Protecting Your Bar From Claims in the Wake of 'Mortimer'

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In Pennsylvania, only the holder of a liquor license (licensee) may be held liable for a violation of the Pennsylvania Dram Shop Act, 47 Pa.C.S. Sections, 4-493, 4-497. Many times in a civil action arising from physical injuries caused by an alleged intoxicated patron (AIP), establishing a Dram Shop Act violation is important for a plaintiff, as such liability is an exception to the Pennsylvania Fair Share Act, 42 Pa.C.S. Section 7102. When dram shop liability is involved, the licensee may be jointly and severally liable for the entire judgment awarded to a plaintiff. Even if the licensee is apportioned a minimal amount of liability and the AIP is assigned the majority of liability, the licensee will nevertheless be on the hook for the entire judgment. A savvy plaintiff will strive to establish dram shop liability against the licensee, recognizing that oftentimes the licensee may have more assets that could be used toward a judgment than those of an AIP.

In order to avoid the liability implications associated with a liquor license, bars may use corporate structures to isolate the licensee from other related entities. For example, a separate business entity may be created and used to hold the liquor license. Pennsylvania courts have held this practice is not illegal per se and is acceptable under Pennsylvania law. See *Mortimer v. McCool*, 255 A.3d 261, 270 (Pa. Super. 2021). Yet, when a licensee does not have enough assets or any insurance to satisfy a judgment in full, a plaintiff may try to pierce the corporate veil in order to gain access to additional assets.

Historically, piercing the corporate veil allowed a plaintiff to go after the assets of the licensee's owners, members or shareholders. Today, plaintiffs have a new arrow in their quiver when seeking assets to satisfy judgments—specifically, the enterprise doctrine. In the seminal case *Mortimer, supra*, the Pennsylvania Supreme Court adopted this doctrine, which allows a plaintiff to go after any affiliated or sister companies of the licensee and pierce the corporate veil of these affiliated companies in order to satisfy the judgement against the licensee.

In *Mortimer*, the underlying case involved dram shop liability in which the plaintiff obtained a combined judgment against the defendant-licensee (the company that held the liquor license) and other defendants. The defendant-licensee was jointly and severally liable for the entire judgment due to the dram shop violation. The defendant-licensee did not have liquor liability insurance and had no significant assets beyond the liquor license itself. While the liquor license was sold, the value of the sale failed to satisfy the full judgment. To collect the balance of the judgment, the plaintiff filed a separate action against the defendant-licensee, members of the licensee, and an affiliated entity (the property owner). Two brothers owned the defendant-licensee company, and these brothers and their father owned the affiliated entity. In the separate action, the plaintiff sought to pierce the corporate veil and, pursuant to the enterprise doctrine, hold the affiliated entity liable for the judgment.

After a bench trial, the trial court in *Mortimer* noted that the Pennsylvania Supreme Court had not yet adopted the enterprise doctrine. Nonetheless, the trial court analyzed the plaintiff's enterprise claim using the following five-part test, which the trial called the "Miners test": "identity of ownership, unified administrative control, similar or supplementary business function, involuntary creditors, and insolvency of the corporation against which the claim lies." The trial court concluded that the plaintiff had failed to satisfy the enterprise doctrine even if it did apply, as the affiliated company and the defendant-licensee did not have identical ownership. The trial court further held that the entities were at all times managed and administered as independent entities.

On appeal, in *Mortimer*, the Supreme Court recognized the viability of the enterprise doctrine. The Supreme Court declined to adopt a multi-factor, rigid test to determine the applicability of the enterprise doctrine, including the Miners test (though the Supreme Court explained that the Miners test was "compatible with a restrained approach"). Instead, the Supreme Court held that a simple two-prong test should be used to guide a court when determining whether enterprise piercing was warranted. These prongs included "unity of interest and ownership" and that there is "some fraud, wrong or injustice" in which "piercing is an equitable remedy." The Supreme Court explained that "enterprise liability requires that the affiliates that the enterprise comprises have common owners or an administrative nexus above the sister corporations. Without that nexus, piercing the veil to reach a sister corporation cannot be just." The Supreme Court reasoned that enterprise piercing is "triangular" in that "enterprise liability in any tenable form must run up from the debtor corporation to the common owner, and from there down to the targeted sister corporation(s)." As such, the Supreme Court held that substantial common ownership is required in order for "triangular piercing" to be warranted. The Supreme Court stressed that enterprise piercing should only be used "in cases of great injustice and inequity."

In deciding the case on appeal in *Mortimer*, the Supreme Court held there was no substantial common ownership between the defendant-licensee and the affiliated company. Relying upon the trial court's

findings, the Supreme Court found that the father was a one-third owner of the affiliated company who held no interest in the defendant-licensee. The Supreme Court noted that while the father may have played an administrative role in the defendant-licensee, the father did not exercise any meaningful control over the operations or management of the defendant-licensee. The Supreme Court further found that traditional piercing (specifically, alter ego doctrine) was also inapplicable, as the brothers "maintained an appropriate separation between their personal interests and [the defendant-licensee's] corporate affairs and coffers."

Since *Mortimer*, the Pennsylvania Superior Court has appeared to adopt the two-prong analysis set forth in *Mortimer*, in which focus is on the whether there is "unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist" and "that there be some fraud, wrong or injustice." See *Unruh Turner Burke & Frees v. Tattersall Development*, 283 A.3d 1265, 1274 (Pa. Super. 2022); *Smith v. A.O. Smith*, 270 A.3d 1185, 1200 (Pa. Super. 2022), reargument denied (Apr. 6, 2022), appeal denied, 283 A.3d 1247 (Pa. 2022). In contrast, federal courts appear to use the Miners test to determine the applicability of enterprise liability, while noting that "the threshold inquiry remains the presence of piercing-worthy conduct by controlling actors or alter egos." See *KorDev v. Eagle Hemp*, 2:21-CV-1341-NR (W.D. Pa. Jan. 17, 2023); *Seven Springs Mountain Resort v. Hess*, 3:21-CV-6, 2022 WL 1004178 (W.D. Pa. Apr. 4, 2022).

While the Supreme Court in *Mortimer* stressed and cautioned that enterprise liability should only be used when truly egregious misconduct is involved, there are still potential risks and liability to sister companies of the licensee that can arise from the adoption of this doctrine. Not only does the doctrine implicate the assets of sister entities, but the applicability of the doctrine and whether egregious misconduct took place are judgment determinations. Given these potential risks and implications, including differing tests used by courts, many bars may be wondering, How do we protect ourselves?

It is clear that since *Mortimer*, the use of a corporate structure to isolate the licensee from any entities associated with the bar alone will not protect the assets of affiliated companies. Instead, bars must take additional steps to ensure that the assets of any affiliated entities are protected.

The most important way for bars to protect themselves is to ensure that the licensee and any affiliated companies do not have substantial common ownership. If there is no common ownership, then the enterprise doctrine is inapplicable and cannot be used to attack the assets of the affiliated company. In *Mortimer*, even though the affiliated company and the defendant-licensee shared some common owners, the Supreme Court nevertheless held that ownership between the two entities was different enough to avoid enterprise liability.

Additionally, the licensee should be separately managed and administered as an independent entity. The licensee should adhere to any business formalities required by Pennsylvania law. While limited liability companies often do not have the same formalities as corporations, limited

liability companies should nevertheless have a certificate of organization and an operating agreement. The licensee should maintain a separate bank account, separate bookkeeping records, and file separate taxes. The licensee should further maintain the liquor license to ensure it remains in good standing, especially if the license is the main capitalization of the company. Such actions could prevent any illusions of fraud or wrongdoing, as well as protect members of the licensee from veil piercing.

Bars can, and should, further protect themselves by ensuring that the licensee has adequate liquor liability insurance. While there is no requirement in Pennsylvania that liquor licensees carry liquor liability insurance, it has always been the most responsible course of action. In the wake of *Mortimer*, it appears that having such insurance is imperative, not only to protect the assets of the licensee, but now to also potentially protect the assets of any affiliated companies.

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