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Doctors sue ViaHealth over funds

By WILL ASTOR

Former Genesee Hospital doctors are suing ViaHealth and several of the health system's top officers in an attempt to reclaim \$3 million in lost retirement funds.

Fourteen ex-Genesee physicians planned to file papers today in U.S. District Court alleging ViaHealth illegally seized deferred compensation taken out of their paychecks.

The doctors claim in the court papers that ViaHealth officials and retirement plan administrators let some favored Genesee employees transfer their jobs and retirement accounts to Rochester General Hospital, but denied the same opportunities to others.

Most of the plaintiffs no longer work at ViaHealth hospitals. But the group includes several doctors who still work there, including Rochester General's highest-paid physician, surgeon Vincent Chang M.D.

In addition to ViaHealth, the action names Rochester General, ViaHealth CEO Samuel Huston and former ViaHealth CEOs Thomas Litz and Arthur Liebert as defendants. It also names the retirement plan's administrator, Diversified Investment Advisors Inc.

Litz headed ViaHealth when Genesee closed in April 2001. He resigned that August. Liebert was Litz's immediate predecessor. Huston took over from Litz and previously served as ViaHealth's chief operating officer.

A win for the doctors in federal court—while keeping their deferred compensation out of the hands of creditors—could open the door for Genesee creditors, who have lost out in attempts to collect tens of millions of dollars in state Supreme Court, said the physicians' attorney, Nelson

Thomas of Dolin, Thomas & Solomon LLP. It also could pose problems for ViaHealth's ongoing attempt to legally shut down Genesee in a state Supreme Court judicial dissolution proceeding, Thomas believes.

The disputed \$3 million was withheld from the physicians' Genesee paychecks and has been held in special insurance company trust accounts since the hospital closed two years ago.

The doctors' suit runs parallel to a judicial-dissolution action Genesee filed in state Supreme Court last year. In that case, the court-appointed receiver's attorney has filed papers claiming the doctors deferred compensation should be thrown into a fund for general distribution to creditors.

If that claim succeeds, the physicians would see pennies on the dollar at best against amounts they set aside ranging from \$1,900 to \$1 million.

Judicial dissolution is a state-court proceeding analogous to bankruptcy. In the dissolution, Genesee assets are to be gathered and liquidated by the receiver and the proceeds divided equally among eligible claimants.

Assets identified by the receiver total \$19.4 million in cash, including the doctors' \$3 million plus some \$10 million in receivables. Creditors, including Rochester General, have filed claims in state court against Genesee totaling an estimated \$100 million. Bondholders owed more than \$30 million have filed papers seeking to claim \$6 million of the available assets.

In the dissolution, receivers' attorney Warren Rosenbaum of Shapiro, Rosenbaum, Lettschutz and Nelson LLP maintains in court papers the doctors gave up any legal claim to the salary amounts they set aside until they legally were eligible to withdraw the funds when they set the tax-

deferred amounts aside.

Thomas, who also represents the doctors in the state-court case, has countered with papers stating the doctors' retirement money should have been protected under state employment law. Under terms of their deferred-compensation agreements some were eligible to collect when Genesee closed, he added.

State Supreme Court Justice Thomas Stander is slated to hear arguments on those motions in June.

Key questions in the federal case are whether ViaHealth and Genesee legally are separate entities and whether the physicians' employer was Genesee or ViaHealth.

If the hospital alone was the doctors' employer, or if ViaHealth and Genesee were legally separate, ViaHealth likely would have no liability, even if the doctors' deferred pay was found to be wrongly withheld from them.

In state court suits brought by Genesee, Stander has denied all but one attempt to collect from ViaHealth, taking the position that hospital and health system legally are distinct entities. The single claim he honored went to a construction firm that worked at Genesee, but produced a contract signed by ViaHealth officials.

In the federal suit, Thomas said, the doctors contend that ViaHealth and Genesee are legal "alter egos," and thus mutually liable, and that under the U.S. Employee Retirement Income Security Act of 1974 provisions ViaHealth was the doctors' legal employer.

In addition to the \$3 million in deferred compensation, the ex-Genesee physicians are asking for unspecified punitive damages and an award for other unstated economic losses. No trial date has been set.

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