Daniel J. Myers is a principal at Myers Law, LLC. He can be reached at 216.236.8202 or dmyers@myerslawllc.com

Hospitals Are Not Special: Consumer Laws You Need To Use When Dealing With Hospital Bills, Personal Injury Settlements, And Medical Malpractice

by Daniel J. Myers[1]

In Ohio, there are a handful of very broad, very powerful laws that protect consumers from unfair, deceptive, and unconscionable sales practices of businesses, debt collectors, and service providers. These laws are not new—most are decades old—but they are not well understood or used by most attorneys. These old laws provide new ways to solve many of the most persistent and vexing problems in medical billing, hospital payment, personal injury settlement negotiation, and could potentially provide some security in medical malpractice litigation.

This article explains what those laws are, and how they apply to hospitals, especially after a recent 2021 decision from Cuyahoga County Common Pleas Judge John P. O'Donnell in the putative class action lawsuit *van Brakle v. The Cleveland Clinic Foundation*. Finally, this article explores how attorneys may be able to use these laws when dealing with hospitals, nursing homes, and other "healthcare" or "medical" service providers, excluding physicians and chiropractors.

Hospitals have avoided compliance with these laws by not complying with the laws. In litigation, some have claimed that they are unique, different from all of the other businesses regulated by Ohio's consumer laws. That viewpoint is challenged in *van Brakle*, and should be challenged by attorneys in other practice areas, as well.

I. The Consumer Laws And Other Laws You Need To Know About If You Interact With Hospitals.

There are four consumer protection laws all attorneys should familiarize themselves with when they are forced to deal with hospitals, nursing homes, or medical bills. These are the Consumer Sales Practices Act (CSPA); the Cleveland Consumer Protection Ordinance (Cleveland Ordinance); the Summit County Consumer Protection Ordinance (Summit Ordinance); and the Fair Debt Collection Practices Act (FDCPA). This article will focus on the CSPA. The Ohio Association for Justice published an article previously in its *Trial* magazine discussing the application of the FDCPA to medical bill debt collectors and insurance reimbursement collectors.[2] The Summit Ordinance and Cleveland Ordinance generally mirror (or in Cleveland's situation, incorporate) the Ohio CSPA requirements and prohibitions, with some exceptions under the Summit Ordinance.

Attorneys should also be aware of three other state statutes that relate to the maximum amount that in-network hospitals can charge or attempt to collect from insured patients. Understanding these statutes is particularly important when negotiating or paying medical bills after settlement or judgment in a personal injury case.

A. The Consumer Sales Practices Act and local Ordinances.

The CSPA[3] has been Ohio's main consumer protection law since the 1970s. This law prohibits "suppliers" from engaging in unfair, deceptive, or unconscionable acts or practices with their consumer customers.[4] The CSPA broadly defines "suppliers" to include any person that is engaged in the business of effecting or soliciting the sale, lease, or transfer of goods or services to consumers.[5] The CSPA also applies to the individual owners, directors, and officers of a company when those persons participate in, direct, take part in, or otherwise cause the prohibited conduct to occur.[6] The CSPA does not apply to transactions with attorneys, physicians, dentists, certified public

accountants, or certain other professionals.[7] Some exemptions are blanket professional exemptions while others are limited to specific situations.[8]

Most of the specific acts the CSPA prohibits or requires are found in the Ohio Administrative Code, as well as a case database maintained by the Ohio Attorney General, known as the Public Inspection File.[9] The CSPA entitles consumers to rescind certain transactions or, in other situations, obtain actual economic damages, non-economic damages, treble actual economic damages, statutory damages for each violation, and attorneys' fees for knowing violations.[10] Consumers can also obtain declaratory relief and injunctive relief, with courts declaring specific conduct to violate the CSPA and forever prohibiting the business from engaging in that illegal conduct.[11]

As discussed later, the CSPA applies to hospitals and hospital systems because hospitals provide services to consumers, and hospitals are not physicians. Physicians, and not hospitals, are exempt from the CSPA.[12] Every Ohio appellate court and U.S. Federal District Court considering this issue has agreed that the physician exemption is limited to people that practice medicine, is narrowly interpreted, and does not include hospitals, or debt collectors, attempting to collect on a hospital bill.[13]

The CSPA specifically requires businesses that provide services, including non-profit businesses, to provide notices to a consumer before services are performed outlining the consumer's right to an estimate.[14] When an estimate is requested, a good faith attempt must be made to provide that estimate.[15] When a deposit or other partial payment is made toward the service, the business must provide, at that time, a written receipt that not only states the amount and date of the payment, but also the cash selling price of the services, and description of the services, to which the payment applies.[16] Central to the Receipt Rule is that the payment must actually be timely applied to the service. Subsequent payments (deductible or coinsurance) after the initial deposit (copayment) require the business to provide a similar written receipt, detailing the amount paid, date paid, and balance remaining due, among other things.[17] If the transaction amount or terms change, then the subsequent payments are considered initial payments, and the business must provide the more detailed written receipt for initial payments.[18] This prevents miscommunications and misunderstandings about amounts paid, amounts owed, and double billing.

The Cleveland Ordinance[19] and Summit Ordinance[20] are similar to the state law, and provide for similar, and cumulative, damages. The Cleveland Ordinance applies to all consumer transactions in the City of Cleveland, and the Summit Ordinance applies to all consumer transactions in Summit County. These can easily apply to most if not all Cleveland Clinic Foundation, University Hospitals, Summa Health, Metro, and other hospital and nursing home transactions.

B. The Other Medical Cost Statutes.

Ohio also has multiple statutes limiting the amounts that insured patients are allowed to be charged by an in-network facility or provider. One law prohibits hospitals and other providers from attempting to collect compensation from a patient that exceeds the patient's copayment, deductible, or coinsurance responsibility for the service, but it only applies to patients enrolled in health insurance plans that the provider contracts with, *i.e.* the provider is considered to be an in-network provider.[21] A hospital violates that law when they seek to recover from the insured patient an excessive amount. The law does not apply to situations where the hospital attempts to collect an excessive amount from someone other than the patient. For example, the law does not apply when the hospital seeks to collect payment from the patient's other insurers following an assignment of medical payment benefits.[22] When a hospital takes a copay from a consumer, fails to account for it, and then bills the patient the same amount or more, it has necessarily violated R.C. 1751.60 because it has attempted to collect more than allowed.

Another statute, R.C. 3923.81, similarly only applies to insured patients, but it limits the patient's responsibility when the patient is required to pay out of pocket for a service. The patient is not responsible for more than what the hospital would be paid by the patient's insurer "under applicable reimbursement rates negotiated with the provider."[23] Depending on the agreement between the hospital and the insurer, this amount could be lower than expected. The statute refers to the reimbursement rate as the rate that the insurer agrees to pay the provider for covered charges.[24] The statute does not appear to constrain the applicability of this out-of-pocket limit only to services that are actually covered by the insurance plan so long as the service has an applicable negotiated rate if it were covered.

Finally, Ohio attempted to enact R.C. 5162.80, a price transparency law requiring hospitals and providers to give patients a good faith estimate prior to non-emergency services being performed. However, hospitals appear generally not to have complied with this law, and its constitutionality has been challenged due to the procedure followed when it was enacted.[25]

These medical cost statutes, as well as the CSPA, were recently at issue, and remain at issue, in a putative class action pending in the Cuyahoga County Court of Common Pleas.

II. The Cleveland Clinic Foundation Medical Billing Lawsuit

In *van Brakle v. The Cleveland Clinic Foundation*[26] , a consumer alleged that her copayment for an imaging service was never applied to that service, and never applied to her account. She claims to have never received a receipt required by the CSPA, was never given an estimate required by Ohio law or the CSPA, and was never given a written notice of her right to an estimate as required by the CSPA. She claims that the Cleveland Clinic sent her to collections to attempt to recover an unlawful amount.

The Cleveland Clinic moved to dismiss the action arguing, among other things, that the CSPA did not apply to it because the Cleveland Clinic was exempt under the physician exemption to the definition of "consumer transaction," that the specific CSPA regulations in the Ohio Administrative Code were impossible to comply with and therefore did not apply to it, and that the CSPA claims were preempted by R.C. 5162.80, which it also argued was unconstitutional and not enforceable against it.

Judge John P. O'Donnell denied the motion to dismiss and issued a 12-page opinion disagreeing with the Cleveland Clinic's legal positions.[27] This decision provided detailed explanations previously missing from other legal authority on these issues.

Judge O'Donnell first noted that "[t]he CSPA does not exclude transactions between patients and hospitals or clinics" from its definition of "consumer transaction" because the physician exemption only applies to human beings, not corporate hospital systems.[28] This is consistent with long-standing medical malpractice case law that clearly distinguishes hospitals from physicians, because "only licensed physicians, not hospitals, are permitted to practice medicine."[29]

Additionally, Judge O'Donnell stated that a "hospital or clinic is not unambiguously excluded from the Ohio Administrative Code's rules," because the relevant regulations apply to consumer transactions, and therefore they apply to hospitals who are engaged in such transactions.[30] This has a far-reaching impact on other regulations, such as the requirement to provide a consumer with a written description of all services and goods provided during "services," including the identity of the individuals performing the various services.[31] Such a duty and such a failure have obvious impact and relevance to medical malpractice cases where the identity of the tortfeasor can be unknown or hidden from the patient, resulting in dismissal or statute of limitation issues. Additionally, regulations prohibit businesses from charging for services that are not expressly authorized, or charging for partially completed services without advance warning that charges will be incurred for incomplete services.[32]

Furthermore, Judge O'Donnell noted that R.C. 5162.80 did not preempt the CSPA claims for two reasons: first, that law appears to be unenforceable due to questions of its constitutionality, and unenforceable laws cannot conflict with anything; second, the CSPA and R.C. 5162.80 appear to require the same thing.[33] Additionally, the Court noted that it is empowered to declare new conduct to be unfair, deceptive, or unconscionable under the CSPA, even if no court has yet declared that conduct to be unfair, deceptive, or unconscionable.[34]

Ultimately, Judge O'Donnell stated that if Mrs. van Brakle is able to prove the allegations in her Amended Complaint against the Cleveland Clinic, "they are sufficient to support a class action claim."[35] This case, not to mention the supporting authority behind it, has clear and, up to now, unrealized potential use in personal injury and medical malpractice cases.

III. How These Statutes Help Injured Parties In Personal Injury And Medical Malpractice Cases.

Applying the CSPA to hospital billing and medical services brings more remedies, more defenses, and better protections for patients. It is important to note that there is a two-year statute of limitations period in which to bring CSPA claims against a hospital or debt collector, unless the hospital sues to collect the relevant bills or obligation from the patient, in which case all CSPA claims, even long-expired claims, can be raised in a counterclaim.[36] Additionally, it is critical to remember that the CSPA does not apply to physicians or chiropractors or other licensed practitioners of medicine, but does apply to hospitals and clinics and hospital systems.

Bearing that all in mind, and the strategic decisions, advice, and analysis each unique situation requires, it is clear that the CSPA and these laws have the potential to tip the balance in personal injury settlement negotiations. Using these laws could also provide some protection in medical malpractice cases where the individual physician is not known until after the statute of limitation has run.

A. Using the CSPA to Retain more Settlement Proceeds for Clients.

In personal injury cases, a substantial amount of time is spent negotiating with medical providers over billing or with debt collectors on insurance reimbursement claims, and clients often give up substantial sums of their settlement or judgment proceeds to these entities. Using the CSPA, attorneys for

injured parties can aggressively request proof of (1) estimates being provided up front on non-emergency (or even some emergency) services, (2) proper receipts being provided for copayments or other payments made previously, (3) identification of persons that provided the actual services, and (4) cost-breakdowns of labor separate from materials provided by the hospital.[37] If the hospitals or their debt collectors are unable to provide proof of these things, or refuse to do so, the patient may be able to leverage these claims to reduce the debt, or bring suit. In suit, the patient may be entitled to statutory or treble their actual damages from the hospital or debt collector, and may recover attorneys' fees.[38]

Additionally, attorneys can request the negotiated reimbursement rates between the provider and the insurer to make sure the patient is not being required to pay more than legally allowed. If the hospital has overbilled the patient because it did not submit the claim to the patient's insurer, the hospital could be requested to submit the claim to the insurer. In some situations, with delayed claims, insurers have issued an Explanation of Benefit form stating that the patient responsibility is $0, even when the claim is denied.[39]

There may be agreements between insurance companies and in-network hospitals that claims will be submitted within a certain amount of time. If the amount billed exceeds the amount the insurer agreed to pay for that service, there is good reason to reduce the charged amount due to the limitation on patient responsibility under R.C. 3923.81. Finally, when the hospital overcharged a patient under R.C. 1751.60, and collected more money that it was entitled to from the patient, a claim—perhaps even a class claim—might exist for unjust enrichment. When negotiating with hospitals and debt collectors, attorneys should remember the possible remedies available in a lawsuit, including the often-ignored declaratory judgment and injunctive relief that could forever alter the hospital's practices.

B. Belt and Suspenders for a Medical Malpractice Lawsuit.

In medical malpractice cases, hospitals are not generally liable unless the victim of malpractice can prove that a physician or employee was primarily negligent, and a plaintiff's failure to sue the proper physician may defeat a vicarious liability claim against the hospital.[40] Patients and their attorneys often do not know all of the individuals involved in the care of the patient, even after medical records are requested pre-suit. In these difficult situations, it may make sense for counsel to add one additional count to a malpractice action, against the hospital only, for violations of the CSPA. The CSPA becomes most helpful when the hospital has not identified, and the patient does not know, all of the persons that provided medical care or services.

Failing to sue the proper individual usually results in dismissal of the case against the hospital, or, at best for the malpractice victim, the hospital pointing to an empty chair at trial.[41] To avoid that, attorneys in the right situation may consider adding a claim for the hospital's (not the physician's) violation of the CSPA Service Rule, OAC 109:4-3-05(D). According to Judge O'Donnell's decision in *van Brakle*, the Service Rule requirements appear to apply to hospitals. These requirements include a duty to inform the patient in advance that someone other than the hospital's employees (*i.e.* subcontractors or other independent contractors) may be performing some of the services when the hospital disclaims any warranty or guarantee for those services.[42] Upon request, the hospital needs to specifically identify the other persons to the patient.[43] More to the point, the hospital is also required to given a written, itemized cost break down for the services rendered and goods or materials provided, and that writing must identify all individuals that performed services for the patient.[44] There is no requirement that the patient request this writing from the hospital—it exists as a legal duty on the hospital to provide to the patient. The hospital's failure to do these things can violate the CSPA. The hospital's failure to provide that information could create direct liability for the hospital under the CSPA.

Although the CSPA does not apply to claims of personal injury or death[45], and therefore it may not be possible to include the lost value of the unrealized malpractice action in the consumer claim against the hospital, it does bring up the possibility of additional damages, treble damages, statutory damages, limited non-economic damages, and attorney fees, against the hospital for its violations. Under the Cleveland and Summit Ordinances, those non-economic damages are not as limited as they are under the CSPA. Arguments could be made that non-personal injury damages should or could include the sunk expense of experts on the lost malpractice case, costs of attempting to locate the correct identities of physicians that should have been disclosed, or other expenses. It can also be raised during discovery to identify missing parties or obtain audit trails of medical records, to show that the hospital had a duty to provide this information pre-suit, and should not be dragging its feet during discovery on these issues or topics.

Attorneys may also be interested in exploring whether the failure to provide these identities is fraudulent concealment, as the hospital would have failed to disclose latent information that it was legally obligated to provide, and which was material to the service or billing of the service.

IV. Conclusion

While the *van Brakle* case is only one case, and has not been fully litigated, the decision of Judge John O'Donnell and the authority it is based upon make it clear that the CSPA should not be ignored or left unused in personal injury settlement negotiations or medical malpractice cases. The CSPA, as well as other statutes, should be consulted by personal injury attorneys, medical malpractice attorneys, and any attorneys dealing with consumer debt or representing individuals wronged by a company, even in non-traditional consumer law settings. There are lessons to learn, and roads never travelled, that could change hospital, nursing home, and debt collection practices for the better moving forward. ■

End Notes

1. Dan Myers is a consumer lawyer practicing statewide but located in the Cleveland-area. Dan focuses his practice on patients, homeowners, and individuals who have been overbilled, defrauded, or received shoddy services from hospitals, home improvement contractors, and debt collectors. In the past nine years, Dan has handled individual cases and class actions. You can find out more information about these laws, or Dan, at www.ShieldConsumers.com, or www.OhioHomeownerLaw.com. He, along with Scott Perlmuter of Tittle & Perlmuter, are counsel of record in the putative class action *van Brake. v. The Cleveland Clinic Foundation*. This article is not legal advice, and the author is not your attorney or co-counsel. This article is provided for informational purposes, and includes thoughts, opinions, and ideas of the author. The thoughts in this article should not be followed without an independent, specific analysis performed by counsel in each case or situation.
2. Daniel Myers, *The Forgotten Consumer: Statutory Damages most Personal Injury Attorneys Leave on the Table at Settlement*, 30 Ohio Trial (Publication of the Ohio Association of Justice), 36 (Winter 2020).
3. R.C. 1345.01 *et seq.*
4. R.C. 1345.02(A); R.C. 1345.03(A).
5. R.C. 1345.01(C); R.C. 1345.01(A).
6. *See, e.g., Garber v. STS Concrete Co., L.L.C.*, 8th Dist. Cuyahoga No. 99139, 2013-Ohio-2700, 991 N.E.2d 1225, ¶¶ 27-28 (discussion of individual liability of owners, offices, and directors under the CSPA).
7. R.C. 1345.01(A).
8. *Id.*
9. R.C. 1345.09(B); OAC 109:4-3-01 *et seq.*; the Online Public Inspection File can be accessed at https://opif.ohioattorneygeneral.gov/.
10. R.C. 1345.09(A)-(B).
11. R.C. 1345.09(D).
12. *See Thorton v. Meredia Suburban Hosp.*, 8th Dist. Cuyahoga No. 59405, 1991 Ohio App. LEXIS 5549, *2-3, 1991 WL 244206 (Nov. 21, 1991); *Summa Health Sys. v. Viningre*, 140 Ohio App. 3d 780, 749 N.E.2d 344, 356 (9th Dist. Dec. 27, 2000); *Elder v. Fischer*, 129 Ohio App. 3d 209, 215-16, 717 N.E.2d 730 (1st Dist. July 24, 1998) (appeal not accepted *Elder v. Fischer*, 84 Ohio St. 3d 1434, 702 N.E.2d 1213 (1998)); *Firelands Reg'l Med. Ctr. v. Jeavons*, 6th Dist. Erie No. E-07-068, 2008-Ohio-5031, ¶¶ 34-35; *Monroe v. Forum Health*, 11th Dist. Trumbull No. 2012-T-0026, 2012-Ohio-6133, ¶¶ 61-64; *Lockard v. Kno-Ho-Co Community Action Comm'n*, 5th Dist. Coshocton No. 92-CA-21, 1993 Ohio App. LEXIS 4503, at *9-10, 1993 WL 385359 (5th Dist. Sept. 20, 1993).
13. *See* cases cited in note 11. *See also Ruess v. First Fin. Collection Co.*, S.D. Ohio No. 1:08-cv-697, 2009 U.S. Dist. LEXIS 115624, 2009 WL 4828600 (S.D. Ohio Dec. 11, 2009); *Kelly v. Montgomery Lynch & Assoc.*, N.D. Ohio No. 1:07-CV-919, 2008 U.S. Dist. LEXIS 30917, *31 at fn. 6, 2008 WL 1775251 (N.D. Ohio Apr. 15, 2008); *Foster v. D.B.S. Collection Agency*, 463 F. Supp. 2d 783, 808-09 (S.D. Ohio Dec. 5, 2006); *Leib v. Thompson, Dunlap & Heydinger, Ltd.*, S.D. Ohio No. 2:17-cv-00243, 2019 U.S. Dist. LEXIS 14014, 2019 WL 358904 (S.D. Ohio Jan 29, 2019).
14. OAC 109:4-3-05(A)-(C).
15. *Id.*
16. OAC 109:4-3-07(B).
17. OAC 109:4-3-07(C).
18. *Id.*
19. Cleveland Cod. Ord. § 641.01 et seq. (definitions); Cleveland Cod. Ord. § 641.11-12 (defining acts that are unfair or unconscionable); Cleveland Cod. Ord. § 643.02 (general prohibition); Cleveland Cod. Ord. § 643.11 (enforcement and damages).
20. Summit County Cod. Ord. § 201.01(h)-(i) (defining unfair and unconscionable acts prohibited); Summit County Cod. Ord. § 761.01 et seq.
21. R.C. 1751.60(A).
22. *King v. ProMedica Health System, Inc.*, 129 Ohio St.3d 596, 2011-Ohio-4200, ¶ 2, 955 N.E.2d 348.
23. R.C. 3923.81(A).
24. R.C. 3923.81(C)(2).
25. *Community Hosps. & Wellness Ctrs. v. State*, 6th Dist. Williams Nos. WM-19-001, WM-19-002, 2020-Ohio-401 (Feb. 7, 2020).
26. All allegations and descriptions of the claims in the *van Brakle v. The Cleveland Clinic Foundation* lawsuit are from the Amended Complaint filed in that case, available online at the Cuyahoga County Searchable Docket, located at *https://cpdocket.cp.cuyahogacounty.us*, Case Number CV-20-936348.
27. J.E. Denying Def's M. to Dism. Am. Compl., dated 01/14/2021 (hereinafter CCF Decision), available on the Cuyahoga County Docket.
28. *Id.*, at pp. 4-5.
29. *Schelling v. Humphrey*, 123 Ohio St. 3d 387, 2009-Ohio-4175, 916 N.E.2d 1029, ¶ 14 (emphasis added) (quoting *Albain v. Flower Hosp.*, 50 Ohio St.3d 251, 256, 553 N.E.2d 1038, (1990) *reversed on other grounds* as noted in *Poe v. Univ. of Cincinnati*, 10th Dist. Franklin Nos. 12AP-929 & 13AP-210, 2013-Ohio-5451, ¶ 37, 5 N.E.3d 61).
30. CCF Decision, at p. 7.
31. *See* OAC 109:4-3-05(D)(12) & (16).
32. *See, generally*, OAC 109:4-3-05(D).
33. CCF Decision, at pp. 9-10.
34. *Id.*, at pp. 10-11.
35. *Id.*, at p. 12.
36. R.C. 1345.10(C) (establishing a two-year statute of limitations, but noting that "an action . . . arising out of the same consumer transaction can be used as a counterclaim whenever a supplier sues a consumer on an obligation arising from the consumer transaction.").
37. *See, generally*, OAC 109:4-3-05; OAC 109:4-3-07.
38. R.C. 1345.09(B) (regarding damages); R.C. 1345.09(F)(2) (regarding attorneys' fees).
39. The author has professional experience receiving the same in relation to various client matters where hospitals submitted bills and claims to insurance too late. Your experience may differ.
40. *Cobbin v. Cleveland Clinic Foundation*, 8th Dist. Cuyahoga No. 107852, 2019-Ohio-3659, ¶¶ 25-30, 143 N.E.3d 1155 (discussion on hospital vicarious liability and physician liability).
41. *Rush v. University of Cincinnati Physicians, Inc.*, 1st Dist. Hamilton No. C-150309, 2016-Ohio-947, ¶¶ 23-26.
42. OAC 109:4-3-05(D)(16).
43. *Id.*
44. OAC 109:4-3-05(D)(12).
45. R.C. 1345.12(C).