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Legal Separateness: The Boundaries on Written Discovery

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The concept of corporate legal separateness has long been a fortress protecting affiliated business entities such as parents, subsidiaries, and sister companies from various kinds of liability and litigation. However, how much protection does such legal separateness offer the information that corporations gather and store when faced with vehicles of written discovery such as interrogatory requests or requests for production? In other words, if an opposing party requests information or documents from a party that requires that party to seek information or documents from an affiliated non-party entity, is the party then required to seek the requested information or documents from its affiliated non-party entities?

A survey of case law throughout different federal circuits shows that the degree of separation may vary depending on the jurisdiction and the facts involved. But ultimately, the central question in all circuits becomes, what degree of "control" does one entity have over the other?

Each Circuit has its own complex balancing test to define the level of control between corporate entities. In the Third Circuit, the seminal case *Gerling Intern. Ins. Co. v. C.I.R.*, provides four factors for courts to assess control between parent/subsidiary corporations: (1) alter ego doctrine; (2) subsidiary was agent of parent in lawsuit transaction; (3) subsidiary can secure documents to meet its own business needs and for litigation help; and (4) there is access to documents in the ordinary course of business. *Id.* at 140. The *Gerling* court distinguishes between parent/subsidiary and sister corporations, noting that for sister corporations, the requisite control has only been found on alter ego grounds. *Id.*

Unlike the Third Circuit, courts within the Seventh Circuit do not distinguish between parent/subsidiary and other affiliate relationships in the analysis for "control." In the Seventh Circuit "control" is determined as follows: "a party need not have actual possession of the documents to be deemed in control of them; rather, the test is whether the party has a legal right to obtain them" and sets out seven factors to analyze such "control": (1) commonality of ownership; (2) exchange or intermingling of directors, officers, employees; (3) exchange of documents in the ordinary course of business; (4) non-party's connection to the transaction at issue; (5) any benefit or involvement of the non-party corporation in the litigation; (6); the party's marketing or servicing of the non-party's products; and (7) financial relationship between the companies. *Meridian Laboratories, Inc. v. OncoGenerix USA, Inc*.

Ninth Circuit courts have consistently reasoned that subsidiary companies lack the control of documents possessed by the parent corporation and that extending the definition of "control" to include the practical ability to obtain documents is not enough because the parent company "could legally—and without breaching any contract—refuse to turn over such documents." *In re Citric Acid Litig*. Some Ninth Circuit cases have looked to Third Circuit decisions to analyze factors to determine the requisite "control." *See e.g.*, *Cryptography Research, Inc. v. Visa Int'l Serv. Assoc.*, *AFL Telecomms. LLC v. SurplusEQ.com, Inc*.

On the other side of the spectrum, courts in the Second Circuit have defined "control" not as "legal ownership or actual physical possession" but when "that party has the right, authority, or practical ability to obtain the documents from a non-party to the action." *In re NTL, Inc. Securities Litigation*. Courts in the Eleventh Circuit similarly broadly define "control" for discovery purposes, only requiring "right, authority, or practical ability to obtain the materials sought on demand," weighing three factors: (1) the corporate structure; (2) the non-parties' connection to the transaction at issue in the litigation; and (3) the degree the nonparties benefit from the outcome of the litigation. *Costa v. Kerzner Intern. Resorts, Inc.*

Courts within the Fourth Circuit construe “control” to include both the legal right to control the company and the actual ability to obtain the information. There are two tests used depending on the situation: (1) the legal-right-to-documents test that is applied when information is readily attainable through a subpoena duces tecum so that there is no compelling reason exists to expand the definition of control, and (2) the practical-ability-to-obtain test, which applies an 11-factor test when no subpoena has been issued, examining corporate structure and officer overlap, the non-parties’ connection to the litigation, and agreements among entities that reflect legal rights to obtain certain documents. See e.g., *Ultra-Mek, Inc. v. Man Wah (USA), Inc.*

The facts of each case and the various factors considered by the court may result in different outcomes in seeking to obtain discovery from affiliated non-party entities of parties in a case. Knowing the tests and precedent in your jurisdiction may dictate whether certain requests should be compelled or opposed during discovery. That said, in many cases, a third-party subpoena may be a less complex vehicle for parties to obtain information and documents from non-party affiliated entities.

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