

Medicolegal News

© American Society of Law & Medicine, Inc (1978)

Volume 6, Number 1 Spring 1978

Editor-in-Chief:

George J. Annas, J.D., M.P.H.

Executive Editor:

Elliot L. Sagall, M.D.

Managing Editor:

A. Edward Doudera

Associate Editors:

Leonard H. Glantz, J.D.

Gregory T. Halbert, J.D.

James F. Holzer, J.D.

Frances H. Miller, J.D.

MEDICOLEGAL NEWS is an official publication of the American Society of Law & Medicine and is received free of charge by all regular and student members of the Society. MEDICOLEGAL NEWS is published four times a year, and non-profit postage is paid at Boston, Mass.

MEDICOLEGAL NEWS welcomes original articles, contributions or letters-to-the-editor from members of the American Society of Law & Medicine and its other readers. Manuscripts should be submitted double spaced, in typewritten form and with two copies. Articles not selected for publication will not be returned unless a self-addressed stamped envelope has been provided. All inquiries should be addressed to Managing Editor, MEDICOLEGAL NEWS, 454 Brookline Avenue, Boston, MA 02215.

The views and opinions expressed in articles published by MEDICOLEGAL NEWS are those of the author, and do not necessarily represent the views and opinions of the editors or of the American Society of Law & Medicine.

Non-member subscription rates: \$15.00 per volume (four issues); \$4.00 per single issue and back issues. Unless notice to the contrary is received at the editorial office, it is assumed that a renewal of the subscription to MEDICOLEGAL NEWS is desired.

CONTENTS

News from the Society	p.2
Guest Editorial: <i>Will A Downed Goliath Next Lose His Head?</i>	p.3
Article: <i>Changing Notes in Medical Records: A Proposal</i>	p.4
Hospital Forum	p.9
Article: <i>Judges at the Bedside: The Case of Joseph Saikewicz</i>	p.10
Medicolegal Update	p.14
Medicolegal Meeting Calendar	p.16
Conference Report: <i>Legal Controversies in Nursing</i>	p.18
Medicolegal Reference Shelf	p.20
Cumulative Index - Vol. 1-5	p.31



GUEST EDITORIAL

Will a Downed Goliath Next Lose His Head?

by Richard F. Gibbs, M.D., J.D.

Last year, eight Rhode Island physicians took on four of the nation's largest malpractice underwriters in federal district court charging that the insurers conspired to offer only "claims made" policies in violation of antitrust laws.¹ As expected, the federal district court followed the precedents established by two circuit courts of appeals and six other district courts stating that under the McCarran-Ferguson Act, "the business of insurance" is exempted from antitrust regulation to the extent that the industry is regulated by the various states. However, such exemption does not confer a blanket immunity since all insurers are still subject to the Sherman Anti-trust Act if they engage in "acts of boycott, coercion or intimidation" or if they agree to engage in such acts. The insurance companies argued that the intent of the antitrust laws applies only to a company's attempted boycott of agents and other companies and that they had dealt fairly, equitably and without fraudulent intent with Rhode Island physicians.² The United States Court of Appeals for the First Circuit, in reversing the lower court decision, sought to give a broader view of Congress's intent in enacting federal antitrust legislation. That view favored the right of a "consumer" of insurance to sue an insurance company for violating the antitrust laws.

The plaintiffs' suit alleged to represent two classes: all licensed physicians practicing in Rhode Island and all of the state's citizens who are or will be under a doctor's care. The plaintiffs charged in an amended complaint that the St. Paul Fire and Marine Insurance Company changed its future malpractice policies to provide coverage only on a "claims made" basis rather than an "occurrence" basis. When St. Paul's disgruntled customers tried to take their business elsewhere, the other companies refused to sell them any sort of coverage leaving in effect the St. Paul offer as the only game in town. The doctors charged that the result was an unlawful conspiracy in restraint of trade and prayed for both injunctive relief and treble damages.

The appellate court discussed in depth historical considerations in the development of the antitrust laws from 1869 to the present. The court felt that the "narrow" construction of these laws did limit a cause of action to disputes arising within the insurance industry's classes of membership. However, considerations of public policy favored a "broader" construction, wherein a primary aim of antitrust laws is to assure consumers the benefits of a free market economy. Free and open competition thus becomes an essential national purpose. Concerted refusal to deal is the essence of boycott and, thus, cuts against a basic policy of antitrust law.

The dissenting opinions of the appellate court took the position that the Sherman Act was applicable since the state had exercised its right to regulate insurance rates.

Continued on page 25

Dr. Gibbs is Vice President of the American Society of Law & Medicine, the President-Elect of the American College of Legal Medicine, as well as Senior Anesthesiologist at the Boston Hospital for Women and an Assistant Professor of Anesthesia at Harvard Medical School. Dr. Gibbs is also the chairman of the Committee on Professional Liability of the Massachusetts Medical Society.

Health Facility Management

● **MEDICAL GROUP PRACTICE MANAGEMENT.** By Francis Foote Manning. (Ballinger Publishing Co., 17 Dunster St., Cambridge, MA 02138) (1977) 371 pp.

Health Financing

Review of State Hospital Cost Control Legislation. The November 1977 issue of State Health Legislation Report (vol. 5, no. 4) contains a special update and review of hospital cost control legislation in Arizona, California, Colorado, Connecticut, Maryland, Massachusetts, Minnesota, Washington and Wisconsin. For a copy write: Legislative Dept., American Medical Association, 535 N. Dearborn St., Chicago IL 60610.

Bayles MD, *National Health Insurance and Non-Covered Services*, JOURNAL OF HEALTH POLITICS, POLICY AND LAW 2(3): 335-48 (Fall 1977).

Brown BM, *Malpractice Risk Financing: New Options Complicate A Once-Easy Decision*, TRUSTEE 30(12): 37-40 (December 1977).

Havighurst CC, Blumstein JF, Bovbjerg R, *Strategies in Underwriting the Costs of Catastrophic Disease*, LAW AND TEMPORARY PROBLEMS 40(4): 122-95 (December 1977).

Mechanic D, *Approaches to Controlling the Costs of Medical Care: Short-Range and Long-Range Alternatives*, NEW ENGLAND JOURNAL OF MEDICINE 298(5): 249-54 (February 1978).

Schonbrun M, *The Future of Blue Cross*, JOURNAL OF HEALTH POLITICS, POLICY AND LAW 2(3): 319-34 (Fall 1977).

Somers AR, *The Case for Negotiated Rates*, HOSPITALS, J.A.H.A. 52(3): 49-52 (February 1976).

NATIONAL HEALTH INSURANCE RESOURCE BOOK. This updated edition presents an overview of the major characteristics of the health industry; information on the health financing and delivery systems of selected foreign nations; and descriptions of major national health insurance bills introduced through August 1976. S/N 052-070-03637-1, 505 pp. (\$5.55). Order from Public Documents Distribution Center, Pueblo, CO 81009.

HOSPITAL REGULATION — Report of the Special Committee on the Regulatory Process (American Hospital Association, Chicago, Illinois 1977). Chapter topics in this 188-page report include the Hospital Industry's View of Regulation, Criteria for Effective Regulation, Regulation of Health Planning, Utilization and Facilities and Hospital Payment Regulation. Copies are available for \$5 each for AHA, 840 North Lake Shore Drive, Chicago, IL 60611 (catalog number 1835).

Continued on page 26

GUEST EDITORIAL (Continued from page 3)

The plaintiffs had argued that no true state regulation existed since past and present insurance rates had been inflated by false and fraudulent statements to the public and to the state insurance commissioner. Unfortunate as this may seem, the dissent looked upon the majority decision as a misapplication of federal law "in an attempt to deal with the crushing malpractice burden being imposed as the result not only, perhaps, of predatory insurance practices but of inflated claims and verdicts."

St. Paul has appealed to the United States Supreme Court and certiorari has been granted. However, the case may not be heard as an early priority, perhaps, to see if the statistics on this current insurance money crisis abates via reforms in the tort system or goes on to become a crisis in health care delivery. Certainly, there is a lull in the recent imbroglios between health care providers, insurance, and state legislators regarding their respective claims of high cost insurance, underpricing premiums, and continuity of health care in the public interest.

One thing is certain and that is that an extensive microdissection of the insurance rating equation with a view toward revolutionary change need be done. It is probably true that it is impossible to accurately predict a fair and equitable insurance rate in any given year. This is because variables are seldom fixed and actuaries, depending on who hires them, are all too ready to lay on the rate regulators with egalitarian certainty while the jaundiced-eyed physicians have come to look upon the rates as crooked lines drawn between assumptions and foregone conclusions. The simplest solution, of course, would be to do a very careful and thorough cost accounting analysis of where the premium dollar goes, and, having assured oneself of good business practices mixed with fiscal austerity, to fix and establish rates for the coming year based solely upon the previous year's actual costs. This is obviously too simple. The industry does not function that way, and nothing can be left to the chance of having underpriced the product or the ability of the industry to recover the loss whatever else occurs. The only way insurance companies can remove the element of risk is to set aside large cash reserves coupled with paper losses, producing, in effect, the inflated premiums alluded to in the Rhode Island case. Whose method is actually most fair and reasonable remains to be established. The ultimate outcome is still in doubt as one ponders the question like a babe in the woods, questionably looking out over the Boston skyline at those monolithic monuments to one of western society's most successful business endeavors.

References

1. See Martino A.F., *David v. Goliath*, JOURNAL OF LEGAL MEDICINE 5(9): 5-8 (September 1977). The case involved is: *Barry v. St. Paul Fire & Marine Insurance Company*, No. 76-1226 (United States Court of Appeals for the First Circuit, May 16, 1977).
2. See Letter-to-the-Editor, Tom H. Swain, Vice President and Assistant to the President, The St. Paul Fire & Marine Ins. Co., JOURNAL OF LEGAL MEDICINE 5(10): 11-12 (October 1977).

NEWS FROM THE SOCIETY (Continued from page 23)

A key to the JOURNAL's rapid growth is its neutral professional and ideological stance. Although medicolegal publications abound — such as newsletters, journals and magazines — most of them are so-called "trade" publications connected with organizations or institutions representing a particular profession or a particular point of view on current medicolegal policy issues. The AMERICAN JOURNAL OF LAW & MEDICINE, in contrast, seeks to provide in-depth articles by persons representing a wide range of professions and perspectives. Furthermore, in selecting articles for publication the JOURNAL's editors make a special effort to strike a balance between health-care providers' perspectives and health care consumers' perspectives.

Persons interested in submitting articles or correspondence to the JOURNAL should contact the Editor-in-Chief, AMERICAN JOURNAL OF LAW & MEDICINE, 454 Brookline Avenue, Boston, Massachusetts 02215. Guidelines for submission of articles and a sample issue for those who have not seen the JOURNAL are available.

Subscriptions to the JOURNAL are available in two ways: First, all members of the American Society of Law & Medicine receive annual subscriptions as part of their membership benefits. Information on the Society and membership is available from Elliot L. Sagall, M.D., President, American Society of Law & Medicine, 454 Brookline Avenue, Boston, Massachusetts 02215. Additionally, for institutional subscribers and for individuals not desirous of Society membership, subscriptions are available from the Journals Department, MIT Press, 28 Carleton Street, Cambridge, Massachusetts 02139.