ILLINOIS TRIAL LAWYERS ASSOCIATION
MEDICAL MALPRACTICE TRIAL NOTEBOOK

Insurance Coverage, Bad Faith, & Governmental Defendants (Federal Tort Claims Act and Illinois Dept. of Financial and Professional Regulation)

By Mark E. McNabola

I. Insurance Coverage

Medical malpractice plaintiffs face even greater challenges than other plaintiffs in making sure they sue the proper entity and make comprehensive claims so that there is ample coverage for their injuries. Insurance coverage issues in medical malpractice cases generally arise in connection with a covered entity and its relationship to the other named parties. In Illinois, some hospitals either self-insure or pool their risk by creating a trust with other not-for-profit hospitals. The majority of Illinois physicians participate in the physician-owned Illinois State Medical Inter-Insurance Exchange (ISMIE). Because an insurer's duty to defend is broader than its duty to indemnify, a plaintiff's attorney must seek disclosure of every insurance policy that might be applicable regardless of the defendant's tender of defense. Other policies may be available to provide additional coverage when the claim exceeds the limits of the selected policy.

A. Parties Covered

When preparing a complaint, plaintiffs should investigate every possible entity associated with the potential defendants. In order to ensure that the plaintiff has access to all potential insurance coverage, all parties must be named. A hospital may consist of more than one entity, including a separate entity under which their staff physicians are covered, such as a physicians' foundation. Also, physicians will likely have a practice affiliation as an employee or partner. Any one or more of these entities may be the insured entity that bears the burden of indemnifying the physician.

In *Chicago Hosp. Risk Pooling Program v. Illinois State Medical Inter-Insurance Exchange*, 397 Ill.App.3d 512, 925 N.E.2d 1216, 339 Ill.Dec. 95 (1st Dist. 2010), the physician was insured under his own ISMIE policy as well as the hospital policy as an employee. After the case settled, the insurers battled it out over which policy held primary status. The court held that once the insured physician exclusively sought coverage from the hospital trust, the trust had the sole responsibility to defend and indemnify him. ISMIE's duty was to provide standby coverage in the event ISMIE refused to defend, and it was relieved of its obligation to defend and indemnify for the loss to the extent that the defense and indemnity costs did not exceed the limits of the trust's primary limits of liability.

B. Agency Issues

Hospitals' attempts to evade liability through independent contractor relationships with physicians were derailed when the Illinois Supreme Court

firmly established a hospital's vicarious liability for its apparent agents regardless of employment status. *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill.2d 511, 622 N.E.2d 788, 190 Ill.Dec. 758 (1993). This issue is inextricably tied with insurance coverage issues depending on the how the policy defines "insured parties" under the insurance agreement.

1. Actual Agency

A hospital is liable for the acts of its actual agents under a theory of *respondeat superior.* This includes all hospital staff members, physicians, nurses, orderlies, lab technicians, etc. When the hospital acts through its agents, there is likely to be no question of coverage under the hospital insurance policy.

2. Apparent Agency

A hospital may be vicariously liable for the negligence of a physician even if it is an independent contractor. *Gilbert, supra; York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill.2d 147, 854 N.E.2d 635 (2006). In order for a hospital to be vicariously liable for the negligence of a physician under a doctrine of apparent authority, a plaintiff must show: (1) the hospital or its agent acted in a manner that would lead a reasonable person to conclude that the physician alleged to be negligent was an employee or agent of the hospital; (2) that the hospital had knowledge of acts of the agent which created the appearance of authority, where there were such acts, and it acquiesced in them; and (3) the plaintiff acted in reliance on the conduct of the hospital or its agent, consistent with ordinary care and prudence. *Id.* On the other hand, if a patient knows or should have known that the treating physician was an independent contractor, then the hospital escapes liability for the physician's acts. *Id.*

In *Dahan v UHS of Bethesda, Inc.*, 295 Ill.App.3d 770, 692 N.E.2d 1303, 230 Ill.Dec. 137 (1st Dist. 1998), the court held that a physician who had a contract with the hospital that specifically provided that the physician was an independent contractor was still vicariously liable for his negligence. The physician's contract required him to see employees of the hospital free of charge and the plaintiff was such an employee. Indeed, it is what the patient knows that is essential to this question—not what is contained in a contract buried in a hospital personnel file.

a. Use of Consent Forms to Give Notice of Independent Contractor Status

In *James by James v. Ingalls Memorial Hosp.*, 299 Ill.App.3d 627, 701 N.E.2d 207, 233 Ill.Dec. 564(1st Dist. 1998), the court considered whether a patient consent form informing the patient of the physician's independent contractor status was sufficient to inform the patient that the physician was not an agent of the hospital. The court held that while it was not dispositive, it was "an important factor" on the issue of whether the hospital held itself out to be a provider of care without informing patients that the care is provided by

independent contractors. Likewise, other cases acknowledge that there could be situations in which a patient signs a consent form containing an independent contractor disclaimer, but other facts create a triable issue on apparent agency. *Churkey v. Rustia*, 329 Ill.App.3d239 (1st Dist. 2002); *Spiegelman v. Victory Memorial Hosp.*, 392 Ill.App.3d 826 (1st Dist. 2009).

I am aware of one such case where the plaintiff's decedent spoke only Spanish and no translation or explanation of the form was provided in the emergency room. The trial court refused to grant summary judgment to the defendant hospital on the issue of apparent agency.

C. Separate Negligent Acts – Multiple Claims

From the plaintiff's perspective, it is imperative to separately allege each and every act of negligence during the treatment of the plaintiff and ascertain all of the potentially applicable insurance policies available during the course of the negligent treatment, including successive policies. An insured who commits separate negligent acts in the treatment of a single patient is amenable to multiple claims, and the aggregate limits of policies covering each act can be recovered. *Doe v. Illinois State Medical Inter-Insurance Exchange*, 234 Ill.App.3d 129, 599 N.E.2d 983, 174 Ill.Dec. 899(1st Dist. 1992). It is the causative events producing the damage that constitute actionable conduct, not the number of injuries. *Id.* In *Doe,* the physician committed acts of negligence during the course of the plaintiff's treatment that included negligent prescription and failure to monitor that occurred during one policy period. He then committed new and additional acts of negligence during the second policy period by treating him improperly once he suffered from the ill-effects of the physician's initial treatment. Therefore, the aggregate limits of the first and second insurance policy were invoked and the coverage available doubled.

D. Single Occurrence

Whether the events would be characterized as a single or multiple occurrence is a question of causation. *Hartford Cas. Ins. Co. v. Medical Protective Co. of Fort Wayne, IN*, 266 Ill.App.3d 781, 641 N.E.2d 545, 204 Ill.Dec. 321 (1st Dist. 1994). Where each of a series of related injuries flow from a single cause, it is a single occurrence. *Id.* Where each injury has an independent cause, this constitutes a series of occurrences. *Id.* Obviously it is in the best interests of the insurer to maintain that the malpractice alleged constituted a single occurrence in order to limit the amounts available to satisfy the plaintiff's claim. It is up to the plaintiff to establish a succession of acts over a period of time that might expand the amounts available for plaintiff's recovery as arose in *Doe* above.

E. Policy Limits

The policy limits of the insured parties in a medical malpractice case factor heavily into case strategy. As suggested above, it is important to ascertain all potential insurance policies as early as possible in the litigation to ensure that your claim has been completely stated in the complaint to invoke all properly applicable policies. This takes on even greater importance with catastrophic injuries for which insurance coverage may be deficient. Individual defendants will seek to limit their exposure as much as possible so no personal assets are at risk. In Illinois a primary insurer may pay its entire policy limit in settlement of a single claim against a single insured without breaching any duties of good faith, even if, by this act, its other insureds would be left without a defense or indemnification. *Chicago Hosp. Risk Pooling Program v. Illinois State Medical Inter-Insurance Exchange*, *supra.*

Policy limits also factor heavily into bad faith claims (see Section II below) where the defendant's insurer rejects a plaintiff's offer to settle within the policy limits and leaves the insured exposed to liability for an award of damages in excess of the policy limits.

F. Policy Exclusions

If the insurer relies on an exclusionary provision, it must be clear and free from doubt that the policy's exclusion prevents coverage. *Hartford Fire Ins. Co. v. Whitehall Convalescent and Nursing Home, Inc.,* 321 Ill.App.3d 879, 748 N.E.2d 674 (1st Dist. 2001) (fraudulent billing and representations regarding charge for prescription drugs and pharmaceuticals constitutes "medical incident" under policy that provided coverage for the rendering of professional medical treatment to nursing home residents). Insurers may also succeed in raising policy exclusions for the sexual misconduct of a physician. *See Illinois State Medical Ins. Services, Inc. v. Cichon*, 258 Ill.App.3d 803, 629 N.E.2d 822, 196 Ill.Dec. 277 (3rd Dist. 1994).

G. Insurer's Duty to Defend

A duty to defend arises from, and is limited by, the language in the contract of insurance. *Chicago Hosp. Risk Pooling Program v. Illinois State Medical Inter-Insurance Exchange*, 397 Ill App. 3d 512, 952 N.E.2d 1216, 339 Ill. Dec. 95 (!st Dist. 2010). The duty to defend, however, is broader than the duty to indemnify. *Hartford Fire Ins. Co. v. Whitehall Convalescent and Nursing Home,* 321 Ill.App.3d 879, 748 N.E.2d 674, 254 Ill.Dec. 956 (1st Dist. 2001).

In a case brought by a patient who was sexually assaulted by the insured's employee during an ultrasound, the court found the insurer had no duty to defend under a professional malpractice policy against claims of negligent hiring, investigation, and supervision. *American Family Mut. Ins. Co. v. Enright*, 334 Ill.App.3d 1026, 781 N.E.2d 394, 269 Ill.Dec. 597 (2nd Dist. 2002). The court found the patient's claims did not involve "professional services," but were based on administrative acts that had nothing to do with

the insured's professional training, skill, experience, or knowledge as a sonographer. *Id.*

H. Insurer in Liquidation

If a defendant's insurance carrier becomes insolvent and is in liquidation, the plaintiff's cause is not a total loss. The plaintiff may recover from other entities.

1. Illinois Insurance Guaranty Fund

The Illinois Insurance Guaranty Fund provides a source of partial recovery to claimants who suffer the misfortune of having a covered defendant's insurance company become insolvent during the litigation. Once an insurance carrier is placed in liquidation, the Fund assumes responsibility for the obligations of the insurance company to Illinois claimants and named insureds, subject to the limitations and conditions of the statute. 215 ILCS 5/537.4. The Fund provides substitute coverage when expected coverage ceases to exist subject to the limits of the statute. *Claudy v. Commonwealth Edison Co.,* 255 Ill.App.3d 714, 626 N.E.2d 1088, 193 Ill.Dec. 537 (1st Dist. 1993), *rev'd on other grounds,* 169 Ill.2d 39 (1995).

2. Plaintiff's Option for Proceeding Following Liquidation

a. Guaranty Fund. The plaintiff must first exhaust his rights under any other available coverage before he or she is entitled to any payments from the Fund. 215 ILCS 5/546(a). Any amount payable by the Fund will be reduced by the amount recoverable under the other insurance coverage. Failure to timely pursue the claim or to exhaust other available coverage may reduce the amount that otherwise would be payable by the Fund.

b. Individual Defendants. The plaintiff may also pursue the defendants individually, going after their personal assets.

c. Other Entities. The plaintiff may also proceed against the insolvent impaired carrier. However, if the plaintiff chooses to file a claim with the liquidator, this filing will operate as a release of the insured's liability to the plaintiff up to the amount of the applicable policy limits.

3. Stay of Proceedings

The Insurance Code allows all proceedings arising out of a claim with coverage under an insurance policy written by an insolvent company to be stayed for 120 days from the date of entry of the order of liquidation. 215 ILCS 5/551.

II. Bad Faith

Bad faith claims can arise when a carrier wrongly turns down an offer of settlement for the policy limits. Consider the following scenario: a patient suffers an injury due to the malpractice of his physician. The patient sues seeking damages in excess of $3,000,000, including $1,000,000 for past and future medical and pain and suffering and loss of enjoyment of life. The physician's insurance policy limit is $1,000,000 per occurrence, and $3,000,000 in the aggregate for the policy period. The facts suggest plaintiff has a strong chance of recovery, yet the insurer rejects the plaintiff's offer to settle for the policy limits. Plaintiff is awarded a judgment of $5,000,000. The insured physician is now exposed to personal liability for the $4,000,000 above the policy limit. In this scenario, the insured may have a claim against its insurer for bad faith refusal to settle. If after receiving the bad faith letter, the insurer refuses to settle the claim, it is susceptible to a bad faith claim. The bad faith lies in the insurer's failure to give at least equal consideration to the insured's interests when making the decision on whether to settle. *O'Neill v. Gallant Insurance Co.,* 329 Ill.App.3d 1166, 769 N.E.2d 100, 106, 263 Ill.Dec. 898 (5th Dist. 2002).

A. When to File Bad Faith Claim

After a jury renders a verdict in excess of the insured medical provider's policy limits, the insured may do one of two things: (1) File a bad faith claim on his own behalf against his insurer (*see Scroggins v. Allstate Insurance Co.,* 74 Ill.App.3d 1027, 393 N.E.2d 718, 30 Ill.Dec. 682 (1st Dist. 1979).

B. Assignment of Claim to Plaintiff

Medical providers who do not want to risk exposure of their personal assets may enter into an agreement assigning their bad faith claim to the plaintiff in the medical malpractice claim. *See Dienstag v. Margolies*, 396 Ill.App.3d 25, 919 N.E.2d 17, 335 Ill.Dec. 496 (1st Dist. 2009). This is obviously more beneficial to the insured medical provider as it shifts the risk of recovering the excess amount of the award entirely to the plaintiff while completely lifting the burden from the medical provider to come up with the money from personal assets. In situations where the insured is insolvent or has limited assets, this may be the only avenue of recovering the entire award.

C. Elements of a Bad Faith Claim

1. **Duty.** Insurance providers have a duty to act in good faith in responding to settlement offers from third-party plaintiffs. *Cramer v. Insurance Exchange Agency,* 174 Ill.2d 513, 675 N.E.2d 897, 221 Ill.Dec. 473 (1996). The basis for bad faith claims is the insurer's failure to put its insured's interests ahead of its own. Id.
2. **Breach.** The insurer breaches its duty through fraud, negligence, or bad faith as assessed according to a reasonable man standard. Illinois

courts have indentified the following factors relevant to the insurer's breach of duty:

(a) insurer's refusal to negotiate, *Cernocky v. Indemnity Insurance Company of North America,* 69 Ill.App.2d 196, 216 N.E.2d 198 (2nd Dist. 1966));

(b) advice of defense counsel, *Olympia Fields Country Club v. Bankers Indemnity Insurance Co.,* 325 Ill.App. 649, 60 N.E.2d 896 (1st Dist. 1945);

(c) advice from the insurance company's adjusters, *Phelan v. State Farm Mutual Automobile Insurance Co.,* 114 Ill.App.3d 96, 448 N.E.2d 579, 69 Ill.Dec. 861 (1st Dist. 1983));

(d) communication with the insurer making the insurer fully aware of the plaintiff's willingness to settle for the policy limits, *Bailey v. Prudence Mutual Casualty Co.,* 429 F.2d 1388, 1390 (7th Cir. 1970). A primary element of a bad faith claim is a demand by the plaintiff to settle within the policy limits of the defendant's insurance. *Haddick v. Valor Insurance,* 198 Ill.2d 409, 763 N.E. 299, 261 Ill.Dec. 329 (2001). Once the plaintiff's attorney has made an assessment of the case and has discovered all available insurance information, the plaintiff should send a written correspondence to the insurer (a.k.a. "bad faith letter") expressly offering to settle the case within the policy limits. The bad faith letter should include the facts supporting the likelihood of recovery and the damages that will likely exceed the policy limits. This letter may be sent at any time before the verdict is rendered, but the earlier, the better. A bad faith claim may rise or fall on this communication.

(e) an inadequate investigation and defense, *Ballard v. Citizens Casualty Company of New York,* 196 F.2d 96, 102 (7th Cir. 1952);

(f) the significant possibility of an adverse verdict, *Central Illinois Public Service Co. v. Agricultural Ins. Co.,* 378 Ill.App.3d 728, 880 N.E.2d 1172, 317 Ill.Dec. 180 (5th Dist. 2008); and

(g) the potential for damages to exceed the policy limits, *Id.*

3. **Proximate Cause.** The breach was a legal cause of the harm to the insured, such as the imposition of personal liability to satisfy the excess verdict.

4. **Damages.** The entry of the excess judgment against the insured constitutes damage sufficient to permit recovery by the insured. *Adduci v. Vigilant Insurance Co.,* 98 Ill.App.3d 472, 424 N.E.2d 645, 648, 53 Ill.Dec. 854 (1st Dist. 1981).

D. Potential Defenses to a Bad Faith Claim

The insurer has the following defenses to a bad faith claim:

1. **Bona Fide Coverage Dispute.** To argue that it had a good faith belief that there was no coverage in the case, the insurer must have defended the suit under a reservation of rights or sought a declaratory judgment of no coverage. Otherwise the insurer is found to have wrongfully denied coverage, and it is estopped from raising this defense in a bad faith claim. *Employers Insurance of Wausau v. Ehlco Liquidating Trust,* 186 Ill.2d 127, 708 NE.2d 1022, 237 Ill.Dec. 82 (1999); *Uhlich Children's Advantage Network v. National Union Fire Co. of Pittsburgh, PA*, 398 Ill.App.3d 710, 929 N.E.2d 531, 340 Ill.Dec. 880 (1st Dist. 2010). In addition, a "no-action provision" in ISMIE policies will not defeat a bad faith claim because it is unfair to enforce such a position if ISMIE breached its good-faith duty to settle and exposed its insured to personal liability despite the case having not been tried. *SwedishAmerican Hosp. Ass'n of Rockford v. Illinois State Medical Inter-Ins. Exchange,* 395 Ill.App.3d 80, 916 N.E.2d 80, 334 Ill.Dec. 47 (2nd Dist. 2009).

2. **No Opportunity to Settle Within Policy Limits.** A insurer may raise this defense if the plaintiff has made no demand. Insurers are generally not required to initiate settlement negotiations, but such an obligation may arise in special circumstances, particularly when the probability of an adverse finding on liability is great and the amount of probable damages would greatly exceed the coverage limits. *Haddick v. Valor Insurance,* 198 Ill.2d 409, 763 N.E.2d 299, 261 Ill.Dec. 329 (2001).

3. **Comparative Bad Faith.** While used in other jurisdictions, this defense has not been adopted by Illinois courts.

E. Punitive Damages

One court has held that punitive damages are available in bad faith claims. *O'Neill v. Gallant Insurance Co.,* 329 Ill.App.3d 1166, 769 N.E.2d 100, 263 Ill.Dec. 898 (5th Dist. 2002).

F. Statute of Limitations

The statute of limitations for a bad faith claim is five (5) years from the date of the entry of the judgment against the insured, under 735 ILCS 5/13-205. *Chandler v. American Fire and Cas. Co.*, 377 Ill.App.3d 253, 879 N.E.2d 396, 316 Ill.Dec. 329 (4th Dist. 2007) (providing limitations period for all civil actions without a specific statutory limitations period).

III. Government Defendants

An action against a government defendant presents certain procedural and substantive obstacles to a plaintiff pursuing a medical malpractice claim. Both the Federal Tort Claims Act and the Illinois Local Governmental and Governmental Employees Tort Immunity Act are virtual minefields of immunities and bureaucratic frustrations for the victims of professional medical negligence at the hands of government entities.

A. Federal Tort Claims Act

The Federal Tort Claims Act (FTCA) makes the federal government liable for the torts of its employees to the same extent that they would be liable under the law of the place where the tort was committed. 28 U.S.C. §1346, *et seq.* Federal courts have jurisdiction over FTCA cases. The FTCA provides that the case be decided by a judge, not a jury. 28 U.S.C. §2402.

1. **Parties.** Defendants in FTCA claims for malpractice are generally healthcare providers employed at federally-funded facilities such as Veteran's hospitals, public health services, or prisons, and the entities themselves.

2. **Statute of Limitations.** A tort claim against the United States must be presented in writing to the appropriate Federal agency within two years after the claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented. 28 U.S.C. §2401(b). The claim accrues once a plaintiff has been armed with the facts indicating that her legal rights have been invaded. *United States v. Kubrick*, 444 U.S. 111 (1979); *Massey v. United States*, 312 F.3d 272 (7th Cir. 2002). The strict discovery rule, which the plaintiff is aware an injury was negligently inflicted, does not apply to the FTCA limitations period.

3. **Immunities.** While the FTCA waives the government's sovereign immunity and provides that the federal government is liable to the extent it would be liable under state law, there are some exceptions. For instance, in *Selbe v. United States*, 130 F.3d 1265 (7th Cir. 1997), the plaintiff was barred from bringing suit for medical malpractice arising out of military injuries.

4. **Caps on Damages.** Although many courts have allowed damage caps under state law to be applied to FTCA claims, *see Carter v. United States*, 333 F.3d 791 (7th Cir. 2003), since the

Illinois Supreme Court recently struck down such damage caps, they would not apply to an FTCA case brought under Illinois law. *Lebron v. Gottlieb Memorial Hosp.*, 237 Ill.2d 217, 930 N.E.2d 895, 341 Ill.Dec. 381 (2010).

5. **Punitive Damages and Pre-Judgment Interest.** The United States is not liable for punitive damages or pre-judgment interest. 28 U.S.C. §2674.

6. **Special Considerations.** A plaintiff should be cognizant of the procedural requirements of filing a malpractice action against the U.S. government in Federal Court. See 28 U.S.C. §§ 2671-2680. A claim must first be presented to and disposed of by the proper federal agency.

B. State Tort Immunity Act

The Local Governmental and Governmental Employees Tort Immunity Act (the Illinois Tort Immunity Act), 745 ILCS 10/1-101, addresses the liabilities and immunities of public entities at the state and local level. It was enacted to "protect local public entities and public employees from liability arising from the operation of government." 745 ILCS 10/1-101.1(a). A "local public entity" is an entity formed pursuant to the Illinois Constitution or the Intergovernmental Cooperation Act, as well as any not-for-profit corporation organized to conduct public business. *Carroll v. Paddock*, 199 Ill.2d 16, 764 N.E.2d 1118 (2002). Public business is the business of government and a local public entity must either be owned by or operated and controlled by a local governmental unit. *Id.* Immunity under the Act only attaches to liability arising from the operation of government. 745 ILCS 10/1-101.1 (West 2000). A "public employee" is an employee of a local public entity as described above. *Id.*

A plaintiff should consider challenging a defendant's claim to local-public-entity status under the Act where appropriate. To that end, plaintiffs should deny this allegation in answering any affirmative defenses asserting immunity under the Act. Additionally, plaintiffs should conduct discovery to establish whether the defendant receives state funding, whether it is operated or controlled by a local governmental entity, or whether it conducts public business.

1. **Parties**. Parties who enjoy the benefits of the Act include healthcare professionals employed at state healthcare facilities, such as hospitals or prisons, as well as city and county public health facilities and hospitals, and the entities themselves.

2. **Statute of Limitations.** The Tort Immunity Act generally prescribes a one-year statute of limitations for personal injury claims, but actions for

injury or death against any local public entity or employee involving patient care may be brought more up to 2 years "after the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of the injury or death for which damages are sought in the action. 745 ILCS 10/8-101(b). The two year statute of limitations does not begin to run for a minor until the minor reaches the age of eighteen. See, e.g., Ferguson v. McKenzie, 202 Ill. 2d 304, 780 N.E.2d 660 (2001). The claims are subject to the four-year medical malpractice statute of repose. 745 ILCS 10/8-101(b).

3. **Immunities.** The Tort Immunity Act provides certain specific (and arguably anomalous) immunities to state or local governmental entities that provide medical care and services to patients.

   a. Failure to examine or Diagnose. Section 6-106(a) of the Illinois Tort Immunity Act provides that no public entity or employee is liable for "injury resulting from diagnosing or failing to diagnose that a person is afflicted with mental or physical illness or addiction or from failing to prescribe for mental or physical illness or addiction." 745 ILCS § 10/6-106 (2005). Thus, where a plaintiff essentially alleges that a public entity fails to diagnose an illness, it is immune under section 6-106(a) of the Tort Immunity Act.

   b. Negligent treatment. Section 6-106(d), however, provides that "[n]othing in this section exonerates a public employee from liability for injury proximately caused by his negligent or wrongful act or omission in administering any treatment prescribed for mental or physical illness or addiction or exonerates a local public entity whose employee, while acting in the scope of his employment, so causes such an injury." *Id.* The Tort Immunity Act does not immunize defendants from liability for the negligent prescription or administration of ***treatment,*** of a patient, as opposed to misdiagnosis of a patient. *Mills v. County of Cook*, 272 Ill.Dec. 865, 338 Ill.App.3d 219, 788 N.E.2d 169 (1st dist. 2003). Similarly, acts of omission in administering treatment are not afforded immunity under the Tort Immunity Act. *American Nat. Bank & Trust Co. of Chicago v. Cook County*, 261 Ill.Dec. 85, 327 Ill.App.3d 212, 762 N.E.2d 654 (1st dist. 2001). Once the diagnosis of a medical condition is made and treatment of the condition is prescribed and undertaken, any subsequent prescription or examination required to be made pursuant to that condition is part of the patient's treatment. *Id.*

IV. Governmental Regulation of Healthcare Professionals/Entities

Depending on the facts of the case, a medical malpractice settlement or judgment may impact the professional future of a healthcare professional. Once a judgment or settlement has been paid, immediate reporting requirements come into play that may impact the medical practice and/or professional reputation of a physician. Illinois requires reporting of payments to the National Practitioner Data Bank (NPDB) and the Illinois Department of Financial and Professional Regulation (IDFPR). A physician will also be required to voluntarily disclose the outcome of all malpractice claims to hospitals, professional societies, managed care providers, and insurers. These reporting requirements may provide valuable information to plaintiffs in investigating the professional records and reputations of defendants as well as those of medical expert witnesses. Since this information is integral to the physician credentialing process, it may also be useful in making ancillary claims against hospitals and medical institutions based on their hiring and retention of certain physicians.

A. National Practitioner Data Bank

Congress created the National Practitioner Data Bank (NPDB), 42 U.S.C. §11101, *et seq.*, a national database operated by the Secretary of the U.S. Department of Health and Human Services. The payment of a settlement in a malpractice claim or satisfaction of a judgment in a cause of action based on malpractice must be reported to the NPDB. 42 U.S.C. §11131(a). The primary purpose of the NPDB is to create and maintain a national database of state medical licensing disciplines and malpractice settlements and judgments to prevent physicians from concealing this information. By compiling a database with physician-specific information, this system makes each malpractice award, settlement, or disciplinary action by a hospital or state licensing agency readily available to state medical licensing agencies and hospitals regardless of where in the country the physician might attempt to relocate his practice. This information is not readily available to the public.

B. Illinois Dept. of Financial and Professional Regulation (IDFPR)

The IDFPR is the state agency that issues medical licenses to professionals and has the authority to discipline physicians and affect their medical licensure in Illinois. Insurers must report a settlement or judgment in a medical malpractice case to IDFPR. 225 ILCS 60/23(A)(1)(3). A physician is also required to file a mandatory report when he settles a medical liability case that is not covered by an insurance company. 225 ILCS 60/22(A)(36). Under the Illinois Medical Practice Act, the Medical Disciplinary Board is responsible for evaluating qualifying reports and submitting the results of its findings to the IDFPR. *See* 225 ILCS 60/1 *et seq.*

C. Reporting Requirements Upon Other Entities

The following institutions must report to the Illinois Medical Disciplinary Board (MDB) when certain events have occurred:

1. **Healthcare institutions.** A healthcare institution must report the termination or restriction of any provider's clinical privileges based on a final determination that the practitioner has either committed an act(s) that may directly threaten patient care or that such a provider may be mentally or physically disabled in such a manner as to endanger patients under that provider's care. If the provider accepts voluntary termination or restriction of clinical privileges when formal proceedings have been initiated, this must also be reported. 225 ILCS 60/23(A)(1).

2. **Professional associations.** The president or CEO of a professional association or society must report to the MDB when it renders a final determination that a person has committed unprofessional conduct related directly to patient care or that a person may be mentally or physically disabled in such a manner as to endanger patients under that provider's care. 225 ILCS 60/23(A)(2).

3. **Professional liability insurers.** Every insurance company that offers policies of professional liability insurance to a practitioner licensed under the MPA must report to the MDB the settlement of any claim or cause of action, or final judgment rendered in any cause of action, that alleged negligence in the furnishing of medical care by the licensed person when the settlement or final judgment is in favor of the plaintiff. 225 ILCS 60/23(A)(3).

4. **State's attorneys.** The state's attorney must report to the MDB all instances in which a practitioner is convicted or otherwise found guilty of the commission of any felony. 225 ILCS 60/23(A)(4).

5. **State agencies.** All agencies, boards, commissions, departments, or other branches of the State government must report to the MDB any instance in which a practitioner has either committed an act or acts that may be a violation of the MPA or that may constitute unprofessional conduct related directly to patient care or that indicates that a practitioner licensed under the MPA may be mentally or physically disabled in such a manner as to endanger patients under that practitioner's care. 225 ILCS 60/23(A)(5).

D. Plaintiff's Access to Reported Information

The public has access to some of the information garnered in the reporting and disciplinary process. Information reported to the National Practitioner Data Bank is not freely available to the public, but after a determination is made by the Illinois MDB, the information is placed in the IDFPR newsletter and can be accessed online at www.idfpr.com/dpr/news/page1.asp. The Illinois Department of Professional Regulation website also lists disciplinary actions in its licensing database and provides a summary report to anyone who inquires about that practitioner with the payment of a fee. 225 ILCS 60/23(F). Additionally, this information may be available through various media outlets that collect and store such information like jury verdict and settlement reporters or through Westlaw or LEXIS/NEXIS services.

E. Plaintiff's Use of Reported Information

The professional record of a healthcare professional may prove useful in prosecuting a medical malpractice case. For instance, a party is able to elicit the fact that a physician expert cannot practice medicine without supervision, as it is "highly relevant" to the expert's credibility on the issue of whether other physicians exercised the appropriate standard of medical care. *Creighton v. Thompson*, 266 Ill.App.3d 61, 639 N.E.2d 234, 203 Ill.Dec. 195 (1st Dist. 1994).

See also *Cetera v. DiFilippo*, ___ Ill.App.3d ___, 934 N.E.2d 506, 2010 WL 3063989 (1st Dist. 2010), holding that evidence of a physician expert's letter of reprimand from the IDPR for a failure to diagnose was admissible as relevant to his qualifications and credibility as an expert and physician. *Id.*

Conversely, disciplinary information may also prove detrimental to a plaintiff. Thus licensing information should be gathered for all practitioners involved in the litigation including parties, treating healthcare practitioners, and medical experts on both side of the case.

The Medical Practice Act provides that its reporting requirements will not act to in any way, waive or modify the confidentiality of medical reports and committee reports to the extent provided by law. 225 ILCS 60/23 (B). Any information reported or disclosed must be kept for the confidential use of the MDB, the coordinators and MDB attorneys, the medical investigative staff, and authorized clerical staff. *Id.* The Medical Practice Act and the Medical Studies Act, discussed below, are afforded the same privileged status as the Medical Studies Act. 735 ILCS 5/8-2101, *et seq*.

F. Medical Studies Act

The Medical Studies Act protects the peer review process by preventing disclosure of all information, reports, or statements used in the course of internal quality control or of medical study for the purpose of reducing morbidity or mortality, or for improving patient care or increasing organ and tissue donation. 735 ILCS 5/8-2101, *et seq*. Granting this privilege promotes effective professional self-evaluation by medical professionals to improve the quality of health care. *Jenkins v. Wu,* 102 Ill.2d 468, 468 N.E.2d 1162, 82 Ill.Dec. 382 (1984).

1. Use of Peer Review Proceedings Results. Not all information is protected. Any actual changes, such as modifications to hospital policy or procedure, that were adopted as a direct result of the recommendations and internal conclusions in an action plan formulated by the hospital peer review committee must be disclosed, as they constitute the ultimate decisions made or actions taken as a result of the peer-review process. *Anderson v. Rush-Copley Medical*

Center, Inc., 385 Ill. App. 3d 167, 181, 894 N.E.2d 827 (2nd Dist. 2008). Even less formal decisions or actions such as the issuance of staff reminders, the revision of a job description, and the reformatting of a report form, must be disclosed because the actions were taken as a direct result of the recommendations contained in the committee's action plan. *Id.*