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Loss of Hospital Tax Exemption Upheld

On March 18, 2010, in a precedent shattering and powerful opinion, the Illinois Supreme Court upheld a 2008 lower court ruling which revoked the tax exemption of 43 real estate parcels owned by Provena Covenant Medical Center, including the hospital facility itself.

The primary reasons cited by the court were (1) that in 2002, the tax year in question in the case, the hospital devoted only 0.7 percent of its total revenues to charity care; (2) only 196 patients received free care and only 106 patients' bills were discounted out of 110,000 admissions; and (3) most of its revenue was derived from governmental and private payors.

Mere ownership of a hospital by a public charity in Illinois, as in Connecticut, is insufficient by itself to obtain a local property tax exemption because the property (hospital)must also be used exclusively for charitable purposes. (Connecticut has dealt with this issue in a more relaxed fashion, allowing minor incidental nonexempt uses to survive assessors' challenges.)

Faced with this paucity of financial outlay for charitable purposes, Provena had argued that because it had been established as a charity by its donors and founders, it was not required to give anything of financial value away. It was sufficient, Provena asserted, that it provide medical care, which is in itself a charitable activity because it relieves disease and suffering. This claim was tossed aside by the court, which concluded that if even charitable use was satisfied at the time of the founding of the hospital, if valid, it could "thereafter . . . practice economic predation and nevertheless maintain its charitable status."

Insufficient financial commitment to charity care and lack of documentation other than a tiny amount of free and discounted care sunk Provena's case even though the court did not make it clear how much uncompensated care would qualify the hospital as a charity. Having spent more money on advertising than on free care and having taken in less than $7,000 in charitable donations during 2002, Provena was seen more as a business than as a charitable entity.

The impact in Connecticut of the Illinois court's potentially earth shaking decision remains to be determined. Given Illinois rules, it may not be binding precendent in that state for the present time. However, a cash-strapped Connecticut municipality able to offer similar arguments maybe tempted to reject an exemption request to test the issue here.

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A Wasteful Procedure?

While osteoporosis is understood to be a serious public health concern, especially among older Americans, a recent study indicates that it is questionable whether the procedure vertebroplasty can make any difference.

Vertebroplasty involves injecting medical "cement" into the spine. By doing so, it is hoped that the spine can be stabilized, pain reduced and disability reduced.

An article in the August 6, 2009, issue of *The New England Journal of Medicine* described a study in which 131 patients with severe

osteoporotic injuries were assigned to receive either vertebroplasty or "sham" surgery. According to a report in the November 2009 issue of *Duke Medicine*, "the placebo group went through [all] the motions of surgery . . . ." (Very interesting informed consent issues are presented by this study design!)

One month later, the vertebroplasty group and the "sham" surgery group "experienced a similar, and significant, reduction in pain." According to the study author, Dr. David Kallmes of the Mayo Clinic, "there was no difference in pain relief, function or quality of life between the two groups."

With the Death of a Physician, An Era Fades

He worked almost 100 hours every week; his wife was his nurse. "He saw patients at his house at all hours day and night, on weekdays and weekends. He served as the Danbury school system's first doctor and presided over the first mass inoculations of local school children. He was a familiar presence riding his bike around town or swimming daily at the Y."

This and more can be found in the sentimental semi-obituary of Dr. Martin F. Randolph written by Peter Applebome in *The New York Times* on March 25, 2010.

Reflecting on current health care policy discussions revolving around increasing the number and compensation of primary care physicians in order to "encourage healthy choices and preventive care the way a trusted family doctor [Dr. Randolph] once could," Mr. Applebome wonders whether progress will be made or if the debate will just result in the "shuffling of the deck chairs on an expensive cruise to nowhere."

Poignantly, the author notes that of Dr. Randolph's eight children, only one became a physician – Dr. Christopher Randolph, who practices allergy medicine in Waterbury.

Hospital Can Challenge Zoning Decision

A property developer obtained approval from the Norwalk Zoning Commission to remove a parking garage from the proposed plan for the development of its property even though the garage had previously been approved by the commission. Norwalk Hospital appealed the commission action; the developer sought to have the appeal dismissed on the basis that the hospital lacked a sufficient legal interest in the proceedings to challenge them.

An earlier hearing before the commission had approved the construction of a 78,000-square foot office building together with the garage, purportedly for medical offices. Apparently, due to the nature of the proceeding, a public hearing was not required under the Norwalk zoning regulations and the hospital did not otherwise attempt to challenge the approval.

Asserting that the medical office building was actually a stalking horse to house an ambulatory care center to be operated by Stamford Hospital, a competitor, Norwalk said that as a provider of the same or similar services proposed by Stamford Hospital in the development, it would be adversely affected by the installation of a competitive facility practically next door.

Although competitive concerns have frequently been dismissed as insufficient to support an appeal of zoning or other administrative agency actions, in this case Norwalk Hospital was found to be sufficiently "aggrieved" to pursue its appeal.

Sitting in the Stamford/Norwalk Judicial District, Superior Court Judge Taggart D. Adams noted that the likelihood that the proposed development "would potentially attract persons in need of health care services away from Norwalk Hospital, thereby depleting the number of paying or insured persons available to [the hospital], meets the legal standards of possible aggrievement."

Norwalk Hospital was no doubt assisted in this outcome by the court's determination that "the potential competition posed by [Stamford Hospital] possibly may have been engendered by lack of full disclosure of the proposed project in the initial [application]" by the developer.

Norwalk Hospital Association v. Zoning Commission of City of Norwalk, 2010 WL 628894 (January 25, 2010).

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Malpractice Liability After an IME

When Jane Q. Public submits to an independent medical examination for insurance, employment, Worker's Compensation or security purposes, she traditionally has not been seen by the courts to have established a physician/patient relationship with the doctor examining her. As a result, the courts have rejected the notion that the examiner has any obligation to Jane to report his findings. The party who retained him to perform the examination, the rulings tell us, is the only party entitled to know about his conclusions.

This view of the nexus between the physician/IME examiner and the individual being examined has seen some erosion over the years in egregious cases; e.g., when an examiner detected a heart murmur and failed to inform the individual who died of a heart attack several weeks later.

A recent decision by the Arizona Court of Appeals continues that trend. Jeremy Ritchie injured his back at work in 2000. The workers' compensation insurance carrier covering his employer asked Dr. Scott A. Krasner to perform an IME.

Being very careful to avoid establishing a patient/physician relationship, Dr. Krasner had Mr. Ritchie sign a limited liability agreement before the evaluation in which Mr. Ritchie acknowledged that no doctor/patient relationship existed and that the results of Dr. Krasner's evaluation would not be given to him.

Dr. Krasner reviewed Mr. Ritchie's medical records and a previous MRI. He concluded that Mr. Ritchie's condition did not require additional medical care or work restrictions and that he had fully recovered. The compensation carrier terminated his benefits. Sadly, Mr. Ritchie was subsequently diagnosed with a cervical spinal cord compression. After surgery, he was prescribed narcotics for his pain, apparently became addicted and died as a result of an accidental overdose in April 2004.

The inevitable malpractice suit against Dr. Krasner followed with a $5 million verdict to the Ritchie family; Dr. Krasner was found to be partially at fault. On his appeal, Dr. Krasner again said he did not have a doctor/patient relationship with Mr. Ritchie.

While the Court of Appeals agreed, it refused to give Dr. Krasner a free pass, stating that he had not practiced with reasonable care. Strangely, the limited liability agreement signed by Mr. Ritchie before he was examined by Dr. Krasner was kept from the jury by the trial court. No matter, the Court of Appeals said, the acknowledgements in the agreement do "not free Dr. [Krasner] from a duty of care . . . ."

This ruling is on appeal to the Arizona Supreme Court.

From now on, it is more likely that doctors conducting an IME will be held to a test of reasonable conduct under the existing circumstances, even in the absence of a physician/patient relationship.

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