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DECISIONS

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Special points of interest:

- New Jersey limits claims against physicians for failing to carry mandatory insurance but expands liability for hospitals for failure to ensure physician compliance with those same requirements
- Insurer did not act in bad faith for failure to accept limits demand when release did not include a release of all insureds
- Insurer did not breach contract by failing to obtain physician consent to settlement

NEW JERSEY SUPREME COURT HOLDS PATIENT MAY NOT SUE PHYSICIAN FOR FAILING TO HAVE INSURANCE BUT FACILITY MAY BE LIABLE FOR NEGLIGENT HIRING

Liability for Hiring Physician Without Adequate Malprac-

On September 29, 2015, the New Jersey Supreme Court ruled that a patient may not sue a physician for failing to meet the state's medical malpractice liability insurance requirement but that a cause of action for negligent hiring may be asserted by a patient against a health care facility that granted privileges to a physician who had not complied with the statutorily required insurance. In Jarrell v. Kaul, 2015 WL 5683722 (N.J. Sept. 29, 2015), the Court addressed three issues, whether: (1) an injured patient may bring a direct action against a negligent, uninsured physician; (2) failure to comply with the statutory liability insurance requirement gives rise to an informed consent claim; and (3) a healthcare facility granting privileges to a physician to treat patients in its facility has a duty to determine and monitor the physician's compliance with the statutory malpractice insurance requirement. The lawsuit stemmed from alleged negligence committed by a physician who performed a spinal fusion procedure on the patient. The Supreme Court examined the legislative and regulatory history of the malpractice insurance regulations and concluded that they did not support a private right of action. On the second issue, the Court rejected the informed consent claim and held that consent related to risks pertaining to the medical treatment and the absence of insurance bears no relation to the nature of the proposed medical course or the risks attendant thereto. On the last issue, the Court held that, under New Jersey law, the facility had a duty to withhold privileges to any physician who did not meet the financial responsibility requirements for a license to practice medicine. The Jarrell decision represents a mixed-bag for health care professionals as it limits liability for physicians in several aspects while expanding liability for negligent hiring claims against medical facilities.

SOUTH DAKOTA JUDGE HOLDS THAT HOSPITALS CAN BE SUED OVER DOCTOR CREDENTIALING

A Circuit Court Judge in South Dakota has held that health providers can be sued for failing to properly credential doctors and that members of credentialing committees can also be held liable. The ruling comes in a case in which three dozen plaintiffs are suing a spine surgeon, two medical facilities and the doctors on the credentialing committee. Plaintiffs claim the surgeon got credentials because he could generate profits at the facilities and despite previously losing credentials at a Nebraska hospital. The ruling by the First Judicial Circuit sets the stage for South Dakota to join at least thirty other states that allow lawsuits under "negligent credentialing" theories. The case is Larry Lieswald v. Allan Sossan et al., County of Yankton, SD.

Fifth Circuit Court of Appeals Concludes That Prison Is Not Covered In Suit Over Inmate's Death

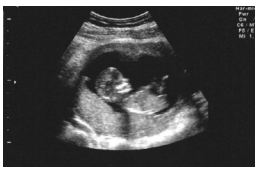
"When speaking generally, administering medication to an individual or to a group of people is certainly a form of 'medical treatment' … [and] the medical services exclusion plainly excludes from coverage any liability that is based on the failure of [the insured] to render medical services."

In a decision issued on September 2, 2015, the United States Court of Appeals for the Fifth Circuit held that an insurer was not obligated to defend or indemnify a private prison operator in a civil rights lawsuit brought by the family of a man who died in detention after the facility allegedly failed to provide him with medication. In LCS Corrections Services, Inc. v. Lexington Ins. Co., 800 F.3d 664 (5th Cir. 2015), the three-judge panel concluded that the insured could not look to its insurer to provide a defense and coverage in a civil rights lawsuit filed by the surviving heirs of Marcio Garcia, who died of seizures after the prison denied him benzodiazepine, which he had been taking prior to his incarceration. Mr. Garcia's death took place approximately two weeks after he was sent to the insured's prison in Falfurrias, Texas, on a federal conviction. His family sued the facility and the doctors who provided care at the facility. The family also asserted a claim for deprivation of Mr. Garcia's civil rights. The family won a $2.25 million verdict that found LCS, not the doctors, liable under state malpractice law. Lexington provided coverage for the lawsuit under a $1 million health care provider policy but defense costs eroded the policy limits. The plaintiffs also filed a separate civil rights action against the prison. The insured filed a declaratory judgment action seeking to force Lexington to cover the civil rights claims under commercial general liability (CGL) policies and commercial umbrella liability policies. The CGL policies, however, excluded claims stemming from medical service while the umbrella policies precluded coverage for professional liability claims. The Court concluded that the policies Lexington issued to the insured prison expressly excluded damages stemming from a failure to render professional or medical services. Because the provision of medicine falls within both exclusions, the Court concluded that they preclude the insurer from providing both a defense and indemnity for the

underlying lawsuit. The ruling overturned a lower court's ruling that concluded Lexington owed a defense under one of the CGL policies. The trial court did not address the indemnity issue in its ruling. The appellate panel was not convinced by the insured's argument that it was the company's policy decision to deny medication that caused the inmate's death, not a professional act. The panel explained that "[i]t may be true that no professional decision was made in denying the medicine. But providing and administering medicine to an inmate in a prison is a medical service, which LCS failed to render, for whatever reasons." As a result, the lawsuit was excluded from coverage.

Connecticut Trial Court Takes Up Issue of When A Fetus Can be Considered a Person

A Connecticut wrongful death lawsuit headed to trial earlier this month to address the issue of when a fetus can be considered a person for legal purposes. Stamford physician Corinne de Cholnoky has been sued for allegedly causing the death of the fetus after rupturing Melanie Foster's fetal membrane while trying to remove an intrauterine birth control device. The fetus was born alive twenty-two weeks into the pregnancy but died less than two hours later. Counsel for the physician argued that the case should be dismissed on the grounds that wrongful death lawsuits were not allowed in cases in which the fetus was not viable. State Superior Court Judge Michael Kemp rejected the arguments in August and has allowed the case to go to trial. Courts in other states have come down on both sides of the issue. Jury selection has begun in Melanie Foster v. Corinne de Cholnoly, Fairfield County, CT.



Viable fetus and Wrongful Death

Federal Court Concludes Insurer Did Not Act In Bad Faith By Rejecting Limits Demand That Did Not Release All Insureds

On September 22, 2015, a Kansas Federal District Court in Kemp v. Hudgins, 2015 WL 5568082 (D. Kan. Sept. 22, 2015) held that an insurer's rejection of a policy limits settlement that did not release all insureds from liability did not constitute bad faith. In Kemp, a judgment creditor brought a garnishment action against an insured judgment debtor and auto liability insurer alleging that the insurer was liable for a $5.7 million judgment, notwithstanding the $50,000 policy limit, on the grounds that the insurer acted in bad faith when it failed to settle the underlying claim. The underlying claim stemmed from an automobile accident that resulted in the death of the plaintiff's thirteen year old daughter. The other automobile involved in the accident was being driven by the defendant, who was a permissive user of the vehicle owned by his girlfriend. The girlfriend was the named insured under the $50,000 auto policy and the driver defendant was insured as a permissive user. The insurer rejected the full policy settlement demand—which would have resultec in the release of the driver but not the insured policyholder. The Court agreed with the insurer and held that it did not act in bad faith because the insurer reasonably believed it owed a duty of good faith to obtain a release of both insureds. The Court noted the settlement would have left the policyholder open to liability after exhaustion of the policy limits. The Court found that the insurer's rejection of the initial settlement demand was "within the bounds of good faith because it did not include a release of both insureds."

Insurer acted in good faith

"There was no bad faith in refusing to accept a settlement offer that required additional consideration, beyond the policy limits, for the release of both insureds."

Louisiana Appellate Court Holds That Insurer Did Not Breach Duty to Doctor In Malpractice Deal

A Louisiana Appellate Court has upheld a lower court's ruling that an insurer did not breach any contractual duty to a doctor sued for medical malpractice by settling the suit without her consent. In Eileen Clare Lynch-Ballard v. Lammico Ins. Agency, Inc., 2015 WL 5613317 (La. App. 5 Cir. Sept. 23, 2015), the insured physician filed a lawsuit against its professional liability insurer to recover for breach of contract by settling a medical malpractice claim without her consent. The underlying action stemmed from a claim asserted by the family of a man who died after being treated by the physician in the emergency room at East Carrol Parish Hospital in 2008. Counsel was retained and, after defending the physician before the licensing board and based upon his own evaluation, he determined the case was "indefensible" and should be settled. The insurer subsequently settled the claim and included the physician's name in the release papers. The insurer argued that consent was not required because her employment was terminated with the named insured facility. The Court agreed and held that the insurer is not obligated to obtain consent from an insured once that insured is no longer paying premiums on the policy.

Louisiana Court Rules That Insurer Had Right To Settle Without Physician's Consent

Sexual Abuse can be within scope of professional liability coverage

In Pacific Employers Ins. Co. v. Travelers Cas. And Sur. Co., 2015 WL 5636875 (D. Conn. Sept. 25, 2015), a Connecticut federal court concluded that sexual abuse claims stemming from a long-term medical study of children fell within the hospital's professional liability insurance policy, not its general liability policy. In so holding, the Court concluded that the claims against the hospital, which related to negligent failure to supervise the doctor, fell within the definition of "professional service" because the research committee's role was to supervise research at the hospital and the term "professional services" included "service ... by a professional board or committee of the named insured."

Alabama Judge Keeps Privacy Suit Against Hospital Alive

"Because Plaintiffs have alleged actual identity theft and economic injury, which together constitute an injury …, it is not necessary to reach the questions of whether Plaintiffs would have standing on other, independent bases."

In a decision issued on September 29, 2015, an Alabama federal district court denied a motion to dismiss a lawsuit filed against Triad of Alabama, LLC in a putative class action lawsuit alleging violations of the Fair Credit Reporting Act ("FCRA") and state law claims for negligence, wantonness, negligence *per se*, invasion of privacy, and breach of contract. The Judge's ruling in Smith v. Triad of Alabama, LLC, 2015 WL 5793318 (M.D. Ala. Sept. 29, 2015) allows the proposed class action against Alabama-based Flowers Hospital for its part in an employee's theft of sensitive patient information to move forward. Lead plaintiffs, five former patients, filed the data breach class action lawsuit against Flowers Hospital in May alleging that the hospital "flagrantly disregarded" patient privacy rights by inadequately safeguarding their personal information and subjecting patients to increased risks of identity theft and fraud. The plaintiffs claimed that the hospital employee stole sensitive patient information, subjected them to identity theft, and allowed third parties to file false tax returns with their information. Flowers Hospital filed a motion to dismiss the class action lawsuit in July arguing that the plaintiffs had failed to establish a link between the employee theft and financial damages. The hospital further argued that the plaintiffs had not shown that they had been denied tax refunds or that they had incurred fees or paid expenses from the alleged fraud. The hospital also contended that a possibility that they may be subjected to identity theft in the future was not enough for the plaintiffs to establish standing in court. In upholding the rulings of the Magistrate Judge to let the

case proceed, Judge Watkins held that the plaintiffs have alleged that they became victims of actual identify theft and they had set out specific ways in which they have suffered quantifiable monetary losses as a consequence of their identify theft and that no more is required to demonstrate standing. Judge Watkins agreed with the Magistrate Judge that the injuries were fairly traceable to the defendant's actions and that a judgment in the plaintiffs' favor could redress the alleged injury. The Judge, therefore, held that the case should proceed to discovery.

Senators Call For Enforcement of Mental Health Parity Law

"This important legislation was enacted to ensure that health insurance plans cover behavioral and physical health equally."

Twenty-two senators from both parties on October 16, 2015, asked Secretary of Health and Human Services Sylvia Burwell and Secretary of Labor Thomas Perez to enforce a George W. Bush-era law ordering health insurance plans to cover mental and physical health as equals. The senators requested that the secretaries enforce the Mental Health Parity and Addiction Equity Act ("MHPAEA"), which they say has not been done consistently before. Specifically, the senators asked the secretaries from the departments in charge of enforcing the law how many MHPAEA compliance audits have been conducted, what the results were, if they will be made public, and what audits will be conducted in the future. Additionally, they asked if the departments will be issuing guidelines to health plans and insurers about

what must be done to be in compliance with the law, when those will be released and when enforcement will begin. Consumers have told the senators that health plans often refuse to disclose what criteria is being used to determine whether behavioral or medical care is being covered, pointing customers only to websites or giving general statements. The letter sent to the secretaries noted that, without the criteria information, "it is impossible to determine if the plan is in compliance with the law of if a parity violation has occurred."

Masschusetts' Highest Court Concludes That Expert Opinions Were Properly Dislcosed Prior to Trial

On September 10, 2015, the Supreme Judicial Court of Massachusetts in Kace v. Liang, 36 N.E.3d 1215 (Mass. 2015), affirmed the lower court's ruling that the plaintiff met the expert disclosure requirements. The lawsuit was filed against an emergency room physician by the estate of a patient who died of cardiac dysrhythmia stemming from viral myocarditis. The lawsuit, brought in 2008, alleged that defendant's medical care and treatment of the decedent was negligent and grossly negligent and that defendant's substandard medical care caused the decedent's death. The jury found defendant negligent in his medical treatment of the decedent and that his negligence caused the decedent's death. The jury awarded $2.925 million to the estate in wrongful death damages. The physician appealed on several grounds, including that the plaintiff's expert failed to disclose his opinions about the timing details of the doctor's examination and that this opinion provided a basis for the defendant's alleged breach of the standard of care. The physician also argued that the use of web pages to cross-examine him was impermissible because the physician was not serving as an expert witness and because they were unauthenticated and unreliable since they were undated and without a named author. The Supreme Judicial Court affirmed the trial court's rulings and held that: (1) plaintiff met the basic disclosure requirements of Mass. R. Civ. P. 26(b)(4)(A)(i) to disclose the substance of and grounds for the opinions of an expert witness; (2) certain materials obtained from the Internet and used during plaintiff's examination of the defendant did not qualify under the "learned treatise" exception to the hearsay rule, but the error did not result in undue prejudice to the defendant; and (3) the trial judge erred in precluding defendant's counsel from using one of the decedent's prior medical records in his cross-examination of plaintiff's sole expert witness, but that the error was not prejudicial.

Litigants Requesting Copies of Medical Records Have Standing to Protest Firm's Overcharges Under New York Law

A New York federal district court in a September 16, 2015 decision issued in McCracken v. Verisma Sys., Inc., 2015 WL 5510367 (W.D.N.Y. Sept. 16, 2015) has allowed putative class action plaintiffs to move forward against a hospital and its medical records contractor on claims that the contractor that supplied copies of medical records overcharged for its services. Under New York law, a health-care provider is obligated to provide a person with access to his or her medical records and permits the provider to impose a "reasonable charge for all inspections and copies" not to exceed seventy-five cents per page. The plaintiffs alleged that Verisma overcharged for copies provided to their law firm. In addition to arguing, unsuccessfully, that the plaintiffs lacked standing because the law firm actually requested and paid for the records, Verisma also asserted that it was entitled to have the complaint dismissed because it had not charged more than seventy-five cents per page. The Court disagreed saying that the law permits firms and providers to impose only actual charges and that seventy-five cents is a ceiling. It further noted that a provider is not entitled to charge more than what it actually costs to produce the copies, even if that is less than seventy-five cents. The Court said both parties would be permitted to introduce evidence of the actual costs in order to determine if the fee charged was reasonable. In addition, the Court refused to dismiss the plaintiffs' causes of action for unjust enrichment and for deceptive trade practices under N.Y. Gen. Bus. Law. § 349(a) and concluded that the plaintiffs had sufficiently alleged the elements of those claims.

Provider and Contractor Can Be Sued Under New York Law For Overcharging for Copies of Medical Records

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Notable Verdicts

Oakland County, MI — November, 2015. An Oakland County jury awarded $5 million in damages, to relatives of a 90-year old resident of a Detroit-area retirement facility who ingested dishwasher detergent and died thirteen days later. The resident, who suffered from dementia, prevailed against the facility on a theory that the facility was negligent in failing to provide adequate supervision and secure cabinets.

Orange County, CA —July, 2015. An Orange County jury returned a verdict for $10.2 million in a medical malpractice case involving a seizure disorder. After an eight-week trial, the jury rendered a verdict for $5.7 million in actual damages and $4.5 million in punitive damages. The jury concluded that the facility was negligent and that it misrepresented that they were equipped to care for the decedent.

Cook County, IL— May, 2015. After a fourteen day trial, a jury returned a verdict awarding $4.2 million in damages to a plaintiff who sued the hospital where he was admitted after they failed to prevent a suicide attempt. The 63–year old was brought to the ER of the hospital defendant after suffering from a pill overdose. After he was stabilized, he obtained a knife and used it to stab himself more than 30 times. He was found hours later in a pool of blood and suffered brain damage from the blood loss. Plaintiff sued the hospital alleging that they breached the standard of care for failing to protect him. He also alleged that he should have been placed in a more high-risk category, as he had already made a suicide attempt while on the premises by wrapping plastic tubing around his neck.

Notable Defense Verdicts

District of Columbia— September, 2015. A jury in Superior Court in Washington, DC returned a verdict in favor of Washington Hospital Center after an eight day trial involving injuries sustained by a contract nurse while treating a patient. The nurse, working through an agency, tripped and fell over a wheelchair and sustained an annular tear in her lumbar spine. The hospital disputed liability and contended that the wheelchair had been outside the area where she tripped for less than four minutes. The jury agreed and found in favor of the hospital.

Philadelphia County, PA August, 2015. - A Philadelphia County jury concluded that plaintiffs did not prove that a physician or hospital were negligent in the alleged wrongful death of an 83-year old man who died after undergoing surgery to remove cancerous portions of his lung. The decedent's family alleged that the respiratory distress he suffered was the result of the Haldol being over-prescribed. The defendants alleged that the death was caused by co-morbidities, not negligence.

Recent Notable Defense Verdicts

Pinellas County, FL— August, 2015. A Florida state court jury found that a physician and the non-party hospital were not negligent in causing the death of a 60-year old patient who died during a hospital admission for end stage kidney disease. The patient's surviving son claimed that his mother died as a result of a myocardial infarction caused indirectly by the administration of Lovenox.

Schenectady County, NY—June, 2015. The court entered a directed verdict in favor of defendant physicians. In the lawsuit, the plaintiff alleged that the defendants negligently damaged the left ureter of a 37-year old plaintiff who underwent a partial abdominal hysterectomy in 2009. The defendants relied on cross-examination of a non-party surgeon who testified he did not observe signs of transection of the ureter in subsequent treatment.