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Welcome to Speaking of Health Law

Hi, I'm Norm Tabler, host of *The Lighter Side of Health Law* AHLA podcast sponsored by Coker Group. I hope you enjoy this month's edition.

The Nuclear Option

Here's a False Claims Act case where the defendant is invoking a defense that qualifies as the nuclear *option*.

Dr. Gerald Polukoff filed a whistleblower case against health system giant Intermountain Health Care. He alleged that Intermountain performed unnecessary heart surgeries and then charged Medicare for them.

Of course, Intermountain insists that it did no such thing. But Intermountain didn't stop there. It has petitioned the U.S. Supreme Court to declare—are you sitting down—that the whistleblower provisions of the False Claims Act violate the U.S. Constitution.

Intermountain argues that the Act violates the Constitution by permitting any Tom, Dick or Harry to be a *federal officer* prosecuting a case in the name of the federal government when every seventh-grader knows that Article II requires that officers can be appointed only by the president, courts, or department heads.

Second, even if whistleblowers are *not* officers within the meaning of Article II, that's also a violation because it means that a core officer function—namely, civil law enforcement--is vested in a nonofficer.

The case is *Intermountain Health Care v. U.S. ex rel. Polukoff*.

Oh, By the Way, You Owe Us $17 Million

This is the message Providence Hospital in Washington State gave the Lloyd's of London carrier that wrote the hospital's claims-made insurance policy.

The policy required the hospital to notify the carrier no later than 60 days after learning of a claim.

When the hospital fired neurosurgeon Dr. David Newell, he screamed *wrongful termination.* Did the hospital notify the carrier? No. Then he demanded arbitration. Still no notice. The proceeding was scheduled. No notice. The proceeding resulted in a $17 million award to the neurosurgeon.

Then the hospital notified the carrier and demanded its $17 million. That was over six months after the formal arbitration demand. The carrier refused to pay, citing the 60-day notice requirement.

Providence sued in federal court. Each side moved for summary judgment on the notice issue. Applying Washington law, the court came down squarely for the hospital, ruling that subject to

only one exception, notice is on time so long as it is given at any time *within the policy period* (seven years in this case).

The one exception is when late notice results in prejudice—that is, harm—to the carrier. Breathing a sigh of relief, the judge noted that the prejudice issue was not before him, and the parties would need to file a new lawsuit if they wanted to argue about it.

The case is *Providence Health v. Certain Underwriters at Lloyd's*, W.D. Wash.

This Is Just a Test

You're watching television when out of the blue you hear an ear-piercing tone, followed by a deep-voiced announcer telling you not to be alarmed, it's just a test of the Emergency Alert System, and that had it been an actual weather alert, say for a tornado, you should take cover, maybe in your cellar. But, he goes on, *you don't have to take cover because* ***this is just a test****.*

A recent New Jersey religious discrimination decision brings this alert to mind. Amy Skuse—s-k-u-s-e---filed a religious discrimination case against her employer for firing her when she refused to get a yellow fever vaccination because it was forbidden by her Buddhist faith.

The trial court granted the employer's motion to compel arbitration, on the grounds that Amy had agreed to its arbitration policy.

But the appellate court reversed the employer's victory, on what might be called a *this-is-just-a-test* rationale. The employer's theory that Amy had agreed to its arbitration policy was based on a series of slides emailed to all new employees. True, the slides set out the policy, but they were labeled a, quote, *training module*, and the last slide asked the employee to click a button to acknowledge *seeing* the slides.

The appellate court noted that it was one thing to acknowledge *seeing* the slides but quite another to *agree to* the policy set out in the slides. Amy may have done the former, but she hadn't done the latter.

The employer's position was a little like saying that if you've heard the Emergency Alert, you've made a contract to go to your cellar in the event of a tornado.

The case is *Skuse v. Pfizer*, N.J. Super. Ct.

Where there's Smoke, Who Needs Fire?

The First Circuit Court of Appeals has overruled the age-old adage *where there's smoke, there's fire.*

Tom Guilfoile was president of a company that partners with hospitals to provide specialty pharmacy services for chronically ill patients. He was concerned that one of his company's contracts might violate the Anti-Kickback Statute and therefore the False Claims Act. And he would *not* shut up about it, threatening to go to over the chairman's head to the board. So the chairman fired him.

Tom filed an action alleging he was fired in retaliation for internally reporting a False Claims Act violation. The district court dismissed the case, ruling that Tom's complaint failed to connect his

kickback allegations with an actual false Medicare or Medicaid claim.

The First Circuit reversed, ruling that the district court had set the bar for Tom too high. He didn't have to show *actual submission of a false claim*. All he had to do was show that his action in raising concerns, quote, *reasonably could lead to a False Claims action.*

As the court put it, the plaintiff in a False Claim Act retaliation action doesn't need to plead the existence of a *fire*—only, quote, *a reasonable amount of smoke*.

The case is *Guilfoile v. Shields*, 1st Cir.

What's In a Name?

Juliet says that a rose would smell the same no matter what it was called, making the point that a *name* is simply an artificial convention with no real meaning.

But don't try telling that to Bill McFeeley. While recovering from gastric surgery in Kennedy Hospital, he suffered a heart attack. He believed there was negligence on the part of the on-call resident, causing permanent heart damage.

The resident was employed not by Kennedy Hospital but by Rowan University Medical School, which is a public entity.

Bill's lawyer sent a tort claim notice to the New Jersey Attorney General and Kennedy Hospital, but *not* to the resident or his employer, Rowan University. In response to the question asking the names of the public entities at fault, the notice named Kennedy Hospital, the State of New Jersey, and, quote, *any other state agency* involved in the matter.

Remember that term: *state agency*.

When Bill's lawyer filed a complaint naming the resident as a defendant, the resident moved to dismiss for failure to comply with the tort claim act by naming his employer, Rowan University. The trial court agreed with him and dismissed the case.

Bill appealed, arguing that the tort notice was valid because it named the State of New Jersey and, quote, *any state agency* involved in the incident. But here's where Juliet was wrong. The court ruled against Bill because Rowan University is a *public entity*—not a *state agency*. If it had been a *state agency*, the tort notice would have been valid, but since it's a public entity, it had to be specifically named. The court affirmed the dismissal.

The case is *McFeeley v. Kar*, Super. Ct. of N.J., App. Div.

Well, that's it for this month's edition of *The Lighter Side of Health Law.* I hope you enjoyed it. Check your *AHLA Weekly* and *Connections* magazine for the next edition.