bridle Path made payments to the owners. Bridle Path paid $40,000 to one owner, $56,000 to a home health agency owned by the owners, $6,800 to a real-estate holding company owned by the owners, $17,600 to an individual from whom the owners acquired a physical therapy company, and $68,000 to a contractor who testified that the payment was for work at the owners' private residence.[92] Bridal Path also increased payments to the owners out of Bridle Path's payroll accounts.[93] The owners did "not dispute or explain any of these payments."[94] Thus, the inference is that all the payments, even those arguably to legitimate service providers or landlords, were not made in the ordinary course of business.

The owners made two arguments to support their claim that they did not intend to defraud the government. First, they argued that the Internal Revenue Service (IRS) instructed them not to pay creditors prior to paying tax liabilities. Second, they claimed that they anticipated an additional $750,000 payment from Prism if, as stated in the purchase agreement, Prism achieved certain net revenues within the first year of operation.[95] The court disagreed. According to the court, "[a] strong inference of intentional fraud arises from these facts" and the owners offered "no facts to defeat the inference—only their flat assertion."[96]

In addition to piercing the corporate veil, the court held the owners personally liable under the federal priority statute, which prohibits a person indebted to the government from making a voluntary assignment of property to themselves or another entity instead of paying the government debt.[97] The owners made several payments to themselves out of Bridle Path's corporate accounts after they stopped making payment toward the Medicare overpayment.[98] The court found "no reason not to conclude that the defendants are personally liable for the [Bridle Path] Medicare debt."[99]

2. Owner and Related Companies Liable for False Claims Act Judgment

In *United States v. Lorenzo,* a Pennsylvania district court pierced the corporate veil to reach a shareholder and related companies in a Medicare false-claims action.[100] There, the government pursued a false-claims action against a dentist and his related companies for Medicare claims filed for oral cancer examinations of nursing home residents.[101] After concluding that the claims submitted by U.S. Mobile, a company owned and controlled by the dentist, constituted false claims, the court addressed the liability of the dentist and his related companies.[102]

The court held the dentist and his related companies jointly and severally liable for U.S. Mobile's false claims.[103] The dentist placed the Medicare revenues into the accounts of U.S. Mobile and his own professional bank account.[104] U.S. Mobile transferred undocumented funds to related companies, including suspicious rental transactions with related companies where the rental amount nearly doubled from the previous lease and documentation failed to show any other related party paying similar rents.[105] In addition, U.S. Mobile entered into contracts for services and equipment with the dentist and other related companies.[106] Further, the dentist transferred the services of another dentist to his private practice, but continued to pay the dentist from U.S. Mobile funds.[107] The court found:

> There can be no question that corporate formalities were not observed; that significant inter-entity transactions were not documented; and that the corporations and partnerships were treated as a single unit and the alter ego of [the dentist].
>
> Finally, it is clear that U.S. Mobile was undercapitalized and that revenues were siphoned off from other ventures.[108]

Consequently, the court pierced the veil and held the dentist and related companies liable for U.S. Mobile's false claims.[109]

3. Parent Corporation Dismissed from a False-Claims Action Against Subsidiary

In *United States ex rel. Kneepkins v. Gambro Healthcare, Inc.,* the Massachusetts district court dismissed a parent corporation from the government's false-claims action because the government's allegation that the parent was the sole owner of the subsidiary corporation was insufficient to pierce the corporate veil.[110] There, the government brought a false-claims action against, among others, Dialysis Holdings, a successor in interest to a Medicare lab, and its sole owner, Gambro Healthcare, for allegedly performing unnecessary and wasteful blood tests at a medical testing lab.[111] Dialysis Holdings, Gambro's wholly-owned subsidiary, was the only link between Gambro Healthcare and the alleged wrongdoers.[112]

The court applied a three-factor standard to determine whether to pierce the veil: (1) the corporate identity; (2) the injustice that would result from not piercing the veil; and (3) the fraudulent intent of the defendants.[113] It concluded that the government's pleadings were insufficient as to Gambro because "[t]he only fact alleged is Gambro's sole ownership of Dialysis Holdings" and "[t]hat alone is plainly not enough."[114]

The government raised three arguments in opposition to Gambro's motion to dismiss. First, the government argued that the court should disregard the corporate form, "in the interests of 'public convenience, fairness and equity'" and, furthermore, "that the corporate form garners less respect in matters involving the enforcement of federal statutes."[115] The court rejected the argument, finding that the government did not allege that Gambro filed a false claim itself and did not allege that Gambro had stripped Dialysis Holdings of its assets.[116]

Second, the government argued that "Gambro, a privately-held corporation whose affairs are not open to scrutiny, must be kept in the case because the information concerning its relationship with Dialysis Holdings and Vivra is within its control, unavailable to the government for pleading purposes, and may only be unearthed through discovery."[117] The court rejected the argument, because the government had not alleged facts supporting that belief.[118]

Finally, the government argued that the pleadings were sufficient to put Gambro on notice of the claims.[119] The court rejected the argument, concluding that the government "may not require a defendant to guess at what the contours of the claims against it may be when they take shape at some uncertain future time."[120]

4. Owners and Related Companies Not Liable for Medicaid Overpayment Judgment

In *State v. Woodvale Management Services, Inc.*, a Minnesota appellate court refused to find shareholders, officers, directors, and related companies liable for Medicaid overpayments made to an intermediate care facility for the mentally retarded (ICF/MR).[121] There, two individuals were the sole officers, directors, and shareholders of a corporation that operated an ICF/MR.[122] The individuals formed a management corporation and transferred all of the ICF/MR corporation's stock to the management corporation.[123] The individuals also owned a sole proprietorship that leased property to the ICF/MR corporation.[124] Eventually, the state closed the ICF/MR, which was in poor financial condition at the time.[125] The State of Minnesota subsequently attempted to pierce the corporate veil and recover the Medicaid payments owed by the ICF/MR from the individuals and the parent management company.[126]

Absent a showing of improper conduct, the court refused to find the individuals and related corporation liable for the debt of the ICF/MR.[127] It found the corporate entities "were, in fact, operated as separate corporations, observing all of the requisite and statutory corporate formalities."[128] It noted that "corporate dividends were not paid but reinvested in the corporation and . . . there was no evidence that [the parent] siphoned funds from [the ICF/MR]."[129] The court also found that it was "undisputed" that the ICF/MR was adequately capitalized.[130] Although the ICF/MR was insolvent at the time the judgment became due, it was solvent during the period that gave rise to the judgment.[131] The court noted that "it is the State that directly caused the insolvency of [the ICF/MR] by closing the facility."[132]

Furthermore, the court found no indicia of fraud. Rather, it found that the management company provided management services to the ICF/MR, which in turn provided services to residents.[133] Although the state argued that the $3,000 initial capitalization of the ICF/MR corporation was inadequate, the court found that at the time it was capitalized, "there was no indication that the amount would prove insufficient."[134]

5. Jury to Hear Question of Whether Nursing Home Corporation was Adequately Capitalized

In *Autrey v. 22 Texas Services, Inc.*, plaintiffs filed a malpractice action against a nursing home operator and its general and limited partners, as well as the operator's management company and its general and limited partners.[135] The defendant general and limited partners moved for summary judgment on the grounds that plaintiffs failed to produce any evidence to justify piercing the corporate veil.[136] Applying Pennsylvania law, under which "there is a strong presumption against piercing the corporate veil," the Texas district court concluded that plaintiffs raised a genuine issue of fact as to the liability of the general and limited partners.[137]

With respect to the management company, the court found that the general partner of the management company, which was responsible for 100% of the operations of forty-nine nursing homes in Texas, as well as others in other states, had $42,000 in assets and virtually no liquid assets.[138] It noted that the "financial condition raises disturbing questions," especially where "undercapitalization" is a basis for piercing the corporate veil.[139] In addition to undercapitalization, the court looked to the corporate structure of the general partner.[140] It found that "[a]t the time of incorporation, [the company] had no employees, office space, or expenses; consequently, the company paid no rent and spent no money on advertising."[141] Furthermore, the court found it "suspicious" that the general partner "had nonfunctioning corporate officers."[142] The court concluded that if plaintiffs could prove at trial that defendants "asserted control over the management and ownership of the Texas nursing homes owned by [the general partner], it would add credence to their claim that [the general partner] represents nothing more than a corporate sham benefitting Defendants, all of whom serve as the sole shareholders of [the general partner]."[143]

With regard to the operating company, the court found that six months after its formation, it had more than $54,000 in liabilities with no accompanying net assets.[144] "Based on the nature and risk of the nursing home business, the Court notes that engaging in the ownership of forty-nine nursing homes while also maintaining no net assets appears to amount to nothing less than a disputable issue regarding undercapitalization."[145]

These factual issues were sufficient to survive defendants' motion for summary judgment. The court held that "[g]iven the dispute surrounding whether [the entities] were adequately capitalized, the Court finds it reasonable to allow a jury to decide the issue."[146]

6. Veil-Piercing Inappropriate on Summary Judgment in Medicaid Overpayment Liability Action

In *Community Care Centers, Inc. v. Hamilton,* a nursing home corporation appealed an Indiana trial court decision in favor of the state Medicaid agency, rendering the nursing home shareholders personally liable for over $6 million in Medicaid overpayments.[147] The trial court had granted the Medicaid agency's motion for summary judgment on the grounds that the shareholders "through the manipulation of the corporate form, were the wrongful recipients of [over $6 million] in taxpayer-derived Medicaid funds," which was "enhanced by the absence . . . of corporate budgetary records, payment by the corporation of individual obligations and vice versa, commingling assets and affairs, together with the transfer of assets by salaries which were on their face fundamentally, unreasonably disparate to any value received."[148]

Applying Indiana law, under which courts are "reluctant to disregard corporate identity and do so only to protect third parties from fraud or injustice,"[149] the court examined the evidence as it related to the following eight factors: (1) undercapitalization; (2) absence of corporate records; (3) fraudulent representation by shareholders; (4) use of the corporation to promote fraud, injustice, or illegal activities; (5) payment by the corporation of individual obligations; (6) commingling of assets and affairs; (7) failure to observe required corporate formalities; and (8) other shareholder acts or conduct ignoring the corporate form.[150] The appellate court reversed the trial court's grant of summary judgment:

> While it may be that [the company's] corporate veil should be pierced, it should not have been pierced on summary judgment. Piercing the corporate veil should only be accomplished on summary judgment in extraordinary circumstances such as when it is patently obvious that the sole purpose for a corporation's existence is to perpetrate a fraud or injustice.[151]

VI. Conclusion

A. Restructuring to Reduce Unnecessary Risk of Exclusion

Forming operating SPEs, such as limited liability companies, to operate each nursing home will avoid unnecessary exclusion of all other nursing homes under common ownership or control in the event of exclusion of any one of the nursing homes.

The benefit of having the company's nursing homes owned and operated by SPEs is further demonstrated by the following example. In this example, *Company X* is neither the licensed operator nor the certified provider of any of the nursing homes. Instead, *Company X* forms three single-purpose operating company subsidiaries—*Company A*, *Company B*, and *Company C*, each wholly owned by *Company X*—to be the licensed operators and certified providers of the nursing homes. *Company A* operates the Friendly Nursing Home, *Company B* operates the Caring Nursing Home, and *Company C* operates the Loving Nursing Home. *Company A* enters into a plea agreement with the United States to settle civil and criminal claims arising under the False Claims Act for allegedly providing substandard quality of care to the residents of the Friendly Nursing Home, and for billing and receiving payment from the Medicare and Medicaid programs for that substandard care. The DHHS Secretary excludes *Company A* from the Medicare and Medicaid programs.

Under this scenario, the DHHS Secretary does not exclude the Caring Nursing Home and the Loving Nursing Home for the conduct attributable to the Friendly Nursing Home, because the former are neither owned nor controlled by *Company A*. In addition, under this scenario, entities participating in the Medicare and Medicaid programs that provided items or services to all three nursing homes would be precluded from billing for items or services related to business conducted only with the Friendly Nursing Home. They could continue to seek reimbursement from any federal program for any business done with the Caring Nursing Home and the Loving Nursing Home.

In this example, *Company A*'s nursing home operations will have the maximum protection against exclusion if each nursing home is operated by an operating SPE. If a nursing home must be excluded, it will mandate neither the exclusion nor the divestiture to avoid exclusion of any other nursing home provider.

Moreover, *Company A*'s real estate holdings will have the maximum protection in the event of exclusion if the operating interests are held separate and apart from the real estate. Placing the real-estate interests in a real-property SPE and the operating interests in an operating SPE will avoid from the outset the possibility of restructuring on short notice to avoid a permissive exclusion attaching to the real estate.

Forming operating SPEs with ownership identical to other operating SPEs does not present unreasonable exposure to the owners or related companies. The DHHS Secretary may exclude any individual who has a direct or indirect ownership or control interest in, or is an officer or managing employee of, a sanctioned entity.[152] There is, however, no requirement or authority for the DHHS Secretary to exclude an individual who *had* a direct or indirect ownership or control interest in, or who *was* an officer or managing employee of a sanctioned entity.[153] The owners, shareholders, members, directors, or officers of the soon-to-be excluded operating entity could divest their interest in the company without having to divest their interests in any other nursing home operations, because the DHHS Secretary must give notice of intent to exclude.[154] This approach is commonly employed in divestiture situations with the knowledge and consent of the OIG.

B. Restructuring to Reduce Exposure to Financial Liability

Forming operating SPEs for each nursing home can prevent third-party and government litigants from obtaining and enforcing judgments against related operating companies, the real estate, and investors in the event that the operating company is sued to recoup Medicare or Medicaid overpayments, for False Claims Act violations, or for nursing-home malpractice.

Furthermore, holding the real estate in a separate real-property entity that leases the nursing home to the operating entity protects the assets by making the real estate unavailable for collection by judgment creditors of the operating entity. This, in turn, can serve to make the real estate more attractive to potential lenders because the most problematic risks of nursing home operations do not reach the real estate. Indeed, many current investors and lenders are requiring that the real property owner not engage in the operation of the facility. The model for such an approach is the Real Estate Investment Trust (REIT), which prohibits owners from engaging in the operations of the real estate they own. There are other legitimate corollary benefits and uses for a separate real-property SPE. For example, the real estate could be placed in a trust for estate-planning purposes while the current operators directly own the operating entity. In addition, the real-property entity could attract investors who are leery of operating risks, thereby altering the ownership composition between the real-property entity and the operating entity.

Forming operating SPEs with ownership identical to other operating SPEs, or ownership identical to the real property entities, does not present unreasonable exposure to the owners or related companies. Although there is no single litmus test for determining when courts will pierce the corporate veil, the following factors alone are insufficient: wholly owned, sole shareholder, or sole member companies;[155] insolvency;[156] and failure to pay corporate dividends.[157] Due to the variation among courts in applying veil-piercing analyses, defendants should carefully evaluate choice-of-law provisions when faced with a veil-piercing claim. Some jurisdictions require a showing of fraud, or indicia of fraud, an element favorable to defendants. Finally, defendant limited liability companies should assert that the corporate veil-piercing doctrine is inapplicable to the company, which instead should be held to the statutory standards in the state where it was formed.

APPENDIX: Practice Guide

I. Avoiding Veil-Piercing

Mere ownership of a nursing home operating company is insufficient to hold the shareholders, members, or parent company liable for the acts and omissions of the company, even if the related companies have identical directors and officers. That said, there are steps that nursing home companies should take to minimize the risk of veil-piercing exposure.

A. Adhere to Formalities. The following are formalities that courts have found significant:

- Adopt bylaws;
- Conduct meetings of the shareholders/directors/officers/ members;

- Maintain meeting minutes that reflect business decisions made by the officers; and
- Maintain separate banking and accounting records that account for the cash and assets of the company separate and distinct from the cash and assets of shareholders, directors, officers, members, and affiliates.

B. Preserve the distinction among the operating entity and its shareholders, directors, officers, members, and affiliates. Conduct business in the company name, not in the name of an affiliate, shareholder, director, officer, or member of the company. Relevent measures include the following:

- Hold out to the public only the operating entity, not its shareholders/members or affiliates, as operating the nursing home;
- Have the operating entity, not related/affiliate companies, rent the property;
- Enter into product and service agreements on behalf of the operating entity;
- Market the services of the nursing home, not those of its affiliates;
- Use admissions agreements that identify the nursing home operating entity only, not its "chain" affiliates; and
- Employ and pay nursing home personnel at the company level, not at the chain level.

C. Adequately Capitalize the Operating Entity. There is little guidance concerning what constitutes adequate capitalization of a nursing home. In one case, \$3,000 was deemed to be sufficient capitalization of an ICF/MR at the time of incorporation. In another case, \$500 was viewed as "thin capitalization," but the court did not decide whether that amount of capitalization was too thin. In the recent *Autrey* case discussed in the Article, the court questioned the adequacy of a nursing home management company's capitalization where the management was responsible for the operations of forty-nine nursing homes, had \$42,000 in assets, and virtually no liquid assets.[158] The following are indicia of capitalization that courts will consider.

1. Initial Capitalization

- Capitalize to meet state minimum statutory requirements.
- Capitalize to meet industry standards. Some states require Medicaid providers upon enrollment to show financial

statements and demonstrate minimum working capital capacity.
- The lack of some amount of operating capital will be found to be inadequate capitalization.

2. **Solvency**

- Maintain capital necessary to pay immediate and foreseeable obligations.

3. **Insurance**

- Maintain adequate insurance according to state-law and industry standards.
- Maintain capital necessary to pay out insurance deductibles as foreseeable obligations of the company.

D. Avoid even the appearance of siphoning revenues to related entities or shareholders/members. Indicia of siphoning include the following:

- Repayment of loans from shareholders at a time when other creditors are not being paid;
- Payment of rent to related companies for greater than fair market value; and
- Payment of management fees to related companies for greater than fair market value.

II. Deciding Whether to Restructure

Ultimately, the decision to restructure is made based on an assessment of the organization's business goals, which involves a balancing of acceptable risk with acceptable costs. If the business goal is minimizing liability and exclusion exposure, the costs associated with creating SPEs to hold the real estate and operate the nursing home may outweigh the risks of losing several nursing homes to exclusion or malpractice judgments. On the other hand, if the business goal is administrative simplicity, the balance likely would not tip in favor of creating a real-property SPE and an operating SPE for each nursing home. There is a point at which the goals of administrative simplicity and minimizing liability and exclusion exposure converge, coupled with the costs associated with restructuring, no longer outweigh the risk of losing several nursing homes.

The costs of restructuring can be high. For each entity, there are costs associated with:

- Deciding upon the legal structure to form and in which state to form it;
- Forming the legal structure;
- Preparing the articles of incorporation or limited liability company operating agreements;
- Qualifying the entities to do business in the state in which the nursing home is located;
- Annual company and business registration fees;
- Maintaining corporate formalities;
- Maintaining adequate capitalization;
- Locally managing day-to-day operations and financials; and
- Locally establishing facility policy.

Moreover, restructuring has financing, tax, and employment implications that go beyond the scope of this Article.

Nevertheless, the benefits of restructuring can be great. Establishing real property SPEs and operating SPEs benefits the organization by:

- Making real estate unavailable for collection by judgment creditors;
- Shielding from exclusion affiliate nursing homes operated by separate entities with the same ownership and control;
- Shielding from judgment creditors the operating cash and assets of affiliate nursing homes;
- Precluding the poor-performing nursing home from depleting the cash and assets of more successful operations, and driving into bankruptcy the business operation of all of the commonly-owned nursing homes; and
- Increasing opportunities for commercial and government financing.

Endnotes

1 Liberty Mutual Ins. Corp. v. M & O Springfield Co., No. 97-4146, 1998 WL 894654, *2 (7th Cir. Dec. 17, 1998) (unpublished opinion) (quoting Van Dorn Co. v. Future Chem. & Oil Corp., 753 F.2d 565, 569 (7th Cir. 1985)) (citations omitted).

2 U.S. Dep't of Health and Human Servs., Office of Inspector Gen., Special Advisory Bulletin on the Effect of Exclusion from Participation in Federal

Health Care Programs, 64 Fed. Reg. 52,791 (Sept. 30, 1999) (discussion of the OIG's role in exclusions).

[3] 42 U.S.C. § 1320a-7(a) (2003); 42 C.F.R. § 1001.101 (2003). Specifically, under 42 U.S.C. § 1320a-7, Congress requires the Secretary of DHHS to exclude an individual or entity from participation in the federal health care programs where he or it has been convicted of: "(1) a criminal offense related to the delivery of an item or service under subchapter XVIII . . . or under any State health care program;" (2) "a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service;" (3) certain offenses "in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program . . . consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct;" and (4) an offense "consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance."

[4] Under the permissive exclusion authority, the Secretary of DHHS may exclude individuals and entities who have committed fraud or other criminal acts, or who have been "otherwise sanctioned" under a federal or state health care program for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity. 42 U.S.C. § 1320a-7(b)(5)(B) (2003); 42 C.F.R. § 1001.601(a)(1) (2003).

[5] An ownership interest means a five-percent or greater interest in the capital, stock, or profits of the entity or any mortgage, deed, trust, note, or other obligation secured in whole or in part by the property or assets of the entity. 42 U.S.C. § 1320a-7(b)(8)(A)(i) (2003); 42 C.F.R. § 1001.1001(a)(ii)(A)(2) (2003).

[6] A controlling interest includes officers, directors, agents, partners, and managing employees. 42 U.S.C. § 1320a-7(b)(8)(A)(ii) (2003); 42 C.F.R. § 1001.1001(a)(ii)(A)(3)-(6) (2003).

[7] 42 U.S.C. § 1320a-7(b)(8) (2003); 42 C.F.R. § 1001.1001(a)(ii)(A) (2003).

[8] 42 U.S.C § 1320a-7(b)(8)(A)(i) (2003); 42 C.F.R. § 1001.1001(a)(ii)(A) (2003).

[9] 42 U.S.C § 1320a-7(b)(8)(A)(iii) (2003); 42 C.F.R. § 1001.1001(a)(ii)(B) (2003).

[10] *See* 42 C.F.R. §§ 405.370, 405.371(a), 405.372, 405.373 (2003). *See also* Centers for Medicare and Medicaid Services, CMS-Pub. 13-2, Medicare Intermediary Manual, Part 2 §§ 2225, 2229 (2003) (procedures for suspending interim payments and recovery of overpayment resulting from unnecessary services). A Medicare fiscal intermediary may also suspend Medicare payments to recover Medicaid overpayments owed to a provider. In addition, it may withhold the federal share of Medicaid payments to a Medicaid provider that has Medicare overpayment liability. *See id.* §§ 2226.1, 2226.2.

[11] *See* 42 C.F.R. §§ 405.370, 405.371(a), 405.372, 405.373 (2003).

[12] *See, e.g.,* Conn. Agencies Regs. § 17-311-53(b) (2003) ("Whenever the Commissioner . . . renders a rate decision . . . which decision results in the facility being indebted to the Department . . . for past Medicaid overpayments, the department shall recoup said Medicaid overpayments as soon as possible from the department's monthly Medicaid payments to the facility.").

[13] It is worth noting that some states' laws specifically authorize the Medicaid agency to recoup overpayments from another provider that is owned or controlled by the same individual or entity that owns the provider that is subject to the overpayment recoupment. In Connecticut, for example,

> [i]f a facility owes money to the department, the department may offset against such indebtedness any liability of the department to another provider which is owned or controlled by the same person or persons who owned or controlled the first facility at the time the indebtedness to the department was incurred. In the case of the same

person or persons owning or controlling two or more facilities but separately incorporating them, whether the person or persons own or control such corporations shall be an issue of fact. Where common ownership or control is found, this subsection shall apply notwithstanding the form of business organization utilized by such persons e.g. separate corporations, limited partnerships, etc.

CONN. AGENCIES REGS. § 17-311-53(f) (2003).

14 *See* U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON GOVERNMENT EFFICIENCY, FINANCE MANAGEMENT AND INTERGOVERNMENTAL RELATIONS, COMMITTEE ON GOVERNMENT REFORM, HOUSE OF REPRESENTATIVES, DEBT COLLECTION IMPROVEMENT ACT OF 1996, HHS'S CENTERS FOR MEDICARE & MEDICAID SERVICES FACES CHALLENGES TO FULLY IMPLEMENT CERTAIN KEY PROVISIONS, GAO REP. NO. 02-307, at 5 (Feb. 22, 2002).

15 *See id* at 1; U.S. DEP'T OF HEALTH AND HUMAN SERVS., OFFICE OF INSPECTOR GEN., DELINQUENT MEDICARE DEBT AND COMPLIANCE WITH THE DEBT COLLECTION IMPROVEMENT ACT BY THE CENTERS FOR MEDICARE AND MEDICAID SERVICES, OIG REP. NO. A-17-01-02003, at 3 (2002).

16 *See* VERNON SMITH ET AL., THE HENRY J. KAISER FAMILY FOUNDATION, KAISER COMMISSION ON MEDICAID AND THE UNINSURED, MEDICAID SPENDING GROWTH: A 50-STATE UPDATE FOR FISCAL YEAR 2003, at 1, 2, 4, 6-7, 13 (2003), *available at* www.kff.org/content/2003/4082/4082.pdf (last visited Sept. 30, 2003).

17 *See* JOHN HOLAHAN ET AL., THE HENRY J. KAISER FAMILY FOUNDATION, KAISER COMMISSION ON MEDICAID AND THE UNINSURED, THE STATE FISCAL CRISIS AND MEDICAID: WILL HEALTH PROGRAMS BE MAJOR BUDGET TARGETS? 12 (2003), *available at* www.kff.org/content/2003/4073/4073.pdf (last visited Sept. 30, 2003).

18 31 U.S.C. § 3729(a) (2003).

19 *See, e.g.,* Press Release, U.S. Attorney's Office, U.S. Reaches Settlement with Temple University Health System Affiliates (Mar. 5, 2003) (announcing $500,000 civil settlement involving two nursing homes for failing to provide adequate resident assessments and evaluations, nutrition, falls prevention, and pain management, among other care), *available at* www.usao-edpa.com/Pr/2003/mar/temple.html (last visited Sept. 30, 2003).

20 31 U.S.C. § 3729(a) (authorizing penalties of $5,000 to $10,000); 64 Fed. Reg. 47,099-104 (Aug. 30, 1999) (In accordance with other legislation, DOJ provides increase of penalty amounts to $5,500 and $11,000 to account for inflation).

21 *See* Press Release, Beverly Enterprises, Inc., Beverly Enterprises Finalizes Medicare Settlements (Feb. 3, 2000), *available at* www.beverlycares.com/beverly_internet/investor/corporate_info/investor_news/february_3_2000_medicare_settlement.html (last visited Sept. 30, 2003).

22 Press Release, U.S. Dep't of Justice, Vencor and Ventas Paying U.S. $219 Million to Resolve Health Care Claims as Part of Vencor's Bankruptcy Reorganization (Mar. 19, 2001), *available at* www.usdoj.gov/opa/pr/2001/March/115civ.htm (last visited Sept. 30, 2003).

23 *See, e.g.,* MICH. COMP. LAWS ANN. § 400.601 (West 2003) (Michigan Medicaid False Claims Act).

24 *See, e.g.,* CAL. GOV'T CODE § 12650 (West 2003) (California False Claims Act); D.C. CODE ANN. § 2-308.03 (2003) (claims by the District government against contractor).

25 *See, e.g.,* JACK A. MEYER, TAXPAYERS AGAINST FRAUD EDUCATION FUND, FIGHTING MEDICARE FRAUD: MORE BANG FOR THE FEDERAL BUCK (2003) (finding benefit to cost ratio of nearly 9 to 1 for federal government funds spent on investigating fraud and prosecuting cases), *available at* www.taf.org/publications%5Cpdf%5Cfighting medicarefraud.pdf (last visited Sept. 30, 2003).

26 *See, e.g.,* ANDY SCHNEIDER, TAXPAYERS AGAINST FRAUD EDUCATION FUND, REDUCING MEDICAID FRAUD: THE POTENTIAL OF THE FALSE CLAIMS ACT 33 (2003), *available at*

www.taf.org/publications/PDF/reducingmedicaidfraud.pdf (last visited Sept. 30, 2003).

27 Fuqua v. Horizon/CMS Healthcare Corp., No. 4:98-00-CV-1087-Y, 2001 WL 267650, at *1 (N.D. Tex. Feb. 14, 2001) (final judgment).

28 *See* THERESA W. BOURDON & SHARON C. DUBIN, AON RISK CONSULTANTS, INC., LONG TERM CARE GENERAL LIABILITY AND PROFESSIONAL LIABILITY ACTUARIAL ANALYSIS 3, 6, 13 (2003), *available at* www.ahca.org/brief/aon_ltcanalysis2003.pdf (last visited Sept. 30, 2003).

29 *Id.* at 3, 7, 13.

30 *Id.* at 3.

31 *See id.* at 31-34.

32 *Id.* at 31.

33 *See* NAT'L CONF. OF ST. LEGISLATURES, HEALTH POLICY TRACKING SERVICE SNAPSHOTS: LONG TERM CARE: 2003 MID-YEAR REPORT, NURSING HOME LIABILITY INSURANCE (Aug. 2003), *available at* www.ncsl.org/programs/health/ss3longcare.htm (last visited Sept. 30, 2003).

34 *See, e.g.,* N.Y. PUB. HEALTH LAW § 2801-a(9) (McKinney 2003) (with limited exceptions, authorizing only a "natural person, a partnership or limited liability company" to engage in the business of operating a hospital for profit); *id.* § 2801 (including nursing home in the definition of hospital).

35 *See* RESTATEMENT (SECOND) OF AGENCY: CORPORATE SUBSIDIARIES § 14M (1983) [hereinafter RESTATEMENT].

36 *See generally* 18 AM. JUR. 2D, *Corporations* § 43 (1985).

37 *See* LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES 1 n.1 (2002) (limited liability companies growing by more than 30% per year).

38 Elf Atochem North America, Inc. v. Jaffari, 727 A.2d 286, 290-91 (Del. 1999) (noting that Delaware's Limited Liability Company Act provides "substantial freedom of contract").

39 RIBSTEIN & KEATINGE, *supra* note 37, § 8.02 at 2.

40 *Id.*

41 *See, e.g.,* CONN. GEN. STAT. ANN. §§ 34-133(a), 34-133(b), 34-134 (West 2003); DEL. CODE ANN. tit. 6, § 18-303(a) (2003).

42 DEL. CODE ANN. tit. 6, § 18-303(a).

43 *See generally* RESTATEMENT, *supra* note 35, at § 14M cmt. a.

44 *See, e.g.,* CAL. CORP. CODE § 17101(e) (West 2003) ("a member . . . may agree to be obligated personally . . . as long as the agreement . . . is set forth in the articles of organization or in a written operating agreement"); CONN. GEN. STAT. ANN. § 34-134 (West 2003) ("[a] member or manager of a limited liability company is not a proper party to a proceeding by or against a limited liability company . . ., except where the object of the proceeding is to enforce a member's or manager's right against or liability to the limited liability company or as otherwise provided in an operating agreement"); *id.* § 34-141 (a member or manager is required to discharge his duties in good faith and shall not be liable to the limited liability company if he acts in good faith); DEL. CODE ANN. tit. 6, § 18-303(b) (2003) ("under a limited liability company agreement . . . , a member or manager may agree to be obligated personally for any or all of the debts, obligations and liabilities of the limited liability company"); 805 ILL. COMP. STAT. 180/10-10 (West 2003) (members are liable if a provision to that effect is in the articles of organization and a member has consented in writing to the adoption of the provision).

45 DEL. CODE ANN. tit. 6, § 18-607(a) (2003).

46 *Id.* § 18-607(b).

47 *See, e.g.,* CAL. CORP. CODE § 17101(b) (West 2003) (member may be liable "under the same or similar circumstances and to the same extent as a shareholder of a corporation"); GA. CODE ANN. § 14-11-314 (2003) ("this chapter does not alter any law with respect to disregarding legal entities");

MINN. STAT. § 322B.303, subd. 2 (West 2003) ("case law that states the conditions and circumstances under which the corporate veil of a corporation may be pierced under Minnesota law also applies to limited liability companies"); N.D. CENT. CODE § 10-32-29, 3 (2003) ("case law that states the conditions and circumstances under which the corporate veil of a corporation may be pierced under North Dakota law also applies to limited liability companies"); WASH. REV. CODE § 25.15.060 (2003) (members "shall be personally liable for any act, debt, obligation, or liability of the limited liability company to the extent that shareholders of a Washington business corporation would be liable in analogous circumstances"); WIS. STAT. ANN. § 183.0304(2) (West 2003) ("nothing in this chapter shall preclude a court from ignoring the limited liability company entity under principles of common law of this state that are similar to those applicable to business corporations and shareholders in this state"). Some states have limited the application of the corporate veil-piercing doctrine to specifically exclude the failure to follow formalities applicable to corporations. *See also* CAL. CORP. CODE § 17101(b) (West 2003); COLO. REV. STAT. ANN. § 7-80-107(2) (West 2003); WASH. REV. CODE § 25.15.060 (2003).

[48] *See, e.g.,* STEPHEN B. PRESSER, PIERCING THE CORPORATE VEIL § 401[2] (West 2002); KLM Indus., Inc. v. Tylutki, 815 A.2d 688, 689 n.2 (Conn. App. Ct. 2003) ("the determination of whether to pierce the corporate veil of a stock corporation or to disregard the protections afforded a limited liability company requires the same analysis"); Curole v. Ochsner Clinic, L.L.C., 811 So. 2d 92, 96 (La. Ct. App. 2002) (limited liability company veil may be pierced based on a "totality of the circumstances" review, but finding insufficient allegations to support veil-piercing claim for venue purposes) (citing Hollowell v. Orleans Reg. Hosp., LLC, 217 F.3d 379, 387 (5th Cir. 2000)); J.C. Compton Co. v. Brewster, 59 P.3d 1288, 1293 (Or. Ct. App. 2002) (reversing judgment in favor of plaintiff on LLC veil-piercing claim where plaintiff failed to show a relationship between the misconduct and the plaintiff's injury); Bonner v. Brunson, No. A03A1514, 2003 WL 21730686, at *1 (Ga. Ct. App. July 28, 2003) (a Georgia court may pierce the veil of the limited liability company if the member, "in order to defeat justice or perpetrate fraud, conducts his personal and limited liability company business as if they were one by commingling the two on an interchangeable or joint basis or confusing otherwise separate properties, records, or control"); Kaycee Land & Livestock v. Flahive, 46 P.3d 323, 328-29 (Wyo. 2002) (holding that the doctrine of piercing the veil should apply to limited liability companies, although the factors that would justify piercing an limited liability company veil might differ).

[49] *See, e.g.,* New Horizons Supply Co-op. v. Haack, No. 98-1865, 1999 WL 33499, at *3 (Wis. Ct. App. Jan. 28, 1999) (rejecting trial court's theory of piercing limited liability company veil, but upholding trial court's decision based on failure to follow statutory formation requirements). *See also* Warren H. Johnson, *Limited Liability Companies (LLCs): Is the LLC Liability Shield Holding Up Under Judicial Scrutiny?*, 35 NEW ENG. L. REV. 177, 209-214 (2000) (arguing in favor of a "juridical personality" for limited liabilities companies and rejecting the treatment of limited liability companies "like a partnership" or "like a corporation").

[50] *See, e.g.,* DEL. CODE ANN. tit. 6, § 18-607(a) (2003).

[51] *See, e.g.,* Autrey v. 22 Tex. Servs., Inc., 79 F. Supp. 2d 735, 745 (S.D. Tex. 2000); Cmty. Care Ctrs., Inc. v. Hamilton, 774 N.E.2d 559, 565-66 (Ind. Ct. App. 2002). *C.f.,* RIBSTEIN & KEATINGE, *supra* note 37, § 12.03 at 6 (noting that inadequate capitalization is rare, even in corporations).

[52] The converse also applies. For example, in Pepsi-Cola Bottling Co. v. Handy, No. 1973-S, 2000 WL 364199, at *3-*6 (Del. Ch. Mar. 15, 2000), the court looked to the Delaware Limited Liability Company Act and found that the

defendants were not entitled to statutory protections as members of a limited liability company because the allegations were "based on conduct [that] occurred before the LLC was formed." Thus, defendants could not use the Delaware Limited Liability Company Act to shield them from liability under other theories.

53 Kaycee Land & Livestock v. Flahive, 46 P.3d 323, 328 (Wyo. 2002). *See also,* Ribstein & Keatinge, *supra* note 37, § 12.03 at 5-7 (discussing distinctions between corporations and limited liability companies in the context of veil-piercing).

54 *See* United States v. Pisani, 646 F.2d 83, 88 (3rd Cir. 1981); *Cmty. Care Ctrs., Inc.*, 774 N.E.2d at 565. *See also Kaycee Land & Livestock*, 46 P.3d at 328 (holding that "the doctrine of piercing the veil should apply to limited liability companies," although the factors that would justify piercing an limited liability company veil might differ because, for example, "many of the organizational formalities applicable to corporations do not apply to LLCs").

55 *See, e.g.,* Cal. Corp. Code § 17101(b) (West 2003); Colo. Rev. Stat. Ann. § 7-80-107(2) (West 2003); Mont. Code Ann. § 35-8-304(2) (2002); Wash. Rev. Code Ann. § 25.15.060 (West 2003).

56 *See* 805 Ill. Comp. Stat. § 180/10-10 (West 2003), *amended by* P.A. 90-424, § 10, effective Jan. 1, 1998.

57 *Id.* § 180/10-10(a).

58 *Id.* § 180/10-10(d).

59 Ribstein & Keatinge, *supra* note 37, § 1.02 at 2 n.2. The first limited liability company act was enacted in Wyoming in 1977. *Id.* at 6. *See* Kaycee Land & Livestock v. Flahive, 46 P.3d 323, 326 (Wyo. 2002). By the mid-1990s, all fifty states and the District of Columbia had enacted limited liability company statutes. Ribstein & Keatinge, *supra* note 37, at 8.

60 Ribstein & Keatinge, *supra* note 37, § 12.03 at 3-5 (noting uncertainty in how courts have treated and will treat veil-piercing in the limited liability company context).

61 For a sampling of cases involving attempts to pierce the veil of Medicare provider companies, see United States v. Pisani, 646 F.2d 83, 87 (3d Cir. 1981); United States v. Bridle Path Enters., Inc., No. CIV.A.99-11051-GAO, 2001 WL 1688911, at *2 (D. Mass. Dec. 4, 2001) (piercing the corporate veil to recover Medicare overpayments); United States ex rel. Kneepkins v. Gambro Healthcare, Inc., 115 F. Supp. 2d 35, 39-41 (D. Mass 2000) (dismissing a parent corporation from a Medicare false-claims action); Healthcare Tech. Servs., Inc. v. Shalala, No. CIV.A.99-4467, 2000 WL 537448, at * 3–4 (E.D. Pa. Apr. 25, 2000) (declining to dismiss related companies from action seeking to recover Medicare overpayments on allegations that one individual was President and CEO of four companies, all four companies were located in the same city, and four companies "shifted patients between them to increase payments flowing to one company, and avoid or bypass various actions . . . that reduced payments to another related company"); United States ex rel. Piacentile v. Wolk, No. CIV.A.93-5773, 1995 WL 20833, at *4 (E.D. Pa. 1995) (holding shareholder not liable for corporation's violation of the False Claims Act where there was no basis for piercing the corporate veil); United States v. Lorenzo, 768 F. Supp. 1127, 1132-33 (E.D. Pa. 1991) (piercing the corporate veil in false-claims action against dentist and related companies); United States v. Arrow Med. Equip. Co., No. CIV.A.90-5701, 1990 WL 210601, at *8 (E.D. Pa. Dec. 18, 1990) (declining to dismiss officers and related companies from action seeking to recover Medicare overpayments because defendants "cannot be permitted to use the corporate form as a defensive shield to ward off . . . overpayment claim[s] and to escape the reach of the Medicare regulations from which they previously benefited"); United States v. Thomas, 515 F. Supp. 1351, 1357 (W.D. Tex. 1981) (piercing the corporate veil to recover Medicare payments

where assets were dissipated to sole shareholder's benefit at time that corporation was failing).

[62] *Pisani*, 646 F.2d at 86, 88.

[63] *Id.* at 86.

[64] *Id.* at 86-87.

[65] *See Id.* at 87. Notwithstanding the fraud factor applied in many federal (and state) cases, the Court of Appeals for the District of Columbia Circuit recently noted: "The difference between being a fraud and conducting one is important. Even a fully-capitalized, Fortune 500 corporation can embark on a fraud, but that would not make its corporate form a sham or its shareholders personally liable." United States v. Jamieson Sci. and Eng'g, Inc., 322 F.3d 738, 741 (D.C. Cir. 2003) (citations omitted) (holding President and CEO of corporation not personally liable under False Claims Act based on the company's alleged fraudulent conduct).

[66] *Pisani*, 646 F.2d at 88-89.

[67] *Id.* at 88 (citations omitted) (quoting DeWitt Truck Brokers v. W. Ray Flemming Fruit Co., 540 F.2d 681, 686-87 (4th Cir. 1976). *See also* United States v. Jon-T Chem., Inc., 768 F.2d 686, 691-93 (5th Cir. 1985) (applying "a laundry list of factors" and concluding that government's claims for fraudulent misrepresentation and conversion sounded in tort rather than contract and, thus, indicia of fraud were unnecessary to uphold ruling piercing the corporate veil); Healthcare Tech. Servs., Inc. v. Shalala, No. CIV.A.99-4467, 2000 WL 537448, at * 3 (E.D. Pa. Apr. 25, 2000); United States v. Lorenzo, 768 F. Supp. 1127, 1132-33 (E.D. Pa. 1991); United States v. Golden Acres, Inc., 702 F. Supp. 1097, 1104-07 (D. Del. 1988) (applying these factors, court held related companies and individuals liable for HUD judgment against defendant company for company's failure to make mortgage payments to HUD).

[68] *Pisani*, 646 F.2d at 84, 89-90.

[69] *Id.* at 88.

[70] United States ex rel. Kneepkins v. Gambro Healthcare, Inc., 115 F. Supp. 2d 35, 39-40 (D. Mass 2000) (applying three-factor test in Medicare false-claims action). *See also* United States v. Bridle Path Enters., Inc., No. CIV.A.99-11051-GAO, 2001 WL 1688911, at *3 (D. Mass. Dec. 4, 2001) (applying three-factor test in Medicare overpayment-recoupment action).

[71] *See, e.g., Bridle Path Enters.,* 2001 WL 1688911, at *3 (noting a "strong inference of intentional fraud" based on payments made to owners and related companies while Medicare provider was operating at a net loss).

[72] United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979).

[73] Cmty. Care Ctrs., Inc. v. Hamilton, 774 N.E.2d 559, 562 (Ind. Ct. App. 2002).

[74] *See, e.g.,* Autrey v. 22 Tex. Servs., Inc., 79 F. Supp. 2d 735, 746-47 (S.D. Tex. 2000) (plaintiffs' allegations against nursing home and related companies created triable issue of fact as to veil-piercing that survived defendants' motion for summary judgment); House v. 22 Tex. Servs., Inc., 60 F. Supp. 2d 602, 610, 614 (S.D. Tex. 1999) (court pierces corporate veil to obtain personal jurisdiction over individual defendants).

[75] *See, e.g.,* Wausau Bus. Ins. Co. v. Turner Const. Co., 141 F. Supp. 2d 412, 416–17 (S.D.N.Y. 2001) (court applied New York law by agreement of the parties, although New York choice of law principles would apply the law of the state of incorporation [Delaware] to determine whether to pierce the corporate veil); *Autrey*,79 F. Supp. 2d at 740 (in nursing home malpractice action, court applied the law of the state of incorporation of the corporate defendants to determine whether to pierce the corporate veil); Downing v. Jameson, No. CV 96-0323910S, 1998 WL 811876, at *3-*4 (Conn. Super. Ct. Nov. 13, 1998) (court applied Connecticut law to assess whether veil-piercing allegations against foreign company survived a motion for summary judgment).

[76] *See* Presser, *supra* note 48, § 1.03[4] at I-27 to 31 (West 1991) (citing Frederick J. Powell, Parent and Subsidiary Corporations: Liability of a parent corporation for the obligations of its subsidiary (1931) (the seminal treatise on piercing the corporate veil); William Meade Fletcher, Fletcher Cyclopedia of The Law of Private Corporations §§ 41 at 557-61, 41.30 at 617-18 (West 1999)).

[77] *See* Presser, *supra* note 48, § 1.03[4] at I-29; Fletcher, *supra* note 76, § 41.30 at 625-31. *See also* Messick v. Moring, 514 So. 2d 892, 894 (Al. 1987); Angelo Tomasso, Inc. v. Armor Constr. & Paving, Inc., 187 Conn. 544, 557 (1982); SFA Folio Collections, Inc. v. Bannon, 217 Conn. 220, 232 (1991) (citing H. Henn & J. Alexander, Laws of Corporations, §149 at 355 (3d ed. 1983)); Dania Jai-Alai Palace, Inc. v. Sykes, 450 So. 2d 1114, 1118 (Fla. 1984) (quoting Riesen v. Maryland Cas. Co., 14 So. 2d 197, 199 (Fla. 1943)); Solomon v. Betras Plastics, Inc., 550 So. 2d 1182, 1184 (Fla. Dist. Ct. App. 1989); Hanson v. Bradley, 10 N.E.2d 259, 264 (Mass. 1937); RLI Ins. Co. v. Martin Ginden Ins. Agency, Inc., No. 917614F, 1994 WL 879678, at *2 (Mass. Super. Ct. June 22, 1994); My Bread Baking Co. v. Cumberland Farms, Inc., 233 N.E.2d 748, 751-52 (Mass. 1968), *cited in* Markham v. Fay, 884 F. Supp. 594, 603 (D. Mass. 1995) (referring to *My Bread Making Co.* as a "seminal decision"); Glenn v. Wagner, 329 S.E.2d 326, 330 (N.C. 1985) (quoting B-W Acceptance Corp. v. Spencer, 149 S.E.2d 570, 576 (N.C. 1966)); Castleberry v, Branscum, 721 S.W.2d 270, 271-272 (Tex. 1986).

[78] Presser, *supra* note 76, 1.03[4] at I-28 (noting Powell's test requiring (i) that the subsidiary is an "alter ego," or "mere instrumentality" of the parent; (ii) that a "fraud or wrong" occurred; and (iii) that "unjust loss or injury" resulted); Fletcher, *supra* note 76, § 41.32 at 637 ("fraud, illegal activity or fundamental unfairness are required in many jurisdictions"). *See also id.* § 41.25 at 605-06.

[79] Ribstein & Keatinge, *supra* note 37, § 12.03 at 4-5.

[80] *See e.g.,* Gen. Ins. Servs., Inc. v. Marcola, 497 S.E.2d 679, 683-84 (Ga. Ct. App. 1998) (lack of intentional misrepresentation by president supported refusal to pierce the veil); Tex. Bus. Corp. Act Ann. art. 2.21(A)(2) (2003) (in contract actions, Texas requires actual fraud: the liability of shareholders for contractual obligations of a corporation is limited to instances where the shareholder "caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud . . . primarily for the direct personal benefit of the" shareholder).

[81] *See, e.g.,* United States v. Bridle Path Enters., Inc., No. CIV.A.99-11051-GAO, 2001 WL 1688911, at *3 (D. Mass. Dec. 4, 2001).

[82] *Messick,* 514 So. 2d at 894-95; *Castleberry,* 721 S.W.2d at 271.

[83] *Bridle Path Enters., Inc.,* 2001 WL 1688911, at *1.

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.* at *2.

[89] *Bridle Path Enters., Inc.,* 2001 WL 1688911, at *3.

[90] *Id.* at *2.

[91] *Id.* at *3.

[92] *Id.* at *2.

[93] *Id.*

[94] *Id.*

[95] *Bridle Path Enters., Inc.,* 2001 WL 1688911, at *3.

[96] *Id.*

[97] *Id.* at *4.

[98] *Id.*

[99] *Id.*

[100] United States v. Lorenzo, 768 F. Supp. 1127, 1133 (E.D. Pa. 1991).
[101] *Id.* at 1128.
[102] *Id.* at 1132.
[103] *Id.* at 1133.
[104] *Id.* at 1132.
[105] *Id.* The court describes the "undocumented" transactions as: a ten-year lease entered into in 1985 that required U.S. Mobile to pay twice the rent it paid under a 1984 ten-year lease, with the dentist and his wife as signatories to the leases; and loans made with undocumented terms between U.S. Mobile and the related companies and the dentist and his wife. *Id.*
[106] *Lorenzo*, 768 F. Supp. at 1132-33. The court described the contracts for services and space as rental by U.S. Mobile of space and services from a related company that resulted in U.S. Mobile owing in excess of $200,000 over a three-year period; contracts between U.S. Mobile and a related company for services, staff, and the use of a computer; and the purchase of a photocopier by U.S. Mobile to benefit the dentist's private office.
[107] *Id.* at 1133.
[108] *Id.*
[109] *Id.*
[110] United States ex rel. Kneepkins v. Gambro Healthcare, Inc., 115 F. Supp. 2d 35, 39-40 (D. Mass 2000).
[111] *Id.* at 37, 39.
[112] *Id.* at 39.
[113] *Id.*
[114] *Id.* at 40.
[115] *Id.* (quoting Town of Brookline v. Gorsuch, 667 F.2d 215, 221 (1st Cir. 1981)).
[116] *Kneepkins*, 115 F. Supp. 2d at 40.
[117] *Id.*
[118] *Id.*
[119] *Id.* at 41.
[120] *Id.*
[121] State v. Woodvale Mgmt. Servs., Inc., No. C2-98-584, 1998 WL 811554, *1 (Minn. Ct. App. Nov. 24, 1998).
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Woodvale Mgmt. Servs., Inc.*, 1998 WL 811554, at *2.
[128] *Id.* at *3.
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Woodvale Mgmt. Servs., Inc.*, 1998 WL 811554, at *3.
[134] *Id.* at *4.
[135] Autrey v. 22 Tex. Servs., Inc., 79 F. Supp. 2d 735, 738 (S.D. Tex. 2000).
[136] *Id.* at 740.
[137] *Id.* at 740, 741.
[138] *Id.* at 740.
[139] *Id.* at 740-41.
[140] *Id.* at 741.
[141] *Autrey*, 79 F. Supp. 2d at 741.
[142] *Id.*
[143] *Id.*
[144] *Id.*

[145] *Id.* at 742.
[146] *Id.* at 746-47.
[147] Cmty. Care Ctrs., Inc. v. Hamilton, 774 N.E.2d 559, 562 (Ind. Ct. App. 2002).
[148] *Id.* at 564.
[149] *Id.*
[150] *Id.* at 564-70.
[151] *Id.* at 570.
[152] 42 C.F.R. § 1001.1051(a)(1) (2003).
[153] *See id.* § 1001.1051(a)(1), (2).
[154] 42 C.F.R. §§ 1001.2002(a), 2003 (2003).
[155] United States ex rel. Kneepkins v. Gambro Healthcare, Inc., 115 F. Supp. 2d 35, 39 (D.Mass 2000).
[156] State v. Woodvale Mgmt. Servs., Inc., No. C2-98-584, 1998 WL 811554, *2 (Minn. Ct. App. Nov. 24, 1998).
[157] *Id.*
[158] Autrey v. 22 Tex. Servs., Inc., 79 F. Supp. 2d 735, 738-39 (S.D. Tex. 2000).