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Health Care Compliance in Real Estate Leasing Arrangements

Health care providers who have entered into or who propose to enter into real estate leasing transactions should keep in mind that ignorance of anti-kickback compliance requirements can do more than sink a real estate deal — it can create major civil and perhaps criminal legal problems for either party!

A primary concern is a transaction not based on fair market value or that is not substantiated by a market rental valuation estimate by a competent expert. When requesting market data, both parties should be clear as to whether the rental estimate is based on a gross, modified net or triple net basis; obviously a critical issue.

Tenant reimbursement to the landlord of leasehold improvement costs, which are frequently folded into rent, is another area of concern. Costs should be reasonable, there should be no subsidy or over payment and a market interest rate should be imputed in the reimbursement formula. In a large (square footage and/or cost) leasehold build out, evidence of competitive bids would be very valuable confirmatory data.

Square footage must be accurately calculated, preferably with a physical measurement, so that the parties do not, even inadvertently, wind up entering a deal with a tenant paying for more or less space than it should. Depending on the context, such out-of-kilter deals could be seen as disguised payments for referrals.

Forgiveness deals, which let a tenant off the hook as a result of claims of loss of business, loss of a partner, etc., must be very carefully worked through with counsel, if at all, to comply with fraud and abuse strictures.

Bottom line: leasing transactions must be reasonable, based on fair market value, vetted as if neither party was a health care provider or in a position to refer federally-reimbursed health care business or have such business referred to it. The cost of non-compliance could be very steep.

For further guidance, please contact Elliott B. Pollack, Esq. at 860.424.4340 or ebpollack@pullcom.com.

Taming the National Practitioner Data Bank

Most readers of *Health Care Insights* know that entities such as insurance companies and risk retention groups subject to the mandatory reporting requirements of the National Practitioner Data Bank (NPDB) must advise NPDB when a malpractice claim is paid. However, the interpretive NPDB guidelines define a "medical malpractice payment" as "the result of a written complaint or claim demanding monetary payment for damages."

One creative legal thinker, Professor E. Haavii Morreim of the University of Tennessee Health Science Center, wonders in a recent blog post whether money paid *prior to the filing of a lawsuit* must be reported to the NPDB because "a written complaint or claim" was not filed or submitted to the physician.

Professor Morreim's careful reading of the guidelines would tend to encourage physicians to settle cases very early on because the payor may not be required to file an NPDB report.

Other legal folks think that even a malpractice plaintiff's lawyer's written notification of a potential claim, followed by a payment, would be enough to trigger the mandatory NPDB report.

Further guidance on this issue may be expected.

For additional information, please contact Bonnie L. Heiple, Esq. at 860.424.4355 or bheiple@pullcom.com.

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Dermatology Deconstructed

Jim Rendon's piece in the August 2010 issue of *Smart Money* devotes three pages to the care of our skin. Among the provocative observations offered by Mr. Rendon:

- Reported cases of melanoma increased from 47,700 in 2000 to almost 69,000 in 2009.
- The only FDA-approved use for botulinum toxin (Botox) is "to alleviate furrows between the eyebrows. Using it anywhere else is considered 'off-label.'" There have been at least 18 reports of significant complications flowing from the cosmetic use of Botox over the last nine years.
- While dermatologists, speaking through the American Academy of Dermatology, maintain "that there's no such thing as safe sun exposure," Dr. Michael Holick, professor of endocrinology at Boston University Medical Center, offers that moderate exposure to sun causes our bodies to produce vitamin D, which is helpful to overall health and can reduce the incidence of serious ailments such as "chronic fatigue, depression, heart disease, cancer and diabetes," thus counterbalancing concerns, if only slightly, about sun exposure leading to skin cancer.

Are Prescribed Treatments More Effective for *Tinea Pedis*?

Among the health care problems suffered by Americans, perhaps one of the most nagging, albeit among the most inconsequential, is athlete's foot. It is also known by the Latin term *tinea pedis*.

The Medical Letter, the not-for-profit independent newsletter which seeks to provide health care professionals with unbiased drug prescribing recommendations, recently offered some timely discussion on this nasty topic.

A *TML* reader's physician prescribed *Naftin* gel to treat his athlete's foot. The pharmacy charged $145 to fill the prescription. "Do patients need to pay prices like these," *The Medical Letter* asks, "to treat *tinea pedis*?"

After reviewing the literature and Food and Drug Administration approvals, *TML* observes that "there is no acceptable evidence that expensive prescription drugs are more effective than inexpensive over-the-counter formulations for treatment of *tinea pedis*."

To some slight degree, this note may help to explain why Americans are being asked to "foot" such high health care costs.

Mandatory Malpractice Mediation Enacted

Public Act 10-122 was passed by the Connecticut General Assembly and signed by then-Governor Rell. Effective July 1, 2010, it requires a mandatory mediation session with a judge, senior judge or judge trial referee shortly after a medical malpractice action is filed. If the parties cannot reach a settlement within 120 days after the referral, subject to an extension for reasonable cause, the litigation resumes unless the parties wish to seek other alternative dispute resolution resources.

As one malpractice litigator put it: "Legislating mediation (in malpractice cases) is a logical step toward providing a cost-effective and efficient procedure for resolving (these) disputes."

For further information about Connecticut's new medical malpractice mediation system, please contact Michael A. Kurs, Esq. at 860.424.4331 or mkurs@pullcom.com.

Medical Pioneer is Deceased

During his residency at Gallinger Municipal Hospital in Washington during the late 1940s, Dr. Arnall Patz made a startling observation. "Eighteen of the 21 premature

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infants who had retinopathy of prematurity, then known as retrolental fibroplasia," he noted, "received continuous oxygen in levels four to five times the necessary clinical amount." Dr. Patz sought National Institute of Health (NIH) funding to study this fatal phenomenon.

But as frequently occurs when a courageous physician asserts that the emperor lacks clothes, Dr. Patz's application was rejected. Alison Snyder notes in her obituary of Dr. Patz in the May 22, 2010, issue of *The Lancet* that NIH reviewers huffed that there was "nothing scientific whatsoever about the possibility of oxygen, which these babies breathe with every breath, that it could possibly be so damaging to the eye to destroy the retina and blind these babies."

Quite to the contrary, Dr. Patz's research, which had to be privately funded, confirmed that high levels of oxygen *were* an important risk factor in the development of retinopathy of prematurity: "reducing the level of oxygen reduced incidence," Ms. Snyder writes. Dr. Patz won an Albert Lasker Medical Research award in 1956 which was presented to him by Helen Keller.

Dr. Patz died at 89 in Pikesville, Maryland on March 11, 2010.

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