

## ARE A PATIENT'S DIRECTIVES AGAINST RESUSCITATIVE MEASURES COVERED UNDER THE LOUISIANA MEDICAL MALPRACTICE ACT?

In *Terry v. Red River Center Corporation*, (37,991 (La. App. 2nd Cir., 12/10/03), 2003 WL 22901004) a lawsuit was filed by the surviving children of an elderly patient, Doris Lee, who died while she was in a nursing home. The surviving children filed the lawsuit with the district court without first filing and utilizing the medical review panel screening process. The children claimed that the nursing home employees failed to follow the patient's directives against the use of life-sustaining procedures. Lee had provided written instructions and directives that were contained in her chart at the nursing home forbidding use of a respirator, dialysis, a feeding tube and CPR.

On the evening of April 28, 2002, nursing home employees found Lee "unresponsive" and "unable to stimulate her" in her room. Contrary to Lee's directives, these employees instituted efforts to revive Lee, including calling EMT's who began CPR, intubation, manual ventilation, chest compression, an EKG, and the insertion of a tube down Lee's left nostril. These procedures allegedly caused Lee to swell beyond recognition until her daughter arrived. Afterward, life support was discontinued, and Lee died. Lee's children brought suit under the Nursing Home Residents Bill of Rights ("NHRBR"), La. R.S. 40:2010.8, alleging that the nursing home's failure to follow Lee's directives caused her and her children to suffer damages.

To avoid having to comply with the medical review panel procedure, the children argued that resuscitation procedures had been utilized by the nursing home which caused the patient to swell beyond recognition and allegedly resulted in her death. The

Court, citing the NHRBR in its reasoning, concluded that the claim was not "treatment related" because the problems came as a result of the nursing home's failure to abide by the patient's wishes; the claim was not a result of malpractice. For these reasons, the claim was not subject to the provisions of the Louisiana Medical Malpractice Act. As a result, the claimants in this case are not required to participate in a medical review panel screening process. Further, there is no \$100,000 limitation or "cap" for each individual health care provider, nor is there a \$500,000 cap for the total claim, which protections would normally apply under the Louisiana Medical Malpractice Act. Again, the Court's reasoning is based on the rationale that the claim here is not treatment related.

In short, although this is not a final judgment and can be reviewed by the Louisiana Supreme Court on appeal, it nonetheless shows that if health care providers do not follow patients' directives in not performing CPR or other resuscitative measures, then health care providers in a nursing home environment may not necessarily be covered by the protections afforded by the Louisiana Medical Malpractice Act.

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# ERNST & YOUNG RESPONDS TO FALSE CLAIMS ACT COMPLAINT IN PA

In our February issue we covered the United States Attorney's False Claims Act suit against Ernst & Young, L.L.P. The complaint, which was filed in early January, alleged that Ernst & Young, by providing consulting and advice, caused the submission of false claims by nine hospitals to the Medicare program.

On March 1, 2004, Ernst & Young responded to the complaint, moving to dismiss all of the government's claims. The defendant's principal argument is that no false claims were ever submitted to Medicare. Alternatively, Ernst & Young argues that the government's unjust enrichment and improper payments claims should be dismissed because the hospitals, not Ernst & Young, received the government's payments. Moreover, Ernst & Young contends that claims must be addressed through the Medicare administrative process.

Ernst & Young also contends that in some instances, its advice came after the claims were submitted and,

therefore, could not have caused improper submissions. Finally, Ernst & Young asserts that several of the government's claims are barred by the statute of limitations.

For those interested in continuing to follow the progression of the case, it is docketed in the Eastern District of Pennsylvania as No. 04-CV-00041. As of the printing date of this article, no hearing date had been set for Ernst & Young's motion.



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## DID YOU KNOW?

- That the Stark II, Phase II regulations have been released? These regulations can affect many business ventures and relationships between health care providers. Watch for an upcoming Kean, Miller seminar on the new Stark regulations.
- That the Medicare assignment rules were modified by the Medicare Prescription Drug, Improvement and Modernization Act of 2003 (the "Act")? The changes relate to independent contractor relationships.

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