CARR MALONEY PC

LEGALLY SPEAKING

VOLUME XXXV: October 2017

PHYSICIANS' LIABILITY IN THE OPIOID CRISIS

The "opioid crisis" has drawn national attention to the fact that drug users are dying in alarming numbers and the problem seems to be getting worse. [CLICK HERE TO READ MORE]

RECENT SUPREME COURT RULINGS LIMIT THE EXTENT OF PLAINTIFF FORUM SHOPPING

In two nearly unanimous rulings, the Supreme Court finally reined in the practice of forum shopping in BNSF Railway Co. v. Tyrell and Bristol-Myers Squibb Co. v. Superior Court of California. [CLICK HERE TO READ MORE]

BATHROOM BILLS AND WHAT THEY MEAN FOR EMPLOYERS: UPDATES FROM THE TRUMP ADMINISTRATION

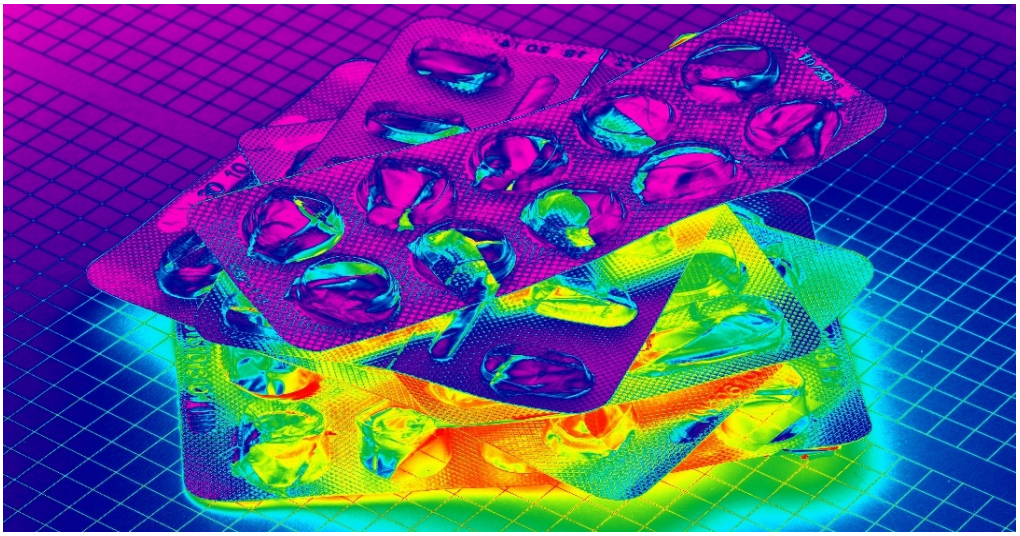
This update discusses the Trump administration's reversal of Obama administration rules and clarifies employers' current responsibilities in light of these changes. [CLICK HERE TO READ MORE]

D.C. CIRCUIT ADDRESSES TELEPHONE CONSUMER PROTECTION ACT

The D.C. Circuit's decision in ACA International is expected to address a critical area of the Telephone Consumer Protection Act ("TCPA") [CLICK HERE TO READ MORE]

CLICK HERE TO READ MORE NEWS, ANNOUNCEMENTS AND DEVELOPMENTS

Carr Maloney PC is a litigation firm providing comprehensive legal services throughout the mid-Atlantic region. Businesses and individuals use the firm as a single resource to meet all of their legal needs. Recognizing that each client's legal issue comes with its own specific complexities, we simplify the complex.



CARR MALONEY PC

PHYSICIANS' LIABILITY IN THE OPIOID CRISIS: A RECOMMENDATION

By Edward J. Krill, Esq.

The "opioid crisis" has drawn national attention to the fact that drug users are dying in alarming numbers and the problem seems to be getting worse. Reports from the Centers for Disease Control provide a picture of massive injury from substance use:

- In 2014, 47,055 people died from drug overdoses
- Increasingly, opiate users are combining prescription drugs with heroin
- The number of prescriptions for opioids tripled from 2000 to 2016
- In 2010, physicians wrote enough prescriptions for oxycodone to provide a one month supply to every adult American

In response to this situation, government and professional organizations have begun to take action. The DEA has imposed penalties on five times as many physicians in 2016 as five years before. At least three physicians have been prosecuted for deaths resulting from the alleged over-prescription of pain killer drugs. Civil suits are being filed for "negligent prescribing" when patients overdose on prescribed drugs. The risks to physicians of continuing to set patient satisfaction as an important goal in reducing pain are now fairly evident.

The following are recommendations to consider if the prescription of this type of pain medication is a regular component of a practice. However, there is no easy answer to this problem and each case should be assessed on an individual basis.

Evaluation: Conduct and document a risk-benefit assessment with patient participation. This would consist of asking the patient that will receive a new prescription for pain killers and patients who have been taking such drugs. The assessment would ask whether the patient is taking other drugs and the source, whether steps are being taken by the patient to remedy the underlying cause of the problem requiring pain medication, possible urine testing, perhaps a conference with family members and other care givers. One should ask about any history of addiction to any substance, including alcohol. The point of this exercise is to demonstrate that the prescriber evaluated the impact of such drugs on this individual patient and was not negligent in setting the dose, requiring follow-up visits or otherwise monitoring initial drug suitability or continuing prescribing. **(continued)**

Ed Krill has been practicing business law with a focus on health care and hospitals for more than 35 years. He helps clients find solutions to regulatory and contractual problems that make business sense and that avoid litigation and protracted controversy.

Ed counsels healthcare providers and professionals on a variety of issues, including credentialing and accreditation standards, licensure, discipline, labor and employment matters, practice structure and the buying and selling of practices and interests in practices. He is well-versed in Medicare regulations and other professionals.

Ed is a frequent speaker on health law topics at seminars and taskforce meetings of the American Health Lawyers Association, District of Columbia Hospital Association, and Academy of Medicine of Washington, DC. He is also a founding member of the American Society of Hospital Attorneys

PHYSICIANS' LIABILITY IN THE OPIOID CRISIS: A RECOMMENDATION

(continued from previous page)

Alternatives: Think outside the scope of your specialty and consider the total patient profile, looking for other sources of pain killers. Ask the patient for a complete statement of his or her health situation as an intake or continuing care form, including a listing of other potential prescribers. When another source of such drugs seems probable, ask the patient and in situations that pose significant risks, call and inquire of the other practitioner(s).

Individualize Dosage: Bear in mind that long term use of pain killers can result in a tolerance, a loss of effectiveness at the original dose and a need for increased dosage to achieve the relief of pain once obtained. Balance this against the CDC's recommendation that no more than 100 milligrams of opioid medication per day be prescribed for any patient. The CDC and perhaps many hospitals and other health care organizations do not differentiate between patient with chronic lower back pain and a terminal patient with bone cancer. A careful justification for the dosage prescribed should periodically be entered into each patient's record to refute any allegation that the prescribed dosage was negligently arrived at.

Responsibility to Family: Be aware that you may have responsibilities to persons other that the patient. Obstetricians and pediatricians are most likely to be seen as needing to consider the welfare of a child in utero, a newborn or a young toddler who is in the care of someone who may be impaired. Child abuse and neglect laws that require reporting come to mind in this situation.

There is no easy answer to this epidemic for the practitioner. Avoiding risk means not serving patients with legitimate need for pain relief. Thoughtful, careful evaluation of each patient's needs, the potential for addiction and overdose and patient education should help avoid some of the liability that is being imposed on clinicians when patients suffer harm from these drugs. Failure to do so can be costly.

D.C. CIRCUIT ADDRESSES TELEPHONE CONSUMER PROTECTION ACT

By M. Therese Waymel, Esq.

On October 19, 2016, the U.S. Court of Appeals for the D.C. Circuit heard oral argument in ACA International v. FCC (No. 15-1211). The D.C. Circuit's decision in ACA International is expected to address a critical area of the Telephone Consumer Protection Act ("TCPA") regarding what constitutes an "automatic telephone dialing system" (or "ATDS") and more specifically, what type of device has the capacity to fall underneath the definition of an ATDS.

In the event that the TCPA has not made it to the top of your short list of issues in the past year (or ever), in short, the TCPA was designed to safeguard consumer privacy through the regulation of the use of auto dialers and prerecorded messages in unwanted telemarketing communications. The consequences of noncompliance come at a high cost, as the TCPA permits the award of treble damages while affording no cap on damages.

Though the issue of what constitutes an ATDS may seem like a small distinction in the overall TCPA scheme, the broadly defined term has created significant confusion in the business community as to the certainty of the statute's scope and the parameters of compliance. Such uncertainty has resulted in costly litigation and multimillion dollar penalties at the expense of businesses spanning nearly every major industry. ACA International provides the D.C. Circuit the opportunity to clear up some of the confusion.

Regardless of whether the D.C. Circuit takes advantage of this opportunity, the ACA International decision is sure to deliver sweeping consequences affecting the future of TCPA compliance. Nearing the one-year anniversary of oral arguments in ACA International, the closely-watched appeal undoubtedly has a captive audience on the edge of their seats. Stay tuned.

BATHROOM BILLS AND WHAT THEY MEAN FOR EMPLOYERS: UPDATES UNDER THE TRUMP ADMINISTRATION

By Diana Lockshin, Esq.

In Carr Maloney's *Legally Speaking: Volume XXXII*, we included a legal resource for employers on the topic of controversial and confusing "bathroom bills," which are laws that seek to protect or limit transgender individuals' rights to use bathrooms and/or changing facilities that correspond with their gender identify instead of the sex they were assigned at birth. For the full article, *Bathroom Bills and What They Mean for Employers: A Legal Resource*, click here. This update discusses the Trump administration's reversal of Obama administration rules and clarifies employers' current responsibilities in light of these changes.

Trump administration reversal of Obama administration rules

On February 22, 2017, Attorney General Jeff Sessions and Education Secretary Betsy DeVos issued a joint letter withdrawing the Obama administration's May 13, 2016 "Dear Colleague" Letter, which was intended as guidance to schools that receive federal funds, and directed those same schools to let students use the bathrooms that match their gender identity. It also declared that discrimination against transgender students is sex discrimination under Title IX of the education code. In reversing Obama administration policy, the Trump administration said the May guidance lacked "extensive legal analysis" and did not adhere to "the express language of Title IX," among other purported flaws.

Employers should continue to treat transgender employees as if they are covered under anti-discrimination statutes.

While the Trump administration's action applies only in the public school setting, the February 2017 Letter issued by the U.S. Department of Justice and the Department of Education appears to be at odds with the position the U.S. Equal Employment Opportunity Commission ("EEOC") has advocated in recent years regarding transgender rights in the workplace: discrimination based on sexual orientation and transgender status is sex discrimination, which is prohibited by Title VII of the Civil Rights Act of 1964.

(continued on next page)

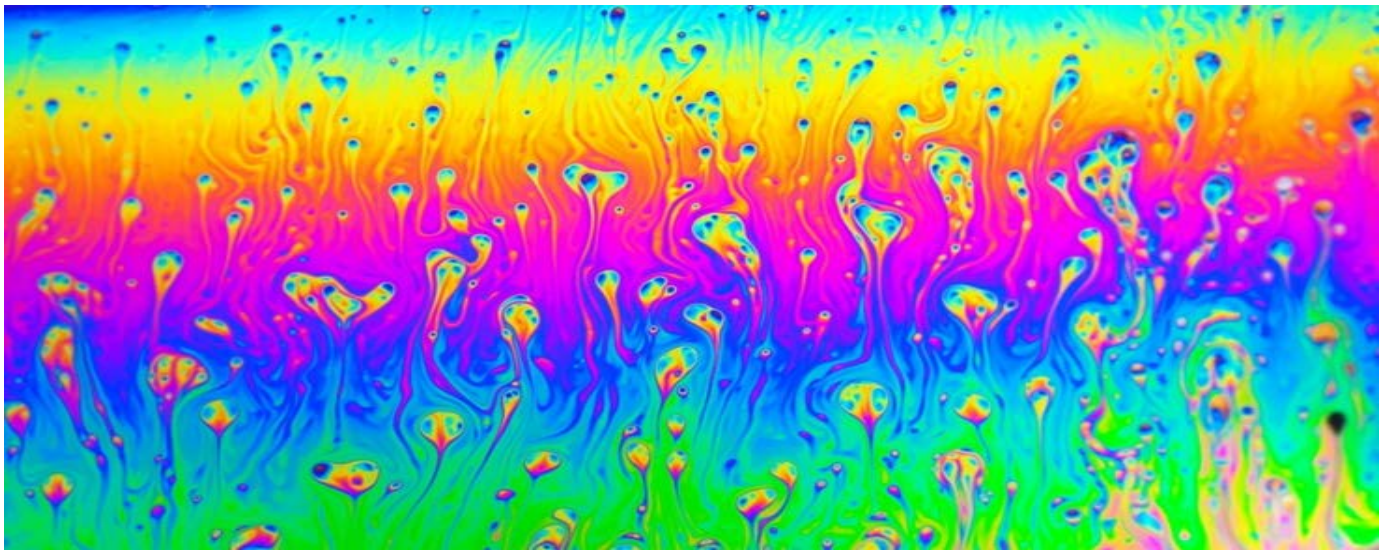
CARR MALONEY PC

Carr Maloney Associate Diana Lockshin is an energetic and experienced litigator focused on health law, employment law, professional liability, and complex litigation matters.

Her original article in this series, "Bathroom Bills and What They Mean for Employers," appeared in the July 2016 edition of *Legally Speaking.* Diana co-authored 'Compliance Strategies for Federal Government Contractors Under OFCCP Sex Bias Rules' in *Legally Speaking: Volume XXXII.*

Her professional experience includes negotiation, risk management, trial contracts and regulatory compliance. A native of Colombia, Diana is proficient in Spanish and Portuguese and offers English-Spanish interpretation services.

Diana is a member of the Maryland State Bar Association, American Bar Association, American Health Lawyers' Association and Hispanic National Bar Association



BATHROOM BILLS AND WHAT THEY MEAN FOR EMPLOYERS: UPDATES UNDER THE TRUMP ADMINISTRATION

(continued from previous page)

Despite this contradiction, employers should continue to prioritize implementing, updating, and maintaining their policies protecting LGBT rights to ensure they comply with the EEOC's current interpretation and with any applicable state or local laws, which remain unchanged by the Trump administration's actions.

Notably, EEOC Commissioner Chai Feldblum and Victoria Lipnic, who was recently appointed by President Trump to chair the EEOC, have both stated that the EEOC's most recent strategic enforcement plan, or SEP, for 2017-2021, will largely remain the same under the Trump administration. This includes prioritizing protection for LGBT individuals against sex-based discrimination. Feldblum has also reaffirmed that she is committed to implementing recommendations that were put forth in the EEOC's June 2016 study of harassment in the workplace, which was created by a task force led by Feldblum and Lipnic.

Feldblum is working to guide various entities, including EEOC field offices and trade associations, in implementing the recommendations. Among other recommendations, the anti-harassment report recommended that employers adopt certain nontraditional forms of training, including workplace civility training and bystander intervention training. The agency is currently working with an outside contractor to develop training courses that address compliance training on harassment specifically, and on workplace civility training. This training may be available to employers by the end of 2017.

Moreover, "the EEOC has proven to be less prone to dramatic shifts in enforcement priorities and interpretations following a change in the Chief Executive compared to other agencies." Additionally, "a growing number of decisions from federal district courts may also make it more difficult to reverse the EEOC's current guidance under Title VII and a change in the EEOC's position would not reverse court rulings establishing precedent under Title VII. Thus, private litigants would still be able to bring claims alleging discrimination based on sexual orientation or gender identity citing those rulings. Also, EEOC may not necessarily follow that agency's lead since numerous district courts have recently agreed with its position, holding that Title VII prohibits discrimination based on sexual orientation. Those court decisions have found that the wording of Title VII at the very least includes sexual orientation, and reversing guidance alone is not enough to reverse court precedent.

Finally, it should be noted that under Title VII, aggrieved employees also have an individual right of action for workplace discrimination claims. Therefore, litigation on behalf of private plaintiffs will continue even if a reconstituted EEOC under the Trump administration decides to stop aggressively pursuing transgender bias cases.

DIANA LOCKSHIN is licensed to practice law in the District of Columbia and Maryland.

SUPREME COURT RULINGS LIMIT THE EXTENT OF PLAINTIFF FORUM SHOPPING

By Patrick Belford, Esq.

Since the Supreme Court's decision in *International Shoe Co. v. Washington* (1945), courts around the country have grappled with the question of where a corporate defendant can be subject to the personal jurisdiction of a state.

In two nearly unanimous rulings, the Supreme Court finally reined in the practice of forum shopping in *BNSF Railway Co. v. Tyrell* and *Bristol-Myers Squibb Co. v. Superior Court of California*.

For corporate defendants, the paradigm forum for the exercise of general ("all purpose") personal jurisdiction is where the defendant's affiliations with the forum state are so constant and pervasive so as to regard them as at home in the forum, namely its state of incorporation and its principal place of business. In practice, this meant that a state court could hear any claim against a corporate defendant, even if the alleged conduct occurred in a different state. On the other hand, in order to be subject to a state court's specific ("case-linked") jurisdiction the alleged conduct must arise out of or relate to a corporate defendant's activities in the forum state. Consequently, forum shopping plaintiffs initiated lawsuits in states that exercised personal jurisdiction over claims based on a de minimis amount of contact with the forum.

In the BNSF Railway Co. decision, the Court addressed a Montana state court's exercise of general personal jurisdiction over an out-of-state corporate defendant by two non-residents for injuries suffered while working for the railway in a different state. Under the *International Shoe* standard, the Montana Supreme Court argued that BNSF maintained a sufficient presence in Montana (2,061 miles of railroad track, employees from Montana, and related facilities) for general jurisdiction. In a nearly unanimous decision, the Supreme Court rejected the argument that BNSF's contacts with the state were sufficient for general personal jurisdiction because "the general jurisdiction inquiry calls for an appraisal of a corporation's activities in their entirety…a corporation that operates in many places can scarcely be deemed at home in all of them." The Court concluded that in-state business does not suffice to permit the assertion of general jurisdiction over claims by out-of-state defendants that are unrelated to the corporate defendant's activity in the forum.

The *Bristol-Myer Squibb Co*. decision involved a California state court's exercise of specific personal jurisdiction over the drug maker in a class action suit by plaintiffs, most of whom were non-residents of California. In *Bristol-Myers Squibb Co.*, plaintiffs from 33 states filed suit under California law for injuries allegedly suffered after taking the drug Plavix. The California Supreme Court denied BMS's motion to quash service on the non-residents claims based upon BMS's unrelated business activities in the state. In another nearly unanimous decision, the Supreme Court reversed the California court's sliding scale approach to specific jurisdiction arguing, "there must be an 'affiliation between the forum and the underlying activity, principally, [an] activity that takes place in the forum state…when there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the forum state." The Court's analysis focused on BMS's development, marketing, and distribution of Plavix (primarily in New York and New Jersey) in comparison with their activities in California (drug sales in state) and concluded the latter was insufficient for conferring specific jurisdiction.

Following the *BNSF Railway* and *Bristol-Myers Squibb Co.* decisions, corporate defendants can now expect to be subject to state court personal jurisdiction: (1) in their state of incorporation; (2) in the state where their principal place of business is located; and (3) in any state where there is a direct or causal connection between the forum state and the alleged conduct.

CARR MALONEY PC

NEWS AND ANNOUNCEMENTS

CARR MALONEY EQUITY MEMBERS RECOGNIZED BY BEST LAWYERS ®



For the sixth straight year, Carr Maloney Equity Members Paul J. Maloney (Personal Injury Litigation-Defendants), Jan E. Simonsen (Personal Injury Litigation-Defendants and Mass Tort Litigation/Class Actions-Defendants) and Kevin M. Murphy (Trusts and Estates) are listed in the 2018 edition of Best Lawyers in America for the sixth straight year. Congratulations on this well deserved honor!

CARR MALONEY MEMBER MARIANA BRAVO ELECTED VICE PRESIDENT OF EXTERNAL AFFAIRS FOR THE HISPANIC NATIONAL BAR ASSOCIATION

On September 8th, Carr Maloney Member Mariana Bravo was sworn in as Vice President of External Affairs for the Hispanic National Bar Association. A long standing member of the HNBA's National Executive Committee, she will act as the Association's liaison with all non-affiliated groups and organizations. As HNBA's Vice President of Programs in 2016 and 2017, Mariana Bravo was instrumental in launching "Su Negocio", a collaboration between the HNBA and MassMutual that provides commercial enterprise resources to the Latino small business community. She also served as HNBA's Regional President for the District of Columbia, Maryland, Virginia and West Virginia from 2012 to 2015.

CARR MALONEY MEMBER KELLY LIPPINCOTT TO CO-VICE CHAIR DEFENSE RESEARCH INSTITUTE'S INSURANCE COVERAGE AND PRACTICE SYMPOSIUM

On December 7th, Carr Maloney Member Kelly Lippincott will be Program Co-Vice Chair for DRI's *Insurance Coverage and Practice Symposium* in New York City. This two day conference features industry leader's perspectives on handling problem jurisdictions and regulatory intrusions into claims, an examination of problematic jurisdictions and their effects, a discussion on the ethics and strategy of defending an uncooperative insured and common sense tips to help in-house and outside counsel navigate their respective roles in coverage litigation. This is the foremost educational event for insurance executives, claims professionals, and outside counsel specializing in insurance coverage, so please visit here for more information.

CARR MALONEY EQUITY MEMBER JAN SIMONSEN TO CO-CHAIR PERRIN CONFERENCES' FOOD & BEVERAGE LITIGATION CONFERENCE

On Wednesday, October 25, 2017, Carr Maloney Equity Member Jan Simonsen will Co-chair Perrin Conferences' ***Food & Beverage Litigation Conference: A Look at Hospitality, Liquor & Food Liability*** in Chicago. This one day conference features speakers and panel discussions on Cyber Security and E-Discovery, Best Practices in Crisis Management, Recent and Future Trends for Food and Distilled Beverage Manufacturers, Recent Developments in Food Class Action Litigation and more. In-house counsel and insurance professionals will receive complimentary registration for this conference, so please visit www.perrinconferences.com to learn more about this signature event.