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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.

Protecting Men from Ovarian Cancer

To say Mona Estrada is overly cautious would be an understatement. She apparently wants to protect men from ovarian cancer, even though, of course, men don't have ovaries.

Mona bought and used Johnson & Johnson baby powder for 60 years. The fact that she kept using it for so long strongly suggests she was satisfied.

But then Mona read about cases alleging that the baby powder caused ovarian cancer. And she said to herself, *if I'd known about this risk, I never would have bought the darn baby powder*. And, this being America, she decided to make a *federal* case out if it—and not just any case, but a *class action*.

She sued on behalf of all the women in the United States who wouldn't have bought the baby powder if they had known about the ovarian cancer risk. But Mona didn't stop there. She also sued on behalf of all the *men* who bought the baby powder. Why? Presumably, because if those men had known the powder might give them ovarian cancer, they wouldn't have bought it.

Shockingly, the federal district court dismissed Mona's case for lack of standing. On appeal, the Third Circuit upheld the dismissal, ruling that Mona's, quote *buyer's remorse* was not an injury recognized under Article III of the Constitution.

Sadly, therefore, the men of America won't be able to rely on Mona to protect them from ovarian cancer.

The case is *Estrada v. Johnson & Johnson*, 3d Cir.

Did the Rep from Stryker Strike Her?

The main thing about this case is that it's fun to say.

Stryker—that's S T R Y K E R—is a medical device company. In Texas an OR nurse sued Stryker, alleging that its representative struck her during a surgical procedure. So the question was, *did the rep from Stryker strike her?*

The rep says he used his foot to give her a *gentle tap* to the knee to get her attention. The nurse says it was a *kick* and it re-injured her already bum knee. Why did he use his foot? He says his hands were full.

The trial court gave Stryker summary judgment, ruling there wasn't sufficient evidence to submit the question, *did the rep from Stryker strike her?* But the Court of Appeals reversed, ruling that there ***was*** sufficient evidence to submit the question, *did the rep from Stryker strike her?*

The case is *Cavazos v. Stryker*, Tex. Ct. of Apps., 13th Dist.

The We-Committed-this-Crime-Before Defense

Generally, when a company is accused of committing a crime, the defense is, "Your honor, we did *not* commit the crime."

But when an adult diaper company was accused of defrauding Medicaid, its defense was the opposite. The defense was, "Your honor, we simply repeated the same crime we got caught committing before."

Why would the defendant diaper company adopt this line of defense? The answer can be found in the False Claims Act's prohibition on whistleblower suits that are based on allegations already the subject of a whistleblower suit.

Here, the defendant noted that its scheme—namely charging Medicaid the sticker price it paid for diapers without revealing enormous rebates from the supplier—had been the subject of a case it paid millions to settle back in 2011.

But the court rejected the defense, noting that the old case involved a *different supplier* and *different time periods*.

The case is *U.S. ex rel. Herman v. Coloplast Corp*., D. Mass.

When Is a Report Not a Report?

Have you ever assumed you knew the meaning of a word, but the more you concentrated on it, the less sure you were? It's that way with the word *report* in EMTALA's anti-retaliation provision.

The provision prohibits retaliation against an employee who, quote, *reports* a violation.

When a pregnant woman came to the Southwest Regional ER, she was referred to another hospital. Over the following days the Southwest staff met to discuss whether it had violated EMTALA. The consensus was that it *had* violated the act but need not inform state authorities.

Nurse Marie Gillispie disagreed with the decision not to inform the authorities and said so. When she was fired, she sued under the anti-retaliation provision, alleging she had been fired for reporting a violation internally. So the question was whether Marie had, quote, *reported* the violation internally.

The Third Circuit ruled that she had *not*. Its reasoning? Marie spoke up only *after* the staff was well aware of the incident and had discussed it at meetings.

So the answer to the riddle is that a report is not a report when it doesn't provide information the recipient doesn't already have.

The case is *Gillispie v. RegionalCare Hosp. Partners*, 3d Cir.

What's in a Name?

A couple of years ago optometrists all over the country noticed that without their knowledge, Chase Amazon Visa credit card accounts had been opened in their names, something that requires personal information, including social security numbers and dates of birth.

It didn't take long for their on-line discussions to reveal one common link: all of them had given their personal information to the National Optometry Board when applying to sit for board exams.

When three of the optometrists filed class actions for breach of privacy and related wrongs, the Board moved to dismiss, arguing that the plaintiffs couldn't trace the breach back to it—that it was pure speculation to say the Board was the source of the breach.

The district court bought the Board's argument and dismissed. But the Fourth Circuit reversed, noting that the *names* on the credit cards pointed to the Board as the source of the breach. For example, the cards for two of the three named women plaintiffs were issued in surnames they had given the Board years ago but had long ago changed because of divorce or remarriage. It was unlikely that any other organization would be the source of those obsolete names.

The Fourth Circuit reversed the dismissal and sent the case back to the lower court.

The case is *Hutton v. Nat'l Bd. of Examiners in Optometry*, Fourth Circuit.

The Unkindest Cut of All

When Brutus stabbed Julius Caesar, Shakespeare called it "the most unkindest cut of all" because it was delivered by a close friend.

Beth-Israel Deaconess Hospital in Massachusetts was the setting when pharmacist Mary Takki delivered a cut to a co-worker.

When the co-worker arrived at work with wind-blown hair, Mary said, quote, "I can fix your hair for you." The co-worker responded, "Sure, go ahead." And Mary proceeded to cut her hair.

When word of the haircut reached HR, a manager asked the co-worker about the incident. The co-worker said she hadn't intended that Mary would *cut* her hair—only *fix* it.

HR confronted Mary, telling her she would be fired her for—are you sitting down?—*workplace violence*. *But,* HR went on, she could avoid firing if she signed a resignation agreement. Mary signed.

When Mary sued the hospital for breach of contract under the Labor Management Relations Act, the hospital moved for summary judgment on the grounds that Mary had failed to exhaust grievance procedures under the collective bargaining agreement. The court agreed with the hospital and awarded it summary judgment.

If there's a lesson, maybe it's, *don't give a co-worker a free haircut unless she signs a waiver.*

The case is *Takki v. Beth Israel Deaconess,* D. Mass.

The Downside of Being a Three-Time Winner

You don't hear much about three-time winners: three-time *losers*, sure, but three-time winners, not so much.

Well, meet nurse Cecilia Guardiola. She's a three-time winner. She's also experienced in clinical documentation and case management. But she's out of a job, and her lawyer says that being a three-time winner that has made her unemployable. Why? Because her three wins were all as a False Claims Act *whistleblower*—against her last three employers—all health systems.

The suits resulted in $32.5 million in settlements, with Cecelia getting somewhere between $5 and $8 million.

But the downside to being a three-time whistleblower winner is that health systems don't seem eager to hire them. Go figure.

Big Pharma Made Me Do It

Remember comedian Flip Wilson? Back in the 70s his character Geraldine had an all-purpose excuse for misbehavior: *"The devil made me do it!"*

Union organizer Henry Green tried a variation on that theme when he faced sentencing for five years of embezzling union funds.

As Henry saw it, it wasn't his fault. Purdue Pharmaceutical made him do it. Purdue manufactures OxyContin, and OxyContin is what Henry bought with the money he embezzled. So Purdue is to blame for the embezzlement, and Henry shouldn't go to jail. Q.E.D.

The judge wasn't impressed. She sentenced Henry to six months behind bars, one year of supervised release, and restitution of the money he stole.

The case is *U.S. v. Green*, D. Mass.

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.*