

Advertising Re-emerges as a Significant Risk Exposure for Healthcare Organizations

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In the 1990s, the legal doctrine of apparent agency, which had been previously applied in the hospital setting, was used to impose liability on managed care organizations for the acts of independently contracted as well as employed physicians. Recent case law has expanded that doctrine in the context of advertising materials so that various types of health care organizations — hospitals, nursing homes, and others — may become accountable for the acts of their health care professionals based upon information contained in advertising materials.

Risk exposures based upon a hospital's marketing and advertising have become more explicit following a recent decision by the First District Appellate Court of Illinois in *McCorry v. Evangelical Hospitals Corp.*, 331 Ill.App 3d 668, 771 N.E.2d 1067 (1st Dist. 2002). The Court applied the doctrine of apparent agency to hold the hospital liable for the medical negligence of its staff physicians. The finding was based upon the hospital's advertising materials regarding its services and medical staff.

Background – *McCorry v. Evangelical Hospitals Corp.*

In June 1994, Richard McCorry was admitted to Christ Hospital by his personal physician, Dr. Kazaniwskyj. CNS Neurological Surgery provided neurosurgery services at the hospital. A CNS neurosurgeon and member of the Christ Hospital medical staff, Dr. Hurley, performed surgery on the plaintiff.

After Dr. Hurley performed surgery on Mr. McCorry, Mr. McCorry was found to be paralyzed. Mr. McCorry subsequently sued Christ

Hospital, alleging vicarious liability for the negligent act of its apparent agent, Dr. Hurley. As evidence of the apparent agency, the plaintiff submitted the hospital's advertising literature that refers to its "highly qualified physicians" and to "our physicians" to assert that an independent contractor staff physician acted as an agent of the hospital. Mr. McCorry did not allege that Dr. Hurley was an employee of the hospital.

Legal issues reviewed in the Appellate Court decision

The appellate court examines whether or not the physician acted as an apparent agent of the hospital. In the landmark decision, *Gilbert v. Sycamore Municipal Hospital*, 156 Ill.2d 511, 622 N.E.2d 788 (Ill. 1993), the Illinois Supreme Court concluded that a hospital can be held liable for a physician's negligent acts unless the patient knows, or should have known, that the physician is an independent contractor. A plaintiff must prove the following elements of a claim in order to prevail on the theory of apparent agency:

1. The hospital, or its agent, acted in a manner that leads a reasonable person to conclude that the allegedly negligent individual was an employee or agent of the hospital. Thus, it appears through the hospital's conduct that the hospital is responsible for the quality of services provided by the independent contractor staff physicians who are on its medical staff.
2. The physician appeared to act on behalf of the hospital, and the hospital allowed the physician to appear to have the authority to act on its behalf.



3. The plaintiff reasonably relied on the conduct of the hospital and/or its independent contractor physician agent (who provided services at the hospital).

Plaintiff McCorry presented evidence corresponding to the elements of apparent agency:

1. The hospital advertisement stated that its staff includes “highly qualified physicians,” making it a desirable place to receive medical care. Moreover, CNS maintained an office on hospital grounds, in a building connected to the hospital.

2. The hospital did not present evidence to show that it informed Mr. McCorry that its staff physicians may be independent contractors, rather than employed physicians/agents of the institution. For example, there was no language in the informed consent document to that effect. In the absence of this information, Mr. McCorry had reason to believe that Christ Hospital was the principal, and Dr. Hurley was held out as its agent.

3. It appeared from the language “our physicians” in the advertisements, that the hospital had responsibility for the quality of services provided by the physicians.

Doctrine of apparent agency

The doctrine of apparent agency refers to the concept that an entity, such as Christ Hospital, may be held liable for the negligent acts of a non-employed physician if the hospital creates an appearance that the independently contracted physician is an employee, and the patient reasonably believes and detrimentally relies on the appearance of that authority. Under the facts of McCorry, Christ Hospital was found to have granted the apparent authority to the extent that the plaintiff relied in part on the hospital when he accepted treatment from Dr. Hurley. In addition, the hospital literature could have led a reasonable person to conclude that it accepted responsibility for its choice of physicians to provide the advertised health care.

Strategies for reducing risk exposures relating to the doctrine of apparent agency

The risk exposures highlighted in this case focus on advertising and marketing strategies and the informed consent document. It is important to review and revise advertising and marketing materials, informed consent forms and all other documents to eliminate exposures relating to the doctrine of apparent agency. Steps to take include, but are not limited to:

- Review and revise all marketing materials, informed consent forms and other documents to ensure they do not contain any language that may imply that contracted members of the medical staff or other contracted providers are agents of the organization.
- Review and revise marketing materials and other documents to eliminate the use of possessive language or statements regarding the medical staff or other contracted providers who are not actual employees of the organization. Statements such as “our physicians” or “Eastern View Nursing Home’s medical staff” support the belief that the facility or agency and medical staff are one organization.
- Review and revise marketing materials and other documents that contain descriptions of services provided to ensure the descriptions are accurate and do not contain statements that may be misleading.
- Revise consent to treatment forms, refusal of treatment forms and other documents to include a disclaimer informing patients that contracted members of the medical staff and other contracted providers are independent contractors and not agents or employees of the organization.
- Obtain legal counsel review of all marketing materials and other documents prior to publication.