



Nursing home suits face new litigation hurdles

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Plaintiffs' lawyers seeking to bring negligence claims against nursing homes are seeing a number of new obstacles, including mandatory arbitration clauses and corporate structures that mask the ownership of facilities.

"It's a corporate shell game," said David Couch of David A. Couch Law Firm in Little Rock, Ark. "They set up myriad holding corporations to avoid responsibility."

Other attorneys agree.

"If you look carefully at the way the facility is established, there will be a contractual relationship between a management company and a nursing home, where the same human being is on both sides of the contract and the management company is being paid a disproportionately high amount of money compared to its services," said David Cohen, a shareholder with Stark & Stark in Princeton, N.J. and chair-elect of the nursing home litigation section of AAJ.

Another common scenario is for an owner to set up a real estate investment trust that leases real estate to the nursing home at rates that sometimes exceed the entire value of the property, said Cohen.

A separate LLC holds the nursing home license, but "the owner sucks all the money out of the facility via management fees or rent so there is no money in the corporation that owns the license," said Couch.

Cohen charged that owners often "elect not to insure the nursing home and then they cry poverty when they are held accountable for their conduct. It takes a lot of work for lawyers to find out that the poverty is illusory."

Many states do not require nursing homes to carry insurance.

These developments have affected how plaintiffs' attorneys bring suits.

"Normally, you would just sue the facility alleging negligence. Now you have to sue them all – the administrative services company, the leasing company, the management company," said Couch.

The extra work needed to trace ownership has driven up the cost of litigating a nursing home case, which can easily run to \$50,000 to \$250,000 to try, said Roy Turner of The Law Office of Roy D. Turner in Bridgewater, Va., vice chair of the American Association of Justice's nursing home litigation section.

Mandatory arbitration clauses and state damage caps are also obstacles for trial lawyers.

In states that cap med-mal damages, lawyers have been alleging other causes of action to get around the caps, such as consumer rights claims or a products liability claim where a product such as a bedrail was involved.

Legislation

There are a number of legislative developments in the nursing home area.

The Nursing Home Arbitration Act, which would ban pre-dispute mandatory arbitration agreements in nursing home contracts, recently passed committees in both houses of Congress, [as we recently reported](#).

Another recently introduced bill, the Nursing Home Transparency and Quality of Care Improvement Act, [H.R. 7128](#), would improve reporting and transparency of nursing home ownership.

The Department of Health and Human Services has proposed a star-system to grade nursing homes and has released [a compliance guidance](#) based on voluntary participation.

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