

A New Year's Resolution: Avoid The Rising Tide of Defamation Claims In The Health Care Arena

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In college and graduate school, we all had professors that had "non-attribution/academic freedom" policies designed to foster open debate, critical thinking and robust discussion. To state the obvious, we are a long way from those college days. In the highly competitive health care arena where public views associated with products, services, research and technology can translate into millions of dollars gained or lost, the last several years have seen a rising number of defamation claims, particularly arising in the context of published clinical studies or product testing articles.

For example, this past year the Massachusetts federal district court in [Saad v. American Diabetes Association](#), 2015 U.S. Dist. LEXIS 108977 (D. Mass. 2015) was faced with the issue of whether statements in a prominent research publication expressing "concern" about the manipulation of scientific data were actionable.

In [Saad](#), the plaintiff, a physician and professor of medicine, sued the American Diabetes Association after it published an "Expression of Concern" in its journal "Diabetes" relating to several previous articles by Dr. Saad that "Diabetes" had published. The ADA informed Dr. Saad that his prior articles "appear to contain instances of [laboratory] image manipulation and duplication." The ADA also contacted the university where Dr. Saad taught to express its concerns. The university, in turn, conducted its own investigation, which concluded that "mistakes had occurred in the treatment of the digital images, identification methods, storage, and the manipulation of the laboratory images." However, it found no evidence of dishonesty by Dr. Saad and that, despite the mistakes, the articles were scientifically supported. The ADA then published an "Expression of Concern" in the online and print versions of "Diabetes," stating that based on the inaccuracies found by the investigation, it remained concerned about the reliability and credibility of some of the data presented by Dr. Saad.

Dr. Saad then sued for defamation, asserting that the ADA's statements falsely implied professional dishonesty. The Court dismissed the lawsuit, ruling that the ADA's statements were protected opinions based on disclosed facts. In so doing, the Court noted a series of recent decisions in which courts confronted with this type of situation have recognized that statements made in the context of a scientific/medical debate lend themselves to being deemed protectable opinion under the First Amendment.

Among those decisions were opinions issued by the Supreme Judicial Court of Massachusetts in [HipSaver, Inc. v. Kiel](#), 464 Mass 517 (2013) and the Court of Appeals for the Second Circuit in [ONY, Inc. v. Cornerstone Therapeutics, Inc.](#), 720 F.3d. 490 (2nd Cir. 2013). [HipSaver](#) involved trade disparagement claims brought against the Journal of the American Medical Association by a medical device manufacturer that claimed a published clinical trial study had libeled it. Similarly, the [ONY](#) case arose from allegations that a published scientific article reporting research results violated the Lanham Act's prohibition on false advertising and separately constituted "tortious injurious falsehoods."

The common legal thread throughout these cases is that courts will be more likely inclined to deem assorted disparaging or critical statements made in the context of reporting on research results to be protectable opinion if the data and facts underlying the medical/scientific viewpoint is disclosed so that the nexus between the disclosed facts and the opinion is reasonably clear, thereby allowing reasonable readers to discern for themselves whether they agree or disagree with the published view. As a result, health care companies, hospitals, and those publishing clinical studies critiquing products, services or technologies would be well advised to review such written statements to ensure that: (1) the factual basis for any opinion is set forth in the published work; (2) the factual basis underlying the opinion is itself accurate; (3) outright assertions of dishonesty or misconduct are avoided unless carefully supported; and (4) cautionary language is used where appropriate. This will minimize the risk that the critical discussion of science and medicine plays out in a public courtroom, rather than in the public marketplace of ideas.

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