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Professional Liability

Patient May Have Claim Against Facility That Granted Privileges to Uninsured Doctor

A Sept. 29 state supreme court decision highlights the potential liability for health-care facilities that fail to do appropriate due diligence before granting privileges to physicians, health-care attorneys told Bloomberg BNA (*Jarrell v. Kaul*, 2015 BL 315262, N.J., No. A-42-13, 9/29/15).

The New Jersey Supreme Court, in a decision by Judge Mary Catherine Cuff of the New Jersey Superior Court Appellate Division, on temporary assignment to the state supreme court, said an ambulatory surgical facility might be liable to a patient for injuries caused by a physician who had only limited medical malpractice liability coverage.

A facility, the court said, has "a duty to withhold privileges to any physician who did not meet the financial responsibility requirements for a license to practice medicine in this State."

Michael F. Schaff, with Wilentz, Goldman & Spitzer PA, Woodbridge, N.J., said hospitals should take note of the decision because it places on health-care facilities that grant physician privileges the duty to be certain their physicians have insurance. "Patients expect facilities to do due diligence" prior to making credentialing decisions, Schaff said. This ruling points out that a failure to do so may expose the facility to liability, he said.

Grace D. Mack, also with Wilentz, Goldman & Spitzer PA in Woodbridge, said that the decision might be of interest outside of New Jersey because "the duty of care applies everywhere."

Spinal Surgery Not Covered. Plaintiff James Jarrell sought treatment from Dr. Richard Kaul for persistent back pain. The doctor performed a spinal fusion procedure at Market Street Surgical Center (MSSC), an ambulatory surgical facility. At the time of the surgery, Jarrell was required by New Jersey law to have medical malpractice liability insurance or to have a posted letter of credit demonstrating financial responsibility. Kaul had malpractice insurance, but his policy expressly excluded spinal surgery procedures.

Jarrell brought suit against Kaul, alleging that the physician negligently performed his surgery, leading to greater pain and a revision surgery. A jury awarded Jarrell \$500,000 on this claim and awarded his wife \$250,000 for loss of consortium.

At issue on an appeal to the state supreme court was whether the trial court properly granted summary judgment for Kaul on two issues: whether Jarrell had a di-

rect claim against the physician for his failure to maintain malpractice insurance covering the procedure, and whether Jarrell had a cause of action against Kaul for lack of informed consent, based on Kaul's failure to tell him he lacked the insurance. Also at issue was whether the trial court properly granted summary judgment for MSSC on a claim based on its credentialing of a physician who lacked the required insurance.

No Private Right of Action. N.J. Stat. Ann. § 45:9-19.17 requires New Jersey physicians to maintain medical malpractice liability insurance coverage. A physician who doesn't have such coverage "is subject to disciplinary action and civil penalties," up to and including revocation or suspension of his license by the Board of Medical Examiners (BME), the law says.

"Neither the statute nor the implementing regulations expressly provide that an injured patient has a direct cause of action against a treating physician who does not comply with the statutory financial responsibility provisions," the court said.

Nor, it added, did the statute or regulations implicitly create a direct cause of action by a patient against a noncompliant physician. There was "no evidence that the Legislature contemplated that enforcement" of the insurance requirement "would be advanced by bestowing a direct cause of action on an injured patient."

On the contrary, the court said, the Legislature specifically provided that an action by the BME—the agency charged with regulating the licensure and disciplining of physicians—"would be the most likely vehicle to ensure compliance" with the law.

Informed Consent Claim Rejected. A majority of the court also said a physician's failure to tell his patient that his malpractice insurance wouldn't cover him for the procedure in question didn't give rise to a lack of informed consent claim.

It recognized that a physician's lack of malpractice insurance "may be material information for some patients," but said that recognizing a cause of action for lack of informed consent in these circumstances would be "a stark departure" from existing New Jersey law. The law generally allows a claim alleging that a doctor failed to tell a patient something that a reasonable patient would have deemed to have been material to his choice to undergo the proposed treatment.

Justice Barry T. Albin, joined by Chief Justice Stuart Rabner, dissented from this portion of the decision. Albin wrote that a "patient has a right to know whether a physician performing a procedure is in a financially responsible position in the event that the patient suffers injuries due to medical malpractice."

If the physician doesn't tell the patient that he isn't insured for the procedure, "the patient should be able to file a cause of action for lack of informed consent, provided he would not have undergone the procedure had he been properly informed and he can prove his damages," Albin said.

Facility's Liability. The court characterized Jarrell's claim against MSSC as an action based on negligent hiring, and noted that, under state law, whenever a business hires a contractor to perform a task that requires special skills and a specific permit or license, its hiring of a contractor who doesn't have the requisite permit or license subjects it to liability.

In granting privileges to a physician who doesn't have the appropriate credentials, a facility similarly may be exposed to liability for hiring an incompetent contractor. The court said Jarrell's claim against MSSC, based on its permitting Kaul to perform a medical procedure for which he was uninsured at its facility, fell within this situation.

Obtaining and maintaining liability insurance (or filing proof of financial responsibility) is required to practice medicine in New Jersey. The "basic element of competency" for a New Jersey physician is the possession of a valid license. A noncompliant physician thus wouldn't be competent to practice medicine in the state, the court said.

Still, a negligent hiring claim isn't a strict liability claim, it said. Jarrell must do more than prove that MSSC granted Kaul privileges despite his lack of insurance. The court said there are "several open questions" here, including whether Kaul complied with the proof-of-financial-responsibility alternative and whether MSSC relied on his assertion that he was in compliance when it granted him privileges. The court remanded the case to the trial court for further proceedings.

Mack noted that there were several question left open by the court's opinion. For example, she said, the court recognized that discovery was needed to ascertain

whether MSSC knew Kaul lacked insurance coverage for the particular procedure.

She also said she wasn't certain what the patient's damages would be in an action against a facility that failed to confirm a doctor's malpractice liability coverage.

What Can Facility Do? To avoid potential liability, Schaff said, health-care facilities should determine for themselves whether a physician seeking privileges has the requisite insurance, rather than just taking the doctor's word for it.

Privilege applications should, for example, ask the physician for the name of his or her insurance provider, the policy number and a copy of the certificate of coverage. Grace suggested a facility include a requirement that the physician inform it of any changes in the insurance coverage and/or update the information on a yearly basis. The facility itself may check with the insurer periodically to determine if any changes have occurred.

Schaff and Mack emphasized that this was an unusual case that involved a physician with a history of difficulties and that most privilege-granting facilities conduct the type of due diligence they suggested.

Lewis Stein, of Nusbaum, Stein, Goldstein, Bronstein & Kron PA, Succasunna, N.J., represented Jarrell. Jeffrey B. Randolph, Glen Rock, N.J., represented Kaul. Peter E. Rhatican, Liberty Corner, N.J., represented MSSC.

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Full text is at http://www.bloomberglaw.com/public/document/Jarrell_v_Kaul_No_A42_September_Term_2013_2015_BL_315262_NJ_Sept_.