

Physician Liability Under EMTALA

By: Jim Hoover, Esq., of Burr & Forman LLP



I have been asked many times by both hospitals and physicians alike if physicians have liability under the Emergency Medical Treatment and Active Labor Act (EMTALA).¹ The answer is a resounding yes. In fact, physicians have liability from two potential sources for violating the requirements imposed by EMTALA, directly under EMTALA and indirectly under a hospital's medical staff by-

laws. Also, a physician should keep in mind that the line that distinguishes EMTALA from medical malpractice concepts is sometimes blurry. In any given emergency department encounter, it is possible to violate EMTALA without any malpractice liability and vice versa. This article will concentrate on a physician's liability exposure under EMTALA.

It may be helpful to understand that enforcement of EMTALA is a complaint driven process, i.e., the investigation of a hospital's policies and procedures, and a physicians' response or lack thereof and any subsequent sanctions, are initiated by a complaint. Complaints are generally levied by a patient or often times by another hospital. If the results of an investigation indicate that a hospital violated one or more of provisions of EMTALA, a hospital may be subject to termination of its provider agreement and/or the imposition of civil monetary penalties (CMPs). CMS then refers cases it has investigated to the HHS Office of Inspector General (OIG) if CMS finds violations that appear to fall within the OIG's EMTALA jurisdiction. In such cases, CMPs may be imposed by the OIG against both the hospital and individual physicians for EMTALA violations.

Although EMTALA is generally framed in terms of a participating hospital's obligations (thus the reason hospitals have to address emergency room call coverage in its by-laws and the second source of liability for a physician), rather than a physician's obligations, EMTALA does impose two administrative remedies against physicians who "violate" the statute. A CMP of up to \$50,000 per violation may be imposed against a physician and in certain circumstances the offending physician may be excluded from participation in the Medicare and Medicaid programs.

Specifically, EMTALA authorizes the imposition of sanctions against any physician who is responsible for the

examination, treatment, or transfer of an individual in a participating hospital, including a physician on-call for the care of such an individual, and who negligently violates a requirement of EMTALA.² Although "negligence" is not defined in the EMTALA statute or regulation, case law generally holds that a physician negligently violates EMTALA when the physician fails to do something that he or she had a duty to do, or omits some act that a similarly situated physician of ordinary prudence would have done under the same circumstances. CMPs may also be imposed against a physician who signs a certification required by EMTALA certifying the medical benefits reasonably to be expected from a transfer to another **Continued on Page 6**

¹42 U.S.C. § 1395dd

²42 U.S.C. § 1395dd(d)(1)(B)

What Is On The Horizon For Federal Taxes?



By: William O. "Trey" Whitt, III, CPA of Dent, Baker & Company, LLP

2012 marks a transition year between the tax policies ushered in by George Bush in 2001 and a tax climate that is far from certain. Arriving shortly after the 9/11 attacks on our country was the first of many tax changes designed to energize the economy. Highlights of those changes included a lowering of all ordinary and capital gains rates, the favorable tax rate treatment of corporate dividends, and more robust allowances for businesses to deduct capital purchases. Taxes, since that time, have been at a historical low.

As a Presidential candidate, and now as President, Barack Obama has been very consistent in his view of taxes. He likes the tax rates exactly where they are for families earning less than \$250,000 but prefers a more progressive rate structure for taxpayers earning more than that amount. In some cases, however, President Obama has advocated even more generous tax provisions than his predecessor, one example being the 100% "bonus depreciation" rule that enabled businesses to deduct a wide range of capital expenditures in 2011. While many elements of the Bush tax program were scheduled to sunset at the end of 2010, political pressure stemming from a sluggish economy caused Congress to pass and the President to sign legislation that extended the Bush tax program for two years. Barring a similar last minute extension, big changes are in store for 2013 and beyond. **Continued on Page 3**

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Habitat for Humanity Day

On Saturday April 28, eleven volunteers participated in the first JCMS Habitat for Humanity Day. JCMS members **Darlene Traffanstedt, M.D.**; **Robert Levin, M.D.**; **Elizabeth Beirele Chen, M.D.** (and her nephew, Arian Beierle) ; **Mike Chen, M.D.**; **Andy Daniel, M.D.**; **Roxanne Travelute, M.D.** and **Mike Honan, M.D.** (and their son, Benjamin) along with Executive Director Martha Wise (and her son, Tyler) helped to put siding and to build a front porch on a home located on Chenault Street in Pratt City which had been destroyed by last year's tornados. All those who participated had a great time and learned something they did not know. We hope more of you will join them at the next event!

To find out more about Habitat for Humanity and/or to make donations, please visit their website:
<http://www.habitatbirmingham.org/>





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So what is going to happen in 2013? The short answer is that no one knows just yet, and, to complicate matters further, that answer will likely not come until after the November elections. However, an examination of the relevant issues might give us some insight into what is to come.

A Presidential election year generally yields considerable debate, yet little action, on the economy and the role that taxes play. This time around, it seems that “reform” and “simplification” have been the tax mantras attracting the most attention. Herman Cain led the way with his polarizing 9-9-9 Plan. Since then, the other candidates have been vying to “outreform” and “outsimplify” one another. Don’t expect much in the way of tax reform or simplification any time soon, however.

Last November, the Congressional deficit reduction super committee attempted and failed to agree upon a combination of spending cuts and tax increases as an actionable plan to trim the federal deficit. Many thought that the recommendations of the super committee would pave the way for meaningful tax reform. Instead, this failure to agree on even a basic outline of what tax and spending reform should look like suggests that a wholesale Tax Code overhaul is not going to happen. Instead, expect subtle tweaks to the tax rules that will result in an overall tax increase.

Two tax increases already on the books are the Medicare surtaxes that will apply to the wage and investment income of higher income taxpayers beginning in 2013. Whether additional taxes will target higher income taxpayers, lower to middle income taxpayers, corporations, or some combination of different taxpayer constituencies depends largely on the composition of Congress and who occupies the White House beyond 2012.

Given the uncertainty surrounding the income tax rules beyond this year, what should businesses and business owners do to prepare? Here are a few general recommendations that make sense regardless of whether taxes go up, down, or stay the same:

1) If you are contemplating a major business transaction (examples include buying or selling a business, admitting a new owner, or making a large purchase), be sure to keep your professional advisors in the loop well in advance of the commitment. Transaction terms are difficult, if not impossible, to modify after the ink has dried; having an extra set of eyes reviewing a deal before it is finalized can help deliver the best possible tax and financial outcome.

Specifically relating to the sale of a business or other appreciated assets, the federal capital gains rate for 2012 remains 15%; however, many believe that rate will revert to the pre-Bush era rate of 20% beginning in 2013. An additional 5% tax in 2013 might be a sufficient incentive to accelerate your business transition plans into the current year.

(2) Consider your income taxes as a business expense to be budgeted and monitored. Tax avoidance can lead to irrational and imprudent financial decisions. A common refrain that we hear is, “We have made too much money. We need to spend it so we won’t pay as much tax.” Sometimes it makes sense to spend money at the end of the year. Maximizing retirement savings, rewarding employees, and making necessary capital investments in the business can all be reasonable financial decisions that have the added benefit of driving down tax liability. However, making tax decisions that are not supported by the economics of the business may lead to financial ruin down the road, especially in an economic environment where financial flexibility is absolutely necessary for business survival.

(3) If you determine that within the next 12 to 18 months your business will need to make some capital improvements and/or additions, and, as noted above, the financial outlook of the business supports these purchases, then 2012 would be a good year to do that. Bonus depreciation (capped at 50% of qualifying purchases) and the business expensing election (capped at \$125,000 in qualifying purchases) work in tandem to provide a nice tax deduction in 2012. These provisions may be extended into 2013 at their current levels, but that is far from guaranteed at this point.

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Trey Whitt is a partner of Dent, Baker & Co. For additional articles and other information available on the DBC blog, visit dentbaker.com.

Upcoming MASA Seminar

Prescribing and Pharmacology of Controlled Drugs:
Critical Issues and Common Pitfalls

This Course in Prescribing Controlled Drugs is designed for physicians, dentists, and physician assistants in all specialties who need or wish to increase their knowledge and ability to effectively prescribe and control medications without the potential for abuse. There will be two different meetings – **August 10-12 in Orange Beach and November 17-18 in Birmingham**. Find out more information by visiting MASA at www.masalink.org and looking under the Education tab or contact MASA’s Department of Education at (334) 954-2500 or (800) 239-6272 for more information.



Introducing DocBookMD

The Jefferson County Medical Society and Capson Physicians Insurance are excited to bring you free access to DocBookMD, a unique smartphone application that has revolutionized a physician's ability to practice medicine and communicate with colleagues. Through DocBookMD, you can instantly communicate with fellow members of the Jefferson County Medical Society (future enhancements include links to other Alabama societies) in a secure, HIPAA-compliant environment, allowing you to exchange information instantaneously at the point of care. The information can include high-resolution images of a wound or condition, x-rays, EKGs or other pertinent diagnostic images. DocBookMD enables easy navigation to JCMS members' contact information and provides instant access to pharmacies in Jefferson, Shelby and surrounding counties and other important resources.

DocBookMD is being adopted by medical societies and their members across the country for its cutting edge technology and ongoing research. Capson Physicians Insurance is underwriting the cost of this application and service so you can enjoy its benefits free of charge because of the application's enhancements to patient care and in support of the JCMS and its members.

For information on DocBookMD and how you can instantly start using it, contact Kelly Logan at klogan@jcmsalabama.org or 933-8601. We hope you find it useful and look forward to any feedback you may have regarding this new member-only benefit.

Seeking BC/BE pediatrician

Seeking BC/BE pediatrician for practice limited to attention and learning disorders. Focus started in Mobile, Alabama, and FocusMD is forming a network of clinics in other southeastern cities. Grow with the practice –opportunity to start part-time. No call. No weekends. No management hassles. We provide further training; simple, customized EHR and manage the practice so that you have time to manage the patients. We are seeking a pediatrician with interest in this area of practice that would like to develop more expertise in delivering high quality, compassionate care for this group of often overlooked patients. Reply to drwiley@frustrationtofocus.com

Ask Robin Long for your MEMBER DISCOUNT!!

The Jefferson County Medical Society has arranged for its members to receive special discounts for collection and billing services. By special agreement with Healthcare Financial Services, LLC (HFS), members will get outstanding collections results and services while paying low contingency fee rates... no results, no fees for JCMS members. Take advantage of your JCMS affiliation and call Robin Long at 601-420-1242 or 1-877-747-7072 (Client Services). Your benefits will be worth the call as HFS designs a special campaign for your specific needs. Be sure to mention your membership with JCMS to receive the discounted rate.

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In Memoriam

The JCMS wants to acknowledge the recent passing of the following JCMS members:

George Ellis Rudd, M.D.
March 17, 2012

John G. Hankins, M.D.
March 28, 2012

Perry A. Morgan, Jr., M.D.
April 17, 2012

Richard A. Lytle, M.D.
May 15, 2012



New Members

Jeffrey A. Alten, M.D.	Pediatrics	Morris L. Roebuck, Jr., M.D.	Internal Medicine
John T. Anderson, M.D.	Allergy & Immunology	Janyce M. Sanford, M.D.	Emergency Medicine
Shameza La Joy Boyd, M.D.	Pediatrics	Anne M. Schmidt, M.D.	Family Medicine
Brent A. Clower, M.D.	Resident	Frank M. Skidmore, M.D.	Neurology
Leo C. DeRosier, M.D.	Plastic Surgery	William D. Sudduth, M.D.	Orthopaedics
Silvio H. Litovsky, M.D.	Pathology	Steven J. Thomas, M.D.	Plastic Surgery
John M. Lytle, M.D.	Pediatrics	Allan C. Walls, M.D.	Surgery
Rafique J. Mahmood, M.D.	Obstetrics/Gynecology	Jonathon W. Walter, M.D.	Radiology
Srinivas Mallempati, M.D.	Physical Med & Rehab	Jubal R. Watts, Jr., M.D.	Radiology
Melanie S. Morris, M.D.	Surgery	Jon S. Williamson, M.D.	Psychiatry
Paul J. O'Leary, M.D.	Psychiatry	Matthew R. Willey, M.D.	Resident
William A. Powell, III, M.D.	Internal Medicine	Duraid S. Younan, M.D.	Surgery
Adeel Rabbani, M.D.	Psychiatry	Jacob J. Yunker, M.D.	Ophthalmology
Daniel R. Robinson, M.D.	Resident		

UPCOMING EVENTS

- June 18 Foundation Trust Meeting – 5:30 p.m.
Executive Committee Meeting – 6:00 p.m.
- July 16 Executive Committee Meeting – 5:30 pm
- July 24 MASA's Resident Fellow Section Meeting at 6:00 p.m. in the JCMS Board Meeting
- Aug. 25 JCMS/UAB SOM's Scholarship Fundraising Dinner – Speaker Gene Stallings
- Sept. 18 The Wayne Finley 811 Breakfast Club Meeting at 8:30 a.m. in the JCMS Board Room
- Sept. 24 Foundation Trust Meeting – 5:00 p.m.
Executive Committee Meeting – 5:30 p.m.
Board of Directors Meeting – 6:30 p.m.

Contact Juanita Pruitt at 933-8601 or jpruitt@jcmsalabama.org for more information regarding any of the above events.

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facility outweigh the risks associated with the transfer, if the physician knew or should have known that the benefits did not outweigh the risks, or misrepresents an individual's condition or other information, including a hospital's obligations under this section.³

The Inspector General ("I.G.") is delegated the authority for imposing penalties under EMTALA. Any physician who negligently violates EMTALA is subject to a CMP of not more than \$50,000 for each such violation. In determining the amount of a CMP, the I.G. is required to consider the following factors: the degree of a respondent's culpability, the seriousness of the condition of the individual seeking emergency medical treatment, any prior history of a respondent's violations, a respondent's financial condition, the nature and circumstances of the violation, and such other matters as justice may require.⁴

A physician's liability for CMPs is subject to the following caveat: if, after an initial examination, a physician determines that the individual requires the services of a physician listed by the hospital on its list of on-call physicians . . . and notifies the on-call physician and the on-call physician fails or refuses to appear within a reasonable period of time, and the physician orders the transfer of the individual because the physician determines that without the services of the on-call physician the benefits of transfer outweigh the risks of transfer, the physician authorizing the transfer shall not be subject to a CMP.⁵ However, the previous sentence does not apply to the hospital or to the on-call physician who failed or refused to appear.⁶ Thus, the hospital and on-call physician are still subject to CMPs if the on-call physician fails to respond to call in a reasonable time period. This is perhaps the biggest exposure for physicians. Many of the CMPs imposed against physicians for violations of EMTALA arise out of the on-call physician's failure to respond to call in a reasonable amount of time.

In addition to CMPs, a physician may also be excluded from participation in the Medicare and State health care programs for any gross and flagrant or repeated violations of the statute's requirements.⁷ A "gross and flagrant" violation is one which presents an imminent danger to the health, safety or well-being of the individual who seeks emergency examination and treatment or places that individual unnecessarily in a high risk situation.⁸

As is evident from the above, physicians certainly have liability under EMTALA. In order to avoid liability or reduce their exposure to liability, physicians should understand their responsibilities under EMTALA and comply with its requirements. Additionally, if a physician is the subject of an EMTALA complaint the physician should be aware that (s)he has numerous defenses available to him/her, which will be the subject of a future article.

³Id.

⁴42 C.F.R. § 1003.106(a)(4).

⁵42 U.S.C. § 1395dd(d)(1)(C)

⁶Id.

⁷42 C.F.R. § 1003.105(a)(1)(ii)

⁸Id.

Jim Hoover is a partner in the Health Care Practice Group at Burr & Forman LLP and exclusively represents health-care providers in regulatory and litigation matters.

JCMS Medical School Scholarship Fund

The JCMS Board has decided to support medical scholarships to assist qualified students with their medical school expenses. Dean Ray Watts, M.D., of the UAB School of Medicine has generously agreed to match any scholarship monies raised this year. Accordingly, this year's fundraising efforts will go to establish a JCMS scholarship fund at UAB. In the future, the Board anticipates creating a separate 501(c)(3) entity which can independently administer scholarships to recipients who attend other medical schools.

We are pleased to announce that a fundraising dinner will be held on August 24 at the Marriott on Highway 280. Coach Gene Stallings will be the keynote speaker that evening and ABC 33/40's Chief Meteorologist, James Spann, will serve as our emcee. Tickets are \$100 per person if purchased through July 15; \$125 per person if purchased after July 15. A portion of each ticket price is tax deductible. There are sponsorship opportunities available as well: Platinum Sponsor-\$5,000 includes two tables (sixteen seats) and invitations for sixteen people to the VIP reception; Gold Sponsor-\$2,500 includes one table (eight seats) and invitations for eight to the VIP reception; Silver Sponsor-\$1,500 includes one table (eight seats). To obtain information about sponsorships and tickets, please contact the JCMS office at 933-8601 or mwise@jcmsalabama.org.

We would like to thank the following groups which have already agreed to help sponsor the event:

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Let Us Introduce You. . .



The JCMS is pleased to introduce you to one of our practice service partners, Healthcare Financial Services, LLC, and its Alabama representative, Robin Long. Robin has been working with JCMS members in the central Alabama area for several years now and is very involved in several local Medical Group Management Associations. HFS has been in business for over twenty years and has approximately 1,000 clients located in eight different states. Its headquarters is located in Flowood, Mississippi, in a new facility that was built solely to service collection clients. Because HFS provides services primarily to healthcare clients, it has a special sensitivity to the nature of the relationship between patients and physicians and can tailor its efforts to the particular needs of a practice. It understands the need to maintain positive public relations with the patient and in the provider's community.



Not only does HFS offer bi-lingual bad-debt collection services for healthcare clients ranging from single physician practices to hospitals, it is unique in that it also offers a pre-collection product which is less expensive and a "softer" approach than collections. Fees for all services are contingency-based, so you do not have to pay until HFS is successful in collecting amounts due from patients. HFS uses its extensive experience to leverage the personal contact of a collector with the newest and best in technology to reach debtors and obtain payments. If all non-litigation collection efforts fail and client decides to pursue collection efforts through litigation, HFS has a network of attorneys in place to handle those cases.

Robin and HFS are strong supporters of the JCMS. They have entered into a member benefit agreement with the JCMS through which JCMS members receive discounted rates on collection services and have sponsored our JCMS Day at the Ballpark Event for the last several years. HFS welcomes new clients and will respect individual accounts and specific needs. Call Robin Long today at (601) 927-3243 to discuss how he can assist you in improving your bottom line—make sure to let him know you are a JCMS member in order to receive your discount. Below are comments from several member practices that use HFS to assist in collection efforts:

Alabama Allergy and Asthma Center has been working with Healthcare Financial Services for almost 5 years. Overall, we have been very pleased with the collections process and the high level of customer service. I believe our patients are treated with courtesy and I have yet to receive a complaint from a patient regarding the collection process.

Jason Bidy, CEO

I highly recommend Robin Long and HFS for your collection work. We have used HFS for several years now and have always been pleased with their level of attention to

both small balance accounts as well as the large. I never worry about how our patients are treated and trust that they are doing what is best for our practice. Robin is always on top of things and truly cares for his clients.

Garrett Doss, Administrator
Ob-Gyn South, PC

Robin Long and his company, Healthcare Financial Services, LLC, have been terrific assets to our business. Robin and his staff have done a great job collecting our old accounts. His company handles our patients with honesty and kindness. We never have to worry about the "tactics" his employees use to get the account paid.

Healthcare Financial Services provides a great service at a reasonable price delivered by fun people. I enjoy working with Robin to take care of this necessary part of our day to day business. I can heartily endorse Robin Long and Healthcare Financial Services, LLC, without reservation.

Colleen Ingram, Administrator
Total Skin & Beauty Dermatology Center, P.C.

Thank you to Healthcare Financial Services and Robin Long for sponsoring the 2012 JCMS Day at the Ballpark event on May 6, 2012!



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