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MEMORANDUM

TO: Daniel Moriarty

FROM: Jeffery D. Parrish

DATE: January 11, 2016

RE: Tennessee Legislation Needed to Protect Post-Acute and Long Term Care Providers

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As counsel to a post-acute and long term care provider doing business in Tennessee. I am sure that you are aware of the changes in Tennessee law over the last few years that have resulted in a number of protections for healthcare providers in medical malpractice cases, i.e. tort reform. While much of the attention on Tennessee tort reform has been on the new caps on damages, there have been a number of additional statutes passed which are very favorable for providers, for example, limiting the use of healthcare survey reports in litigation as well as advertising, requiring claimants to appropriately focus on the proper parties to sue in medical malpractice cases, and leveling the playing field in regard to communications that defense attorneys can have with claimants' treating physicians and other providers. There is sound data to suggest that these statutory changes are having a positive impact on healthcare provider litigation in Tennessee including SNFs. After many, many years of escalating SNF liability claim (i) loss rates, (ii) severity, and (iii) costs as a percentage of SNF Medicaid rates, these numbers are all down in Tennessee since 2013. This positive evolution is in stark contrast to the loss numbers in Kentucky where, as you are well aware, there have been no liability reforms, where a number of trial lawyers moved following Tennessee's tort reforms, and where all SNF-specific claim numbers have skyrocketed to astounding levels. Again, the good news is that it appears Tennessee claims have leveled-off and are trending downward similar to the experience in other states that have passed significant tort reform initiatives.

To supplement these successes, Tennessee providers should continue to be proactive and prepare for the inevitable modifications to the trial lawyers' methods. For example, as legal commentators and healthcare media have recognized, a growing trend has developed in which trial lawyers are using new tactics and strategies as alternatives to traditional negligence and medical malpractice cases against SNFs - *class actions*. In these cases, the claimants' attorneys base large class actions on allegations that the facilities' staffing levels violate the state's nursing home resident rights act and/or consumer protection act. This trend can be traced back to 2010 when the long term care company Skilled Healthcare Group in California (now merged with Genesis Healthcare) settled a class action which had more than 32,000 class members with the settlement amount being approximately $63 million. That settlement followed a class action jury award of $671 million resulting from allegations that the company had engaged in chronic understaffing at 22 SNFs. It is no surprise that this jury verdict and the subsequent settlement got the attention of trial lawyers.

For a period, it appeared that this new litigation technique was limited to California. However, this class action strategy has recently gained traction in the South. Earlier this year, the Arkansas Supreme Court certified a class action lawsuit against 12 SNFs operated in Arkansas by a national long term care provider. The certified class includes 3400 past and present patients together with their families. There are also additional, similar class certifications pending in Arkansas. Tennessee's post-acute and long term care providers should take the *advance opportunity* to preemptively shut down this new trial lawyer strategy before it takes root in Tennessee.

Quite simply, Tennessee needs a couple of new statutory provisions providing: (1) that its nursing home resident rights statute does not provide a private cause of action and (2) that there shall be no class actions filed under (a) the resident rights statute or (b) the Tennessee Adult Protection Act (TAPA). Tennessee is well positioned for such new provisions. For example, in the substantial liability reform legislation enacted in 2011, there was a provision added to the Tennessee Consumer Protection Act barring class actions under that statute. So, Tennessee is ahead of the game in that regard. In addition, at least one court has held that there is no private right of action under the Tennessee resident rights statute. However, that one case was in federal court, and this important matter of state law needs to be expressly codified in the Tennessee Code together with a provision that there shall be no class actions pursuant to the resident right's statute or under TAPA.

In summary, trial lawyers, now in states neighboring Tennessee, have begun suing post-acute and long term care providers in more and more class actions under state consumer protection and nursing home resident rights statutes. Tennessee has already addressed the impropriety of class actions under its consumer protection statute. Now is the appropriate time to preemptively bar private causes of action and class actions under the Tennessee resident rights statute and class actions under TAPA.