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Long Term Care Lenders Beware: Could You Be Liable For Patient Care?

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Plaintiffs are increasingly seeking to extend to remote lenders liability for alleged negligent care of residents in long term care facilities. The current strategy is to use "alter ego and veil piercing" theories which claim that a sham corporation has been set up for the purpose of protecting shareholders from liability and/or defrauding those who would hold it accountable.

A March 2014 decision in the United States Bankruptcy Court for the Middle District of Florida illustrates this in terms of the long term care industry. In *Fundamental Long Term Care, Inc.*, Trans Healthcare, Inc. (THI) operated long term care facilities throughout the United States. THI's wholly-owned subsidiary, Trans Health Management Inc. (THMI), provided management services to THI's operating subsidiaries, including clinical, compliance, business management, corporate financial control, accounting, payroll and benefits administration services. The plaintiffs won their lawsuit against THI and THMI, but the judgment was not collectable from either entity.

To collect the judgment, the plaintiffs alleged that a series of entities referred to as the GTCR Group, a private equity funding group, was liable for the judgment under alter ego and veil piercing theories. The plaintiffs claimed that GTCR Group built a nationwide nursing home empire. GTCR Group provided the initial funding for THI and several million dollars in subsequent capital contributions. GTCR Group also helped raise money from other sources. One of the GTCR entities, a realty company, entered into a sale-leaseback transaction with THI whereby THMI operated nursing homes owned by the realty company. Profits from the nursing home paid the rent and management services. The plaintiffs asserted that GTCR Group was involved in the facility operator's day-to-day management and administration under a professional services agreement; was responsible for its corporate and business strategy; and held itself out to the public as being the operator.

The Florida bankruptcy court ultimately held that the plaintiffs failed to state a claim against the lender under an alter ego or veil piercing theory. The essential elements for establishing either theory are essentially the same, and include (1) domination and control, (2) improper or fraudulent use of the corporate form, and (3) injury to the claimant as a result of the fraudulent or improper use of the corporate form. As to the first element, the court found that, while any individual fact might not be sufficient, the allegations taken together could give rise to dominion or control of the nursing home operator. On the second element, the court found no allegations in the plaintiffs' lengthy complaint that the corporate form itself was used for an improper purpose. Instead, the allegations in the complaint recognized that THI and THMI were initially created for the legitimate purpose of operating and managing long term care facilities. The only alleged improper conduct involved placing the assets of the nursing home operator and management company out of reach of their creditors, thereby protecting the lender's investment. Because this allegation did not cause the plaintiffs' harm, they failed to meet the third element for extending liability.

Long term care lenders should be prepared to respond to similar alter ego and veil piercing theories as plaintiffs seek to extend the boundaries of liability beyond the facility operator with responsibility for hands-on patient care. Lenders should be equipped to demonstrate, through affidavits and deposition testimony, that they are legally distinct entities uninvolved in the operation, management or control of any facility providing hands-on care to residents.

In Tennessee, it may be important to show that the lender was never the holder of the certificate of need when the long term care facility was opened. Under Tennessee regulations, the licensee has the ultimate responsibility for the operation of the facility, including the final authority to make or control operational decisions and legal responsibility for the business management. Tenn. Comp. R. & Regs. 1200-08-06-.02(3)(a). A lender may contribute capital and maintain a remote financial interest in the facility, but it does not make the decisions that affect patient care. As the Florida federal case illustrated, it is critical to establish the legitimate business purpose of the corporate structure and to break the link of causation to the plaintiffs' alleged harm.

Courts will closely scrutinize complex corporate arrangements, and lenders should prepare for responding to plaintiffs to extend liability for patient care to lenders before these arguments arise.