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LICENSURE

Failure to Exhaust Remedies Does Not Bar Physician's Constitutional Challenge

In a recent Ohio case, for the first time on appeal to the trial court, the court allowed a physician to raise a facial constitutional challenge to Ohio Revised Code § 4731.22(B)(22). *Derakhshan v. State Med. Bd.*, 2007 WL 3148684 (Ohio Ct. App. 10th Dist. Oct. 30, 2007). In 2005, the Medical Board of Ohio (the "Board") sent Dr. Derakhshan a citation letter notifying him that the Board intended to determine whether to limit, revoke or suspend his license to practice medicine in Ohio. The reason for the possible penalty was a Consent Order from the West Virginia Board of Medicine requiring Dr. Derakhshan to (i) complete courses in controlled substance management and record keeping, (ii) cease advising patients to cut time-released medications in half and (iii) reduce the number of patients he examines. Ohio Revised Code § 4731.22(B)(22) allows the Board to take action regarding an individual's medical license if a medical licensing entity in another jurisdiction limits, revokes or suspends the individual's license, refuses to renew or reinstate a license, imposes probation, or issues an order of censure or other reprimand.

After receiving the Board's letter, Dr. Derakhshan failed to request a hearing from the Board, and the Board voted to revoke his license. Dr. Derakhshan then filed a notice of appeal to the Franklin County Court of Common Pleas. The Board moved to dismiss Dr. Derakhshan's appeal for failure to exhaust administrative remedies and lack of subject-matter jurisdiction. Specifically, the Board argued that Dr. Derakhshan's failure to request a hearing deprived the trial court of jurisdiction over the appeal. The trial court granted the motion to dismiss.

The doctrine of exhaustion requires a person to exhaust administrative remedies before seeking redress from the judicial system. According to the Ohio 10th District Court of Appeals (the "Court"), the purpose of the rule is to allow an administrative agency to apply its expertise in developing a factual record without premature judicial intervention

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in administrative processes. In Ohio, the exhaustion requirement is not a jurisdictional defect. Instead, it is an affirmative defense that must be timely asserted or it will be considered waived. In *Derakhshan*, the Board timely raised the exhaustion defense.

In response, Dr. Derakhshan argued that the exhaustion requirement did not preclude his facial constitutional challenge because the Board had no authority to address such a challenge. The Court, citing the Supreme Court of Ohio, held that requiring litigants to assert constitutional arguments administratively would be a waste of time and effort for all involved. According to the Court, where resort to administrative remedies would be futile, exhaustion is not required. The Court stated that, "extrinsic facts are not needed to determine whether a statute is unconstitutional on its face." However, when a statute is challenged as applied, a specific set of facts and the development of a record is crucial to determining the statute's constitutionality. The Court then concluded that the failure to request an administrative hearing would not preclude an appellant from raising a facial constitutional challenge for the first time on appeal. The Court reversed the decision of the trial court and remanded the case for further proceedings.

Statutory Immunity For Providing Comfort Care Does Not Preclude Disciplinary Action By State Medical Board

In an important case for all physicians and other health care professionals who provide comfort care, an Ohio Court of Appeals in *Gelesh v. State Med. Bd. of Ohio*, 172 Ohio App.3d 365 (Ohio Ct. App. 10th Dist. 2007) held that the Ohio legislature's grant of immunity for physician providers of comfort care does not deprive the Medical Board of Ohio (the "Board") of jurisdiction to determine whether the prerequisites for physician immunity from disciplinary action have been satisfied in particular cases, and that the Board's determination may take place within the context of the disciplinary hearing process. In effect, the court held that the legislature's grant of immunity for medical decision-making in the context of the provision of comfort care is only an affirmative defense in a Board disciplinary action and that the applicability of immunity for physicians in particular cases is to be made by the Board, not the courts.

Ohio's comfort care immunity statute, R.C. § 2133.11, became effective in October 1991. It grants immunity to health care providers involved in the provision of comfort care from criminal prosecution, civil action and damages and professional disciplinary action when providers have acted in good faith and within the scope of their authority, even when adverse outcomes occur.

In *Gelesh*, the Board initiated disciplinary proceedings against Dr. Gelesh based upon his administration of medication to an 88 year-old patient to facilitate the comfort of that patient. The physician ordered benzodiazepine for the patient, but was handed succinylcholine instead, which he then administered to the patient. As a consequence of the administration of the succinylcholine, the patient went into respiratory arrest and expired. Based on this sequence of events, the Board gave Dr. Gelesh notice of its intention to consider disciplinary action against him for conduct that was "a departure from or failure to conform to minimal standards of care of similar practitioners under the same or similar circumstances," as permitted by R.C. § 4731.22(B)(6).

Instead of defending himself before the Board, Dr. Gelesh filed a civil action against the Board seeking declaratory and injunctive relief, contending that the statutory immunity provided by R.C. § 2133.11 shielded him from professional disciplinary action and thereby deprived the Board of the authority to initiate disciplinary proceedings. The trial court, upon motion of the Board, dismissed Dr. Gelesh's complaint, finding that the lack of a statutorily specified procedural mechanism by which to determine if immunity was warranted on particular cases, and that the fact-specific nature of such inquiries, made it logical to relegate the fact-finding necessary to granting immunity from professional disciplinary action to the Board. Dr. Gelesh appealed to the 10th District Court of Appeals in Franklin County.

The Appeals Court held that the term "professional disciplinary action" was ambiguous, and reasoned that the legislature meant only to shield providers from sanctions and not from the disciplinary process. It rejected Dr. Gelesh's argument that a two-step process – one before the court to determine immunity and one before the Board to determine if a sanction was warranted – had to be employed. In so doing, the court recognized that its approach would mean that immunity determinations with respect to criminal and civil actions would be made by the courts, while physician professional disciplinary action immunity would be decided by the professional licensing board.

MEDICAL STAFF CREDENTIALING

No Specific Proof of Physician Negligence Required for Negligent Credentialing Claims

Negligent credentialing claims do not require proof of negligence by the doctor, according to a recent Ohio appeals court decision. *Schelling v. Humphrey*, 2007 WL 2965773 (Ohio Ct. App. 6th Dist. Oct. 12, 2007). The court determined that medical malpractice and negligent credentialing claims, while factually intertwined, remain independent, distinct claims. In *Schelling*, the plaintiff appealed from a trial court's dismissal of her claim for failure to state a claim upon which relief can be granted. Schelling initially filed claims against Dr. Humphrey and Community Hospitals of Williams County ("Community Hospitals").

In 2003, Dr. Humphrey performed two podiatric surgeries on Schelling in an attempt to correct persistent foot pain. Schelling claimed that Dr. Humphrey was negligent in performing these surgeries and that she can no longer work

as a result of her injuries. Schelling brought a negligent credentialing claim against Community Hospitals based on Dr. Humphrey's history of criminal conduct. Beginning in 2001, Dr. Humphrey stole an air compressor, several power tools, several back-hoes and a utility trailer. In 2004, Dr. Humphrey confessed to seven felony offenses stemming from these thefts and, as a result of his felony convictions, Dr. Humphrey's license to practice medicine in Ohio was suspended.

At the request of Dr. Humphrey, the trial court separated the negligence claim against Dr. Humphrey from the negligent credentialing claim against Community Hospitals. After Dr. Humphrey declared bankruptcy, Schelling voluntarily dismissed the case against Dr. Humphrey according to an agreement reached with the bankruptcy trustee. The trial court then dismissed Community Hospitals, ruling that Schelling could not proceed against Community Hospitals without a negligence finding against Dr. Humphrey.

The Ohio 6th District Court of Appeals looked at other cases in Ohio to decide whether the doctor must be part of the lawsuit to bring a negligent credentialing claim against a hospital. Specifically, the 4th District found in an earlier case that the physician was not required to be a named party in a negligent credentialing case. The 4th District reasoned that a physician's negligent act is factually and legally distinct from a hospital's alleged act of negligently credentialing a physician. Therefore, the court concluded that the negligence claim and the negligent credentialing claim were separate causes of action. The appellate court remanded the case to the trial court for further proceedings.

HCQIA Bars Physician's Claims Against Hospital

The U.S. District Court for the Northern District of Ohio granted a hospital's motion for summary judgment in a case arising from the hospital's refusal to grant staff privileges to a physician, holding that the physician's claims against the hospital were barred by the Health Care Quality Improvement Act of 1986 ("HCQIA" or "the Act"). *Talwar v. Mercer County Joint Twp. Cmty. Hosp.*, 2007 WL 3306611 (N.D. Ohio Nov. 8, 2007).

Dr. Talwar applied for general surgery privileges at Mercer County Joint Township Community Hospital ("Mercer") in December 2004. Dr. Talwar was granted temporary privileges in early 2005. In July 2005, Mercer's Credentials Committee voted to recommend that the Medical Staff Credentials Committee ("MEC") grant Dr. Talwar's application. The Credential Committee's recommendation included the stipulation that, in lieu of the usual six-month review and advancement to active status, Mercer review a set number of Dr. Talwar's cases for quality-care purposes prior to considering him for advancement.

The MEC instructed Mercer's CEO to further investigate Dr. Talwar's application. After this investigation, the MEC unanimously voted to recommend to Mercer's Board of Trustees ("Board") that it deny Dr. Talwar's application. Dr. Talwar requested a hearing once he learned of this decision. The hearing officer upheld the MEC's decision to deny Dr. Talwar's application, and the Board denied Dr. Talwar's application for privileges after he requested appellate review.

Dr. Talwar then brought suit against Mercer in the U.S. District Court for the Northern District of Ohio. Dr. Talwar asserted claims for civil rights violations, breach of contract, denial of common-law fair procedure rights, violation of due process rights, defamation and racial discrimination against Mercer. Mercer filed a motion for partial summary judgment arguing that it was protected from liability for damages under HCQIA.

In order for HCQIA immunity to apply, a professional review action must be taken: "(1) in the reasonable belief that the action was in furtherance of quality health care, (2) after a reasonable effort to obtain the facts of the matter, (3) after adequate notice and hearing procedures as are fair to the physician under the circumstances, and (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the Act's notice and hearing requirements." The Act creates a presumption of immunity that the plaintiff must rebut with the preponderance of the evidence.

The court analyzed Mercer's actions and concluded that a reasonable jury could not find by a preponderance of the evidence that Mercer's actions fell outside HCQIA requirements. The court pointed out that Dr. Talwar made several misrepresentations in his application, that Mercer took steps in order to obtain the relevant facts and that Mercer gave Dr. Talwar sufficient notice of its decisions and ample opportunities to be heard. Therefore, the court concluded that Mercer was protected by HCQIA and its motion for partial summary judgment was granted.

FRAUD AND ABUSE

OIG Approves Purchase of Discounted Services by Nursing Home Provider

In Advisory Opinion No. 07-12, the Office of the Inspector General of the Department of Health and Human Services ("OIG") indicated it would not challenge the arrangement by which two long-term care facilities proposed to enter into no-cost and low-cost contracts to service providers without risking administrative sanctions.

The arrangement involved two long-term care facilities that provide medical, clinical, and nursing services to veterans and their spouses ("Nursing Homes"). The Nursing Homes are solely responsible for the operation, financing, management, and general direction of the facilities. The Nursing Homes must hire contractors to provide physical, occupational, and speech therapy (together, the "Services"), and issued an invitation for prospective contractors to submit competitive

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bids. Pursuant to state law, the Nursing Homes are required to award the contracts to the lowest responsive and responsible bidder to meet contract criteria.

Contractors were asked to bid on how much they would charge for providing services to the Nursing Homes' uninsured residents, with the Nursing Homes assuming all services costs for those residents, according to the details of the arrangement. The winning bidder would become the exclusive provider of services to uninsured residents at the Nursing Homes, as well as those with coverage through Medicare, Medicaid, and third-party insurance providers.

The low bidder's submission included free services to uninsured residents at one of the Nursing Homes, and low-cost services to uninsured residents at the other Nursing Home. Because the invitation stated that billing for services rendered to uninsured residents could not exceed the contract price, one Nursing Home would not be billed for the low bidder's services, while the other would be charged up to the bid amount. The bidder would bill insurers to the extent of patients' insurance coverage, and the Nursing Homes would reimburse without limitation the low bidder for all Medicare and third-party insurer deductibles and cost-sharing amounts.

The OIG determined that such an arrangement with this bidder could potentially generate prohibited remuneration under the Anti-Kickback Statute because the Nursing Homes could be giving the bidder exclusive access to the Federal health care program business in exchange for the bidder providing the Services to uninsured residents for free or at discounted rates, which Nursing Homes would otherwise have to fund.

However, the OIG indicted it would not challenge the arrangement after noting that the Services and the bid are only one part of a comprehensive regulatory scheme to care for the state's veterans and their spouses. In addition to this safeguard, the OIG found that there is a low risk that the arrangement will result in inappropriate utilization because the Services may only be ordered by Nursing Homes' physicians—none of whom has outside financial relationships with the low bidder. Furthermore, the OIG stressed that because the operator of the Nursing Homes is a state agency, the financial savings that would be realized under the arrangement will inure to the state's citizens in the form of conserved state resources.

OIG Disapproves of Proposal to Give Optometrists Ownership in Surgery Center

In Advisory Opinion No. 07-13, released October 19, 2007 by the Department of Health and Human Services Office of Inspector General ("OIG"), the OIG found that the owners of a practice group, consisting of eight ophthalmologists, nine optometrists and a subsidiary of a non-profit hospital, could be sanctioned for violating the Anti-Kickback Statute if they enter into an arrangement allowing the optometrists to join the other group practice members to become owners in a surgery center.

The surgery center, which operates three single-specialty ophthalmology ambulatory surgical centers, is jointly owned by the eight ophthalmologists and the hospital. The proposed arrangement would have permitted the nine optometrist owners in the group practice to also become part owners of the surgery center.

The ophthalmologists that have ownership interests in both the group practice and the surgery center personally perform surgical procedures at the ambulatory surgery centers. As such, the OIG noted that the surgical business could be considered an extension of their office practice. However, the OIG found that the optometrists did not have a comparable extension of their office practices through the ambulatory surgery centers since they did not personally perform surgical procedures there, despite the fact that some of the optometrists assist the ophthalmologists with pre-operative and postoperative work at the centers.

The optometrists made referrals to the ophthalmologists for the treatment of specific eye diseases or injuries. As members of the group practice, the optometrists agreed to refer patients to the group practice facilities and the ambulatory surgery centers, except where patients chose otherwise or other facilities or centers were more appropriate for the patient's treatment.

The OIG did not give its approval to the arrangement, finding a likelihood that the optometrists would use their investment in the surgery center as a vehicle for receiving remuneration for referrals of patients to the ophthalmologists. The OIG also determined that the arrangement did not contain sufficient safeguards to ensure the optometrists' investment in the surgical center was for purposes other than to induce or reward referrals.

Learn More!

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