"Doc Fix" Still Under Consideration

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On July 18, Representative Michael Burgess (R-TX) introduced a bill that would give Congress a quick-and-dirty option for averting a 27% cut in Medicare pay for physicians in January. The *Assuring Medicare Stability and Access for Seniors Act of 2012* — H.R. 6142 — would freeze Medicare rates at their current level through 2013, thus postponing a cut until January 1, 2014.

Of the three bills floated this year to deal with the Medicare reimbursement issue, the legislation from Burgess appears to be the most passable. A more ambitious bipartisan bill introduced in May would scrap the sustainable growth rate (SGR) formula that Medicare uses to set physician pay, phase out fee-for-service reimbursement, and replace it with a system that rewards physicians for high-quality, low-cost care. The high price tag of the bill — *the Medicare Physician Payment Innovation Act of 2012* — makes passage unlikely in an election year.

A bill from Senator Rand Paul (R-KY) also would eliminate the SGR formula and give physicians annual Medicare raises equal to increases in the Consumer Price Index up to 3%. Paul proposes to offset the cost of his bill, which he puts at $440 billion, by repealing Medicaid expansion and premium subsidy payments under the *Patient Protection and Affordable Care Act* (PPACA). This bill also has dim prospects because Democrats who control the Senate have vowed to protect the PPACA.

Representative Burgess is on record stating that his bill would cost roughly $20 billion. It does not offer any "pay for" to make it budget neutral, but Burgess has stated that a deficit-reduction bill passed by the House in May and now awaiting Senate action would free up enough money to fund H.R. 6142.

Burgess introduced his legislation with the goal of passing it before the November general election. Otherwise, the effort to stave off a 27% pay cut could take a back seat to a set of more pressing issues facing Congress at the end of 2012: the expiration of the tax cuts enacted during the George W. Bush administration, $1.2 trillion in automatic spending cuts mandated by last year's debt-ceiling deal, and the need to raise the debt ceiling again.

Discovery May be Stayed while Motion to Dismiss is Pending

On April 9, 2012, in a case claiming that a hospital violated EMTALA, a magistrate judge of the U.S. District Court for the District of Nevada granted the hospital its motion to stay discovery, pending disposition of the hospital's motions to dismiss, if it likely appears that the motion to dismiss will be granted (Money v. Banner Health, D. Nev., No. 3:11cv800, 4/9/12).

The Facts

At approximately 2:30pm on November 4, 2010, Kenneth Money presented at the ED of Banner Hospital in Fallon, Nevada, complaining of chest pain radiating to his jaw. Money initially was assessed by a nurse and subsequently seen and treated by Dr. Donald Gandy. Following a review of Money's medical history and a physical examination, Gandy ordered a series of medications, including Clonidine and morphine.

Afterward, Money also was examined by Dr. Warren P. Thai who diagnosed hypertension, back pain, and morbid obesity.

An EKG was performed, and although the test reading "was essentially normal," Money's condition apparently started declining. Thai and Gandy ordered additional tests, and at 11:45pm they diagnosed Money with acute myocardial infarction. He was treated for a heart attack and for cardiac ischemia, and was transferred to Banner Hospital's intensive care unit. At 12:33am, an unidentified doctor signed a request to air transfer Money to St. Mary's Hospital in Reno; but at 12:39am, he went into cardiac arrest. Despite attempts to revive him, Money was pronounced dead at 1:12am.

Nearly a year later, on November 3, 2011, Mrs. Sherry Money, the Estate of Mr. Money, and Kenny Money filed suit against Banner Hospital and Drs. Thai and Gandy, alleging that the circumstances surrounding Money's death gave rise to a federal cause of action under EMTALA. Plaintiffs claim that the hospital violated both elements of EMTALA: failing to screen Money and failing to stabilize him. In addition, Plaintiffs asserted state law claims (i.e., traditional medical malpractice and wrongful death) against Banner Hospital and Drs. Thai and Gandy.

In January 2012, Banner Hospital and Dr. Thai filed two motions to dismiss, including one motion questioning federal jurisdiction, arguing Plaintiffs' failure to articulate a viable EMTALA claim. Defendants contend that Kenny Money was both screened and stabilized consistent with EMTALA requirements, and that "EMTALA would not give rise to either a screening or stabilization cause of action because Mr. Money was admitted to Banner Hospital. Defendants further argue that Plaintiffs' complaint fails with respect to Plaintiffs' EMTALA claims, because they merely reflect a 'formulaic recitation of the elements of a cause of action.'"

Then "Banner Hospital and Dr. Thai filed a Motion to Stay Discovery pending disposition of Defendants' Motions to Dismiss. Dr. Gandy joined in Banner Hospital's and Dr. Thai's Motion to Stay." At issue is "whether a stay of discovery should or should not be granted ... dependent on whether this court determines it is probable, the underlying Motion to Dismiss will be granted."

The Ruling

The court used a well reasoned two-part test for assessing whether and under what conditions discovery should be stayed. First the court must determine that "an underlying motion to dismiss must be potentially dispositive of the entire case, or at least dispositive on the issue on which discovery stay is sought. Second, the court must determine whether the pending motion can be decided without additional discovery. In applying this two-part test, the court evaluating the motion to stay must take a so-called 'preliminary peek' at the merits of the underlying pending dispositive motion to assess whether a stay of discovery is warranted." If the party moving to stay satisfies both prongs of the test, discovery may be stayed.

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In completing its "preliminary peek" of Defendants' motion to dismiss, the court found deficiencies in Plaintiffs' pleadings. It stated that the "complaint parrots the required elements for an EMTALA cause of action without averring specific facts as to how Defendants, Banner Hospital in particular, either failed to screen the patient or failed to stabilize him before transfer. Plaintiffs' Complaint and Opposition to Defendants' Motions to Dismiss both allege Banner's noncompliance with its own procedures but does not specify what the 'usual procedures' are and how these 'usual procedures' differed with the treatment provided Mr. Money ... [Also] the facts alleged in Plaintiffs' Complaint do not give rise to a viable EMTALA (i.e., failure to screen and/or failure to stabilize) cause of action."

Central to the court's analysis was that the only defendant named with regard to Plaintiffs' EMTALA causes of action was Banner Hospital. The court noted that EMTALA only authorizes suits against hospitals, not physicians. "Thus, if there is no basis under the facts as alleged herein for an EMTALA claim against Banner Hospital, it necessarily follows that there is no federal jurisdiction for this court to hear this lawsuit, and Plaintiffs' state law causes of action would have to be dismissed."

Continuing, the court wrote that what gives "rise to a viable EMTALA claim is a failure to screen the patient, or if screened, that the screening differed markedly from that provided other patients ... Here, based on Plaintiffs' pleadings, the inescapable conclusion is Mr. Money was, in fact, screened consistent with EMTALA requirements ... Faulty, incorrect, or 'cursory' screening does not violate EMTALA."

Moreover, Kenny Money was admitted to the hospital. "The fact that Mr. Money was admitted is critical," the court ruled, "because by statute, Banner Hospital's obligations under EMTALA end when an individual like Mr. Money is screened and thereafter admitted for inpatient care ... [thus preventing] Plaintiffs from relying on EMTALA as a predicate for federal jurisdiction."

Likewise, with the "failure to stabilize" argument, the court concluded that the complaint did not state a claim on which relief could be granted, because under EMTALA a hospital's duty to "stabilize" a patient only arises in connection with the transfer of that patient to a different hospital. The court held that similar to the "failure to screen" claims, "Plaintiffs' 'failure to stabilize' claim also fails herein because a hospital's liability under EMTALA terminates when a patient is admitted for inpatient care ... Once again, it appears that Plaintiffs have pled themselves out of court by proffering evidence that demonstrates that Banner Hospital fulfilled its EMTALA obligations."

Plaintiffs also asserted that Kenny Money's admission was a "sham." To the contrary, the court found that "an impartial reading of the Complaint infers that Defendants repeatedly attempted to treat and stabilize Mr. Money before he died. These facts undermine Plaintiffs' ... argument that Banner Hospital had no intention of treating Mr. Money."

Convinced that Plaintiffs' EMTALA claims would fail, the court reasoned that it "will not have jurisdiction over the claims Plaintiffs assert against Banner Hospital and therefore, the court must refrain from proceeding with Plaintiffs' state law claims against Drs. Thai and Gandy." Furthermore, the court ruled that staying discovery was proper because the court can decide the underlying motion to dismiss without further discovery. "Anticipating that Defendants' motions to dismiss will eventually be granted, the court concludes that discovery should be stayed herein pending final resolution of the motions to dismiss ... [and] THEREFORE ORDERED that Defendants' Motion to Stay Discovery pending disposition of Defendants' motions to dismiss is GRANTED."

Final Resolution: EMTALA Action Failed

The magistrate judge was right on the money: His evaluation that the underlying pending motion to dismiss the Money case would be granted, was so decided by the district court on July 13, 2012, (Money v. Banner Health, D. Nev., No. 3:11-cv-00800-LRH-WGC, 7/13/12).

The United States District Court for the District of Nevada reviewed the documents and pleadings and found that Plaintiffs' "allegations fail to establish that Money was screened in an inappropriate manner, or that Banner failed to meet EMTALA's stabilization requirements. It is undisputed that Money was ultimately admitted into Banner and treated at the hospital thereby cutting off Banner's liability under EMTALA." The court also determined that since Money was "examined and treated throughout his time at Banner, eventually leading to Banner's decision to transfer Money to another hospital," Plaintiffs' complaint fails "to allege that Banner only admitted Money to avoid liability under EMTALA." Because EMTALA does not require a correct diagnosis, the court stated that "it is irrelevant that Banner may have misdiagnosed Money's condition." The court therefore granted Banner's motion to dismiss Plaintiffs' EMTALA claim.

Finally, the court declined to exercise supplemental jurisdiction over Plaintiffs' related state law claims for medical negligence/malpractice. The federal district court concluded that having dismissed Plaintiffs' sole federal claim, it also "shall dismiss Plaintiffs' related state law claims without prejudice."

To examine the court's April 9, 2012, opinion go to http://docs.justia.com/cases/federal/district courts/nevada/nvdce/3:2011cv00800/84260/23/0.pdf?1334150416.

For the July 13, 2012, opinion, go to http://docs.justia.com/cases/federal/district-courts/nevada/nvdce/3:2011cv00800/84260/25/.

Request from Clinic to Transfer Patient Does Not Trigger Hospital's EMTALA Duty

On May 9, 2012, the U.S. District Court for the District of Kansas dismissed a claim asserting that a hospital violated EMTALA by refusing a clinic's request to transfer a patient to its ED when the patient requires specialized treatment for an emergency (Penn v. Salina Regional Health Center, D. Kan., No. 6:11 cv 1243, 5/9/12).

The Facts

The COMCARE operated clinic is co-owned by Ottawa County Health Center, a critical access hospital, and the local Health Planning Commission in Minneapolis, Kansas. The physicians at COMCARE are employed by COMCARE, and many of them also have employment agreements with Ottawa County Health Center to provide emergency services at the hospital. Experiencing "pressure and aching in her

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upper chest which radiated into her neck, as well as constant pain in both arms and her jaw" Theresa A. Penn, age 45, presented to the COMCARE clinic in the afternoon on January 14, 2011.

Dr. Kelly Yoxall, Penn's primary care physician, examined Penn, concluding that Penn's symptoms "were consistent with acute coronary syndrome and acute myocardial infarction and that Penn was in a life threatening emergency." Because Salina Regional Health Center was the closest hospital with an ED and specialized facilities, Yoxall called SRHC requesting permission to transfer. Stating that there were no available beds in the intensive care unit, Dr. Curtis D. Kauer, the SRHC on-call cardiologist, refused the transfer request.

Yoxall then contacted a Wichita hospital, 85 miles further away from the clinic than SRHC, whose cardiologist agreed to accept Penn. En route by ambulance to Wichita, Penn "coded" during the trip. Even though emergency surgery was performed at the Wichita hospital, Penn died shortly after midnight on January 15, 2011.

Michael E. Penn, as Special Administrator of the Estate of Theresa Penn, filed a lawsuit against the hospital and the on-call cardiologist alleging that the refusal to accept the transfer of Penn was a violation of EMTALA. SRHC responded with a motion to dismiss, arguing that Plaintiff's complaint alone is legally insufficient to state a claim for which relief may be granted.

The Ruling

The Court first noted that under EMTALA, for hospitals with an ED, "if any individual ... comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department." The Court then iterated the definition of "comes to" with respect to an individual who is not a patient but who has "requested an examination or treatment for a medical condition, or has such a request made on his or her behalf," and who has presented either:

- At a hospital's dedicated emergency department;
- On hospital property; or
- Is in a ground or air ambulance owned and operated by the hospital for purposes of examination and treatment for a medical condition at a hospital's dedicated emergency department, even if the ambulance is not on hospital grounds.

Plaintiff contended that the "come to" requirement was met when Penn was in Yoxall's office when the physician called and spoke with the SRHC on-call cardiologist. The District Court rejected Plaintiff's argument holding that Penn had not "come to" the hospital ED within the EMTALA definition because Penn "had neither presented on Salina Regional's campus nor been in an ambulance owned by Salina Regional."

Plaintiff then made an alternative EMTALA "reverse dumping" claim. "Reverse dumping" occurs when a hospital ED refuses to accept an appropriate transfer from another hospital of a patient requiring its specialized capabilities. SRHC argued "that for a hospital to be liable under EMTALA based on 'reverse dumping,' the request for transfer must come from a hospital, not a clinic or a physician."

The Court agreed with Defendant stating that it was "apparent that 'reverse dumping' requires two hospitals: a 'transferring hospital' and a specialized transferee hospital." Satisfied that Plaintiff could not establish a plausible EMTALA case, the Court dismissed Penn's EMTALA claim and granted Salina Regional's motion to dismiss.

The full text of the court's opinion is at https://ecf.ksd.uscourts.gov/cgibin/show_public_doc?2011cv124337.

Claim Dismissed that Hospital Violated EMTALA when In-Patient Discharged

On May 15, 2012, the U.S. District Court for the Eastern District of Missouri dismissed a plaintiff's claim that a hospital violated EMTALA when it discharged a patient, already admitted to the hospital with a mental illness, prior to stabilizing his emergency medical condition (James v. Jefferson Regional Medical Center, E.D. Mo., No. 4:12-cv-267, 5/15/12).

The Facts

On the evening of January 12, 2010, Earl D. James, Jr. presented to the Jefferson Regional Medical Center (JRMC) ED. James complained of suicidal and homicidal thoughts. At the ED, Dr. Petty Petralia diagnosed James's condition as "Altered Mental other (suicidal ideation, major depression schizoaffective disorder)." In her notes, Petralia also indicated that James is "well known to this facility. He was evaluated by the intake coordinator for the mental health division. He will be admitted for further treatment under Dr. Ardekani."

James then was admitted to JRMC's psychiatric unit where he was examined by Ardekani, who noted that James "is a 32 year-old black, unemployed male who was admitted through the intake." Ardekani's evaluation included James's prior psychiatric history and the proposed plan of treatment that "[u]pon admission, we will detox him. We will start him on medication, and will be looking into a group home or a new placement for the patient. He said he can't sleep so will increase trazdone [sic] from 100 to 300 mg at night."

Early the next day, James was discharged and taken to a shelter because James fought with another patient shortly after Ardekani's examination. James alleged that "he was dropped off in a psychotic state," and that prior to discharge he was "not provided medication or afforded any 'stabilizing treatment.'" He also contended that he remained in a psychotic state for the next ten days. On January 23, 2010, while on the streets of St. Louis, James was assaulted.

Asserting that it was "reasonably foreseeable" that JRMC's "failure to stabilize him would cause him harm," James filed a petition for damages. He claimed that the hospital violated EMTALA for "failure to stabilize before discharge and for failure to provide appropriate transfer." JRMC responded by filing a motion to dismiss plaintiff's petition for "failure to state a claim upon which relief may be granted."

The Ruling

Defendant asserted that it was not liable under EMTALA because James was admitted. JRMC argued that the Centers for Medicare and Medicaid Services "has clarified that a hospital's obligation under

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EMTALA ends either when the individual is stabilized or when that hospital, in good faith, admits an individual with an EMC [emergency medical condition] as an inpatient in order to provide stabilizing treatment. That is, ... EMTALA does not apply to any inpatient, even one who was admitted through the dedicated emergency department and for whom the hospital had initially incurred an EMTALA obligation to stabilize an EMC, and who remained unstabilized after admission as an inpatient."

In response, James contended that Defendant could not satisfy its EMTALA obligations merely by admitting him. To back his claim, James relied on the U.S. Court of Appeals for the Sixth Circuit's decision of Moses v. Providence Hospital and Medical Center Inc. Moses involved claims brought by the estate of a woman who was murdered by her spouse after he was discharged from a hospital and following a psychotic episode. Among its rulings, the Sixth Circuit in Moses overruled a CMS interpretation of EMTALA, instead finding that admission to the hospital does not end the EMTALA requirements to stabilize and treat a patient (Moses v. Providence Hospital and Medical Centers Inc., 6th Cir., No. 07-2111, 4/6/09). [The Moses case was first reported in the article "Estate of Murdered Woman Allowed to Pursue EMTALA Claims," in the July/August 2009 issue of *Common Sense*, available at http://www.aaem.org/UserFiles/file/commonsense0709.pdf.]

Rejecting the analysis in Moses, the U.S. District Court in the Eastern District of Missouri held that a hospital meets its obligations under EMTALA once it admits a patient. The Court wrote that "EMTALA was enacted to prevent 'a distinct and rather narrow problem' of patient 'dumping,' or the practice of refusing to admit or summarily transferring a patient based on a perceived inability to pay for hospital services." The Court further explained that while the law "focuses on uniform treatment of patients presented in hospital emergency departments ... a]fter a patient has been admitted in good faith as an inpatient, professional (i.e., doctor-patient) and fiduciary (i.e., hospital-patient) duties attach to the situation ... State law is perfectly adept at delineating and enforcing these duties; the EMTALA is neither necessary nor intended to enforce them."

"Having determined that an EMTALA violation cannot lie if Plaintiff was admitted," the Court concluded that "Plaintiff's EMTALA claims fail because he clearly was admitted to the hospital." The Court dismissed all of Plaintiff's EMTALA claims, but the state malpractice claims remained for remand to the county circuit court.

The full decision is at http://docs.justia.com/cases/federal/district-courts/missouri/moedce/4:2012cv00267/118631/13/0.pdf?ts=1337165592. ■

EMTALA case synopsis prepared by Terri L. Nally, Principal, KAR Associates, Inc.

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