

Bankruptcy

Med mal loophole

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By: Jordana Mishory

The case of an uninsured Juno Beach neurosurgeon who recently won a bankruptcy discharge to escape two large medical malpractice claims has highlighted a loophole in the nation's tough new bankruptcy code.

It was thought that the massive federal bankruptcy overhaul that took effect in October 2005 would largely end the ability of doctors to file for Chapter 7 protection to block medical malpractice suits or wipe out judgments. Doctors also have used the threat of bankruptcy to force plaintiffs to settle for less money.

Under the new Bankruptcy Abuse Prevention and Consumer Protection Act, which was designed to crack down on abusive filings, debtors who earn more than the median state income — which includes most doctors — generally cannot file under Chapter 7 to quickly discharge their unsecured debt. Instead, such debtors generally can only enter a Chapter 13 debt repayment plan.

But some South Florida bankruptcy experts say the new means test does not apply when a person files for Chapter 7 to discharge debt arising from negligence, such as a medical malpractice claim. They say the means test for Chapter 7 filers only applies to discharging consumer debt.

"A doctor filing with multiple malpractice judgments wouldn't be affected by the new law," said Patricia Redmond, a bankruptcy specialist and shareholder at Stearns Weaver Miller in Miami. "It was something we all thought was strange."

She said some Chapter 7 filings by doctors to escape malpractice liability "were more abusive" than filings by ordinary debtors to evade credit card debt.

West Palm Beach bankruptcy attorney Barry Balmuth, who unsuccessfully challenged the Chapter 7 filing of Juno Beach neurosurgeon Jacques Farkas, expressed anger about the loophole. "A wealthy person who was careless in the operating room or in business can get a [Chapter 7] discharge and pay nothing, but someone with [an unpaid] medical bill can't," Balmuth said.

Although Farkas filed for bankruptcy before the new bankruptcy code took effect, his attorney and experts not involved in the case say nothing in the new law would prevent him from filing for Chapter 7.

The loophole has drawn renewed criticism of Florida's lax rules and enforcement regarding physician financial responsibility for satisfying malpractice claims. Florida is one of the few states in the country to allow doctors to practice without buying liability insurance.

Doctors who "go bare" are required to file a \$250,000 letter of credit or simply promise to pay claims. If a doctor doesn't satisfy a claim, a 2003 statute requires the state Department of Health and its Board of Medicine to suspend the doctor's medical license.

State officials have estimated that nearly one-third of Florida physicians carry no liability insurance. Florida medical leaders say many doctors go bare because premiums, particularly in South Florida, are some of the highest in the nation.

But the Daily Business Review reported in a series of articles in 2005 that the Department of Health and Board of Medicine have failed to enforce the requirement that doctors report malpractice judgments, and failed to take licensure action against the doctors for not reporting and paying claims. It also reported that the Health Department has sidestepped the issue of whether to take licensure action against doctors who bankrupt out of judgments.

The Department of Health Web site that publishes practice profiles of physicians listing their disciplinary history and licensure status indicates that Dr. Farkas' license is "clear" and "active."

State Sen. Dennis Jones, R-Seminole, a chiropractor who sponsored a 2005 bill to toughen state enforcement of physician financial responsibility and malpractice reporting rules, said the state should take a more aggressive role in enforcing the rules.

"Doctors owe judgments they never attempt to pay, yet the Board of Medicine continues to renew their license," Jones said. "That's obviously just wrong."

The Florida Medical Association did not return calls for comment by deadline.

'Stop the bleeding'

Farkas, whose case was first reported by the Palm Beach Post last month, filed for Chapter 7 in Palm Beach County in 2004. His petition followed the filing of two malpractice suits against him and JFK Medical Center in Atlantis, where he was employed at the time of the incidents.

He had malpractice coverage when he operated on the two patients who subsequently sued him. But he dropped his insurance before the suits were filed, and his insurance did not have tail coverage. So he had no coverage for the two claims.



Patricia Redmond

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Farkas' attorney, Charles Cohen of Furr & Cohen in Boca Raton, said his client had to file for bankruptcy because the plaintiffs would not settle for a reasonable amount. "We filed the bankruptcy to avoid the doctor continuing to pay legal fees and possible judgments," Cohen said. "We wanted to stop the bleeding."

One of the plaintiffs, Sam Sanguonchitte of Boynton Beach, a wristwatch repairman, saw Farkas in 1998 with a complaint of prolonged dizziness he experienced during a cruise. He was diagnosed with an abnormal cervical spine.

During an August 1999 procedure at JFK Medical Center, Farkas inserted several rods along the cervical spine in Sanguonchitte's neck. Two years later, a different neurosurgeon found that the rods had migrated into Sanguonchitte's cerebellum. He is now confined to a wheelchair and is often in pain.

In January 2004, Sanguonchitte sued both Farkas and JFK Medical Center in Palm Beach Circuit Court in separate suits consolidated for the purpose of discovery. Sanguonchitte's attorney, Nancy La Vista, of Lytal Reiter Clark Fountain & Williams in West Palm Beach, said she filed two separate suits because she did not want the case against the hospital stayed if Farkas filed for bankruptcy.

When Farkas filed for bankruptcy, the trial judge stayed the legal actions pending against him.

Last August, a jury found JFK liable for credentialing Farkas to perform the surgery even though he was not properly trained for it. The jury awarded Sanguonchitte \$11.4 million in damages. The hospital is appealing.

In December 2003, Thelma McAloon of Boynton Beach sued Farkas and JFK after Farkas allegedly cut nerve roots in her lower back due to a slip of his hand during a 2001 procedure. She initially saw the doctor because of severe lower back pain. The accident allegedly left the 77-year-old woman with no control of her bladder or bowels, no feeling in her vagina, leg pain and numbness in her feet.

The suit against JFK and the operating nurse goes to trial in March.

Farkas' liability insurer previously had paid on three malpractice claims against him — for \$200,000 in 1998, \$7,000 in 2001 and \$158,000 in 2004.

Not in bad faith

Both McAloon and Sanguonchitte tried to halt Farkas' Chapter 7 filing. They were represented by Balmuth.

Farkas' bankruptcy petition listed \$2.6 million in total assets, including a \$1.6 million oceanfront home in Juno Beach, nearly \$1 million in a pension and investments, and a \$400,000 annual salary.

Balmuth argued before U.S. Bankruptcy Judge Steven H. Friedman that Farkas' bankruptcy filing was not made in good faith.

But Friedman, and later U.S. District Judge Adalberto Jordan on appeal, held that good faith is not a requirement for filing such a suit. In addition, Jordan ruled that Farkas' actions were not tantamount to bad faith.

"Assuming that bad faith can serve as a basis for dismissal of a Chapter 7 petition, here there was not the sort of egregious conduct that would warrant dismissal for bad faith," Jordan wrote in his Nov. 22 decision.

Balmuth said the tough provisions in the bankruptcy code prohibiting abuse of bankruptcy process did not apply in Farkas' case. Miami bankruptcy attorney Chad Pugatch, who was not familiar with the details of the Farkas case, said challenging the filing on the basis of abuse would require evidence of hiding or misstating assets.

Judge Jordan dismissed the plaintiffs' appeal, saying the discussion of good faith was moot because the bankruptcy court already had discharged Farkas' debt.

Balmuth said his clients had entered an \$11 million claim in Farkas' bankruptcy case. Now, because Farkas' Chapter 7 petition has been approved, Balmuth doesn't expect McAloon and Sanguonchitte to be able to collect anything from the neurosurgeon.

State agencies mute

Declaring bankruptcy long has been a popular option for uninsured Florida doctors who face medical malpractice claims.

Florida medical malpractice plaintiff attorneys all tell war stories of doctors threatening bankruptcy to force settlements much lower than the amount juries might award their injured clients. Many plaintiff lawyers had expressed hope that the 2005 bankruptcy overhaul would take that weapon off the table by preventing doctors from liquidating their debts in Chapter 7 actions.

Florida physicians who practice without liability insurance must file a letter of credit for \$250,000 or simply pledge to pay at least \$250,000 of any judgment. A 2003 statute requires the state Department of Health to suspend the medical license of any doctor who fails to satisfy a claim.

Farkas had opted to satisfy the physician financial responsibility rule by promising to personally pay any claim. But by declaring bankruptcy, it appears that he will not be held responsible by the Department of Health for fulfilling his promise.

Representatives from the Department of Health, Board of Medicine and Department of Financial Services each referred questions about Farkas' case and the general issue to the other agencies. Despite repeated requests, none of them returned calls for comment on whether Farkas' bankruptcy discharge wipes out his responsibility to pay.

Cohen, Farkas' attorney, said he thinks doctors are legally responsible under the Florida physician financial responsibility rules for

paying malpractice claims even if they file for bankruptcy. But he said there is no judgment against his client in the McAloon or Sanguonchitte case. Thus, the state can't take licensure action against him. "He got his discharge, so he goes on," Cohen said.

Sen. Jones said the state should take a tougher stance on enforcing doctors' compliance with the physician responsibility rules. "It's a privilege to practice in Florida," he said. "If you haven't even attempted to pay back, you've abused that privilege."

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