

HIDDEN LIABILITY EXPOSURE FOR NON-EMPLOYEES AND OUTSOURCED OPERATIONS

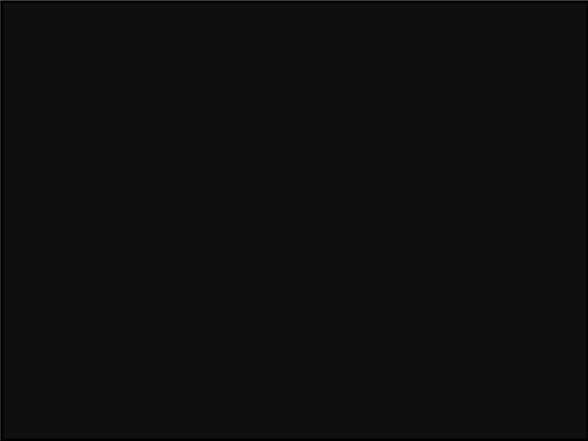
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Litigation Management in a NEW YORK Minute – 2008 Edition

Hidden Liability
Exposure for Non Employees and
Outsourced Operations

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You Are Not As Safe As You Think

Sources of Unintended Exposure

1. **Temporary employees**
2. **Agency employees**
3. **Independent Contractors**
4. **Contracted for services**

Imputing Liability

Actual Employment or Agency
vs.
Apparent/Ostensible Agency

Elements of Actual Agency

1. **The agent was subject to the principal's right of control.**
2. **The agent had a duty to primarily act for the benefit of the principal.**
3. **The agent held the power to alter the legal relations of the principal.**

Elements of Apparent/
Ostensible Agency

1. **The plaintiff reasonably believed that the ostensible agent was an employee of the principal.**
2. **There was a holding out or representation that created the appearance of agency.**
3. **The plaintiff relied upon the existence of an employer-employee relationship between the apparent agent and the principal.**

Courts Often Imply Reliance and
Ignore "Holding Out" Requirements

"It is not to be expected. . . that the various procedures and departments of a complex, modern hospital, like Holy Cross are in fact franchised out to various independent contributors."

"We thus hold that Holy Cross Hospital represented to the decedent that the staff of the Holy Cross Hospital emergency room were its employees, thereby causing the decedent to rely on the skill of the emergency room staff, and that the Hospital is consequently liable to the decedent as if the emergency room staff were its employees."

Mehlman v. Powell, 281 Md. 269, 274-75, 378 A.2d 1121, 1124 (1977)

Inadequate Insurance
Creates Exposure

1. **Inadequate Primary Coverage**
2. **Failure to Obtain Tail Coverage**
3. **Inadequate Aggregate Coverage**
4. **Wasting Policies**
5. **Receivership**
6. **Not Registered to do business**

Contract between Hospital and Emergency Group called for \$1 million per incident with \$3 million aggregate per physician

Group obtained policy with \$1 million per incident per physician, with a \$12 million aggregate, BUT....

- The \$12 million aggregate was spread across 80 locations and 800 physicians.
- Average aggregate per physician was only \$15,000 not \$3 million.
- Policy aggregate was exhausted for several policy years.
- Group purchased a wasting policy. Therefore \$1,000,000 coverage was being reduced by attorneys fees, TPA fees and expert expenses. Less than \$700,000 in coverage available by trial.

Plaintiff's Liability Theories Against Ostensible Employer

1. Negligence by Apparent Agent
2. Negligent training
3. Negligent supervision
4. Negligent retention or assignment
5. Third-Party beneficiary



Contractor's Theories Against
Ostensible Employer

- **Negligent Assignment**
- **Negligent Training**
- **Negligent Supervision**
- **Borrowed servant doctrine**

Borrowed Servant Doctrine

Involves 3 parties:

1. **An employee**
2. **A general employer**
3. **A special employer**

Is the Employee a "Borrowed
Servant" of the Special Employer?

Criteria to determine Master-Servant relationship:

- **The selection and engagement of the servant**
- **The payment of wages**
- **The power to discharge**
- **The power to control the servant's conduct**
- **Whether the work is a part of the regular business of the employer**

Case Study

- Patient requires admission following attempted suicide
- Defendant Hospital receives patient via emergency department
- Defendant Hospital has no psych unit and attempts to transfer patient to appropriate facility
- No bed available; therefore, patient admitted overnight for observation until bed becomes available
- Hospital requests sitter from Agency to monitor patient until transfer
- Sitter sexually assaults patient

The patient stated she told the sitter to just write his name and number down and put it in the drawer because she really didn't feel like talking.

The Patient stated that the sitter began saying that she was very pretty and that all she needed was someone to love her and stated that he could love her.

The sitter wrote his name and phone number down on a piece of paper and placed it in the drawer. The sitter then began to kiss her....

Police Investigator: Okay can you describe that sexual encounter for me, what lead up to it, in your own words?

Agency Sitter: My trying to calm her down and keep her calm and everything and I gave her my number and told her she could call me, you know, if she wanted to talk. And she had asked me if I would lay in the bed with her and then, I told her I couldn't do that. And she had asked, I had told her no I couldn't do that because I would get in trouble. And one thing led to another and she consented to having sex with me.

Plaintiff's Theories vs. Hospital & Temp Agency:

- Negligent retention
- Negligent supervision
- Negligent assignment
- Sitter was actual or apparent agent

Hospital Defenses:

- Sitter is not employee of hospital
- Sitter acted beyond scope of employment
- Agency failed to screen

Agency's Defenses:

- Hospital negligently assigned male sitter
- Sitter is the borrowed servant of hospital

What If:

- Agency failed to obtain "good" insurance
- Agency failed to obtain tail coverage
- Agency exhausted aggregate coverage
- Agency had small wasting policy



Allocate the Risk in the Contract

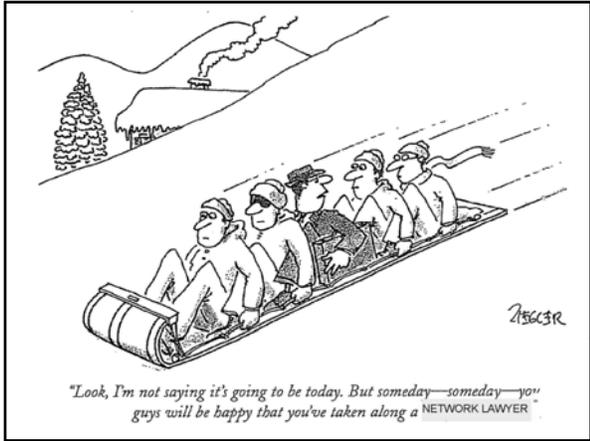
- Indemnity provisions
- Denial of employment status
- Denial of borrowed servant status
- Specific insurance requirements

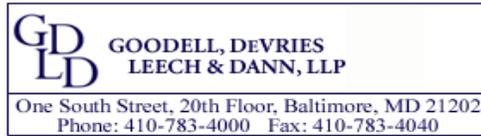
Contractual Protection

- No agent, representative or employee of Contractor shall, for any purposes, be deemed an agent or employee of Hospital.
- No agent, representative or employee of Contractor shall at any time be deemed a borrowed servant of Hospital.

Specific Insurance Requirements

- Contractor shall obtain and keep in force professional liability coverage with minimum coverage for Contractor and each Provider of \$1,000,000 for each incident and \$3,000,000 annually for the aggregate of all claims
- Insurance purchased by Contractor shall be obtained from a commercial carrier satisfactory to Hospital and registered to do business in the State.
- Contractor shall purchase all necessary coverage (including tail coverage) to insure that there is continuous coverage for all claims or potential claims arising from any services rendered under this contract, regardless of when such claims are first asserted.





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Craig B. Merkle, who is one of the founding partners at GDLD, has been actively involved in trial practice since entering private practice in 1982. His practice is concentrated in professional malpractice defense, pharmaceutical and medical device litigation, hospital litigation and professional disciplinary and licensing actions. In addition, he has handled a variety of general litigation matters arising in contract and tort.

Professional Liability Claims. Mr. Merkle has represented physicians and health care providers in virtually every medical specialty, as well as community hospitals and academic medical centers throughout the State of Maryland.

Pharmaceutical and Medical Device Litigation. Mr. Merkle is actively involved in the firm's medical drug and device practice. He has been lead trial counsel for multiparty trial groups in the diet drug litigation in the Court of Common Pleas in Philadelphia, Pennsylvania. In addition to serving as trial counsel, Mr. Merkle has been responsible for conducting discovery, case work-up, expert development and serving as the liaison for local counsel. He has also been involved in the evaluation, discovery and work-up of lawsuits arising from prosthetic knee implants and the investigational study of diabetes drugs.

Professional Disciplinary, Privileging and General Hospital Litigation. Mr. Merkle has represented academic and community health care systems in a number of matters which extend beyond the professional liability arena where he frequently practices. For example, he is often requested to provide counsel and guidance to hospital leadership on issues concerning privileging and employment disputes, impaired physicians, boundary violations, and breach of professional and fiduciary obligations. This representation involves complex problem solving challenges in an effort to balance the safety of patients, the common law and statutory obligations of the institution and the due process rights of the involved health care providers.

Other Civil Litigation. Mr. Merkle has represented individuals, partnerships and corporations in a wide array of litigation matters arising in tort and contract.

EDUCATION

Western Maryland College (B.A., Summa Cum Laude, 1978)

Duke University School of Law (J.D., with distinction, 1981); Order of the Coif; Duke Law Journal 1979-81

PROFESSIONAL AFFILIATIONS

Goodell, DeVries, Leech & Dann, LLP, 1988-Present. One of the founding partners of law firm devoted to representation of clients in litigation and litigation management.

Semmes, Bowen & Semmes, 1982-1988, Associate and Senior Associate in multi-specialty law firm in Baltimore, Maryland and Washington, D.C.

PROFESSIONAL ORGANIZATIONS

- Fellow, American College of Trial Lawyers
- International Association of Defense Trial Counsel (IADC)
- Fourth Circuit Judicial Conference
- Maryland Association of Defense Trial Counsel
- Maryland Society for Healthcare Risk Management
- Defense Research Institute
- Maryland State Bar Association
- Bar Association of Baltimore City
- Wednesday Law Club
- Chair, University of Maryland Law School Norman P. Ramsey Lecture Series