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## LITIGATION CAN PAY OFF

No one likes litigation: It can be expensive, unpredictable and uncontrollable. Document production is not only disruptive and costly, but it also can ferret out that long-buried email that inadvertently now smells like a smoking gun.

However, litigation can be an effective, and sometimes the only, process for vindicating a violated right, particularly where monetary damages are available if the lawsuit is successful. This article identifies several recent cases where an aggressive but careful litigation strategy paid off for hospitals assuming the role of plaintiff.

Reimbursement disputes are often good candidates for productive litigation, particularly those that involve contractual issues. In *Baylor Health Care System v. Insurers Administrative Corporation*, Baylor sued to enforce a series of agreements that obligated the defendant, a third-party administrator, to pay clean claims within 45 days. Baylor had agreed to provide services at reduced rates to the subscribers of a preferred provider network that had contracted with defendant Insurers Administrative Corporation (IAC) to handle claims. By contract, if the 45-day requirement was not met, the “payor” was obligated to pay the provider’s “normal billed charges.” The court determined that IAC was obligated to pay the higher rates if it did not meet the 45-day deadline, and then determined that Baylor was entitled to additional reimbursement in three of the cases presented. The result will govern the relationships between the parties going forward.

Hospitals may be leaving money on the table if they do not take all necessary steps, including litigation, to recover charges claimed under hospital liens against a patient’s recovery in a personal injury lawsuit. In *McCloud v. Goodyear Dunlop Tires N.A., Ltd.*, the U.S. District Court for the Central District of Illinois ordered a lien asserted by the hospital to be paid in full. The malpractice plaintiff had objected that the hospital should not recover more than it would have received under Medicaid, but the court held that as long as the hospital was not actually reimbursed by Medicaid—which it was not—it could recover directly from the patient because of the lien.

A recent South Carolina case demonstrates that a favorable result can be achieved in states requiring certificates of need (CON) by appealing CONs improperly granted to new competitors. In *MRI at Belfair LLC v. South Carolina Dept. of Health and Environmental Control*, the plaintiff appealed a finding that a magnetic resonance imaging (MRI) project was exempt from CON requirements because its value was less than \$600,000—the threshold amount that by statute requires CON approval. This determination was based on a method of allocating shared capital costs, which the challenging MRI center and hospital contended was arbitrary. The Supreme Court of South Carolina agreed and vacated the finding that no CON was required. Thus, the plaintiffs gained a forum in which they could maintain that a new, competing MRI was not needed.

Medicare appeals may appear daunting, but they can be successful and warranted if the administrative ruling is sufficiently vital. Recently in *Cape Cod Hospital v. Sebelius*, five hospitals challenged two Medicare reimbursement rate rules for inpatient hospital services, which the hospitals contended were

issued without addressing comments that suggested the rules were based on a flawed methodology. The rule was used to determine the rural hospital wage-index floor adjustment, which over time, reduced the Medicare payments received by the plaintiff hospitals. The hospitals persuaded the U.S. Court of Appeals for the District of Columbia Circuit that Medicare’s refusal to make the adjustments requested by the hospital for prior years was not justified by its interest in finality. The court then vacated the rule that was the subject of the lawsuit and ordered Medicare to fully consider the hospitals’ position before reissuing any similar rule.

Thorough planning and honest analysis are often key to a successful litigation strategy. Consider taking these steps before deciding to become a litigation plaintiff:

1. Do the research and ensure you have a reasonable likelihood of success on the merits. Understand the arguments for the other side and know why your arguments are stronger.
2. Examine relevant documents to determine if they support your position and do not contain statements that either contradict your position or make potentially embarrassing comments on other issues.
3. Analyze exactly what you will gain if you prevail: Are money damages verifiable and justified? Is injunctive relief meaningful and practical? Have a defined goal that, if achieved, will have been worth the effort.
4. Anticipate the opposition by considering whether the defendant you have sued could counterclaim.
5. Consider whether you would need to resume a long-term relationship with the opposing party, and how the litigation may affect that relationship.
6. Obtain a litigation budget, add a 20-percent factor for the unpredictability of litigation and ensure that, on balance, winning the lawsuit is worth the burden and expense.

If this analytical framework leads to the conclusion that how you have been wronged can be remedied by carefully planned and budgeted litigation, consider this valuable tool for vindicating your rights.

If you have a question on this material or would like to discuss legal services, please contact us at [healthcare@duanemorris.com](mailto:healthcare@duanemorris.com).

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Originally published in *Modern Healthcare Magazine* in June 2011.