HEALTH LAW

A Supplement To The Connecticut Law Tribune

May 2007 ALM

Arbitrating Malpractice Claims Not A Dead Idea

Out-of-court resolution can benefit doctors and patients p.2

INSIDE

GOING AFTER PHYSICIANS' ASSETS

Propriety of PJRs in question, especially when used as a negotiating tool to coerce settlement

By JAMES ROSENBLUM and JAMES BIONDO

How much professional liability insurance should physicians have and how much can they afford? These questions plague physicians and others. Even if physicians had unlimited resources for liability insurance, there are limits on the amount of insurance that carriers provide. Consequently, potential exists for verdicts exceeding insurance limits.

Traditionally, plaintiffs have not pursued personal assets, but it is also traditional for plaintiffs' counsel to threaten to proceed against personal and/or business assets. Such threats are daunting, where a lifetime of savings, tuition for college education, or accounts used to operate the business aspect of a medical practice may be frozen or evaporate.

Physicians rightfully fear that such actions could essentially put them out of business, exposing their patients to potential risk.

Consequently, information about "asset protection" has become a hot topic in medical circles. However, asset protection is easier said than done. There are limits—substantial costs and risk—of off-shore trusts in the Cook Islands. Basic financial planning is a valuable way to preserve assets, but is complicated, time-consuming and often deferred, while other activities take priority. Therefore, many physicians have personal assets that are potentially exposed.

Plaintiffs' counsel have obligations to their clients—not to defendants, and not to society at large. However, courts should consider the implications of laws, and of course the legislature can balance competing interests. The purpose of this article is to raise the question as to the propriety, or at least the scope, of prejudgment remedies against physicians, especially when used as a negotiating tool to coerce settlement or where the impact can interfere with their practice of medicine.

To obtain a prejudgment remedy, plaintiffs must show, with specificity, probable cause of their claims' success, on the merits, considering defenses and potential set-offs to any verdict. Connecticut General Statutes §52-278d requires hearings for prejudgment remedy applications. Under the statute, such hearings "shall be limited to a determination of (1) whether or not there is probable cause that a judgment in the amount of the prejudgment remedy sought, or in an amount greater than the amount of the prejudgment remedy sought, taking into account any defenses, counterclaims or set-offs, will be rendered in the matter in favor of the plaintiff, (2) whether payment of any judgment that may be rendered against the defendant is adequately secured by insurance, ... and (4) if the court finds that the application for the prejudgment remedy should be granted, whether the plaintiff should be required to post a bond to secure the defendant against damages that may result from the prejudgment remedy or whether the defendant should be allowed to substitute a bond for the prejudgment remedy."

The use of a PJR in a medical liability case was addressed in 2005, in *Smith v. MAA*, 2005 Conn. Super. LEXIS 2434. In that case, the PJR application was made on the eve of trial, and appeared to be a negotiating tactic. The judge denied the application, stating: "[I]t became apparent that the PJR application had been submitted at this time largely because settlement negotiations between the plaintiffs and [defendants] were not going smoothly, as the claimed deficiency in insurance coverage had been known since the earliest days of discovery." The court also noted that the affidavits submitted with the

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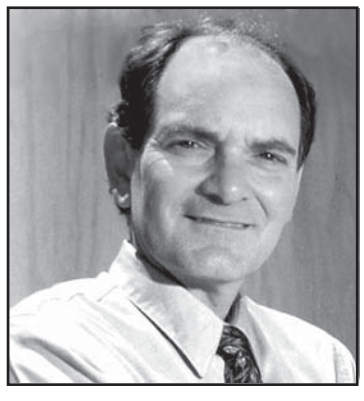

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QUESTIONS RAISED OVER PJRs' PROPRIETY

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application did not establish probable cause.

As a second ground to deny the application, the court relied on its inherent power to control its docket.

On July 29, 2005, the court met with all counsel at a trial management conference at which time there was supposedly a complete discussion of what needed to be accomplished, and when, to permit a trial in the case to commence on Oct. 4, 2005, a date scheduled with the consent of the parties in December 2003.

A full-scale PJR hearing prior to trial would essentially mean having large segments of the matter heard twice. In light of the logistical difficulties of scheduling and going forward with such a proceeding, and the apparent motivation of the timing of the application as a negotiating stratagem, the court declined to entertain the PJR at such a late date.

As noted, when PJRs are sought on the eve of trial, they appear to be negotiating tactics, rather than what they are generally intended to be. Further, they require a trial prior to the trial with expert testimony to establish probable cause and often prove to be costly delays to resolving cases.

Physicians are required by law to have professional liability insurance. Most have insurance above mandatory minimum requirements. There are usually substantial funds to address potential judgments.

Consequently, there are protections for plaintiffs, which was the intent of the legislature in requiring minimum liability insurance coverage for physicians. Therefore, PJRs should not be necessary.

Where a potential verdict could exceed available insurance coverage, the courts are empowered to attach personal and business assets without any showing by the plaintiff that the resident defendant physician is attempting to defraud or frustrate the enforcement of a potential judgment.

Without such evidence being deemed necessary, the courts should balance the need or risks of the individual plaintiff against the effect the proposed order could have upon the defendant physician and/or the public at large. PJRs effect more than the defendant physician. They can unjustifiably interfere with the physician's colleagues, practice, family and ultimately patient care. ■

ELECTRONIC RECORDS

■ From **ELECTRONIC** on PAGE 3

hardware or staffing.

• Under the Stark exemption, donors may include individuals or entities that provide designated health services. Under the Anti-kickback exemption, they may include individuals or entities providing services covered by a federal health care program.

• Under the Stark exemption, recipients may include physicians. Under the Anti-kickback exemption, they may include individuals or entities engaged in the delivery of health care services covered by a federal health care program.

• Donors may not consider the volume or value of the physician's referrals or other business generated between the parties when choosing to whom to donate EHR capability. Donors, however may consider: the total number of prescriptions written by the physician; the size of the physician's medical practice; the total number of hours that the physician practices medicine; the physician's overall use of automated technology in his or her medical practice; whether the physician is a member of the donor's medical staff; the level of uncompensated care provided by the physician; and other reasonable and verifiable matters that don't take into account the volume or value of referrals or other business generated between the parties.

• Donors may *not* limit the use of the system or its interoperability, and physicians may not condition doing business on the receipt of EHR technology.

• A written agreement shall specify the donated items, services and costs.

• Physicians must contribute 15 percent of the cost, and all donations must be made on or before Dec. 31, 2013.

The new exemptions may alleviate the financial burden for physicians in implementing such systems. While barriers still remain, including the need for updated state regulations and adoption of interoperability standards, the pieces are coming together to facilitate use of electronic records. Those wishing to implement EHR systems should consider how best to coordinate with affiliated providers and how any specific initiatives might be treated under the aforementioned state and federal laws. ■

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