

Doctor Deception Can Be Punitive

by Greg Werre & William Hendricks

The Consumers Legal Remedies Act ("Consumers Act") embodied in California Civil Code section 1750 et seq. was designed to protect consumers from deceptive business practices intended to result in the sale of goods or services.

Over the last few years, plaintiff attorneys have alleged violations of the Consumers Act together with medical malpractice in select personal injury lawsuits, a practice that could become more prevalent in the coming years. This article will address the applicability of the Consumers Act to healthcare providers and the added risk the statute poses to doctors facing such a claim.

From a risk management standpoint, doctors must be careful to avoid any deception associated with advertising, written literature available to patients, and informed consent discussions.

To date, a court has yet to rule that the Consumers Act does not apply to healthcare providers. California Civil Code section 1760 states that the statute "shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection." The statute does not specifically reference deceptive acts by healthcare providers. See § 1770. However, the law prohibits "(u)sing deceptive representations...

in connection with goods or services." § 1770(a)(4). "Services" means work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods." § 1761(b). "Consumer" means an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes." § 1761(d). Thus, the language of the statute appears broad enough to encompass the services performed by healthcare providers.

The opportunity to allege punitive damages under section 1780(a) provides incentive for plaintiff attorneys to include a Consumers Act claim with a claim for malpractice.

There are reported cases in which plaintiffs have sued doctors, hospitals, and/or healthcare plans under section 1750 et seq. See Cruz v. Pacificare Health Systems, Inc. (2003) 30 Cal. 4th 303, 66 P.3d 1157, 133 Cal. Rptr. 2d 58; Broughton v. CIGNA Healthplans (1999) 21 Cal. 4th 1066, 988 P.2d 67, 90 Cal. Rptr. 2d 334; Smith v. Pacificare Behavioral Health of California (2001) 93 Cal. App. 4th 139, 113 Cal. Rptr. 2d 140. The defendants in these cases did not attack the applicability of the Consumers Act to healthcare services. The main issue was the enforcement of arbitration provisions in contracts

signed by plaintiffs. There appears to be little, if any, dispute that healthcare providers are subject to liability under the Consumers Act.

The opportunity to allege punitive damages under section 1780(a) provides incentive for plaintiff attorneys to include a Consumers Act claim with a claim for malpractice. A punitive damages claim exposes the personal assets of a defendant because no insurance coverage exists for such a claim.

In addition to the punitive damages provision, the Consumers Act states that the court shall award costs and attorney's fees to a prevailing plaintiff. § 1780(d). On the other hand, reasonable attorney's fees may be awarded to a prevailing defendant upon a finding by the court that the plaintiff's prosecution of the action was not in good faith. Id. Absent a Consumers Act claim, costs and attorney's fees are typically not recoverable in a medical malpractice action.

Section 1770 includes a laundry list of deceptive practices that violate the Consumers Act. Arguably deceptive advertising by a physician violates the Consumers Act. In the past, it has been alleged that advertising about the overall safety of a surgical procedure deceived a plaintiff. In this era, LASIK surgeons as an example commonly advertise their services and thus are targets for

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Doctor Deception *continued*

Consumers Act claims. In another case, a doctor during an informed consent discussion allegedly exaggerated the extent of his experience performing laparoscopies. Plaintiff claimed that the doctor's statements were made in order to deceive plaintiff into having surgery. In another case, plaintiff claimed that a brochure regarding LASIK deceptively implied that the defendant doctor had participated in clinical trials when in truth the doctor had not. Though the brochure was commonly used by doctors with staff privileges at a particular University's laser center, the defendant doctor had placed a sticker containing

his name on the brochure at issue, a document that referenced the clinical trials conducted at the University.

The above examples demonstrate the vulnerability of doctors to a Consumers Act claim. Doctors should thus exercise particular caution to avoid any appearance of deception when advertising, sharing medical literature with patients, and engaging in informed consent discussions. Likewise, medical clinic staff should be educated about the importance of truthful statements when communicating with patients. ■

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