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MASSACHUSETTS QUARTERLY NEWSLETTER

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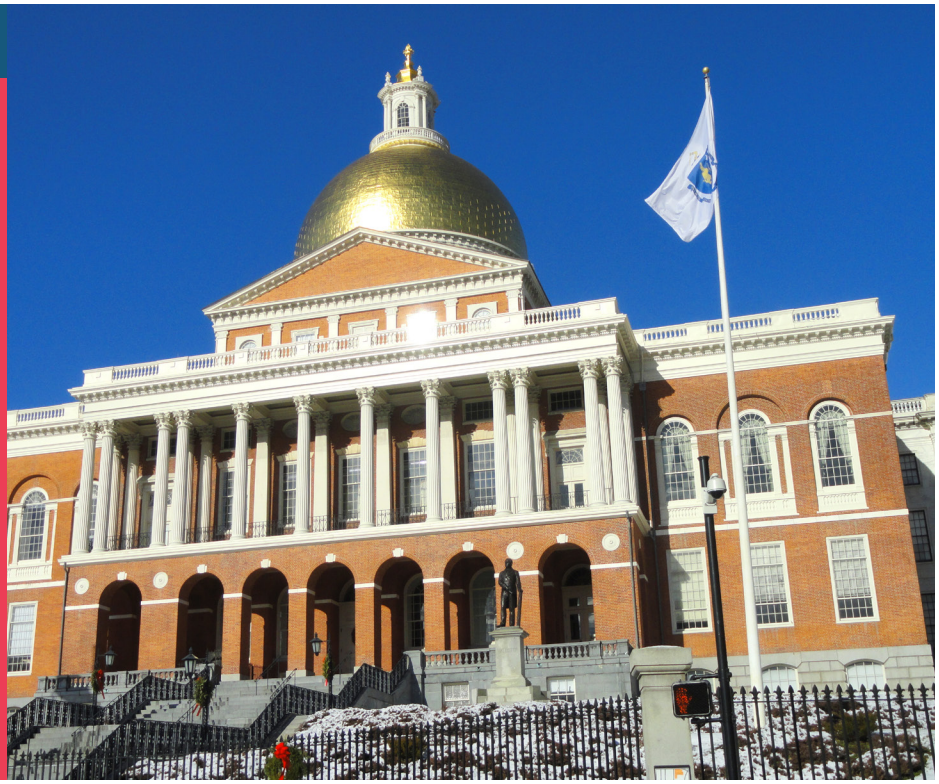

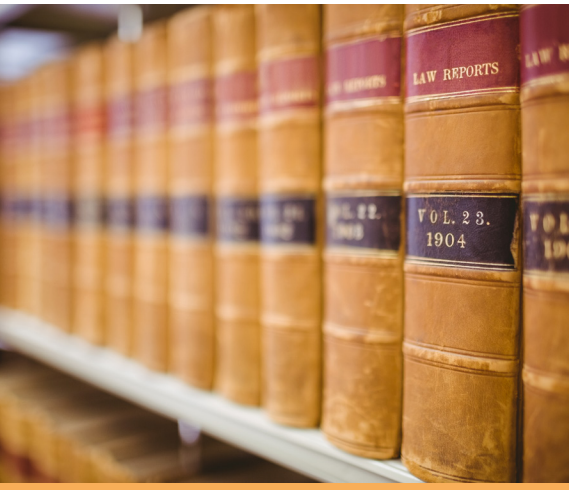

Presentations:

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FIRST CIRCUIT: BILLING FOR IMPROPER UNLICENSED MEDICAL SERVICES IS FRAUD

Recent decision again confirms that where medical services require licensure, demanding payment for services by unlicensed persons, as if the services complied with regulations, constitutes fraud.

"Insurer expected 'licensed professionals, not charlatans.' "

-- United States ex rel. Escobar v. Universal Health Servs., 842 F.3d 103,111 (1st Cir. 2016).

On November 22, 2016, for a second time in the same case, the First Circuit Court of Appeals in Boston ruled that bills to an insurer for unlicensed, unsupervised medical services can form the basis for a fraud complaint. The court upheld a relator's complaint on behalf of the government under the False Claims Act ("FCA") alleging that the bills falsely suggested that the providers were licensed and supervised as set forth in regulations.[1] The court applied a "materiality" standard announced months earlier by the Supreme Court, and declined to dismiss even though the insurer may have continued to pay for unlicensed services after receiving complaints.

The allegations were as follows. In 2009, a child received mental health treatment from defendant.[2] Defendant demanded

governmental insurance benefits using codes indicating its staff were licensed and supervised. The insurer itself had "made it clear in its regulations that it expect[ed] that individuals in the business of providing mental health services . . . have adequate training and professional credentials."[3] However, defendant allegedly "employed unlicensed and unsupervised personnel, in violation of" state regulations.[4] The child patient died tragically from a drug reaction, and her guardians filed an FCA complaint on behalf of the government. The insurer investigated and in 2012 it "learned that [the facility] was using unlicensed and unsupervised personnel."[5]

The First Circuit already had upheld the same complaint.[6] In the interim, the Supreme Court granted *certiorari* and articulated a new standard for whether bills are actionable under the FCA pursuant to an "implied certification" theory of fraud. "[F]irst, the claim does not merely request payment, but also *makes specific representations* about the goods or services provided; and second, the defendant's *failure to disclose noncompliance* with *material* statutory, regulatory, or contractual requirements makes those representations misleading half-truths."[7] The Supreme Court explained that performance "requirements" are "material" if:

- ✓ a *reasonable person* would at- tach importance to the false representation in deciding how to act; or
- ✓ defendant *knew or had reason to know* that the recipient attaches importance to the specific matter.[8]

"Materiality is more likely to be found where the information at issue goes 'to the very essence of the bargain.'"

On remand, the First Circuit again had "little difficulty" concluding that the complaint sufficiently alleged material misrepresentations. The court weighed the factors articulated by the Supreme Court, as follows:

- ✓ the insurer had given notice to defendant that "regulatory compliance was a condition of payment;"
- ✓ requirements of licensure and supervision are "central[ ]" and "go to the 'very essence of the bargain'" for payment of medical services, and;
- ✓ the insurer was unaware of the violations at the relevant time, and awareness of mere allegations of violations is different from "actual knowledge" of their "veracity."

The panel of First Circuit judges explained that they "struggle to think of a misrepresentation-by-omission that would give rise to a breach more material. . . ." The insurer expected, at core, that mental health services "are to be performed by licensed professionals, not charlatans."

The Court explained further that even if "various state regulators had some notice of complaints against [the facility] in late 2009 and 2010, mere awareness of allegations . . . is different from knowledge of actual noncompliance." "[A]ctual knowledge" was not attributed to the insurer itself, and early on the allegations were lacking in "veracity." The Court reserved for another case whether evidence of continued payments despite "actual knowledge" of violations, ever could render a condition as central as licensure and supervision of medical services, immaterial. The court declined to require proof of payment practices in the complaint phase of an FCA matter, because that information is not necessarily available to a potential relator suing on behalf of the government.

The First Circuit returned the case to the District Court for further proceedings.

* * *

FEDERAL RACKETEERING CONVICTION IN MASS. FOR ADVERTISING, BILLING AND SHIPPING MEDICINE IN VIOLATION OF REGULATIONS

On March 22, 2017, after a nine-week trial, a jury in the United States District Court for the District of Massachusetts convicted the former head pharmacist and owner of a compounding pharmacy of violating the Racketeering Influenced and Corrupt Organizations Act (RICO),[9] in connection with a meningitis outbreak that reportedly left 64 dead and over 700 injured. The convictions illustrate a successful use of the RICO Act in responding to corrupt schemes to advertise and sell medical products in a deceptive manner, in disguised violation of binding regulations.

The indictment charged over 70 criminal violations in the wake of an outbreak allegedly caused by tainted compounded steroids shipped from a compounding pharmacy. For approximately six years, the defendant allegedly knowingly made and sold the compounded drugs in a dangerous manner and under unsterile conditions. The pharmacy allegedly sold the drugs without disclosing the departures from regulatory standards and hid the defects from regulators. The compounding "cleanrooms" allegedly harbored dangerous mold. As a result, numerous individuals died, reportedly from injecting the steroids provided by the pharmacy.

Ultimately, the jury returned a verdict finding the defendant guilty of racketeering by means of a "scheme and artifice to defraud . . . customers, and patients of those customers, and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises."[10] The theory of the case accepted by the jury was that the defendant used the mails and wires to conceal violations of binding industry regulations. The racketeering acts included:

- ✓ Selling steroids made in a manner that violated regulatory standards;

- ✓ Falsely representing in mail/wire communication that compounded medications were of the highest quality, *i.e.*, that the pharmacy was USP-797 compliant;[11]
- ✓ Privately shipping interstate, drugs identified as sterile and having requisite quality, prior to receiving the results of testing confirming the sterility and quality of the drugs; and,
- ✓ Shipping drugs made by an unlicensed pharmacy technician.

The jury composed of nine women and three men found defendant guilty of racketeering, racketeering conspiracy, fifty-two acts of mail fraud and three counts of introducing misbranded drugs into interstate commerce without the valid prescription of a practitioner licensed by law to administer the drugs. The jury found that defendant caused to be shipped, twenty-seven lots/batches of a steroid labeled as injectable, which did not meet the regulatory standards and, therefore, could not truthfully be labeled and sold as a sterile drug. The jury also returned a verdict that defendant unlawfully shipped ten lots of steroids prepared by an unlicensed pharmacy technician.

Defendant's sentencing is scheduled for June 21, 2017. A supervisory pharmacist, allegedly tasked with overseeing all aspects of the pharmacy's production and personnel in two "clean rooms," also awaits trial and is facing similar charges.

The jury also notably found that the government failed to prove several other important aspects of the indictment. Defendant was acquitted of:

- ✓ mail and wire fraud charges connected to shipping drugs using an ingredient that had previously expired; and,
- ✓ 25 counts of second-degree murder for "wanton and willful disregard of the likelihood that the natural tendency of [defendant's] actions would cause death or great bodily harm and did in fact cause the deaths" of numerous patients.[12]

The murder indictments had proceeded to trial over an objection that, as defendant put it, a "murderous course of conduct is so irreconcilable with a scheme to defraud and the two cannot coexist under one pattern roof." The District Court judge, Stearns, J., disagreed, reasoning that "[c]riminal conduct does not always reflect the most rational of choices or even the most basic calculations of ultimate self-interest."[13] Judge Stearns explained that, "[i]f the government's allegations prove true, [the pharmacy] will not be the first criminal enterprise undone by greed or a sense of invulnerability."[14] The jury, of course, did not find that the government proved the portion of the indictment that charged murder.

A motion by defendant for new trial is pending on the theory that the trial was "tainted by the improper presentation of murders . . . in support of charges that should not have been brought . . . ."

* * *

TOW COMPANY CANNOT RECOVER FROM INSURER UNDER PART FOUR COVERAGE FOR DAMAGE TO SOMEONE ELSE'S PROPERTY

Following a single-vehicle collision in Swansea, Massachusetts, a tow company demanded payment from the automobile insurer for removal of the vehicle on behalf of the property owner from the bottom of a steep incline. The vehicle owner lacked coverage for towing and Part 7 collision benefits under the Standard Massachusetts Automobile Insurance Policy. On March 27, 2017, the Appeals Court ruled that the insurance company was entitled to decline the demand because the tow was not covered under available Part 4 benefits for "Damage to Someone Else's Property." The Appeals Court concluded that the remedy was solely against the vehicle's owner.[15]

The matter originated from cross motions for summary judgment in the Fall River District Court. The district court entered judgment against the insurer for the amount of the tow company's invoice, reasoning that the recovery services were remediation of property damage, and thus covered under Part 4 of the insurance policy. The motion judge also faulted the insurer's claims handling posture under Mass. G. L. c. 93A. In 2015, the Appellate Division of the District Court, Southern District reversed, reasoning that:

> Despite the arguments by both parties, the issue, in our view, is not whether the presence of [vehicle owner's] SUV at the bottom of the embankment resulted in actionable loss of use of property on which it sat, or whether any such loss of use would amount to "property damage" under the policy, but instead, whether [the tow company] qualifies as a claimant under [Part 4] of the Massachusetts Auto Policy. We find that it does not.

The tow company appealed to the Massachusetts Appeals Court. In a summary decision pursuant to Rule 1:28, the Appeals Court affirmed the Appellate Division's order, holding that in the circumstances, the insurer was not required to pay the invoice. The work performed by the tow company did not constitute repair or remediation under Part 4 coverage. The tow company did not own the land, and the presence of a damaged vehicle on the land was not a sufficient "loss of use" to take the matter outside the typical purview of the towing regime controlled by Mass. G. L. c. 85, § 2C and 211 Code Mass. Regs. § 272.03. The panel reasoned that Part 4 coverage is meant to insure from claims of injury or damage to others, not to insure against economic loss. Accordingly, the Appeals Court found that the tow company's sole remedy was against the vehicle owner.

* * *

SMALL CASE TRIALS NEED CAREFUL ATTENTION

On February 24, 2017, the Appellate Division for the District Court issued a decision reminding judges and practitioners that even in the small-case setting, the civil rules require precision in trial practice. A plaintiff medical provider suing for recovery of Personal Injury Protection (PIP) benefits, whose bills and records were excluded from evidence, still was entitled to avoid a directed verdict. The Appellate Division reversed a grant of directed verdict and remanded for retrial.[16]

Plaintiff health care provider had sued defendant insurer for PIP benefits and alleged tortious claims handling practices. The insurer asserted a non-cooperation defense based on the insured's failure to appear for an Examination under oath (EUO) as a condition precedent to providing PIP benefits.

At trial, the plaintiff's entire documentary evidence was excluded pursuant to Mass. G. L. c. 233, § 79G. The medical provider called just one witness, the adverse claims adjuster, and then rested its case. The trial judge allowed the insurer's motion for a directed verdict pursuant to Rule 50(a) of the Massachusetts Rules of Civil Procedure, and the medical provider appealed.

On appeal, the Appellate Division for the District Court noted that the trial judge entered a directed verdict before the insurer put on any evidence of its non-cooperation affirmative defense. The Appellate panel gave an exposition concerning the correct standard for ending a case at the close of plaintiff's case, and the proper evidentiary standard. The panel wrote that the trial judge was unwarranted in relieving the insurer of the burden of proving its non-cooperation defense.

The appellate panel then clarified the burden of proof, *i.e.*, that (1) an accident occurred; (2) the automobile policy was in effect; (3) the patient sustained injuries that were causally related to the accident; and (4) there are unpaid amounts owed to the medical provider. While the medical provider's evidence was minimal, the panel concluded that it was sufficient to satisfy those four elements. The Appellate Division of the District Court reversed the trial court's dismissal of the case, and returned the case to the District Court for retrial.

* * *

PRESUMPTION OF RECEIPT OF MAILED EUO REQUEST NOT CONTROVERTED BY SUBSEQUENT PIP APPLICATION REPORTING NEW ADDRESS

On January 30, 2017, the Appellate Division for the District Court issued a decision reaffirming its teaching concerning the fundamental obligation to submit to an Examination Under Oath ("EUO") if requested by an automobile insurer.[17] The mailing and non-return of letters requesting EUO were sufficient to establish the defense at summary judgment, and it was not rebutted by evidence of a subsequent change of address.

Plaintiff health care provider sued defendant rental car company, seeking judgment for Personal Injury Protection (PIP) benefits for services rendered pursuant to Mass. G. L. c. 90, § 34M, as well as allegedly tortious claims handling practices. As part of its investigation of the claim, defendant requested that the renter appear for an EUO. Counsel sent correspondence to the renter, postage prepaid, requesting that he appear for an EUO, on two separate occasions. Both times, the renter failed to appear. Counsel for the rental car company obtained the renter's address from medical records and bills submitted by the Plaintiff. None of the letters sent to the renter were returned as undeliverable or unclaimed. The rental car company denied PIP benefits to the renter on the basis of noncooperation. Afterwards, the defendant received a PIP application from the renter with a different address and using a post office box.

The rental car company moved for summary judgment based on the non-cooperation of the renter. Its motion was supported by an affidavit of its employee. The medical provider failed to submit any affidavit, but rather, its opposition included an unsworn copy of the application for benefits with the new address. The motion was allowed and judgement entered for the rental car company.

The Appellate Division for the District Court affirmed, relying on the general proposition that there is a presumption that an addressee receives mail that is properly addressed and deposited with the post office. The Court reaffirmed the longstanding rule that a submission to an EUO, so long as the request is reasonable, is a condition precedent to liability. No showing of prejudice is required to justify denial for failure to appear for an EUO.

The Court then addressed the late-arriving application for benefits with a different address. The Court noted the application may be admissible to show that the renter changed addresses and therefore, arguably did not receive the requests for his EUO. However, the medical provider hearsay application contained no statements regarding the question of receipt of the previous mailings and so failed to rebut the presumption of receipt of the properly-mailed correspondence by submitting. The Court pointed out that the medical provider could have provided an affidavit from the renter, but failed to do so. The Appellate Division of the District Court affirmed the trial court's entry of summary judgment for the rental car company.

* * *

FAIR HEALTH'S DATA IS ADMISSIBLE AT TRIAL PURSUANT TO MASS. G.L. CH. 233, § 79B AND MASS G.L. CH. 233, § 78

In a first-party Personal Injury Protection (PIP) suit brought by a medical care provider to recover payment of services rendered to a patient who was injured in a motor vehicle accident, Defendant, the PIP insurer, was permitted to introduce

into evidence pursuant to Mass. G.L. ch. 23, § 79B and Mass. G.L. ch. 233, § 78, data of what medical providers charged for similar medical procedures in the relevant local geographic area.[18] In its ruling denying Plaintiff's Motion *in Limine* to preclude the introduction of such data, the Court noted, in part, that: the data is available to the public; the data is sufficiently reliable or trustworthy; and, the data "was created with the express purpose of building a fair and reliable database . . ."

Also in its ruling, the Court gave credit to defense witness testimony, while contrasting the Fair Health data with Ingenix data referred to by Plaintiff.

* * *

PIP CLAIMANT'S FAILURE TO APPEAR FOR AN IME EVEN AFTER TREATMENT HAS CONCLUDED CONSTITUTES NONCOOPERATION UNDER MASS. G.L. CH. 90, § 34M THEREBY PRECLUDING PROVIDER'S CLAIMS

Medical care provider brought suit against PIP insurer claiming wrongful denial of Mass. G.L. ch. 90, §34M benefits. Insurer moved for summary judgment on the grounds that Plaintiff's patient twice failed to appear for an IME. The lower Court granted Defendant's Motion for Summary Judgment.

On appeal to the District Court Appellate Division, the medical care provider argued that the request for an IME after treatment had concluded was unreasonable, and that nothing of value could have been achieved by having the patient appear for an IME after treatment had concluded. The Appellate Division disagreed, stating that the IME could have produced an expert opinion as to whether an injury occurred at all, or an opinion as to the severity of any such injury.[19]

* * *

PIP CLAIMANT'S REFUSAL TO ANSWER QUESTIONS AT EXAMINATION UNDER OATH ON THE ADVICE OF COUNSEL CONSTITUTES NONCOOPERATION UNDER MASS. G.L. CH. 90, § 34M THEREBY PRECLUDING PROVIDER'S RIGHT TO RECOVERY

Medical care provider filed suit against the insurer alleging that the PIP carrier wrongfully denied Mass. G.L. ch. 90, § 34M PIP payments. In its defense, insurer filed a Motion for Summary Judgment in the trial court arguing that there was no genuine issue of material fact that Plaintiff's patient breached his duty to cooperate under the policy by refusing to answer questions at his Examination Under Oath. The lower Court allowed insurer's Motion for Summary Judgment.

On appeal to the Appellate Division of the District Court, Plaintiff provider argued that the Trial Court's implicit denial of provider's Motion to Strike insurer's affidavits at the MSJ hearing was erroneous, and therefore, insurer's MSJ was not supported by sufficient affidavits.

The Appellate Division disagreed with the provider indicating that several affidavits submitted in support of insurer's MSJ were "made on personal knowledge", and therefore admissible pursuant to Mass. R. Civ. P. 56(e). As such, the Appellate Division affirmed the lower Court's entry of summary judgment in favor of the insurer.[20]

* * *

MASSACHUSETTS OFFICE UPDATES

Smith & Brink, P.C. is pleased to announce that Jodi Conners, Shahan Kapitanyan, Douglas McInnis, Shauna L. Sullivan, Michael W. Whitcher, and James Yesu have been named Shareholders at the firm. To learn more about our new Shareholders, please visit our website at *www.smithbrink.com*.

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UPCOMING EVENTS

SMITH & BRINK, P.C. TO CONDUCT MOCK TRIAL TRAINING

Bruce Medoff conducts:

Civil and Criminal Mock Trial Training

Dates: April 26, 2017 and April 28, 2017

Location: Mass. Firefighting Academy, Stow, Mass.

For additional information, please email *RhondaZaniewski@SmithBrink.com*

* * *

SMITH & BRINK, P.C. TO PRESENT AT THE INTERNATIONAL ASSOCIATION OF AUTO THEFT INVESTIGATORS NORTH EAST REGIONAL CHAPTER ANNUAL TRAINING SEMINAR

David Brink presents:

RICO

Date: May 15 –May 18, 2017

Location: Portland, ME

For additional information, please visit *www.iaati.org/events/entry/north-east-regional-chapter-annual-training-seminar*

* * *

SMITH & BRINK, P.C. TO PRESENT AT THE NEW ENGLAND CHAPTER OF THE INTERNATIONAL ASSOCIATION OF SPECIAL INVESTIGATION UNITS' 12TH ANNUAL JOINT TRAINING SEMINAR & FRAUD EXPO

Bruce Medoff presents:

Preparing For Depositions

Date: June 6, 2017

Time: 3:15 p.m. – 4:30 p.m.

Location: Boxboro Regency Hotel and Conference Center, 242 Adams Place, Boxborough, Mass.

Jodi Conners presents:

Recent Developments in PIP Litigation

Date: June 7, 2017

Time: 9:30 a.m. - 11:30 am

Location: Boxboro Regency Hotel and Conference Center, 242 Adams Place, Boxborough, Mass.

For additional information about either of these events, please contact Jodi Connors at jconnors@smithbrink.com or visit *www.neiasiu.org/seminar*.

* * *

SMITH & BRINK, P.C. TO TEACH AT MA FIREFIGHTING ACADEMY

Bruce Medoff & Bill Tait to teach at:

Live Burn to Learn

Date: June 15, 2017

Time: 8:00 a.m. – 4:00 p.m.

Location: Department of Fire Services, MA Firefighting Academy, 1 State Road, Stow, MA

For additional information, please email *RhondaZaniewski@SmithBrink.com* or to register, please visit: *ci36.actonsoftware.com/acton/form/4952/0184:d-0001/0/-/-/-/-/index.htm*

* * *

CREDITS

Articles included in this newsletter were authored by Shareholders, Shahan J. Kapitanyan and James Yesu and Associates, Douglas R. Tillberg and Devine Nwabuzor with editing by Shareholder, Douglas D. McInnis. For additional information regarding our Shareholders or Associates, please visit our website at *www.smithbrink.com*.

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DISCLAIMER

The information contained within this newsletter is for informational purposes only, and should not be considered legal advice. Readers should seek professional counsel before acting, or relying, upon the information contained herein.

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ENDNOTES

[1] 31 U.S. § 3729, *et seq.*

[2] *United States ex rel. Escobar v. Universal Health Servs. (Escobar III)*, 842 F.3d 103, 105 (1st Cir., Nov. 22, 2016).

[3] *Id.* at 111.

[4] *Id.* at 107.

[5] *Id.* at 108.

[6] *United States ex rel. Escobar v. Universal Health Servs. (Escobar I)*, 780 F.3d 504, 514 (1st Cir. 2015).

[7] *Universal Health Servs. v. United States ex rel. Escobar (Escobar II)*, 136 S. Ct. 1989, 2001 (2016) (emphasis supplied).

[8] *Id.* at 2002-03.

[9] *United States v. Cadden*, U.S. Dist. Ct., D. Mass. No. 14-cr-10363-RGS-1 (Mar. 22, 2017).

[10] *Indictment*, ¶ 65.

[11] The United States Pharmacopeia ("USP") sets standards for the identity, strength, quality and purity of medicines. Section 9.01(3) of Title 247 of the Code of Massachusetts Regulations requires that all pharmacists licensed in the Commonwealth adhere to the standards set forth in the USP. Amongst others, USP-797 prohibited the use of an ingredient in drugs when the expiration date has been exceeded and required compounding personnel to be adequately skilled, educated, instructed, and trained to properly compound sterile drugs. Indictment, ¶¶ 17-19, 22, 31.

[12] Defendant was also acquitted of: defrauding the US Food and Drug Administration; introducing adulterated drugs into interstate commerce with the intent to defraud and mislead; and four counts of introducing misbranded drugs into interstate commerce with the intent to defraud and mislead.

[13] *United States v. Cadden*, 2016 U.S. Dist. LEXIS 73392, *8, 2016 WL 3167066 (D. Mass. June 6, 2016).

[14] *Id.*

[15] *Big Wheel Truck Sales, Inc. v. Safety Insurance Company*, No. 16-P-318, 91 Mass App. Ct. 1113, 2017 Mass. App. Unpub. LEXIS 299 (March 27, 2017).

[16] *Egleston Physical Therapy v. Progressive Direct Insurance Company*, Appellate Division of the District Court, Southern District, 16-ADMS-40017 (February 24, 2017).

[17] *Falmouth Hospital Association, Inc. v. Enterprise Rent-A-Care Company of Boston, Inc.*, Appellate Division of the District Court, Northern District, 16-ADMS-10014 (Jan. 30, 2017).

[18] *Bajwa v. Met. Prop. & Cas.*, Springfield District Court, 1423CV2020.

[19] *Merrimack Valley P.T., LLC v. Enterprise Rent-A-Car Co.*, Appellate Division of the District Court, 16-ADMS-10033.

[20] *Performance Physical Therapy v. Metlife Home & Auto*, Appellate Division of the District Court 16-ADMS-10019.