

# 15 YEARS ROCHESTER BUSINESS JOURNAL

VOLUME 18, NUMBER 37

DAILY EDITION: www.rbdaily.com

DECEMBER 20, 2002

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ROCHESTER BUSINESS JOURNAL

## Genesee docs want their deferred pay

By WILL ASTOR

Genesee Hospital seized a \$3.8 million physicians' retirement fund illegally, a group of doctors formerly employed there claim.

The \$3.8 million is deferred salary the physicians elected to put aside before Genesee shut down in April 2000. Individual doctors set aside sums ranging from \$1,900 to \$1 million.

The hospital, which is going through a state Supreme Court-supervised dissolution, has been holding the money in a special account. A central question in the case is whether the deferred compensation account is a retirement fund. Genesee has maintained it is not.

The dissolution suit, which Genesee initiated earlier this year, puts a judge in charge of the hospital's disincorporation. It also is supposed to absolve Genesee of \$50 million or more in debt by arranging to pay off creditors. As in a bankruptcy, unsecured creditors are supposed to divide money raised by liquidation of assets equally.

Julia Smith M.D., the former chief of Genesee's hematology/oncology division, complained in an earlier filing in the dissolution case that when she tried to withdraw \$200,000 in salary that she had deferred in June 2001, ViaHealth officials refused, stating the doctors' deferred compensation would be used to pay Genesee's outstanding bills.

And in October, the hospital's court-appointed receiver formally moved to claim the deferred compensation account as part of a general fund to be doled out among all of the hospital's unsecured creditors. If that move succeeds, the doctors could see only pennies back for every dollar they deferred.

Smith and other former Genesee physicians answered with a Dec. 20 filing accusing Genesee of violating a state law that calls for retirement accounts to be held separately, and not mixed with money for general distribution.

The doctors also claim in the filing that unidentified ViaHealth insiders were allowed to transfer retirement accounts from Genesee to Rochester General Hospital, where their money would not be endangered by the Genesee shutdown.

ViaHealth, which ran Genesee and still runs Rochester General, legally is separate from the hospitals, and is not a party to the Genesee dissolution. ViaHealth

**Genesee physicians are accusing the hospital of violating a state law that calls for retirement accounts to be held separately.**

officials declined to comment on the dissolution case.

The physicians also expect to file further claims in the dissolution suit, accusing Genesee of fraud and breach of contract, said Nelson Thomas of Dolin, Thomas & Solomon LLP, who represents Smith and 13 other former Genesee physicians. He declined to comment on whether the doctors intend to file a separate action against ViaHealth.

An action against ViaHealth would not affect the dissolution proceeding, said Warren Rosenbaum of Shapiro, Rosenbaum, Leibschutz & Nelson LLP. He is the attorney for dissolution receiver Douglas Gates of Gates & Adams P.C.

In previous filings, Rosenbaum held

the deferred compensation account is not a retirement fund, and that Genesee had no fiduciary duty to the employed physicians.

Under an Internal Revenue Service rule, he maintained, the doctors gave up any claim on the money they elected to defer when they inked deferred compensation agreements with Genesee. Rosenbaum said the IRS rule states individuals who defer compensation can make no claim on the money they set aside until they reach retirement age, become permanently disabled or die. Short of those eventualities, he said, the doctors have no more claim to the deferred compensation account than any other secured creditor.

Genesee assets total \$19.4 million, including the disputed deferred compensation account. Rosenbaum still is trying to identify other assets, and the amount could increase, he said. But he is taking creditor claims, so it is impossible to say what kind of payout creditors will see.

In her previous filing, Smith claimed that Genesee and a representative of the financial management firm the hospital hired to manage the deferred-compensation program sold the program to herself and other doctors as a retirement plan.

In court papers, Smith said she received monthly statements from the investment firm, Prudential Financial, which made it appear as if her deferred salary was being held in a separate account in her name. She also claimed to have gotten verbal assurances from a Prudential manager that her retirement money could not be lost, the court documents state.

State Supreme Court Justice Thomas Stander has not scheduled a hearing date in the dispute.

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