VORYS *On the Horizon in* HEALTH LAW

A publication of Vorys, Sater, Seymour and Pease LLP May/June 2008

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MEDICAL MALPRACTICE

Mary Carter Agreement Must Be Disclosed To Jury

The Ohio Court of Appeals, First District, recently held that a Mary Carter agreement between a patient and a hospital must be disclosed to a jury. Hodesh v. Korelitz, No. C-061013, 2008 WL 1913530 (Ohio App. 1st Dist. May 2, 2008). Michael Hodesh underwent abdominal surgery for diverticulitis at Jewish Hospital in Cincinnati, Ohio. During the operation, the surgeon, Dr. Joel Korelitz, used towels to pack Hodesh's small bowel. One of the towels was not removed at the end of the surgery. Neither the surgeon nor the nurse would take full responsibility for accounting for the towels used in the procedure. Prior to trial, Korelitz discovered that Hodesh and Jewish Hospital had entered a settlement agreement that Korelitz argued was a Mary Carter agreement.

A Mary Carter agreement is a contract between a plaintiff and at least one defendant allying them against another defendant at trial. A Mary Carter agreement is a partial settlement of a dispute and is generally characterized by three basic provisions: (1) the defendant guarantees the plaintiff a minimum payment regardless of the court's judgment; (2) the plaintiff agrees not to enforce the court's judgment against the settling party; and (3) the settling defendant remains a party in trial, but his exposure is reduced in proportion to any increase in the liability of his codefendants over an agreed amount. Some Mary Carter agreements also include a provision that the agreement remain confidential.

The reason such agreements should be disclosed, according to the Hodesh court, is that the normal adversarial relationship is distorted where a purported defendant has an incentive to increase the plaintiff's damages, and such distortion has the potential for misleading jurors in reviewing evidence and judging witness credibility. The Hodesh court held that the agreement between Hodesh and Jewish Hospital was a Mary Carter agreement and should have been disclosed to the jury.

Physician Required To Disclose Billing Records

A recent Ohio Court of Appeals, Eighth District, case held that a physician was required to answer questions regarding his billing statements to Medicare and Medicaid, his average salary, his income from gynecology, and his tax returns in a medical malpractice action. Cepeda v. Lutheran Hosp., No. 90031, 2008 WL 2058588 (Ohio App. 8th Dist. May 15, 2008).

Maria Cepeda filed a complaint against Dr. Ali Halabi and other defendants arguing that Dr. Halabi inappropriately removed her uterus and ovaries. During Dr. Halabi's deposition, plaintiff's counsel asked for information regarding Dr. Halibi's billing practices and income. Dr. Halabi objected to the questions, arguing they were privileged communications between physician and patient and also irrelevant.

The questions regarding the billing statements of all patients sent to Medicare and Medicaid for the past five years were confidential and privileged under the physician-patient privilege. However, according to the court, the plaintiff was entitled to such information as an exception to the privilege because it was necessary to protect or further a countervailing interest: the protection of society from incompetent physicians, that outweighed a non-party's privilege. Further, the information was sought in an effort to establish that Dr. Halabi had a motive to supplement his income by performing unnecessary procedures. Additionally, the trial court provided for the protection against disclosure of the non-party patients' information by ordering the deposition sealed. The records were also not protected by HIPAA because HIPAA permits disclosure when the healthcare provider is ordered to disclose by the court. The Eighth District court upheld the trial court's decision to compel Dr. Halabi to answer questions regarding his billing and finances.

LONGTERM CARE

Nursing Home Arbitration Agreement Held Unconscionable

A recent Ohio Court of Appeals, Eighth District, opinion found that an arbitration agreement between a nursing home resident and the nursing home was unconscionable. Hayes v. Oakridge Home, 175 Ohio App.3d 334, Ohio App. (8th Dist. 2008).

Florence Hayes, a 94-year-old nursing home resident, challenged the trial court's granting of Oakridge Home's motion to stay pending binding arbitration. When Hayes was admitted to the Oakridge nursing home, she signed two arbitration agreements. Approximately one year later, Hayes filed a complaint alleging that the nursing home's negligent or reckless acts led to her fall out of a wheelchair that caused her to break her hip. Hayes argued that the arbitration agreements were unconscionable.

Unconscionability refers to the absence of a meaningful choice on the part of one of the parties to a contract combined with contract terms that are unreasonably favorable to one party. Unconscionability comprises two concepts, substantive and procedural unconscionability. Substantive unconscionability encompasses the commercial reasonableness of the terms of the contract and involves factors such as fairness of terms, charge for the service rendered, and the standard in the industry. Procedural unconscionability includes the bargaining position of the parties and involves factors such as age, intelligence, education, business experience, bargaining power, who drafted the agreement, whether the terms were explained, and whether alternative sources of supply were available.

To negate an arbitration clause, a party must establish both procedural and substantive unconscionability. The agreement signed by Hayes provided that: (1) the parties would submit medical malpractice disputes to binding arbitration; (2) each party would bear their own costs for arbitration; (3) the arbitration award would not include attorneys fees and costs or punitive damages; and (4) the parties waived the right to a trial. The Hayes court found that the agreement was both procedurally and substantively unconscionable. The agreement was substantively unconscionable because it required Hayes to give up her legal rights to a jury, punitive damages, and attorneys' fees. It was procedurally unconscionable because Hayes, at 94-years-old, had no business experience, the terms were not explained, the nursing home drafted the agreement, and there were no alternative sources of supply. According to the court, "finding a quality nursing home is difficult." The court further held that the agreement was not valid because Hayes did not receive adequate consideration.

FRAUD AND ABUSE

OIG Approves Hospital Providing Electronic Interface Software to Medical Staff

In the recently issued Advisory Opinion 2008-01 (the "Opinion") from the Office of Inspector General (the "OIG") of the Center for Medicare and Medicaid Services, the OIG approved a hospital's provision of free software to physicians on its Medical Staff.

In the arrangement that was the subject of the Opinion, the hospital proposed to provide a licensed custom software interface for use by physicians on its medical staff at no cost to the physicians. The hospital had determined that in order to integrate various physician's electronic health record systems for their private practices with the hospital's system, it was necessary to develop custom software to interface each physician system with the hospital's system. The hospital would likely have to develop several versions of the interface software to accommodate the various types of electronic health record systems used by different physicians. The OIG also stated that the proposed arrangement would

not present any violation of either the Stark Law or the Anti-Kickback Statute, so long as the functionality of the interface software was limited to the ordering or communicating of results of laboratory tests or procedures furnished by the hospital to the physicians' patients and such software would only be used by the physicians for such purpose.

It is important to note that the OIG also stated that the above described arrangement would not constitute a "compensation arrangement" and therefore would not violate the above-mentioned statutes. Therefore, such an arrangement need not qualify under any Stark exception or Anti-Kickback safe harbor, since it does not violate either of those laws in the first place.

MEDICAL RECORDS

Limits On The Application Of Ohio Peer Review Privilege

On May 27, 2008, the Ohio Court of Appeals, Fifth District, ruled that Ohio's peer-review law, O.R.C. 2305.252, did not protect from discovery copies of the documents contained in hospitals' credentialing or peer-review files that were filed with the National Practitioners Data Bank, state medical board, Joint Commission or other organizations. Huntsman v. Aultman Hosp., Nos. 2006 CA 00316, 2006 CA 00331 (Ohio App. 5th Dist. May 27, 2008). As a result, the Court set a limit on the application of Ohio peer-review privilege such that only the documents submitted to hospitals or peer-review committees are protected from discovery under the Ohio statute. See id.

The court also held that an order calling for an in camera document review was not a final appealable order. Parties, however, can challenge a trial court's decision to order production following the in camera review.

In an earlier case involving the same parties, the Court of Appeals held that Ohio's peer-review privilege extended to any information pertaining to the peer-review documents. See Huntsman v. Aultman Hosp., 160 Ohio App.3d 196, 2005-Ohio-1482 (5th Dist. 2005). Although all documents found in peer review files can be freely obtained from their original sources, all documents contained in a hospital's peer-review and credentialing files, including information that identifies what privileged documents the hospital has in its possession, are protected from discovery. *See id.*

MEDICARE REIMBURSEMENT

D.C. Circuit Finds Hospitals Serving Charity Program Patients Ineligible for Disproportionate Share Hospitals Program

Ohio Hospital Care Assurance Program ("HCAP") is a state mandate that allows indigent persons in Ohio who do not participate in the state Medicaid program to receive basic hospital services at no charge. *See* O.R.C. 5112.17(B). Ohio does not reimburse hospitals for the costs of providing such mandatory charity care. Twenty-five Ohio hospitals serving HCAP patients sought to cover some of their HCAP expenses indirectly by arguing that Health and Human Services Secretary should include HCAP beneficiaries in calculating the amount due to the hospitals under the Medicare Disproportionate Share Hospital ("DSH") program. *Adena Reg. Med. Ctr v. Leavitt*, No. 07-5273, 527 F.3d 176 (C.A.D.C. Cir. May 30, 2008).

The U.S. Court of Appeals for the District of Columbia reversed a lower court's decision siding with the hospitals. Under DSH, the more a hospital treats patients who are eligible for medical assistance under a state plan approved under Medicaid, the more money it receives for each patient covered by Medicare. The Court of Appeals held HCAP is not part of the state plan approved under Medicaid because HCAP explicitly applies only to patients who are not covered by Medicaid. Because the mechanism for providing a DSH adjustment is part of Ohio's Medicaid plan, Ohio hospitals providing HCAP care are not eligible for DSH funds under Medicaid or Medicare.

NON-COMPETE AGREEMENTS

Corporation May Redeem Stock Held By Shareholder Owning Competing Hospital

The Kansas Supreme Court recently upheld the right of a Kansas corporation that owned a Kansas limited liability company that owned a hospital to redeem stock held by doctors who had invested in a project to construct a competing hospital. Kansas Heart Hosp., L.L.C. v. Idbeis, No. 97,131, 2008 WL 2065843 (Kan. May 16, 2008).

According to the Kansas Supreme Court, a corporate bylaw provision that restricts a shareholder's eligibility to own shares and requires shares to be transferred to the corporation when eligibility is lost is a valid restriction on ownership under Kansas law. The court held that the provision was an ownership restriction and could be contained in the bylaws rather than a stock restriction that would have to be included in the certificate of incorporation. The provision was not a stock restriction because it did not affect an entire class of stock, only certain stockholders. Further, the word "redemption" in the corporation's bylaw would be understood by a reasonably prudent person to mean a purchase of stock and, therefore, the redemption was authorized by Kansas law. In addition, the court held that a bylaw provision that establishes a formula for the calculation of the price to be paid when a corporation reacquires stock from a shareholder is not a penalty, even if the formula varies depending upon the circumstances of the reacquisition and is not based upon current market price.

Finally, under the facts of the case, the corporate board of directors, in applying the bylaw provisions restricting ownership, made a business judgment in good faith, with due

care, and within the board of directors' authority. Therefore, the board of directors was protected from liability by the business judgment rule.

MEDICAL STAFF RELATIONS

Montana Supreme Court Upholds Injunction Against Radiologist

In *St. James Healthcare v. Cole*, 341 Mont. 368 (2008), the Montana Supreme Court upheld an injunction that St. James Healthcare ("St. James") obtained against its former exclusive contractor for radiologist services, Dr. Jesse A. Cole. Dr. Cole allegedly made harassing and threatening phone calls to a radiologist at Boston University Medical Center, Dr. Chacko, who was engaged in negotiating the radiology contract with St. James after St. James terminated Dr. Cole's contract due to his over-billing practices. At the hearing to extend the temporary restraining order against Dr. Cole, other radiologists testified about previous threatening interactions with Dr. Cole.

Dr. Cole appealed the injunction which prohibited him from: (1) contacting Dr. Chacko or any employee of Boston University; (2) threatening any type of professional or physical harm to Dr. Chacko or any employee of Boston University; (3) coming within 250 feet of Dr. Chacko; (4) indicating to potential patients that Dr. Chacko or the radiology services at St. James are in any manner inadequate or unprofessional; (5) communicating with any potential candidate for St. James' radiology department to discourage or intimidate them from negotiating a contract with St. James; and (6) threatening any St. James' employee. Dr. Cole argued: (1) that the injunction constituted unconstitutional prior restraint on his right to free speech; (2) that the injunction was supported by insufficient evidence; (3) that St. James did not have standing to seek a protective order its employees; and (4) that injunctive relief was not proper since harm to St. James could be remedied by money damages.

The court concluded that an injunction that proscribed speech and conduct intended to embarrass, harass, or threaten was not protected by the First Amendment; therefore, the injunction and restraining order imposed on Dr. Cole was not per se an illegal prior restraint. However, certain provisions of the injunction against Dr. Cole were deemed to be too broad. In particular, provisions enjoining Dr. Cole from telling patients, prospective patients, or physicians that the hospital or new radiology services were inadequate were stricken from the injunction. In addition, the court concluded that the hospital had standing to seek an injunction against Dr. Cole on behalf of third parties with whom it engages in business or employment relationships. Finally, the court held that availability of money damages does not bar injunctive relief.