AHLA WEEKLY

5/25/2018

Intro

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.

Hospital Sued for *Not* Sending Collection Agency after Patients

A Washington State woman sued a hospital for *not* using a collection agency to collect medical bills. That's right: she sued because the hospital did *not* sic a collection agency on its patients.

When Michelle Echlin didn't pay her bill, the hospital referred the debt to CCI. CCI received a fixed fee for every debt referred to it. CCI would send the debtor a two form letters. If that didn't work, CCI's involvement was over.

Michelle's class action alleged that this violated the Fair Debt Collection Act's prohibition of so-called *flat-rating*. *Flat-rating* occurs when a creditor creates the false impression that a collection agency is involved. It's called *flat-rating* because the creditor typically pays a company a fixed fee for sending letters and pretending it intends to pursue the matter to the end.

Michelle alleged that CCI was a *flat-rater* because it received a flat rate for sending two form letters and then bowing out. But the Ninth Circuit affirmed the district court's award of summary judgment in favor of the hospital.

The court cited seven different ways CCI actively participated with the hospital in the debt-collection process. (You might call them the seven habits of highly effective debt-collectors.) CCI was active enough to be an honest-to-goodness collection agency.

So the hospital won the case by proving that it had, in fact, sicced a collection agency on its patients.

The case is *Echlin v. PeaceHealth*, (9th Circuit).

Solving One Problem Brings Two More

Health lawyers who practice before the Food & Drug Administration may want to take note of an FDA warning letter reminding us that solving one problem can create a new problem—or maybe two of them.

The FDA letter to Coleman Peanut Co. recites that the company uses a cat, quote, "as the firm's pest control," end quote. Presumably, the cat is effective because the letter contains no mention of rodents or rodent droppings.

But the letter cites two cat-related problems. You can probably guess the first one. That's right, although there were no rodent droppings, there were *cat droppings*.

The second one takes some thought. Here's a hint: What do employees do when they see a lovable kitty? That's right: *they pet it*. And then they handle the peanuts … without washing their hands in between.

The FDA letter directs Coleman to provide a plan of correction and then be re-inspected, at Coleman's expense.

With Coleman's luck, the cat will probably sue for wrongful termination.

The letter is FDA Warning Letter CMS# 52087.

The Case of the Bashful Whistleblower

You might say William Nash wanted to have his cake and eat it, too. He filed a whistleblower case against his former employer but wanted to remain anonymous so that his current employer wouldn't know that he is a—you guessed it—*whistleblower*.

William's False Claims case alleged that his former employer was guilty of defrauding Medicaid out of millions of dollars. When the government declined to intervene, he decided to drop it. He asked the court to keep the case under seal so his current employer wouldn't find out about it. In the alternative, he asked the court to replace his name with *John Doe*.

The court said, *no way*. The False Claims statute directs the court to unseal a case once the government announces its decision on intervening. William's fear of retaliation is speculative. Besides, the statute contains an anti-retaliation provision.

The court also turned thumbs down on William's request to be called *John Doe* in all the pleadings because the public has a right to know who's using its courts.

But the court gave William one small victory. It said he could replace the motion under consideration with a new one that deleted the name of his current employer. Ironically, that name had never been in the record until William filed the current motion.

Maybe the lesson is that you shouldn't blow a whistle if you don't want to draw attention to yourself.

The case is *U.S. ex rel. Nash v. U.C.B., Inc.*, (S.D.N.Y).

Not a Shred of Evidence

You often hear about defendants insisting, “There’s not a *shred* of evidence.” But in this False Claims Act case, the defendant is insisting there *is* a shred of evidence—*lots* of shreds, and that’s the problem.

Tracy and Michael filed a whistleblower action alleging that SuperValue defrauded the government. They say they had conversations with SuperValue employees, who *admitted the fraud* by SuperValue.

What’s more, they kept notes on the conversations. At their depositions they produced written summaries of the calls. Devastating to SuperValue, *right*? Well, not quite.

You see, Tracy and Michael *shredded* their notes. And they did it *after* they filed the lawsuit. Oh, and Michael deleted all related information from his computer and--are you sitting down?—*threw away* the computer.

So what are the documents they produced at their depositions? Well, Exhibit 16 is an example. It’s a, quote, “Compilation” Michael created from information Tracy gave him over the phone based on Tracy’s notes. And where are Tracy’s notes? You guessed it: *shredded*.

Not surprisingly, SuperValue has moved for sanctions based on the plaintiffs’ destruction of evidence. They want the court to strike all allegations and evidence based on the alleged conversations.

The case is *United States ex rel. Schutte v. SuperValue*, (C.D. Ill.)

The Monkey That Lost Its Appeal

It’s not health law, but it’s too good to pass up. On April 23 a monkey lost it appeal in the Ninth Circuit. The court upheld dismissal of a case brought by PETA—People for Ethical Treatment of Animals—on behalf of a crested macaque named Naruto against defendants who published selfies belonging to Naruto.

That’s right: Naruto took selfies. Naruto found an unattended camera, picked it up, and took selfies—darned good selfies, as a matter of fact.

The court said that PETA is no friend of Naruto. Well, technically, what the court said was that PETA couldn’t qualify as, quote, “next friend” because nonhumans can’t have “next friends” under the law. But the court went further than that technicality, saying that PETA seemed more interested in protecting its own image than Naruto’s interests.

If you’re thinking of suing on behalf of your dog or goldfish, I should note that the court ordered PETA to pay defendants attorneys’ fees for the appeal.

You can’t make this stuff up.

The case is *Naruto v. Slater*, (9th Circuit).

The No Harm, No Foul Defense

Former hospital CEO Edward Novak is relying on the *no harm, no foul* defense, but with a twist. Sure, he concedes, he did commit a foul. After all, he was convicted of violating the Anti-Kickback Statute and is still serving time for it. And that was a foul.

But now he's a defendant in the subsequent False Claims Act case, and, he argues, there was no harm to Medicare. As Ed sees it, when his hospital filed Medicare claims for treating patients admitted by the doctors Ed bribed, the claims were for patient care the hospital *actually delivered*. There was no harm to Medicare: it got its money's worth.

The stakes are high. The government puts the damages from the kickback scheme at $9 million and wants to apply the treble damage provision of the False Claims Act, bringing Ed's liability to a cool $27 million.

Ed ought to be glad the government isn't tacking on the False Claims Act *penalties*. They can be as high as $11,000 for each Medicare claim.

The case is *U.S. v. Novak*, (N.D. Ill.)

The Swiss Cheese Defense

Charged with insider trading based on leaked CMS secrets, four defendants have asserted what the government derisively calls the *Swiss cheese defense*. That's the theory that CMS is like Swiss cheese: full of holes—so full of holes that no information there is really secret.

Defendants acknowledge that former CMS employee David Blaszcak trolled the halls of CMS for information on proposed CMS spending and then forwarded the information to hedge fund analysts. But the argue the information wasn't *inside* information because anybody can find out anything at CMS.

Now it's up to the jury to decide whether or not CMS is Swiss cheese.

The case is *U.S. v. Blaszcak*, (S.D.N.Y.)

Sign-Off

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*.