Prescription Drug Importation and Reimportation: But Everyone is Doing it

Forms of Alternate Dispute Resolution What Are They and What Makes Them Work?

Defamation and Physicians Privileges, Immunities and Qualified Privilege

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The not-for-profit hospital litigation

Using the Courts to Reform the Health Care System

by Richard G. Staub

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Beginning in June 2004, class action lawsuits have been filed nationwide (the NFP Litigation) alleging that not-for-profit hospitals don’t provide enough charity care to justify their tax exemptions, grossly overcharge the uninsured and engage in abusive collection tactics. Most of the suits are being coordinated by a consortium of attorneys (the Consortium) led by Richard “Dickie” Scruggs, who became a billionaire through his participation in the settlement of state attorney general actions against tobacco companies. But while the other targets of Scruggs’ class action crusades have been sued for their allegedly defective products, not-for-profit hospitals are being sued for a product they have not provided: Healthcare insurance to the nation’s uninsured. We’ll explain.

The Problem of the Uninsured

The problem of the non-elderly uninsured has been a perennial public policy concern, and is a critical backdrop to the NFP Litigation. The Census Bureau estimates that in 2003 (the last year for which data are available), 45 million people were uninsured. But the problem may not be quite as bad as that number suggests. The Census Bureau estimate includes more than 14 million people who are eligible for Medicaid and/or state children’s health insurance programs and simply have not applied. It also includes 15 million people with annual household incomes above $50,000 (7.6 million of them in households earning more than $75,000), which is enough in most states to afford an item as important as health insurance. Further, 18.8 million people between the ages of 18 and 34 are uninsured, many of whom voluntarily forgo coverage and take the economic gamble that they won’t need significant healthcare services.

Still, no one can doubt there is a fundamental insurance coverage problem. Many policymakers believe the biggest concern is the estimated 14.8 million uninsured people in households earning between $25,000 and $50,000, who make too much to be covered by current government programs and too little to afford health insurance.

Since the Consortium has emphasized declaring itself the defender of those “who can’t afford health insurance,” you would expect the classes in the Consortium’s suits to be limited to this group. But you’d be wrong.

The Class Participants

Class definitions vary across the Consortium’s complaints, but they generally pick up all uninsured. For example, in "Paul v. Cleveland Clinic Foundation," the putative class covers “all uninsured patients of defendant... from July 15, 1998, through the present, who did not qualify for Medicare and/or Medicaid and who were charged an amount for medical care in excess of the amount to be reimbursed for defendant’s Medicare payments.” This definition encompasses the indigent uninsured as well as the kings, sultans and sheiks who have been treated at the clinic’s world class facilities.

The class definitions also cover folks like Paul Shipman, who was the lead plaintiff in a suit brought against Inova Health Care Services. At the time of his hospital stay Shipman was earning more than $80,000 per year, lived in an attractive townhouse and drove a BMW. When his wife left her job to return to college, they decided to go without health insurance. Since they were young and healthy, they decided the few hundred dollars per month for health insurance was better spent on tuition. The Shipmans lost their gamble when Mr. Shipman became ill and incurred substantial healthcare costs.

The Core Federal Claim

While the Consortium brings a number of claims in the NFP Litigation, its core federal claim is breach of implied contract. The Consortium contends that Section 501(c)(3) of the Internal Revenue Code creates an implied contract between the government and not-for-profit hospitals, whereby not-for-profit hospitals provide charity care in exchange for tax exemption. The plaintiff uninsureds claim they are entitled to recover as third party beneficiaries of the implied contract.

By its terms, Section 501(c)(3) imposes no obligation to provide charity care. Indeed, the statute recognizes several different ways hospitals (and other organizations) can obtain tax-exempt status – e.g., conducting research, offering educational programs or providing training. In determining eligibility for exemption, the IRS applies a “benefit to the community” test to not-for-profit hospitals and has recognized that promotion of health is in itself a benefit to the community. Thus, by accepting Medicare and Medicaid patients and operating an emergency room open to all regardless of ability to pay, not-for-profit hospitals satisfy their tax-exempt obligation.

2 The members of the Consortium are identified on its website – www.nfrplitigation.com.
4 See id.
Plaintiff's core legal theory also fails because Section 501(c)(3) does not create a contract. A long line of cases recognizes that statutes do not create contractual rights, and the Supreme Court has specifically rejected attempts to characterize tax exemptions as contracts. Even if there were a contract, only the IRS or the person whose tax status is at issue has standing to enforce it, and it could only be enforced in specific courts (e.g., tax court).

At the time of this article's writing, 16 decisions have been issued on defendants' Rule 12(b)(6) motions; many more are pending. All rulings to date on plaintiffs' core theory have both rejected it and found that plaintiffs lack standing. So, why did the Consortium bring such a novel federal claim?

The "Tactical Decision"

If asked, most defense lawyers would guess these cases would be filed in state court. After all, most of the Consortium's attorneys have made their fortunes there. In state court, cases involving novel legal claims are much less likely to be dismissed on motion. Moreover, because state courts frequently have more relaxed rules of evidence, filing in state court would enhance plaintiffs' odds of admitting the non-conventional evidence these cases are likely to require.

At the time of the initial filings, however, almost all complaints were brought in federal court. Why federal court? The plaintiffs made an initial "tactical" decision to petition the Judicial Panel on Multi-District Litigation (the JPML) to consolidate the cases in one court. Many judges handling coordinated cases seem to think their job is to avoid burdening other courts with these actions and to use all available tools to encourage settlement. If the cases were consolidated, the defendants would face huge document productions, virtually endless depositions and substantial delays on motion rulings. Thus, the Consortium's strategy appears to have been designed to magnify the threat of exorbitant "blackmail settlements" that class actions often present.

The not-for-profit hospitals convinced the JPML to deny consolidation. The governing statute, 28 U.S.C. § 1407, requires a determination that consolidating cases "involving one or more common questions of fact" would "be for the convenience of the parties and witnesses and would promote the just and efficient conduct of such actions." Here, the only even arguably common question was a question of law: almost all of the questions of fact were unique to each hospital defendant; and the plaintiffs could not demonstrate efficiencies from consolidating discovery.

In the wake of the Consortium's failed JPML petition, it appears that many of the cases will proceed in state court. The next battle will likely be over class certification. If the Consortium succeeds in certifying classes, it may still seek to force settlements, albeit not the industry-wide ones initially targeted. So, what does the Consortium really want in its settlements?

New Roles for Hospitals and Plaintiffs' Attorneys?

The Consortium has had one notable success, although some question whether this was an arms-length transaction. The Consortium reached a proposed settlement with North Mississippi Health Services. The health system was represented by a firm whose partners include Michael Moore — not the guy who brought us Fahrenheit 9/11, but the fellow who as attorney general of Mississippi worked with Scruggs to negotiate the landmark tobacco settlement. The Consortium proclaimed the settlement a "model" for the industry.

Under the proposed settlement, the hospital cannot collect more than 10 percent of the uninsured's annual income per year regardless of the uninsured's personal assets. Uninsured patients with less than 200 percent of the Federal Poverty Level (FPL) are provided free hospital services, subject to a $10 copay. Those between 200 and 400 percent of the FPL — that's up to $75,400 in 2004 for a family of four — receive discounts ranging from 50 to 15 percent off the Medicare rates. The covered services are those medically necessary treatments in the hospital's benefit plan.

We started at the beginning of the article that the not-for-profit hospitals are being sued for not providing health insurance to the nation's uninsured. The North Mississippi model settlement is really a form of catastrophic insurance coverage, delegating various insurance functions to not-for-profit hospitals and to the Consortium.

Modern health insurance can be broken down into three major functions:
1. Underwriting
2. Claims administration and medical management
3. Network administration

The settlement assigns responsibility to not-for-profit hospitals for two of these functions with respect to the uninsured:
1. As the underwriter for their catastrophic losses; and
2. As claims administrator and medical manager making covered services and medical necessity determinations.

The Consortium assumes responsibility for the third function. It becomes the uninsured’s provider network administrator, collectively bargaining with hospitals on the uninsured's behalf, while collecting a network administrative fee — i.e., attorneys fees — for forming the network. The exchange during a hearing in Skipper v. Blue Cross illustrates the Consortium's role:

THE COURT: [Are you] saying that there ought to be a uniform price structure for [hospital services], and an x-ray should cost a hundred dollars because you think that is what it ought to cost? * MR. SCRUGGS: ** We are simply asking . . . the court to say that [the hospital] cannot charge [those without insurance] more than they charge everyone else.

Many Blue Cross/Blue Shield plans negotiate the same way — i.e., we will pay you whatever you want, so long as it is not more than anyone else.

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How Do You Catch a Spyware Cold?

It is possible to have spyware secretly downloaded to your computer merely by visiting a particular website, but those sites are typically, although not exclusively, gambling or adult porn sites. The "I don't know how that got there" excuse is becoming more difficult to support.

The most common infection from spyware comes from actually downloading files. The fastest growing applications used for unintentional spyware downloading are file-sharing programs. (Also known as copyright infringing applications by the RIAA).

These programs, virtually since their inception, have always come in two varieties, ad-supported and ad-free. Of course, the ad-supported version was free while the ad-free program cost $15 or $20. People still bent on downloading music and movies without paying for them are often too cheap to even pay for the ad-free version of file-sharing programs. When they are using the program, beware and potentially spyware are constantly being downloaded to their computer. The ads are regularly flying up on their screen while the file-sharing application is in use. And, imagine that, the ads do not stop once the file-sharing application is closed. What those programs are doing at that point is anyone's guess.

Microsoft to the Rescue

Microsoft has long been criticized for being lax on security with regard to their browser, Internet Explorer®, and their email application, Outlook®. The slow, but steady switch from Internet Explorer to other, safer, browsers like Mozilla's Firefox (a free open-source download from www.mozilla.org) has finally been broken up. Now available in a "beta" form from www.microsoft.com (read not tested) is Microsoft's free anti-spyware program. They recognize that people now have options and will discontinue using applications that put the rest of their data at risk.

Other Answers

I have been using an open-source application (read: free to download) for nearly six months – proving the war against adware and spyware can be won. Mozilla's Firefox (widely reviewed and regarded as superior to Internet Explorer) has permitted me to use the Internet, completely pop-up ad-free throughout that time. There are various free extensions to the program, including one called AdStopper, that lock my browser up tightly from these types of intrusions. I have not seen a single pop-up ad since beginning to use this browser. Another advantage to this browser is that hackers regularly attack Internet Explorer because it is the most widely used browser.

In addition to that, www.openoffice.org offers an open source competitor to Microsoft Office. I have written about this before when it was not quite ready for prime time – it is now. The fear of macro-virus, so common to users of Microsoft® Word®, is gone with the use of this package. I have yet to find any common law office functions you would want in a word processor that are not easily handled by this application. As for integration, it also edits MS Word files and permits the saving of its files in MS Word format for exchange with others.

I did end up downloading Microsoft's free anti-spyware software and running a scan of my office laptop. I don't mind the extra security, especially when it is at no cost. However, because of the use of Firefox and the fact that I do not use my laptop for file-sharing software, my scan yielded not a single spyware or adware program. If you are working with a network, you need to discuss with your IT person the use of any of these programs and how that might affect your current security scheme. But, I think it unwise to merely hope you do not accidentally download one of these and worry about it then. Just last week, a company called Choicepoint, which prides itself on protecting the data for more than 500,000 people in its heavily guarded and secured headquarters, admitted that a person faking fake paperwork from a Kinko's got access to their entire database. A programmer friend of mine once said, "Any lock a human can make, a human can break." And so it goes with data protection. Constant vigilance is required.

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hospital litigation

Regulation by Litigation

Robert Reich, secretary of labor in the Clinton Administration, has observed, "[T]he era of big government may be over, but the era of regulation through litigation has just begun." For certain, the plight of the indigent uninsured is a critical issue. What is troubling is that the Consortium is thrusting its solution into courtrooms across the nation. As one judge remarked, "The plaintiffs seek to use this court as a forum to reform the healthcare system." Is litigation and court-sanctioned settlement an effective way to solve the problem of the uninsured? The Alabama attorney general doesn't think so.

This lawsuit, if successful, would threaten the provision of charitable non-profit healthcare in Alabama. I am convinced that the challenges contained in this litigation, far from ensuring the availability of indigent health care to those most dependent upon it, could destroy the system by which it is currently offered.

He is quite right. The Consortium's model settlement would have profoundly negative consequences on the nation's insurance markets. It would encourage more young, healthy and relatively affluent individuals (like the Shippers) to forgo the purchase of private insurance, leaving older, less-healthy individuals in the insurance pool, driving up insurance costs for everyone. The model settlement would also encourage employers with low-wage workers to terminate insurance coverage due either to policy inflation or the new insurance safety net offered by not-for-profit hospitals. Ironically, the Consortium's model settlement would likely exacerbate the problem of affordable health insurance.

The Consortium's proposed solution begs for careful study and deliberation. Does the Consortium's solution result in an optimal net-social benefit? Are not-for-profit hospitals the appropriate underwriters, claims administrators and medical managers for the uninsured? Is the Coalition the appropriate network administrator for the uninsured? We don't think so. But one thing is certain. This is a determination that courts are ill-equipped to make.

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Paul T. Kostaycik is an associate at Jones Day and focuses his practice on corporate transactions. He devotes a significant portion of his practice to healthcare industry clients.

June 21, 2004) (Mem. Op. and Order of Dissolution at 6 filed Dec. 28, 2004) ("The plaintiffs' claims under §301(c)(3) fail because formulating federal health care policy is not a proper function of an Article III Court.")