Defending Against the Non-Delegable Duty Claim

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Plaintiffs' attorneys have become more and more creative when it comes to crafting claims specifically designed to avoid summary judgment or to pull deeper pockets into the case and keep them there. Specifically, in the medical malpractice arena, claims against the hospital involving physician care are typically predicated on a claim of agency between the physician and the hospital. However, many medical malpractice plaintiffs' attorneys have recently been adding claims of non-delegable duty against the hospital to side-step the hospital's anticipated, and often successful, independent contractor defense.

A claim for non-delegable duty is a new cause of action for medical injuries under the federal regulations governing Medicare. It is essentially a claim that the hospital's participation in Medicare reimbursement programs creates a contractual duty on behalf of the hospital to render non-negligent care to its patients. The argument is that this duty cannot be delegated to the physician; hence, it is a non-delegable duty. In theory, this affords the plaintiff a direct claim against the hospital based on physician care no matter the relationship between the physician and the hospital, thereby rendering an independent contractor defense superfluous.

Thankfully, there are several ways to defend against a claim for non-delegable duty. The first is on a federal level. Most plaintiffs' counsel cite to 42 C.F.R. Part 482.12, "Conditions of Participation for Hospitals," in support of their claim for non-delegable duty. These regulations simply set the minimum requirements for hospitals to participate in federal programs. They do not create a non-delegable duty owed by hospitals to patients to ensure non-negligent care. As one commentator has concluded, "[a] non-delegable duty claim under 42 C.F.R. § 482.12 is simply not supported by existing law." EDWARD J. CARBONE, "Hospitals and the Non-Delegable Duty of Care," Trial Advocate Quarterly (Winter, 2009).

Courts from numerous jurisdictions have similarly found these regulations do not create a non-delegable duty or a private cause of action for a medical liability plaintiff, nor do they create an agency relationship between a hospital and the physicians with whom it contracts for the provision of medical services. For example, in Sepulveda v. Stiff, 2006 WL 3314530, *6 (E.D.Va. 2006), the plaintiff in a medical liability action asserted that the regulations providing the requirements for participation in the Medicare program (specifically 42 C.F.R. § 482.12(e)) created "a contractually non-delegable duty" rendering the hospital liable to the plaintiff. The court determined, however, that the plaintiff was attempting "to circumvent the long-established rule in Virginia that vicarious liability cannot be attributed to independent contractors, except in special circumstances." Sepulveda, 2006 WL 3314530, *7. The court in Sepulveda concluded that neither the explicit text of 42 C.F.R. § 482.12 (e) nor its implications created a private right of action for medical liability
In Acevedo v. Lifemark Hospital of Florida, 2005 WL 1125306 (Fla.Cir.Ct. 2005) the court closely examined a medical liability plaintiff’s claim that federal Medicare regulations and Florida statutes created a non-delegable duty for the defendant hospital. The court rejected the plaintiff’s argument, stating: "The Medicare regulations and state law cited by the Plaintiffs do no more than require a hospital to staff its hospital competently. They provide protections where hospitals do not hire competent physicians and ensure a cause of action for plaintiffs in that regard. This is commonly known as corporate negligence. This court declines to extend non-delegable duty doctrine under the contract or legal theories proposed by the Plaintiffs. Any “non-delegable duty” of the hospital would be limited to providing competent physicians, not ensuring non-negligent care. That is not the mandate of the regulations and statutes cited by the Plaintiffs.” Acevedo, 2005 WL 1125306, *6.

Similarly, in Burns v. St. Edward Mercy Medical Center, 2005 WL 5582062 (Ark. Cir. 2005), the plaintiffs in a medical liability action claimed that, pursuant to federal Medicare regulations, the defendant hospital owed “a duty to ensure” that its contracted services to the defendant doctor were conducted properly. The court concluded, however, that the Medicare regulations “were not intended to preempt or supplant state law in the medical malpractice arena.” Burns, 2005 WL 5582062. See also, Dunn v. Atlantic Surgical Associates, 2007 WL 1784093, *1-2 (Del.Super. 2007) (rejecting the plaintiff’s argument that the defendant hospital had accepted “responsibility and control over the defendant doctors” by being a Medicare participant under the requirements of 42 C.F.R. § 482.12 and concluding that, under the plaintiff’s reasoning, all independent contractors in a hospital participating in Medicare would be servants/agents of that hospital); Blackmon v. Tenet Healthsystem Spalding, Inc., 653 S.E.2d. 333 (Ga.App. 2007) (reversed on other grounds in Blackmon v. Tenet Healthsystem Spalding, Inc., 667 S.E.2d 348 (Ga. 2008)) (concluding that 42 C.F.R. § 482.12(e) “does not impose state tort liability on hospitals for negligence of their independent contractors[, but simply outlines that with which the hospital must comply to receive Medicare.”); Gleeson v. Stephani, 2005 WL 5872119 (Ill.Cir. 2005) (granting summary judgment based on the conclusion that 42 C.F.R. § 482.12(e) “has nothing to do with the issue of agency liability”).

Another angle of attack is on the state level. Most states have a specific act or code section that exclusively governs medical malpractice cases. A non-delegable duty claim is an attempt to circumvent the state requirements for asserting a medical liability claim, i.e., expert qualifications and expert testimony. If the plaintiff has failed to meet any necessary element for asserting a medical malpractice claim under state law, this can be used as ammunition against a claim for non-delegable duty. In addition, most states have not recognized non-delegable duty as a valid claim for medical malpractice nor have they created a pattern jury instruction providing for this cause of action. Each of these arguments can be used to defend against a claim for non-delegable duty.

Lastly, a claim for non-delegable duty can also be attacked on a case-specific level. If the plaintiff at issue is not a Medicare recipient, the hospital’s provision of service to plaintiff does not involve Medicare compliance. Thus, the hospital can argue that it was not acting in compliance with Medicare regulations in providing care to the plaintiff, making plaintiff’s claim for non-delegable duty baseless based on the specific facts at issue.

In all, there is little support for the non-delegable duty claim in both state and federal law. Despite this fact, the non-delegable duty claim is a growing trend and is a creative and sometimes effective tool to attempt to establish liability against the hospital in a medical malpractice action based on physician conduct, or at least avoid early dismissal of the hospital based on an independent contractor theory. Accordingly, the
savvy medical malpractice defense attorney should be prepared to defend against it on all fronts.

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