Filed 5/1/18 Hollander v. XL Capital CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

GAIL HOLLANDER et al., Plaintiffs and Appellants, v. XL CAPITAL LTD. et al., Defendants and Respondents.	B276621 (Los Angeles County Super. Ct. No. BC365455)

APPEAL from a judgment of the Superior Court of Los Angeles County, Debre Katz Weintraub, Judge. Affirmed.

A. Tod Hindin, A Tod Hindin, Karen L. Hindin; The Erhlich Law Firm and Jeffrey I. Erhlich for Plaintiffs and Appellants.

Burris Schoenberg & Walden, Donald S. Burris, Richard E. Walden; Culhane Meadows and Stephen O'Donnell for Defendants and Respondents.

In 2007, Gail and Stanley Hollander (collectively, the Hollanders[1]) sued the insurer of certain artwork they owned, XL Specialty Insurance Company (XL Specialty), and various other defendants, including entities related to XL Specialty. Among those related entity defendants are the following: XL Capital Ltd. (XL Capital); XL America, Inc. (XL America); and NAC Re Corporation (NAC Re) (collectively, defendants).

In 2016, the trial court granted summary judgment to the defendants, finding that the Hollanders had not raised a triable issue of material fact with respect to either their alter ego/single enterprise or agency theories of liability. The Hollanders appealed, arguing that they had submitted sufficient admissible evidence to proceed to trial against defendants on those theories. We disagree and, accordingly, affirm the judgment.

---

[1] Mr. Hollander died in 2016 prior to the trial court's ruling on the summary judgment motion that is the subject of this appeal. Consequently, this appeal is brought by Mrs. Hollander in her personal capacity and in various capacities related to the estate of her deceased husband.

BACKGROUND[2]

As set forth in their verified complaint, the Hollanders own fine art by the German artist Martin Kippenberger. On January 9, 2006, employees of LA Packing were hanging three paintings by Kippenberger in the Hollanders' home and damaged the cardboard frames.

The Hollanders made a claim under their two policies issued by XL Specialty. A claims adjuster, arranged for the paintings to be returned to Kippenberger's estate in Germany, where they were repaired at XL Specialty's expense. The Hollanders disagreed with the adjuster's estimate regarding the diminution in value of the paintings, and arranged to have the paintings sold at auction for $181,745 less than the scheduled value of the paintings on the insurance policy.

In January 2007, the Hollanders commenced this action against XL Specialty and numerous other defendants, alleging claims for breach of contract, breach of the covenant of good faith and fair dealing, breach of Insurance Code section 785, and promissory fraud, and also asserted a claim against LA Packing for negligence. In addition, the Hollanders alleged in boilerplate

---

[2] This case has been the subject of numerous prior appeals. (See *Hollander v. Superior Court* (Aug. 16, 2007, B200615) [nonpub. opn.]; *Hollander v. XL Capital Ltd., et al.* (Dec. 31, 2007, B199231) [nonpub. opn.]; *Hollander v. XL London Market Ltd., et al.* (Apr. 16, 2010, B213864) [nonpub. opn.]; *Hollander v. XL Capital Ltd., et al.* (Oct. 3, 2012, B229004) [nonpub. opn.]; *Hollander v. XL Insurance (Bermuda) Ltd.* (Oct. 5, 2012, B230807) [nonpub. opn.]; *Hollander v. XL Capital Ltd. et al.* (Nov. 16, 2015, B250649) [nonpub. opn.].) Accordingly, our discussion of the facts and the procedural evolution of this case will be tailored to the issues on this appeal.

fashion that all of the XL-related defendants were agents of one another.

On April 29, 2008, the Hollanders amended their complaint to assert that XL Capital, as the parent company of the related entities, was the alter ego of the other XL defendants and operated its many companies as a "single enterprise."

I. Defendants' motion for summary judgment

In February 2011, defendants and eight of their affiliates that had been also named as codefendants (but not the Hollanders' insurer, XL Specialty) (the SJ defendants)[3] moved for summary judgment and/or summary adjudication with regard to the Hollanders' alter ego and related theories of liability. The trial court denied the motion "solely because [the Hollanders] provided sufficient evidence to overcome the presumption of separate corporate existence. There was no determination regarding an inequitable result."

In February 2013, the SJ defendants renewed their motion for summary judgment due to "new, up-to-date facts concerning the net assets of Defendant XL Specialty." More specifically, the SJ defendants stated that recent regulatory filings indicated that XL Specialty's unencumbered assets—that is, assets available to pay any judgment against it—exceeded $164 million as of the end of 2011. Accordingly, the SJ defendants argued that the Hollanders' alter ego and single enterprise claims failed as a matter of law because the Hollanders "cannot show any credible

---

[3] The other SJ defendants are as follows: XL Reinsurance America; XL Insurance America; XL Insurance Company of New York; XL Select Insurance Company; Indian Harbor Insurance Company; Greenwich Insurance Company; XL Re; and XL America Group.

risk of an inequitable result because their insurer, non-movant XL Specialty, irrefutably is capable of paying any judgment they might win."[4] With regard to the Hollanders' agency claims, the SJ defendants argued that the basis for those claims—intercompany pooling and quota share reinsurance agreements and general services contracts—do not establish the control necessary to impose agency liability.

II. The Hollanders' opposition

The Hollanders based their opposition principally on the testimony of three experts: Sean Kneafsey (Kneafsey); Jamie Holmes (Holmes); and Jack Blum (Blum).

A. KNEAFSEY AND XL SPECIALTY'S ABILITY TO PAY

Kneafsey, an attorney with extensive experience representing insurers and insureds, offered the most detailed testimony—a 65 plus page declaration supported by almost 1,500 pages of supporting documentation. Among other things, Kneafsey opined that XL Capital and its wholly owned subsidiaries, including XL America and NAC Re, are doing business as a single enterprise under the trade name "XL Insurance," which is dominated and controlled by XL Capital. According to Kneafsey, XL Capital and its subsidiaries commingled funds and other assets, XL Capital failed to segregate the assets of its various subsidiaries, and XL Capital and its subsidiaries freely transferred assets between and among each other. He further opined that XL Capital conducts all of its

---

[4] In their motion, the SJ defendants also challenged the Hollander's evidentiary support for the other element of alter ego/single enterprise liability: unity of interest and ownership.

basic activities on a companywide single enterprise basis controlled by XL Capital in Bermuda.

However, Kneafsey did not directly challenge XL Specialty's assets and/or its ability to pay any monetary judgment the Hollanders might be awarded. Instead, Kneafsey offered only indirect and contingent challenges. For example, he opined that XL America Group—which conducts XL Capital's American insurance operations and which includes XL Specialty among its members,[5] and which shares profits and losses among its members on a fixed basis—has a "negative net worth *if* its contractual guarantees of the Bermuda subsidiaries of XL Capital are not taken into account." (Italics added.) However, Kneafsey did not explain why or under what circumstances those contractual guarantees should not be taken into account. Similarly, Kneafsey stated that "XL America Group is insolvent (has a negative Policyholder surplus) *without*" a quota share reinsurance agreement with an XL Bermuda subsidiary. (Italics added.) Kneafsey, again, failed to explain why or under what circumstances that quota share agreement should be disregarded. Moreover, Kneafsey did not state or suggest that any of the reinsurance arrangements with the XL Bermuda entities were improper or illegal.

B. HOLMES, BLUM AND XL SPECIALTY'S ABILITY TO PAY

In much the same way, Holmes and Blum failed to directly challenge the value of XL Specialty's assets and/or its ability to pay a monetary judgment. Instead, they limited themselves to

---

[5] According to the Hollanders, none of the defendants are members of the XL America Group.

indirectly attacking various intercorporate arrangements among various XL companies.

For example, Holmes, an attorney and forensic accountant, opined at his deposition that XL Capital and its subsidiaries operated as a single enterprise and that a subset of that group, XL America Group, also operated as a single enterprise.[6] Holmes's evidence for XL America Group being a single enterprise was the "intercompany reinsurance pooling agreement whereby all the profits and losses from XL America Group are shared on a fixed basis." Holmes further opined that the XL America Group was "undercapitalized," because if "the monies paid for reinsurance—*if* that is not included, then XL American Group shows a negative surplus." (Italics added.) However, Holmes did not opine that the intercompany reinsurance pooling agreement was illegal or improper or that XL Specialty's assets were not in excess of $160 million or that XL Specialty would not be able to pay any judgment against it.

Blum, an attorney whose practice focused on financial institutions and issues related to international taxation, including money laundering, opined at his deposition that the XL America Group and its "arrangement with the Bermuda sister companies of XL Capital" was designed to "minimize tax payments in the U.S."[7] However, Blum, like Kneafsey and

---

[6] The deposition excerpts submitted by the Hollanders disclosed Holmes's ultimate opinion about XL Capital and XL America Group operating as a single enterprise, but did not reveal the factual bases for his opinion.

[7] As with Holmes, the excerpts from Blum's deposition disclosed his opinion, but not its factual bases.

Holmes, did not opine that there was anything improper about the XL America Group's contractual relationship with related entities in Bermuda or that those contractual relationships would somehow compromise XL Specialty's ability to pay a judgment.

C. THE HOLLANDERS' LEGAL ARGUMENT ABOUT XL SPECIALTY'S ABILITY TO PAY

In their opposition, the Hollanders, did not offer any legal argument for why the specific Bermuda reinsurance contracts at issue should be disregarded when assessing XL Specialty's ability to pay any eventual judgment.[8] Instead, the Hollanders offered a different type of legal challenge to XL Specialty's ability to pay. They asserted that although their damages related to their breach of contract claim were well within XL Specialty's ability to pay ($181,745 plus interest), they were seeking other more substantial damages: "Plaintiffs have alleged damages which include not only the policy benefits owing them, but also emotional distress damages, attorneys' fees and litigation expenses . . . and punitive damages." Although the Hollanders did not submit any evidence regarding their alleged emotional distress damages, they submitted evidence concerning their legal

---

[8] Reinsurance contracts— contracts "by which an insurer procures a third person to insure him against loss or liability by reason of such original insurance" (Ins. Code, § 620)—are not new or an inherently suspect form of insurance. Indeed, reinsurance contracts have been permitted since the earliest days of the United States. (See Staring & Hansell, Law of Reinsurance, § 1:4 (2017) p. 8 ["at least as early as 1821, there was a practice of endorsing reinsurance on direct fire insurance policies"].) "[R]einsurance is today in general use throughout the United States for all lines of insurance." (*Ibid.*)

fees and expenses—as of 2011, their so-called *Brandt* fees[9] and expenses totaled approximately $5.8 million. According to the Hollanders, their "emotional distress and punitive damages *could* be substantial," especially *if* the punitive damages were 10 times their compensatory damages. (Italics added.) The Hollanders did not (and could not) offer any evidence or argument demonstrating that they were legally entitled to punitive damages, let alone entitled to punitive damages in an amount 10 times whatever their compensatory damages were ultimately determined to be.

III. The trial court's decision

In June 2013, the trial court granted the SJ defendants' motion, finding that the Hollanders' offered "no evidence creating a triable issue of material fact that there would be an inequitable result. [¶] Under these circumstances, there can be no alter ego liability found on behalf of the moving defendants. Plaintiffs present no evidence that would create triable issue of fact of any agency relationship."

The Hollanders appealed and we reversed, holding that the trial court incorrectly relied on two of our prior decisions as law of the case even though those decisions involved different defendants. (See *Hollander v. XL Capital Ltd., et al.* (Nov. 16, 2015, B250649) [nonpub. opn.] at pp. 5–6.)

---

[9] "*Brandt* fees" are those attorney fees that an insured reasonably and necessarily incurs to obtain policy benefits that the insurer wrongfully denied; such fees constitute an economic loss proximately caused by the insurer's tort, and are recoverable as tort damages. (See *Brandt v. Superior Court* 1985) 37 Cal.3d 813, 817–819; *Essex Ins. Co. v. Five Star Dye House, Inc.* (2006) 38 Cal.4th 1252, 1255.)

On remand, the trial court decided to rule on the SJ defendants' motion without the benefit of any additional briefing or evidence. On April 21 and May 27, 2016, the trial court heard oral argument on the motion. At the second hearing, the trial granted summary judgment to the defendants on a number of different theories of liability including alter ego/single enterprise and agency.

The trial court entered judgment in favor of the defendants on June 6, 2016 and the Hollanders timely appealed.

DISCUSSION

I. Standard of review

We review an order granting summary judgment de novo, "considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)

A defendant moving for summary judgment must show "that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to the cause of action." (Code Civ. Proc., § 437c, subd. (p)(2).) In opposing a defendant's motion, the plaintiff may "not rely upon the allegations or denials of its pleadings to show that a triable issue of one or more material facts exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to the cause of action or a defense thereto." (§ 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849 (*Aguilar*).) And the evidence submitted, as is the case with the moving party's evidence, must be admissible. It is not enough in opposing summary judgment to surmise reasons or make unfounded allegations: "a party 'cannot avoid summary

judgment by asserting facts based on mere speculation and conjecture, but instead must produce admissible evidence raising a triable issue of fact.' " (*Dollinger DeAnza Associates v. Chicago Title Ins. Co.* (2011) 199 Cal.App.4th 1132, 1144–1145.)

"In performing our de novo review, we must view the evidence in a light favorable to plaintiff as the losing party [citation], liberally construing [his or] her evidentiary submission while strictly scrutinizing defendants' own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor." (*Saelzler v. Advanced Group* 400 (2001) 25 Cal.4th 763, 768.) We accept as true both the facts shown by the losing party's evidence and reasonable inferences from that evidence. (*Aguilar*, *supra*, 25 Cal.4th at p. 856.)

Summary judgment is appropriate only when "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A triable issue of material fact exists if the evidence and inferences therefrom would allow a reasonable juror to find the underlying fact in favor of the party opposing summary judgment. (*Aguilar*, *supra*, 25 Cal.4th at pp. 850, 856.)

II. Alter ego and single enterprise

A. GUIDING PRINCIPLES

"[C]ommon principles apply regardless of whether the alleged alter ego is based on piercing the corporate veil to attach liability to a shareholder or to hold a corporation liable as part of a single enterprise." (*Toho–Towa Co., Ltd. v. Morgan Creek Productions, Inc.* (2013) 217 Cal.App.4th 1096, 1108.) The purpose of the alter ego and single enterprise theories of liability is a narrow one. As our Supreme Court has noted, " 'The issue is

not so much whether, for all purposes, the corporation is the "alter ego" of its stockholders or officers, nor whether the very purpose of the organization of the corporation was to defraud the individual who is now in court complaining, as it is an issue of whether in the *particular case presented* and for the *purposes of such case* justice and equity can best be accomplished and fraud and unfairness defeated by a disregard of the distinct entity of the corporate form.' " (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300–301 (*Mesler*), italics added.)

"There is no litmus test to determine when the corporate veil will be pierced; rather[,] the result will depend on the circumstances of each particular case. There are, nevertheless, two general requirements: '(1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow.' " (*Mesler*, *supra*, 39 Cal.3d at p. 300.) "[*B*]*oth* of these requirements must be found to exist before the corporate existence will be disregarded." (*Associated Vendors, Inc. v. Oakland Meat Co.* (1962) 210 Cal.App.2d 825, 837 (*Associated Vendors*).)

With regard to the inequitable result prong, courts have warned against stretching the concept of inequity too far: "Certainly, it is not sufficient to merely show that a creditor will remain unsatisfied if the corporate veil is not pierced . . . . In almost every instance where a plaintiff has attempted to invoke the doctrine he is an unsatisfied creditor. The purpose of the doctrine is not to protect every unsatisfied creditor, but rather to afford him protection, where some conduct amounting to bad faith makes it inequitable, under the applicable rule above cited,

for the equitable owner of a corporation to hide behind its corporate veil." (*Associated Vendors*, *supra*, 210 Cal.App.2d at p. 842.) Courts, however, have also held that "[a]n inequitable result does not require a wrongful intent," where a defendant "is insolvent." (*Relentless Air Racing, LLC v. Airborne Turbine Ltd. Partnership* (2013) 222 Cal.App.4th 811, 813 (*Relentless*).) In *Relentless*, the court held that inequity would result if the corporate veil was not pierced because the corporate defendant had "*no* substantial assets from which the judgment could be satisfied." (*Id*. at p. 816, italics added.)

B. NO TRIABLE ISSUE OF FACT WITH REGARD TO ALTER EGO/SINGLE ENTERPRISE THEORY OF LIABILITY

Summary judgment was appropriate on the alter ego/single enterprise theory of liability because the Hollanders failed to meet their evidentiary burden. The Hollanders failed to meet their burden as a consequence of the absence of proper expert testimony that XL Specialty's assets were insufficient to pay an eventual judgment and the absence of evidence to support the Hollanders' claims of emotional distress and punitive damages.

1. Standards for expert testimony

Under Evidence Code section 801, subdivision (a), a person who qualifies as an expert may give opinion testimony "[r]elated to a subject that is sufficiently beyond common experience" when " 'the opinion of [an] expert would assist the trier of fact.' " (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1116 (*Jennings*).) For this reason, "qualified medical experts may, with a proper foundation, testify on matters involving causation when the causal issue is sufficiently beyond the realm of common experience that the expert's opinion will

assist the trier of fact to assess the issue of causation." (*Id.* at p. 1117.)

Nonetheless, an expert "does not possess a carte blanche to express any opinion within the area of expertise." (*Jennings*, *supra*, 114 Cal.App.4th at p. 1117.) Subdivision (b) of Evidence Code section 801 provides that expert opinion must be "[b]ased on matter . . . that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates . . . ." Furthermore, Evidence Code section 802 provides that an expert witness " 'may state . . . the reasons for his opinion and the matter . . . upon which it is based,' " unless precluded by law. As our Supreme Court has explained, under these provisions, the court acts as a "gatekeeper," and "may inquire into, not only the type of material on which an expert relies, but also whether that material actually supports the expert's reasoning." (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 771 (*Sargon*).)

Where this showing is lacking, " 'there is simply too great an analytical gap between the data and the opinion proffered.' " (*Sargon*, *supra*, 55 Cal.4th at p. 771, quoting *General Electric Co. v. Joiner* (1997) 522 U.S. 136, 146.) Thus, "when an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value because an 'expert opinion is worth no more than the reasons upon which it rests.' " (*Jennings*, *supra*, 114 Cal.App.4th at p. 1117.)

In short, in adjudicating summary judgment motions, courts are "not bound by expert opinion that is speculative or conjectural. [Citations.] Plaintiffs cannot manufacture a triable

issue of fact through use of an expert opinion with self-serving conclusions devoid of any basis, explanation, or reasoning." (*McGonnell v. Kaiser Gypsum Co.* (2002) 98 Cal.App.4th 1098, 1106.) "The evidence must be of sufficient quality to allow the trier of fact to find the underlying fact in favor of the party opposing the motion for summary judgment." (*Id.* at p. 1105.) The plaintiff does not meet his burden of demonstrating a triable issue where his evidence merely provides "a dwindling stream of probabilities that narrow into conjecture." (*Lineaweaver v. Plant Insulation Co.* (1995) 31 Cal.App.4th 1409, 1421.)

2. The Hollanders and their experts relied on speculation and conjecture

Here, the Hollanders' experts—Kneafsey, Blum, and Holmes—did not offer opinions directly challenging XL Specialty's ability to pay an eventual judgment. Instead, they offered only unsupported and unexplained conjecture about that company's solvency if certain reinsurance agreements were ignored. Such opinions are plainly insufficient under the teaching of *Sargon*, *supra*, 55 Cal.4th 747. The fact that defendants did not object to the testimony of Kneafsey, Blum, and Holmes is of no consequence. Even when speculative or conjectural expert testimony is admitted in connection with a summary judgment motion, it does not raise a triable issue of fact. (See *Nardizzi v. Harbor Chrysler Plymouth Sales, Inc.* (2006) 136 Cal.App.4th 1409, 1415; *Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 524–525; see also *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 488.)

Correspondingly, the Hollanders asserted that their emotional distress damages "could be substantial," but offered absolutely no evidence to support such an assertion—no

declarations or deposition testimony by either plaintiff or any of their family or friends; no medical records; and no declaration or deposition testimony by any of the Hollanders' treating physicians. In addition, they asserted that a punitive damages award could be substantial as well, without ever directly acknowledging that such an award is entirely discretionary (see *Sumpter v. Matteson* (2008) 158 Cal.App.4th 928, 936) and that the basis for any such award must be established, not by a preponderance of the evidence, but by clear and convincing evidence of malice, fraud or oppression. (See Civ. Code, § 3294, subd. (a); CACI 3940, 3941; *Westrec Marina Management, Inc. v. Jardine Ins. Brokers Orange County, Inc.* (2000) 85 Cal.App.4th 1042, 1050.)

In short, summary judgment was appropriate on the Hollanders' alter ego/single enterprise theory of liability because, instead of basing their opposition to defendants' inequitable result argument on evidence about existing facts, the Hollanders' relied on speculation about contingent future possibilities.

III. Agency

A. GUIDING PRINCIPLES

" ' "Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." ' " (*van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 571.) " ' "The essential characteristics of an agency relationship as laid out in the Restatement are as follows: (1) An agent or apparent agent holds a power to alter the legal relations between the principal and third persons and between the principal and himself; (2) an agent is a fiduciary with respect to matters within the scope of the

agency; and (3) *a principal has the right to control the conduct of the agent with respect to matters entrusted to him*." ' " (*Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.* (2007) 148 Cal.App.4th 937, 964, italics added; see Rest.2d Agency, §§ 12, 13, 14, pp. 57–61; Rest.3d Agency, § 1.01, pp. 17–30.)

Of the three essential characteristics, the right to control may be the most important. " ' "*In the absence of the essential characteristic of the right of control, there is no true agency . . . .*" [Citations.] [¶] "The fact that parties had a preexisting relationship is not sufficient to make one party the agent for the other . . . . [Citation.] *An agency is proved by evidence that the person for whom the work was performed had the right to control the activities of the alleged agent*." ' " (*Secci v. United Independent Taxi Drivers, Inc.* (2017) 8 Cal.App.5th 846, 855, italics added; see *Emery v. Visa Internat. Service Assn.* (2002) 95 Cal.App.4th 952, 960 [affirming summary judgment for defendant because no evidence of "right to control"].)

In the corporate context, an agency relationship is typified by parental control of the subsidiary's internal affairs or daily operations. For example in the context of establishing jurisdiction over a foreign corporation, California courts have held that agency is established "when the evidence demonstrates that the alleged principal had the right to control the activities of the alleged agent." (*In re Automobile Antitrust Cases I & II* (2005) 135 Cal.App.4th 100, 120). However, "[p]laintiffs must show more than mere ownership or control of a local subsidiary by a foreign parent corporation. [Citations.] The foreign company must exercise a highly pervasive degree of control over the local subsidiary. It must veer into management and day-to-

day operations of the local subsidiary." (*Id.* at p. 120, fn. omitted; see *Kramer Motors, Inc. v. British Leyland, Ltd.* (9th Cir.1980) 628 F.2d 1175, 1177–1178.)

B. NO TRIABLE ISSUE OF FACT WITH REGARD TO AGENCY

In support of both their alter ego and agency allegations, the Hollanders argued that one of the defendants—XL Capital—"dominates and controls the activities of its subsidiaries," including XL America and NAC Re. The Hollanders attempted to prove this domination by showing that (1) executives of XL Capital were also executives of various other subsidiaries, (2) various XL companies shared profits and losses as members of reinsurance pools, and (3) various XL companies shared administrative services and the expenses for those services.

1. Shared employees

The Hollanders submitted evidence that the defendants shared one employee. According to Kneafsey, the "Executive Vice President and Chief Executive of Reinsurance General Operations of XL Capital . . . is also a Director and the Chairman and Chief Executive Officer of NAC Re . . . [and a] Director and President of XL America." The Hollanders, however, did not submit evidence about the composition of the rest of the senior leadership for XL America and NAC Re, raising questions about whether XL Capital employees filled any other seats on those companies' boards of directors or any other offices in the companies' executive suite. Put a little differently, if there was only the one XL Capital employee on the boards of XL America and NAC Re, then that fact alone would not suggest that those companies were agents or mere instrumentalities of XL Capital.

Although the one shared employee identified by the Hollanders for the defendants was a senior or "apex" executive

that fact by itself does not raise a triable issue as to whether the defendants were agents of one another. As the United States Supreme Court explained in the context of assessing corporate separateness for purposes of liability: " '[I]t is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary, and that fact alone may not serve to expose the parent corporation to liability for its subsidiary's acts. [Citations.] [¶] This recognition that the corporate personalities remain distinct has its corollary in the 'well established principle [of corporate law] that directors and officers holding positions with a parent and its subsidiary can and do "change hats" to represent the two corporations separately, despite their common ownership.' " (*United States v. Bestfoods* (1998) 524 U.S. 51, 69.)

In considering a parent corporation's potential liability under the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. § 9601 et seq.), the United States Supreme Court distinguished "a parental officer's oversight of a subsidiary from such an officer's control over the operation of the subsidiary's facility." (*United States v. Bestfoods*, *supra*, 524 U.S. at p. 72.) In so doing, the Supreme Court articulated a generally applicable principle that a parent corporation may be directly involved in the activities of its subsidiaries without incurring liability so long as that involvement is "consistent with the parent's investor status." (*Ibid.*) Appropriate parental involvement includes: "monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures." (*Ibid.*)

California courts have used this guidance to hold that the fact "that the directors and officers were interlocking is

insufficient to rebut the presumption that each common officer or director wore the appropriate 'hat' when making corporate and operational decisions for the respective entities." (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 549.)

Here, the Hollanders submitted no evidence rebutting the presumption that the one employee shared by the defendants wore the appropriate "hat" when making corporate and operational decisions for the respective defendants. By way of example, the Hollanders did not submit any evidence showing that the defendants' executive made decisions for XL America and NAC Re that effectively treated those companies as mere instrumentalities of XL Capital.

2. Shared profits and losses

For evidence of shared profits and losses, the Hollanders relied on two different sets of reinsurance agreements: (a) "[i]nter-[c]ompany reinsurance pooling agreements" (pooling agreements); and (b) "quota share reinsurance agreements" (quota agreements). The Hollanders' reliance on these agreements was misplaced with respect to the defendants. None of the defendants was a member of the pools that are the subject of the pooling agreements. Moreover, none of the defendants was a party to any of the quota agreements or a member of the pools that are the subject of those agreements.

3. Shared administrative services

For evidence of shared administrative services, the Hollanders relied on general service agreements (service agreements) of which there were two different types. Although two defendants—XL America and NAC Re—were parties to the service agreements, those agreements, by their express terms,

did not establish a right to control. Under the terms of the service agreements, XL America provided to NAC Re and certain other affiliates (but not XL Capital) various services including the following: advertising; travel; printing; postage and telephone; legal and auditing; actuarial and accounting; data processing; claims handling; and regulatory compliance.

Beyond offering the express terms of the service agreements, the Hollanders did not offer any evidence as to whether or how the service agreements actually affected management of the day-to-day operations of either XL America or NAC Re. In other words, the Hollanders and their experts implicitly assumed that the mere provision of such administrative services turned the receipient into the agent of the provider.

In short, the Hollanders failed to meet their evidentiary burden with respect to showing that the defendants were the agents of each other (or any of the other SJ defendants). Accordingly, the defendants were entitled to judgment as a matter of law on the Hollander's agency theory.

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J. BENDIX, J.