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## Table of Contents





# Extending Negligent Credentialing Liability to Hospital Management Companies

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*This is the first of two articles on recent legal trends in negligent credentialing cases.*

In 2015, courts extended the application of negligent credentialing claims beyond hospitals to entities they contract with for management services. Traditionally, management companies have argued they should not be held liable for credentialing-related issues as they perform only administrative and day-to-day operational duties. However, in at least two instances during 2015, after reviewing the contracts and roles of administrative personnel placed by these entities, courts disagreed.

In *Mohan v. Orlando Health, Inc.* (*Mohan*),[1] the plaintiffs filed claims against Florida-based Orlando Health (Orlando), South Lake Hospital (South Lake), and two physicians. The trial court granted Orlando's motion to dismiss, and the plaintiffs appealed. In the first count, the plaintiffs alleged Orlando was directly liable for negligent credentialing, stating in pertinent part that:

> At all times . . . . [Orlando], by virtue of its assumption of South Lake Hospital's governance as described herein, had the duty and responsibility to exercise reasonable care for the safety and quality of care, treatment and services provided at South Lake Hospital . . . [Orlando] had the duty and responsibility to exercise reasonable care in providing oversight to the medical staff's recommendations to the hospital's governance on the credentialing and re-credentialing of the medical staff physicians. This would necessarily include familiarization with the background and performance of any physician opting to apply or re-apply for privileges . . . .[2]

Orlando argued that its management agreements with South Lake made clear that South Lake retained all responsibility for decisions related to medical staff and credentialing. The appeals court disagreed, focusing on management agreement provisions such as:

> South Lake hereby retains [Orlando] to manage and operate the Hospital in the name, for the account and on behalf of South Lake.

> [Orlando] . . . shall be responsible for all day-to-day management of the Hospital including . . .personnel (including selection, testing, training and education of personnel).[3]

The appeals court found the provision of an Orlando-employed chief executive officer (CEO) to South Lake a material consideration. The CEO allegedly was involved in the negligent extension and renewal of privileges to the subject physicians. Orlando argued it should not be held vicariously liable for the acts of the hospital CEO. The appeals court found, however, that Orlando could be liable for the negligent acts of its employees acting within the scope of their employment.

In another case, *United Tort Claimants v. Quorum Health Resources, LLC* (*United Tort Claimants*),[4] Quorum had an agreement to provide certain executive management and support services to Otero County Hospital in New Mexico, including the CEO and chief financial officer (CFO). The agreement also called for Quorum to provide guidance and assistance to the hospital board. The hospital opened a new pain management service line and recruited a pain management physician to staff that service (Physician). The Physician performed what subsequently were determined to be experimental procedures that injured patients.

The *United Tort Claimants* opinion provides an excellent summary of medical staff process and procedure and summarizes the role of the credentialing and medical executive committees as well as that of the board. As in *Mohan*, the court found that Quorum could be liable for the acts (or failures to act) of its employees. Here, the interim CEO was notified in writing that the procedures performed by the Physician were experimental, but the CEO failed to notify the medical staff or the board or to institute the appropriate peer review procedures. The interim CEO was not aware that the letter of notification was authored by the Physician's assigned proctor. Additionally, the facts of the case make clear that the communication between the prior CEO and the interim CEO was incomplete. Since both were Quorum employees, however, the court found the failure to ensure effective communication was Quorum's responsibility.

The court clarified its position, stating:

> a management company such as [Quorum] does not owe the same duty of care to patients as a hospital. Even though patients may consider the hospital itself, rather than any individual physician practicing at the hospital, as their healthcare provider . . . . they do not regard hospital administrators as the providers of their medical care . . . . a hospital management company's role in assuring the quality of patient care . . . is much narrower than that of the hospital itself.
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> With that said, the Court is not convinced that the role of a hospital management company charged with discharging the responsibilities of the hospital's chief executive officer are so limited, nor its relationships with the hospital's patients so tenuous, that it owes no direct duty to patients . . . the Court concludes that a hospital management company . . . retained to discharge the duties of the hospital's CEO and CFO . . . owes a duty of care, consistent with its role, administrative responsibilities and control, to ensure that the hospital implements and follows appropriate procedures to protect the health and safety of the hospital's patients. That duty flows directly to patients . . . and includes (1) the duty to appropriately involve medical staff in evaluating medical issues; and (2) the duty to inform the board and the medical staff about issues relating to patient safety known or that should be known by the hospital management company.[5]

## Conclusions

In both cases discussed above, the management company provided executive leadership to the client facilities, but the executives remained the management company's employees. When these executives did not execute the responsibilities of their roles, the companies were found liable (or, with respect to the *Mohan* case, the appeals court held they could be liable). The management agreements stated that the hospitals retained responsibility for quality oversight, and, in fact, state law in both jurisdictions makes clear that the boards ultimately are responsible for the oversight of patient care. The courts agreed, but went further. Specifically, the courts held that where the management company employs the CEO, the management company is liable for the CEO's fulfillment of his/her responsibilities. These duties extend beyond those listed in the management agreement to those found in state licensure laws as well as hospital and medical staff bylaws.

Clearly, the management companies did not intend to assume the scope of liability to which they were held. As a result of these decisions, hospitals can anticipate management companies will reevaluate their contracts. Hospitals should expect to see proposed language that attempts to contractually narrow the management company's liability for the acts of its employees who are staffing hospital executive positions as well as tighter indemnification and insurance provisions. Finally, these cases reinforce the message that active board oversight of quality and peer review processes is an essential governance function.

1 163 So. 3d 1231 (Fla. Dist. Ct. App. 2015).
2 *Id.* at 1233.
3 *Id.* at 1235.
4 527 B.R. 719 (Bankr. D. N.M. 2015).
5 *Id.* at 763, 766-767.