The Rogers Law Firm

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Client Newsletter

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Uncompensated Trustees of a Charitable Corporation Immune from Liability

On February 4, 1999, Boston Regional Medical Center ("BRMC"), a 195-bed not-for-profit acute care hospital, filed for Chapter 11 Bankruptcy in the U.S. Bankruptcy Court in Boston. The hospital operated under the direct control of the Seventh Day Adventist Church, which had formed Atlantic Adventist Health Care Corporation ("AAHC") to hold an interest and control BRMC and other not-for-profit Adventist hospitals throughout New England.

Incident to BRMC's filing for bankruptcy in October of 2001, the Official Committee of Unsecured Creditors for the Bankruptcy Estate of Boston Regional Medical Center ("Unsecured Creditors") filed a Complaint in the U.S. Bankruptcy Court in Boston against the Trustees for breach of fiduciary duty as a result of their failure to conduct, control and oversee the business of BRMC. (See Official Committee of Unsecured Creditors for the Bankruptcy Estate of Boston Regional Medical Center, Inc. v. Ricks, et al.) The suit claimed that the Trustees abdicated all decision making responsibilities to BRMC's Adventist officers and members at a time when the hospital was in dire financial condition. The Unsecured Creditors claim that the Trustees attempted to preserve BRMC's assets by transferring them to affiliated Adventist corporations without regard to whether such transactions were in the best interests of BRMC and its creditors. Specifically, the Unsecured Creditors claimed the Trustees violated their fiduciary duty by accepting an offer from Doctors Community Health Corporation ("DCHC") to purchase the operational assets of BRMC over Tenet Health Systems' ("Tenet") offer to purchase all of BRMC's assets. The Unsecured Creditors claimed that the decision to accept DCHC's offer resulted in a loss of approximately twenty-four million dollars. The Complaint alleged: 1) breach of the duty of loyalty and candor; 2) breach of the duty of good faith; and 3) breach of the duty of care.

* The Rogers Law Firm is moving effective Monday, October 18, 2004. Our new address will be 100 Cambridge Street, 20th Floor, Suite 2000, Boston, MA 02114. Our telephone number will remain the same, 617-723-1100. Our new fax number will be 617-723-1180. Our pager number for non-business hours will remain the same, 508-426-8623.

In response to the Complaint, the Trustees set forth the affirmative defenses of M.G.L. c. 231, § 85W and M.G.L. c. 180, § 6C. M.G.L. c. 231, § 85W provides as follows:

> "Except as trustee of otherwise provided in this Section and in Section 85V, no person who serves without compensation, other than reimbursement for actual expenses, as an officer, director or any non-profit charitable organization including those corporations qualified under 26 U.S.C. 501(C)(3) shall be liable for any civil damages as a result of any acts or omissions relating to the performance of his duties as an officer, director or trustee; provided however that the immunity conferred by this section shall not apply to any acts or omissions intentionally designed to harm or to any grossly negligent acts or omissions which result in harm to the person."

The statute further provides that the immunity conferred by this section does not apply to "acts or omissions which are committed in the course of activities primarily commercial in nature even though carried on to obtain revenue to be used for charitable purposes."

The Trustees also set forth the affirmative defense of M.G.L. c. 180, § 6C, which provides in pertinent part that "a director of a corporation shall perform his duties … in good faith and in a manner he reasonably believes to be in the best interests of the corporation, and with such care as an ordinarily prudent person in like position with respect to a similar corporation organized under this Chapter would use under similar circumstances." The statute provides that a director shall not be liable for the performance of his duties in compliance with this statute.

In March of 2003, the Trustees of BRMC filed a Motion for Summary Judgment in the U.S. District Court for the District of Massachusetts[1] on the basis that as uncompensated trustees of a charitable corporation, they are immune from liability under M.G.L. c. 231, § 85W. The Unsecured Creditors filed an Opposition to the Trustees' Motion for Summary Judgment in which they argued that as a result of the Trustees' "egregious conduct", they were not entitled to immunity under M.G.L. c. 231, § 85W. Specifically, the Unsecured Creditors argued that the immunity provided under M.G.L. c. 231, § 85W does not apply to grossly negligent acts or omissions or commercial transactions. In their brief to the Court, the Unsecured Creditors argued that the Trustees were grossly negligent in the performance of their duties as trustees of BRMC. Furthermore, the Unsecured Creditors argued that their allegations against the Trustees include a commercial transaction insofar as their allegations relate to the Trustees' role in the sale of BRMC. The Unsecured Creditors also argued that the Trustees owed fiduciary duties to BRMC and that they intentionally harmed BRMC and its creditors as a result of their decision to accept the DCHC offer over the Tenet offer.

On August 4, 2004, Judge Mark Wolf of the U.S. District Court for the District of Massachusetts issued a Memorandum and Order allowing the Trustees' Motion for Summary Judgment. In his decision, Judge Wolf ruled that 1) the Trustees did not commit any grossly negligent acts or omissions that resulted in harm to the person; 2) the alleged breaches of fiduciary duty were not primarily commercial in nature; and 3) the Unsecured Creditors failed to establish a genuine issue of material fact as to whether the Trustees committed acts intentionally designed to harm BRMC or its creditors.

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[1] Trustee-defendant Laura Hogan moved to withdraw the adversary proceeding to U.S. District Court pursuant to 28 U.S.C. 157(d) and Rule 5011(a) of the Federal Rules of Bankruptcy. Ms. Hogan stated that the withdrawal was appropriate because she and other defendants requested a jury trial and did not consent to the entry of final orders or judgment of the Bankruptcy Court. Although the Motion to Withdraw was filed in February of 2001, the Motion was not allowed by Judge Wolf until April of 2002.

(1) <u>The Trustees Did Not Commit Any Grossly Negligent Acts or Omissions That Resulted in Harm to the Person</u>

The Unsecured Creditors argued to the Court that the immunity provided under M.G.L. c. 231, §85W does not apply to "grossly negligent acts or omissions which result in harm to the person." They further argued that "person", as it appears in the statute, should be read to include entities, such as the Creditors. The Court, however, disagreed with the Unsecured Creditors' interpretation of the statute and held that "person" is not meant to include entities. The Court found that the Trustees did not commit any grossly negligent acts or omissions that resulted in harm to the person.

(2) <u>The Activities of the Trustees Were Not Primarily Commercial in Nature</u>

The Unsecured Creditors claim that the Trustees should not be entitled to the immunity provided under M.G.L. c. 231, §85W, because such immunity does not extend to activities which are primarily commercial in nature. In his decision, Judge Wolf addressed M.G.L. c. 231, § 85W's "primarily commercial in nature" language by reviewing interpretations of similar language in M.G.L. c. 231, § 85K. The Court noted that under M.G.L. c. 231, § 85K, an activity must be "entirely disconnected" from the charity's purpose for it to fall within the exception. In applying this test to facts in the present case, Judge Wolf held that the activities of the Trustees were not entirely disconnected from the charitable purposes of BRMC. The Court found that the alleged acts and omissions of the Trustees in connection with BRMC's finances were, in fact, "entirely connected to the charitable purpose of BRMC, since a hospital can only fulfill its purpose if its board of trustees performs its function."

(3) <u>The Trustees Did Not Commit Acts Intentionally Designed to Harm BRMC or Its Creditors</u>

The Court held that the evidence put forth by the Unsecured Creditors in support of their allegations of intentional harm by the Trustees was "sparse". The Court ruled that no reasonable jury could find that the Trustees committed acts which were intentionally designed to harm BRMC or its creditors. The Court pointed out that the minutes of the AAHC Board Meetings do not contain any statements indicating that the Trustees intended that the risks of the DCHC transaction would materialize and the transaction would fail.

Judge Wolf has also issued an opinion that AAHC is entitled to Judgment on the Pleadings in regard to its Declaratory Judgment Counterclaim that any liability in regard to Count IV of the Complaint is limited to $20,000.00 exclusive of interest and costs under M.G.L. c. 231, § 85K. In Count IV of the Complaint, the Unsecured Creditors claim that AAHC aided and abetted the Trustees' breach of fiduciary duty. The Unsecured Creditors argued that AAHC is not entitled to the liability cap of M.G.L. c. 231, § 85K because its actions were primarily commercial in character. Judge Wolf ruled that the Unsecured Creditors' claim in this regard was not persuasive. He held that AAHC is entitled to the protection of M.G.L. c. 231, § 85K.

Massachusetts Court Denies 93A Claim in Medical Malpractice Action

In the recent case of Darviris, et al. v. Petros, 442 Mass. 274 (2004), the Massachusetts Supreme Judicial Court held that the victim of an unauthorized medical procedure may not bring any action against her physician for unfair or deceptive practices in violation of Massachusetts General Laws, c. 93A. In December of 1995, the Plaintiff sought treatment from Dr. James Petros for rectal bleeding and pain. According to the Plaintiff, Dr. Petros recommended to treat her condition with a fissurectomy. Dr. Petros informed the Plaintiff of possible side-effects from the procedure, but indicated that such effects were unlikely and could, in any event, be corrected by another procedure.

Prior to the Plaintiff's surgery on January 10, 1996, her symptoms had abated. She inquired of Dr. Petros if she should go through with the surgery. Dr. Petros informed her that the surgery was necessary because her symptoms were "chronic", and thus, she agreed to proceed. The Plaintiff signed an informed consent form, which indicated that she consented "to the performance of operations, procedures and treatment in addition to or different from those now contemplated" which Dr. Petros, in his judgment, "may consider necessary".

The Plaintiff underwent her surgery on January 10, 1996. After surgery, Dr. Petros informed the Plaintiff that he had performed a hemorrhoidectomy, and not a fissurectomy. The Plaintiff became upset and informed Dr. Petros that she had not consented to a hemorrhoidectomy and would not have given any such consent because her godfather had suffered greatly as a consequence of undergoing a hemorrhoidectomy. The Plaintiff subsequently experienced terrible pain, which she attributed to the hemorrhoidectomy. As a result of her continued pain, the Plaintiff underwent a second surgery conducted by Dr. Petros on March 10, 1996. After the second surgery, the Plaintiff sought treatment with a different physician.

In March of 1999, the Plaintiff filed a lawsuit against Dr. Petros. The Complaint alleged numerous counts against Dr. Petros, including: battery, failure to obtain informed consent, violation of General Laws, c. 111, §70E (Patient's Bill of Rights), negligent infliction of emotional distress and violation of Massachusetts General Laws, c. 93A. Chapter 93A is the Massachusetts Consumer Protection Statute. The purpose of the statute is to improve the commercial relationship between consumers and business persons and to encourage more equitable behavior in the marketplace. The statute provides for treble damages as a result of unfair and deceptive trade practices. At the conclusion of discovery, Dr. Petros moved for Summary Judgment, arguing that the Plaintiffs' claim for violation of General Laws, c. 93A, failed to state a claim upon which relief could be granted. Dr. Petros further sought Summary Judgment on the grounds that the Plaintiffs' remaining claims were bound by the applicable statute of limitations. The Superior Court granted Dr. Petros' Motion for Summary Judgment, and the Massachusetts Appeals Court affirmed the Superior Court's decision. The Plaintiffs then appealed to the Massachusetts Supreme Judicial Court.

The SJC reviewed the Plaintiffs' appeal and held that "a claim for negligent delivery of medical care, without more does not qualify for redress under our Consumer Protection Statute." The Court concluded that there was no evidence in the record to suggest that Dr. Petros' conduct was "unfair or deceptive" as required by the Statute. The Court did, however, note that this does not mean that all conduct of medical care providers is beyond reach of the Statute. The Court noted that other jurisdictions have held that Consumer Protection Statutes may be applied to the entrepreneurial and

business aspects of providing medical services. Although the Plaintiff argued that her claim under c. 93A relates to the entrepreneurial aspect of Dr. Petros' medical practice because the hemorrhoidectomy may have resulted in Dr. Petros' financial gain, the Court held that there was nothing in the record to suggest that Dr. Petros performed the hemorrhoidectomy, as opposed to the fissurectomy, for his own financial gain. The Court held that Dr. Petros' selection of a hemorrhoidectomy over a fissurectomy may constitute medical malpractice, but nevertheless unless the patient can demonstrate that the physician selected the treatment solely for his or her financial benefit, is insufficient to establish a claim for unfair or deceptive practice under c. 93A.

The SJC also affirmed the ruling of the Superior Court that the Plaintiffs' remaining claims against Dr. Petros are barred by the applicable statute of limitations.

HHS Provides Guidance for Disclosure of Protected Health Information to Law Enforcement

The United States Department of Health and Human Services ("HHS") has issued a Guidance on its web site (www.hhs.gov) to help covered entities determine when they may disclose Protected Health Information ("PHI") to law enforcement officials under the HIPAA Privacy Rule. Some of the more notable information provided by HHS in this Guidance includes:

- A covered entity may respond to a request for PHI for purposes of identifying or locating a suspect, fugitive, material witness or missing person, but the covered entity must limit disclosures of PHI to name and address, date and place of birth, social security number, ABO blood type and rh factor, type of injury, date and time of treatment, date and time of death, and a description of distinguishing physical characteristics;

- A covered entity may disclose limited PHI to law enforcement, in order to identify or apprehend an individual who has admitted participation in a violent crime, if the covered entity reasonably believes the individual may have caused serious harm to a victim (provided that the admission was not made in the course of or based on an individual's request for therapy, counseling, or treatment related to the propensity to commit this type of violent act);

- A covered entity may disclose PHI about a victim of a crime to law enforcement if the victim agrees. If, however, because of an emergency or the person's incapacity, the victim cannot agree, the covered entity may disclose the PHI if law enforcement officials represent: (1) that the PHI is not intended to be used against the victim; (2) is intended to determine whether another person broke the law; (3) the investigation would be materially and adversely affected by waiting until the victim could agree; and (4) the covered entity believes, in its professional judgment, that doing so is in the best interest of the individual whose information is requested;

- A covered entity may disclose protected health information to law enforcement if the covered entity believes in good faith that the PHI is evidence of a crime that occurred on a covered entity's premises;

- A covered entity may disclose PHI to a law enforcement official reasonably able to prevent or lessen a serious or imminent threat to the health or safety of an individual or the public or to identify or apprehend an individual who appears to have escaped from lawful custody.

The Guidance reminds covered entities that the disclosure of PHI to law enforcement is subject to a "minimum necessary" determination by the covered entity. Thus, the covered entity is required to limit the PHI to the "minimum necessary" to complete the intended use of the request or disclosure. The covered entity, however, may rely upon the representations of a law enforcement official as to what information is the "minimum necessary" for their lawful purposes. This Guidance further reminds covered entities that if the law enforcement official making the request for information is not known to the covered entity, the covered entity must verify the identity and authority of such person prior to disclosing the PHI.

In addition to disclosures of PHI to law enforcement officials, a covered entity may use or disclose PHI without an individual's authorization, consent or the opportunity to agree, if such disclosure is "required by law". The HIPAA Privacy Regulations define "required by law" as a "mandate contained in law that compels an entity to make a use or disclosure of protected health information and that is enforceable in a court of law." (i.e. court orders; court-ordered warrants; subpoenas; or summonses issued by a court or grand jury, etc.).

Interim Final Rule Extended for HIPAA's Civil Monetary Penalties

The United States Department of Health and Human Services ("HHS") has announced that it is extending the Interim Final Rule for the imposition of civil monetary penalties on entities that violate HIPAA. The interim final rule was set to expire on September 16, 2004. HHS has now extended this deadline until September 16, 2005. It is the intent of HHS to propose, in the near future, an "Enforcement Rule" which will set forth the procedural and substantive requirements for the imposition of civil monetary penalties. The Enforcement Rule is expected to address how HHS will determine what constitutes a violation of HIPAA, and how civil monetary penalties will be imposed on covered entities that violate HIPAA.

Under the current Interim Final Rule, HHS is authorized to impose civil monetary penalties of not more than $100.00 per each HIPAA violation, with a cap of $25,000.00 per calendar year.

FTC and DOJ Issue Report on Healthcare Competition

On July 23, 2004, the Federal Trade Commission ("FTC") and the United States Department of Justice ("DOJ") issued a report entitled "Improving Healthcare, a Dose of Competition" ("Report"). The Report, which analyzes competition in the healthcare industry, is intended to inform consumers, businesses and policy makers on a wide range of issues affecting the cost, quality and accessibility of healthcare. The Report provides several recommendations and observations on a number of topics in the healthcare industry.

Perhaps the most notable observation contained within the Report is the FTC and DOJ's position that profit/non-profit status of merging hospitals should not be considered a factor in determining whether a hospital merger is likely to be anti-competitive. The Report states that the institutional status of merging hospitals has been addressed by several courts as part of an anti-competitive analysis. Although the courts have rendered differing opinions in this regard, the Report states that "the best available evidence indicates that non-profits exploit market power when given the opportunity to do so." Therefore, the FTC and DOJ believe that the profit/non-profit status of merging hospitals should not be considered a factor as part of an anti-competitive analysis.

The Report also recommends that state governments abolish Certificate of Need ("CoN") laws. These laws provide a process by which state government determines whether there is a need for certain health care projects. (In Massachusetts, this law is referred to as the "Determination of Need" ("DoN") law. The DoN law provides that the Massachusetts Department of Public Health has jurisdiction to determine the need for health care projects which propose one or more of the following: a substantial capital expenditure, substantial change in services, freestanding ambulatory surgery centers, original licensure, or a solicitation of funds.) The FTC and the DOJ believe that state-issued Certificates of Need are often difficult to obtain, and therefore, CoN laws have the effect of shielding incumbent health care providers from new entrants. As a result, CoN laws may increase health care costs due to a supply which is depressed below competitive levels. The Report also suggests that CoN laws may slow the entry of providers into the market that could provide higher quality services than incumbents.

The Report contains several recommendations to improve the balance between competition and regulation in the healthcare industry. Only one of these recommendations, however, is directed to providers. The Report recommends that providers (as well as private payors and governments) "improve measures of price and quality, give consumers more information on prices and quality in ways that they find useful and relevant, give consumers greater incentives to use such information, and align the interests of providers and consumers."

FDA Issues Guidance on Clinical Holds Related to Clinical Investigator Misconduct

The Food and Drug Administration ("FDA") has issued a Guidance for clinical investigators on "The Use of Clinical Holds Following Clinical Investigator Misconduct" ("Guidance"). The Guidance describes circumstances in which the FDA may impose a clinical hold based on credible evidence that a clinical investigator, conducting a study on human subjects, has committed serious violations of FDA regulations. A clinical hold is an order by the FDA to immediately suspend or impose restrictions on an ongoing or proposed clinical study. The FDA is authorized to impose clinical holds pursuant to the Code of Federal Regulations. (See 21 CFR 312.42.)

The Guidance states that clinical investigators are responsible for protecting the rights, safety and welfare of human subjects in their clinical trials. In this regard, the Code of Federal Regulations is intended to assure adequate protection of the rights, safety and welfare of subjects involved in clinical trials, as well as the quality and integrity of the resulting data. If, however, an inspection conducted by the FDA reveals that a clinical investigator has committed violations of the FDA's regulations, the FDA can take several responsive actions: One such action is a "clinical hold". A clinical hold is an order by the FDA that immediately suspends or imposes restrictions on an ongoing or proposed clinical study. There is no definitive set of circumstances which would lead the FDA to impose a clinical hold on an ongoing or proposed study. The Guidance, however, states that the FDA may "impose a clinical hold on a study or study site whenever it finds that human subjects are, or would be, exposed to an unreasonable and significant risk of illness or injury." The Guidance further states that there are certain types of clinical investigator misconduct which more often than not may lead to a clinical hold. These circumstances include:

- Failure to report serious or life-threatening adverse events;
- Serious protocol violations, such as enrolling subjects who do not meet the entrance criteria because they have conditions that put them at increased risk from the investigational drug, or failure to carry out critical safety evaluations;
- Repeated or deliberate failure to obtain adequate informed consent;
- Falsification of study safety data;
- Failure to obtain IRB review and approval for significant protocol changes; and
- Failure to adequately supervise the clinical trial, such that human subjects are or would be exposed to an unreasonable and significant risk of illness or injury.

The Guidance states that the FDA will lift a clinical hold once the grounds for such hold no longer apply. The Guidance suggests that while a clinical hold is in place, the sponsor of the affected study may present evidence to the FDA to show that it has taken steps to protect their study subjects.

The Guidance can be found at www.fda.gov\cber\gdlns\clinholdinvest.pdf.

Congress Seeks Increased Federal Oversight of JCAHO

United States Senators Charles Grassley (R-IA) and Pete Stark (D-CA) recently unveiled legislation that allows the Centers for Medicare and Medicaid Services ("CMS") to have oversight authority over the Joint Commission on Accreditation of Healthcare Organizations ("JCAHO"). The legislation follows the recently released report from the Government Accountability Office ("GAO"), which examined the quality of work done by JCAHO. The GAO Report reviewed 500 hospitals that had received JCAHO's seal of approval over a three-year period. The Report found that serious problems were missed in many of the hospitals that underwent the accreditation process. The GAO Report details how a validation survey of 157 accredited hospitals done by the Federal Government, found between one and six serious deficiencies in each of those hospitals. Senators Grassley and Stark believe that these deficiencies are the type of problems that "put multiple lives at risk". At their press conference announcing the legislation, they stated that the government needs a better way to assess how well JCAHO detects serious deficiencies.

Although JCAHO referred to the GAO Report as both "inflammatory" and "grossly inaccurate", Senators Grassley and Stark believe that Federal oversight of JCAHO is necessary to protect patients. JCAHO already has unique statutory authority to accredit hospitals, but this legislation will now give the Federal Government the same oversight authority for the accreditation of hospitals that it has for all other health care providers. The legislation allows the federal government to hold JCAHO accountable and, if necessary, restrict or remove its hospital accreditation authority.

It is believed that this legislation could reach both the Senate and House floors for a vote later this year.

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