



## **Don't Be Left High and Dry in the Desert:**

*How to handle thorny issues of indemnity disputes between hospitals, physicians and insurance carriers in medical negligence litigation*



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## FACT PATTERN

- Plaintiff sues three physicians and a hospital. The three physicians are each responsible for 1/3 of the case. The case is easily worth \$5,000,000.00 (Five Million Dollars).
- Physician #1 is a direct employee of the hospital.
- Physician #2 is a contracted physician with \$500,000.00 (Five Hundred Thousand Dollars) in coverage.
- Physician #3 is an independent staff physician with \$500,000.00 (Five Hundred Thousand Dollars) in coverage.
- The Plaintiffs drop the three individual physicians but keep their vicarious liability claim against the hospital for the physicians' actions.

# PRINCIPLES

- You prefer the human being in the courtroom.
- Tendering a defense is a dangerous thing; accepting a defense is a dangerous thing.
- Indemnity claims are complicated legally and politically.
- Insurers are disinterested in the long-term business relationships between physician and health systems.
- Extra-contractual exposure can be created by Plaintiffs and Defendants that are vicariously liable for physicians.

- Political Implications
  - Good relationships are key for efficient operations
  - Goal to protect both parties and avoid potential for dispute
  - Hospitals want to avoid suing their doctors!
- Strategies
  - Sufficient insurance limits required by medical staff bylaws
  - Express IC/not employee on consents, forms, admission documents, contracts
  - 'Right of control' tests
    - Alabama uses a reserved right of control test to determine whether a worker is an employee or an independent contractor. This is a common-law right to control test. See *Tuscaloosa Veneer Co. v. Martin*, 172 So. 608 (Ala. 1937)
    - *Martin By & Through Martin v. Goodies Distrib.*, 695 So.2d 1175, 1177 (Ala. 1997)
  - Legislative caps

# Hospital Considerations

# Additional Strategies for Hospitals

- Strategies (cont.)
  - Strong risk management practices
  - No easy answers- but find strategies for hospitals/physicians to remain aligned
- Indemnity Provisions
  - Broad, remain silent, state specific considerations?

# INSURANCE COVERAGE CONSIDERATIONS

## Who is an insured:

- Under the policy?
- By contractual agreement?

Must know  
the  
relationships  
of the  
insureds and  
defendants:

- Be sensitive to business considerations
- Has there been a sale or merger of the entities?
- Is sale/merger planned or in the works?



Conflicts issues  
with defense  
counsel  
representing  
multiple  
insureds

- Address very early on and continue to monitor
- Involvement of insured's personal counsel

# Settlement issues:

- Consent issues
- Multiple insureds:
  - a) can you settle for just one?
  - b) consent of one or all required?
- Multiple claimants:
  - a) settle doctor out, now hospital asserts indemnity claim against your insured
  - b) do you settle doctor out against primary plaintiff or settle with hospital?
  - c) do you still defend insured if limits exhausted?