AHLA WEEKLY

7/27/2018

Welcome to Speaking of Health Law

Hi, I'm Norm Tabler, host of the AHLA podcast series, *Speaking of Health Law*, where we focus on the *Lighter Side of Health Law*. I hope you enjoy this month's edition.

The Broken-Kettle Defense

Remember learning your first year in law school that a defendant may state as many defenses as it wants, even if they're inconsistent. The classic case is the defendant accused of breaking a borrowed kettle. He was allowed to plead that (a) he never borrowed the kettle; (b) it was broken when he borrowed it; and (c) it was unbroken when he returned it.

Wennoa Peebles apparently knows the rule. She was an accounts clerk for a local hospital. When she was fired, she sued the hospital, alleging retaliation for filing an EEOC complaint.

The hospital countered that she was actually fired because she had handed out the personal email addresses of board members to a debt collector in violation of hospital policy and then lied about it.

At various points in the litigation Wennoa said that (a) she did *not* give out the addresses; (b) she gave out the addresses because her job description required it; (c) she gave out the addresses because the executives wouldn't return the debt collector's calls; and (d) she can give out the addresses if she wants because it's not against hospital policy.

Well, you can *plead* inconsistent defenses, but the judge isn't required to believe any of them. And this judge didn't. He threw out Wennoa's case, awarding the hospital summary judgment.

The case is *Peebles v. Greene County Hosp. Bd.*, N.D. Ala.

The Orthopedic Surgeon Who Pretended to be an Orthopedic Surgeon

Back in the 70s Woody Allen made up a whimsical list of mythological beasts. One of them had the head of a lion and the body of a lion—but not the *same* lion.

The beast comes to mind in reading the federal indictment of the New York orthopedic surgeon who pretended to be a New York orthopedic surgeon—but not the *same* New York orthopedic surgeon.

Why would Dr. Spyros Panos pretend to be the doctor referred to in the indictment as *Doctor-1*? The answer is that Dr. Panos had lost his own medical license, served four-and-a-half years for health care fraud, and was still on supervised release. He couldn't practice under his own name.

So he stole the identity of Doctor-1 and worked under that name for a company—one he created—that performed peer review of workers compensation cases. According to the indictment, insurance companies paid him over $860,000 for the reviews.

The indictment charges him—under his real name--with wire fraud, health care fraud, and aggravated identity theft.

The case is *U.S. v. Panos*, S.D.N.Y.

Vertical Integration In Health Care Fraud

For years, we've seen the spread of vertical integration in health care, as when a system includes hospitals, medical groups, labs, and insurance. So maybe it was inevitable that vertical integration would come to health care *fraud.*

Federal authorities in New York City have announced the indictment of five people accused of a slip-and-fall insurance scam.

But this scam didn't involve just one person or even just one element of the scam. It included the people who took the alleged falls, scouts to identify good places to fall, and designated attorneys, chiropractors, and doctors--even lending companies.

That's right: *lending companies*. You see, sometimes victims underwent surgery—unnecessary surgery--to increase damage awards. The victims needed cash to pay for the surgery. So the lending companies made high-interest loans, knowing they'd get repaid when the settlements came in.

The indictment says the scam even included a *training program* instructing victims on how to fall and fake injuries. And according to the indictment, the instructor knew what he was talking about because he's a former chiropractor.

The five are charged with wire fraud in a scheme to obtain fraudulent insurance proceeds.

The case is *U.S. v. Kalkanis*, S.D.N.Y.

Law versus Justice

When a judge says you have justice on your side, he's going to rule in your favor, right? *Well*, not necessarily.

Dr. Bob Feiss confirmed that he qualified for the Medicare Primary Care Incentive Payment Program as of the start of 2011. When 18 months passed without a payment, Bob called the CMS contractor, which confirmed that CMS had miscoded him as an *emergency medicine* physician. When he *still* hadn't been paid by the end of 2013, he contacted CMS, which agreed to correct its mistake.

But CMS took the position that his qualification couldn't start until *2014*, when it finally corrected its own miscoding mistake.

When Bob sued for the $40,000 he was owed for 2011 through 2013, the government did not deny that he deserved it. Instead, it rested on the federal statute prohibiting judicial review of the CMS coding system.

Reluctantly, the court agreed and dismissed Bob's case, with an opinion that opens with the statement, "This is not a just decision, but it is one that the law requires."

So if you have to choose between having the law or justice on your side, you'd better choose the law.

The case is *Feiss v. U.S.*, U.S. Ct. of Fed. Claims.

Hoist with his Own Petard

When Hamlet said that Claudius was *hoist with his own petard*, he meant that he, Hamlet, had turned the tables on Claudius by getting his henchmen killed. So Claudius was figuratively blown up by the *petard*—that little round bomb that spies carry in cartoons—meant for Hamlet.

Oscar Sanchez personifies the quote. As an executive with Maquet Cardiovascular, Oscar had access to sensitive confidential documents. He had signed confidentiality and nondisclosure agreements.

After being disciplined for misbehavior, Oscar told a fellow executive that he had retained copies of company documents as a quote, *burn file* that he would use to *get* the company—only he didn't say *get*--if they fired him.

And they did. So he filed a whistleblower retaliation suit under New Jersey law and turned the burn file over to his law firm. In response to Maquet's discovery motion, Oscar's firm produced the documents, including correspondence with attorneys and documents marked *attorney-client privilege*.

Maquet moved for an order (a) precluding Oscar from using the documents and (b)—this should get your attention—disqualifying Oscar's law firm from the case. The trial court granted the motion without even holding a hearing, and the appellate court unanimously affirmed.

So Oscar was burned by his own burn file. And his law firm was burned along with him because the firm had failed to inform Maquet as soon as it knew it was holding privileged documents.

The case is *Sanchez v. Maquet*, Super. Ct. of N.J., App. Div.

Hold the Spaghetti

Here's a practice tip for all attorneys, whatever their specialty: If you lose your temper in an Italian restaurant, don't throw a plate of spaghetti at your opponent—at least not if innocent bystanders are in the area.

Attorney Jim Sweeny disregarded this practice tip. When he threw his plate of spaghetti at Mike Cosmos, it also hit bystander Constance Koulmey in the head; hot pasta and sauce dripped into her eyes; and she fell and suffered a concussion.

When she sued for her injuries, Jim argued for what might be termed a *change-of-menu*, insisting that the pasta topping was not hot and spicy *fra diavolo*, as Constance claimed, but the milder cavatelli with sausage and broccoli.

Apparently unmoved by Jim's cavatelli defense, the jury awarded Constance over $100,000.

The case is *Koulmey v. Sweeney*, Conn. Super. Ct.

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