

No. 91-3587

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

EMERALD DENISE JOHNSON, as)
Administrator of the Estate of)
LENISE XAVIER NELSON, a minor,)
deceased,)

Plaintiff-Appellant,)

v.)

UNIVERSITY OF CHICAGO HOSPITALS;)
~~JAMES WALTER, M.D.; DENISE~~)
McCALL, R.N.; ST. BERNARD)
HOSPITAL; NILUJARDO CAY, M.D.;)
AMARJIT SINGH, M.D.; RUDOLFO UY,)
M.D.; and THE MEDICUS GROUP,)
INC.,)

Defendants-Appellees.)

Appeal from the United States
District Court for the Northern
District of Illinois, Eastern
Division

No. 90 C 3620

Judge George M. Marovich

**AMICUS CURIAE BRIEF OF THE ILLINOIS HOSPITAL ASSOCIATION,
THE METROPOLITAN CHICAGO HEALTHCARE COUNCIL,
NORTHWESTERN MEMORIAL HOSPITAL, ILLINOIS MASONIC MEDICAL CENTER
AND THE AMERICAN HOSPITAL ASSOCIATION IN SUPPORT OF PETITION OF
APPELLEES UNIVERSITY OF CHICAGO HOSPITALS, JAMES WALTER AND
DENISE McCALL FOR REHEARING WITH SUGGESTION OF REHEARING IN BANC**

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Dated: October 21, 1992

*EMTALA: "comes to the
emergency department"*

CERTIFICATE OF INTEREST

The undersigned counsel for amicus curiae, Illinois Hospital Association furnishes the following list in compliance with Circuit Rule 26.1:

1. Illinois Hospital Association
2. not applicable
3. not applicable

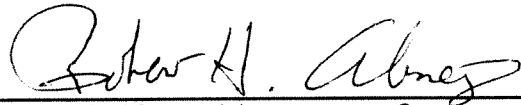
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CERTIFICATE OF INTEREST

The undersigned counsel for amicus curiae, the Metropolitan Chicago HealthCare Council furnishes the following list in compliance with Circuit Rule 26.1:

1. Metropolitan Chicago HealthCare Council
2. not applicable
3. not applicable



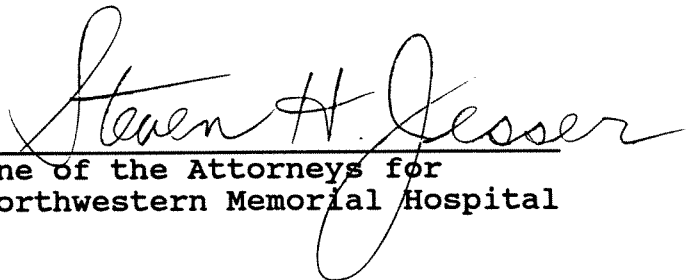
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2. Northwestern Memorial Corporation
3. not applicable




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CERTIFICATE OF INTEREST

The undersigned counsel for amicus curiae, the Illinois Masonic Medical Center, furnishes the following list in compliance with Circuit Rule 26.1:

1. Illinois Masonic Medical Center
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3. not applicable



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CERTIFICATE OF INTEREST

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3. not applicable

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**AMICUS CURIAE BRIEF OF THE ILLINOIS HOSPITAL
ASSOCIATION, THE METROPOLITAN CHICAGO HEALTHCARE
COUNCIL, NORTHWESTERN MEMORIAL HOSPITAL, ILLINOIS
MASONIC MEDICAL CENTER AND THE AMERICAN HOSPITAL
ASSOCIATION IN SUPPORT OF PETITION OF APPELLEES
UNIVERSITY OF CHICAGO HOSPITALS, JAMES WALTER AND DENISE
McCALL FOR REHEARING WITH SUGGESTION OF REHEARING IN BANC**

I. INTRODUCTION

This brief amicus curiae is submitted jointly by the Illinois Hospital Association ("IHA"), the Metropolitan Chicago Healthcare Council ("MCHC"), Northwestern Memorial Hospital ("NMH"), Illinois Masonic Medical Center ("IMMC"), and the American Hospital Association ("AHA"). IHA is a not-for-profit association whose membership of 210 hospitals comprises virtually every hospital in the State of Illinois. MCHC is a not-for-profit association representing over 80 hospitals in the greater Chicago area. NMH is a not-for-profit academic medical center which is one of four resource hospitals in the City of

Chicago designated by the State of Illinois under the Emergency Medical Services Systems Act (the "EMS Act"), Ill. Rev. Stat., ch. 111-½ § 5501 et seq. AHA is the primary national membership organization for hospitals in this country. It has approximately 5,400 member hospitals and other health care organizations. AHA's principal objective is to promote high quality health care and health services for all, through leadership and assistance to hospitals and health care organizations in meeting the health care needs of their communities. Virtually all AHA acute care hospitals are participants in the federal Medicare program and subject to COBRA. AHA member hospitals in Illinois, Wisconsin, and Indiana will be directly affected by the decision of this Court and other hospitals may be affected as it is used as persuasive authority in COBRA litigation across the country.

Amici submit this brief to address a single issue raised by the majority opinion. In reversing the district court's dismissal of the appellant's claim under the Comprehensive Omnibus Budget Reconciliation Act, 42 U.S.C. § 1395dd ("COBRA"), the majority panel held that although (a) COBRA requires a hospital to provide treatment for "any individual who . . . comes to the emergency department," and (b) there is no dispute that appellant did not come to the University of Chicago Hospitals emergency department in this instance, appellant nonetheless has stated a claim under COBRA because "an individual can seek medical assistance from a hospital through telemetry communications and paramedic services

without coming to the hospital's emergency room." Slip op. at 7. For the reasons stated below, this holding creates a significant impediment to the effective provision of emergency medical services throughout Chicago and the State of Illinois -- and therefore threatens the health and safety of Illinois citizens who rely on hospital emergency services.

II. ARGUMENT

For many years, the provision of emergency medical services in the State of Illinois -- and nationwide -- has been subject to enormous pressures. The demand for and cost of these services often greatly exceed the capacity of hospitals which provide them. Two common situations are illustrative. First, in metropolitan areas such as Chicago, because hospital emergency departments periodically experience overcrowding, patients must wait to receive needed emergency services. Second, particularly in rural areas, many hospitals simply cannot afford to staff and maintain their emergency rooms to have the capability to deal with all types of emergency conditions.

To address these problems, the Illinois General Assembly enacted the Emergency Medical Services Act, Ill. Rev. Stat., ch. 111-½, § 5501 et seq., to provide the State of Illinois with a coordinated system for the provision of emergency medical services (the "EMS Act"). Under the EMS Act, a group of hospitals meeting the standards set forth in the Act and accompanying regulations may establish a system where one hospital will operate as a so-called "resource hospital" --

coordinating pre-hospital emergency services for the entire system, composed of hospitals and ambulance providers. Medical control for the EMS system is provided by the "project medical director" -- a physician appointed by the resource hospital with responsibility and authority for total management of the EMS system. Pursuant to protocols developed by the system hospitals and approved by appropriate regulatory agencies, the project medical director directs emergency vehicles to the most appropriate available facility.

EMS systems have developed complex protocols for a procedure commonly referred to as "bypass." The essence of the bypass concept is that the closest hospital may not necessarily be the most appropriate hospital to handle any given emergency. When pre-hospital care personnel make contact with the project medical director to receive medical orders, they may be informed that the nearest hospital is at capacity and does not have the resources to provide the emergency services at that time. The pre-hospital personnel in the ambulance may be directed to another hospital which can provide the necessary emergency services. Bypass procedures thus enable hospitals to allocate responsibility for emergency services in a manner which maximizes the effective provision of those services to the public.

The EMS Act was intended to ensure the most rational and efficient use of emergency medical services, and therefore, the function performed by the resource hospital is absolutely critical to the success of an EMS system. In the City of

Chicago alone, in 1991, fire department paramedics handled 78,029 advanced life support medical emergencies under the coordination of an EMS system resource hospital. Absent the EMS systems and the role of the resource hospitals, there is no guarantee that those 78,029 people would have gotten to the hospital emergency room best able to provide necessary treatment -- in fact, it is certain that many of them would have ended up at over-crowded or temporarily closed emergency rooms while adequate facilities and services waited idle elsewhere.

The majority panel completely ignores the fact -- as pleaded in the complaint -- that defendant UCH was contacted solely in its capacity as the system resource hospital. (Compl. ¶¶ 20-28). A resource hospital in a coordinated system may be exposed to tremendous potential liability simply by directing an emergency vehicle to the most appropriate hospital for that patient. Nothing in the plain language or in the extensive legislative debate indicates that COBRA was intended to apply under these circumstances.

The choices for these hospitals will be clear. They either will be forced to seek revenue to offset this exposure, or limit or eliminate the exposure by reducing or terminating telemetric or telephonic coordination of services altogether. In either case, it is the general public that will bear the burden of this decision -- either diminished access to critically needed emergency services or increased health care costs. Indeed, under the Court's ruling, there is simply no reason why any of the current fifty resource hospitals in the

state would be willing to continue to serve in that capacity. Hence, the coordination of scarce emergency services will be correspondingly affected -- to the detriment of citizens served by these hospitals.

We do not read COBRA to impose such an enormous burden on the provision of pre-hospital and emergency health care. If the Congress had proposed legislation which would have the effect of increasing hospital liability so dramatically, a full and fair dialogue on the consequences of such legislation certainly would have ensued in light of the health care crisis which already exists. We respectfully submit, however, that Congress has done no such thing in the enactment of COBRA, instead attaching liability only in the case of an individual who "comes to the emergency department" of a hospital. We are aware of no legislative history and no policy which supports the extraordinary extension of this language which the panel majority's opinion embraces. Because the costs of this unwarranted extension of COBRA are so immense -- to hospitals and to the community at large -- we urge the court to reconsider the portion of its October 7, 1992 opinion relating to COBRA liability.

Respectfully submitted,

ILLINOIS HOSPITAL ASSOCIATION

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