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Red Flag Requirements Keep Waving for Physicians

In previous issues of *Health Care Insights*, we informed readers that the Federal Trade Commission's (FTC) so called "red flag" rules promulgated to reduce identity theft remained applicable to physicians. However, the effective enforcement date has been postponed several times by the FTC, now until June 1, 2010.

On December 1, 2009, the U.S. District Court for the District of Columbia refused to allow the FTC to apply the rules to lawyers, finding that the FTC lacked statutory authority from Congress over attorney/client relationships. The reality that an attorney must send the client a bill after rendering legal services did not, the court ruled, make attorneys financial institutions or creditors subject to the red flag restrictions.

In a January 27, 2010, letter to the FTC, American Medical Association officials stated that "if the ABA litigation produces an exemption for lawyers, health care professionals should be exempted too," reported an article by Amy Lynn Sorrel in the February 22 issue of *American Medical News*. According to Ms. Sorrel, the American Osteopathic Association, American Dental Association and American Veterinary Medical Association signed on with the AMA as well.

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Counter to the Current

The *Wall Street Journal* reported on October 29, 2009, that IBM will be eliminating the $20 co-payment currently required of its employees when they visit their primary care physicians!

According to reporter William M. Bulkeley, this switch is based on the company's belief that "encouraging people to go to primary care doctors faster (will result in) earlier diagnoses that can save on expensive visits to specialists and emergency rooms."

The new policy applies only to those employees enrolled in IBM's self insured plans.

To underscore the radical nature of this move, the president of the National Business Group on Health, which represents large employers, noted that "the number of employers who cover primary physician visits without a co-pay is miniscule."

Nursing Home Patient's Nephew's Liability Discussed

Benjamin Lee Levine held a power of attorney for his aunt Grace Levine. On April 19, 2006, Ms. Levine was admitted to the Hebrew Home and Hospital. Mr. Levine signed admission papers in which, as his aunt's representative, he agreed to promptly apply for or to otherwise assist the facility in establishing his aunt's eligibility for Medicare or Medicaid benefits.

Although the admission documents undeniably provided that Mr. Levine had no financial liability for his aunt's obligations, Hebrew Home claimed that his failure to use his aunt's assets to pay its bills and to "make a prompt and expeditious application for Medicaid assistance" were duties he assumed as her representative in the admission documents. Breach of these obligations, the Hebrew Home claimed, should render him liable for the damages caused by his breach.

Judge Trial Referee Jerry Wagner, sitting in the Hartford Judicial District Superior Court, agreed

with Mr. Levine that he was not liable for his aunt's debts. However, referring to other judicial rulings, he held that Mr. Levine's liability could be based on "his failure to meet his entirely separate responsibility" as his aunt's "responsible" party by failing to act under the agreement with Hebrew Home.

The lesson here is that damages can be incurred for failure to perform legally assumed duties – not just failure to make payments – to a health care facility.

Hebrew Health Care, Inc. v. Levine, 2009 WL 4682331 (November 3, 2009).

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Psychotherapist Privilege in Danger?

Under federal, Connecticut and most other state laws, a patient's communications with her psychotherapist are protected from discovery. Known as a privilege, it can be waived, however.

In a recent U.S. District Court of Connecticut decision, the plaintiff sued for employment discrimination. His former employer sought his mental health records – an effort which he opposed, claiming the psychotherapist/patient privilege.

In the complaint, the plaintiff had asserted that the defendant's alleged discriminatory actions against him had caused emotional distress. This alone, the District Court stated, would not have created a problem.

However, in response to pretrial discovery filed by the defendant, the plaintiff inexplicably "listed (the names of) mental health providers who treated him for depression and anxiety caused by his work environment." As Sherry L. Talton reports in *Litigation* magazine, Winter 2010 issue, the plaintiff "also produced two letters from psychotherapists regarding his condition."

The court concluded that he could no longer claim the psychotherapist/patient privilege because he was trying to use "the privileged information as a sword and then rely on the privilege itself as a shield."

Inserting his specific psychotherapy treatment "into the equation" opened the door to the loss of this evidentiary privilege.

Jacobs v. Connecticut Community Technical College, 258 F.R.D. 192, D.Conn, 2009.

Physician's Defamation Action Rejected

On December 7, 2003, the *New York Post* printed a rewritten version of an article originally published in another newspaper. The original article set forth the claims of the rock singer Ozzy Osbourne that his former physician, David A. Kipper, M.D., "had over prescribed various medications to (Osbourne) during the time that (he) starred in a television reality series." That article also asserted that the California Medical Board was attempting to revoke Dr. Kipper's medical license "due to his alleged gross negligence in the treatment of other patients."

The rewritten *Post* article falsely stated that Dr. Kipper's license *had* been revoked; it is not clear how this error occurred although it appears to have been due to deadline pressures and editorial oversights than an intention to misstate the facts.

Months after the *Post* article was published, Dr. Kipper's attorney demanded a retraction correctly asserting that no action had been taken by the California Board against his client's license. *After* the retraction was printed, Dr. Kipper sued for libel damages.

Concluding that Dr. Kipper was a "public figure" as a

result of the extensive media coverage of his substance abuse practice, his more than 100 television appearances as a medical expert and his roles as a doctor in several films, New York's highest court, the Court of Appeals, concluded that his libel suit should be dismissed. The court based its ruling on an almost 50-year-old U.S. Supreme Court case deciding that, as a matter of constitutional law, a public figure can not recover damages in a libel action without clear and convincing evidence that a false statement about him was published with "actual malice." "Actual malice" is having knowledge that a statement was false or that it was published with reckless disregard of whether or not it was false.

The *Post's* negligence in rewriting the original newspaper article did not amount to actual malice, the Court of Appeals held, even though there was some evidence that editors were interested in "spicing up" some of its articles. Important emphasis was placed on the fact that the offending article was "inconspicuously placed on page 24 of (the newspaper), where it appeared dwarfed in size by an adjacent, large-scale advertising for home furnishings." The fact that the Post retracted the article as demanded by Dr. Kipper's attorney also tended to indicate that the actual malice test could not be met.

One judge dissented. Dr. Kipper's case should not have been dismissed before trial, he stated. "[T]he fact that (the Post) took a factually accurate article and edited it to reflect something completely untrue" should be enough to allow Dr. Kipper to take his case to a jury, he wrote.

Had Dr. Kipper not striven to achieve celebrity status in the Los Angeles area, it is likely that he would not have been found to have been a "public figure" and that the suit for libel damages would not have run afoul of the "actual malice" requirement.

David A. Kipper, M.D. v. NYP Holdings Co., Inc., 12 NY. 3d 348 (2009)

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Financial Responsibility for Another Man's Child?

Eric Fischer and Pamela Torunier were married in 1986; they divorced in 2007. While married, Torunier gave birth to two children; OF and AF. Mr. Fischer supported AF during the marriage but learned around the date of the divorce that he was not AF's biological father.

Fischer brought suit against AF's father seeking reimbursement for the expenses he incurred in supporting AF.

Is Mr. Fischer entitled to reimbursement for the expenses he incurred in supporting another man's child?

Key to Judge Clarance J. Jones's ruling denying Mr. Fischer a recovery was the fact that he had "willingly assumed the responsibility of parenting a child that he knew was not his biological child . . . since he had "suspected this for some time." Why did he wait 15 years to put his paternity of this child, now almost an adult, into public view, the court demanded.

Because authorizing Mr. Fischer to proceed with the claim now would not benefit the interest of the young woman whom he had recognized as his daughter for some time, notwithstanding his suspicions to the contrary, his claim was denied.

Fischer v. Zollino, Superior Court, Judicial District of New Haven at New Haven, Docket No. CV-08-5004847 (December 7, 2009).

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