Tortious Interference and Physician Credentialing Decisions

By James Hutchison

Tortious interference claims can put a wrinkle in the otherwise generally straightforward jurisprudence governing decisions by hospitals to end affiliations with physicians. Whereas the legal principles that apply to a hospital's decision to suspend or revoke a physician's staff privileges are well established and relatively clear, claims for tortious interference, which can arise when a physician is terminated outside the parameters of the formal credentialing process, often spawn a murkier analysis. Indeed, a claim for tortious interference may survive a motion to dismiss in many settings where other claims are foreclosed.

Most states have adopted the so-called rule of non-review, or a similar rule that prohibits courts from reviewing the merits of a hospital's decision to suspend or revoke staff privileges. With subtle differences in application, such rules generally preclude courts from intervening in hospital staffing decisions except for the limited purpose of ensuring that applicable bylaws and other procedures were followed. To further insulate such decisions from judicial review (and to foster the candid exchange of information designed to improve patient outcomes), other statutes render inadmissible information concerning peer reviews and similar mechanisms by which patient treatment is assessed and decisions to suspend or revoke privileges are made. The net result of these rules is that a decision by a private hospital to terminate a physician's employment is largely immune from court review. Depending on the context of the termination, however, a claim for tortious interference may nevertheless create legal exposure.

In one case, a hospital and one of its exclusive specialty physician groups mutually desired to terminate a member of the group, but the group's managers lacked the resolve to carry out the termination on their own. So, they enlisted the aid of the hospital by having its CEO suggest that the group's exclusive contract might not be renewed if the physician remained a member. This made the group more comfortable because a provision in the physician's contract specifically allowed for his termination if his conduct threatened to jeopardize the group's relationship with the hospital. Following his termination, the physician filed suit—not against the group who fired him but against the hospital—for tortious interference. Whereas a decision to terminate his privileges in accordance with hospital bylaws would have been essentially immune from court review, the termination of his (at will) employment with the group opened the door for the physician to claim that hospital management had tortiously interfered in his reasonable expectation of continued employment. Indeed, the claim survived a motion to dismiss, and though the court later granted the hospital's motion for summary judgment based on the plaintiff's failure to present evidence that any interference by the hospital actually led to his termination, significant sums were spent on the defense.

In a recently decided case, physicians asserted claims for tortious interference against members of a hospital staff who rejected plaintiffs' preliminary applications for staff privileges. The trial court dismissed the claims and the Appellate Court upheld that ruling. Contrary to plaintiffs' argument, the court found that the decision by the staff physicians to reject plaintiffs' preliminary applications was part of the application process and therefore subject to the rule of non-review, i.e., since it did not result in termination, suspension, or reduction of existing staff privileges, it was not subject to judicial scrutiny. The court also rejected plaintiffs' argument that the pre-applications were mishandled, finding that the hospital's reviewing body had considered the pre-applications and supported the decision to reject them.
Despite the ultimate outcome, it is clear that plaintiffs asserted the claims for tortious interference in an attempt to circumvent the rule of non-review, reflecting a perception that claims for tortious interference are relatively easy to plead and difficult to dispose of on a motion to dismiss.

The reason for this perception may lie in two aspects of tortious interference jurisprudence that are not clearly defined. First, despite the name, the commission of a tort per se is not generally an element of the claim. Instead, a plaintiff must prove that the defendant “wrongfully” interfered in his reasonable expectation of continued employment. Although wrongful interference often takes the form of defamation, it is not limited to such conduct, leaving open the possibility that subtler forms of behavior can support the claim—at least at the pleading stage. Second, while most jurisdictions recognize certain “privileges” that provide latitude to interfere in the economic expectations of others, such as where one competitor displaces another with aggressive (but not dishonest) sales tactics, court decisions have often been unclear as to whether a motion to dismiss must find support for a privilege in plaintiff’s allegations, or may rely on easily proven facts beyond the four corners of the complaint. For present purposes, this means physicians may pursue claims for tortious interference because they are more apt to survive dismissal than direct claims based on a credentialing or staffing decision.

So, what is the advice for a hospital looking to reduce claims for tortious interference in connection with the termination of a physician, the rejection of an application for privileges, and the like?

One approach is to specifically reference claims for tortious interference in the hospital bylaws and waive any such claim not specifically arising from defamation or some other narrowly and clearly defined misconduct. Bylaws typically include a waiver by staff members of civil claims against fellow members based on actions taken in connection with their job duties (except for claims based on willful and wanton misconduct). Language aimed at foreclosing claims for tortious interference could be added to the waiver provisions. Similarly, any application or preliminary application for staff privileges could include a waiver of civil claims, including claims for tortious interference based on the decision to deny privileges or otherwise reject the application (except claims for discrimination against protected classes and other claims that cannot be waived for public policy reasons). At bottom, and as in many contexts, careful and defensive drafting can go a long way toward minimizing exposure to claims for tortious interference.