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Going, Going, Gone...The Opportunities and Legal Pitfalls of Online Surgical Auctions

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GOING, GOING, GONE . . . THE OPPORTUNITIES AND LEGAL PITFALLS OF ONLINE SURGICAL AUCTIONS

Brian J. Caveney

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"We're trying to empower and educate consumers... The result: an informed health care consumer empowered with options and complete confidentiality."

"It's dangerous to consider that a patient's care could be reduced to a commodity, like a plane ticket or hotel room."

I. INTRODUCTION

The evolution of the Internet is universally recognized as one of the most important technological advances of the last century. Because the health care industry comprises one of the largest sectors of the American economy, it was inevitable that the promising new Internet technology would be applied in numerous ways to health care. Entrepreneurs are finding creative solutions to difficult problems in the distribution, supply, financing, and provision of health care products and services, thereby improving efficiency and reducing error rates. However, with the exception of newly released privacy and confidentiality regulations, there is very little governmental oversight of the new tools of commerce in the typically highly regulated health care industry.

One of the unique applications of Internet technology in the health care sector is the auctioning of surgical procedures on websites. Publicized as a low-cost way for consumers to make more informed choices about their surgical care, surgical auctions on the Internet may shift the traditional paradigm of medical referral and health care delivery to a more consumer-driven model.

This article provides a brief discussion of Internet auction technology and availability, including its broader applications to health care products and services. It examines the process utilized by the most popular surgical auction site, MedicineOnline.com, and the medical industry's response to the emergence of the surgery auction sites. Furthermore, as no cases of cybermalpractice have been reported in American jurisdictions, it hypothesizes on the various legal theories that plaintiffs could use to establish causes of action against both the surgeons involved in surgical auctions and the websites facilitating the auctions. This article is intended to raise questions about the practice of online surgical auctions, but is not intended as an exhaustive analysis of the causes of action, nor does it provide recommendations on how to proceed with the claims.

II. INTERNET AUCTION SITES

The veil of anonymity on the Internet and the excitement of competing

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with others for millions of hard to find items helped to create the online auction
craze that has swept America and the world. At least thirty-one percent of
Americans who access the Internet regularly, or about thirty-five million people,
participate in online auctions. The most popular of the auction sites, eBay, had
22.4 million registered users in 2000, a 124% increase from the previous year. In
the comfort of their own home or office, consumers now have access to almost
anything in the world with just a few clicks of the mouse.

However, the potential for foul play in Internet auctions is staggering. The
characteristics that make auction sites on the Internet so appealing to bidders are
the very characteristics that make bidders easy prey for clever cheats: anonymity,
speed, low overhead for transactions, ubiquitous access, lack of spatial limitations,
and dearth of state or federal protective regulation. Online auctions made up
seventy-eight percent of all Internet fraud complaints received by the National
Consumers League in 2000, with an average loss of $326 per victim. Internet
auction fraud is also on the Federal Trade Commission’s list of top ten online
scams, and comprises over sixty-four percent of all Internet-related complaints filed
with the FTC.

News stories of ghoulish and appalling items that have been sold on
auction websites abound, running the gamut from shavings from the calluses of the
feet of serial murderers, to dead kittens, to nude autopsy photos of murdered
children. One man even sold a surface-to-air missile on eBay, although the highest
bidder was actually the U.S. Department of Defense so that they could prosecute
the offender.

Shocking medical items that have been sold or at least offered for bidding
on eBay include organs available for transplanting, drug-free urine, and a male
testicle. Another website auctioned off the ova and sperm of fashion models

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3 See Online Auctions Top Internet Fraud Gripe, REUTERS, Jan. 31, 2001, available at

4 See id.

5 See David M. Freedman, Please Bay: Snipers, Shills, and Scammers are Working the Online
Auction Game—Could They be Working You Over?, FORBES ASAP, Nov. 27, 2000, at 134.

6 See Online Auctions Top Internet Fraud Gripe, REUTERS, Jan. 31, 2001, available at

7 See D. Ian Hopper, Lawmakers Focus on Internet Auction Fraud, ALABAMA LIVE, June 26, 2001
(citing the results of a recent study by the Internet Fraud and Complaint Center of the Federal Trade
Commission).

8 See Marcia Stepanek, Making a Killing Online: Ghoulish Auctions Run the Gamut from Bad Taste
to the Truly Shocking, BUSINESS WEEK E.BIZ, Nov. 20, 2000, at EB 85. Items sold by or about serial
murderers have become so common that they have been dubbed “murderabilia.” See id.

9 See Amy Feldman, Ebay’s Gatekeeper: Who Says You Can’t Sell a Human Kidney on eBay? He

10 See Stepanek, supra note 8, at EB 85. In one instance, a seller offered a “fully functional kidney
for sale” on eBay. See Auction Watch Daily, Exclusive Features, The Top Ten Bizarre Online
kidney went as high as $5.7 million before officials at eBay shut down the auction. See id.
available for in vitro fertilization, boasted the auction as “Darwin’s Natural Selection at its very best,” started the bidding at $15,000 and received a twenty percent service fee for the sale of the reproductive cells.11

More constructive uses of Internet auctions to improve the health care industry include business-to-business e-commerce sites that facilitate pharmaceutical auctions between manufacturers, wholesalers and retailers;12 medical supply and device auctions;13 health insurance auctions;14 and the sale of used, reconditioned and overstocked medical equipment.15 In these more traditional contexts, the potential for cost savings and quality improvement in the health care industry is encouraging for future development.

III. THE EMERGENCE OF SURGICAL AUCTIONS ON THE INTERNET

With the continuing advances made in the available technology and the enterprising nature of people within the health care industry, it was inevitable that Internet capabilities would be employed in all aspects of health care. It has been estimated that at least 20,000 websites offering health care information exist on the ever-expanding Internet.16 During 1999, almost seventy million consumers consulted at least one health website to get information about health topics.17

Techniques of telemedicine have been developing for several years to enable patients in remote areas to get consultations from leading experts at academic medical centers.18 For example, with the expansion of bandwidth by fiber optic cable, radiologists can now read high resolution computed axial tomography (CAT) scans and magnetic resonance imaging (MRI) scans from hundreds of miles

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13 See Early Success at eAuction Website Prompts Medibuy.com to Add Layers, HEALTH INDUSTRY TODAY, Aug. 1, 1999.

14 See Brian McCormick, Bidding Wars: Online Insurance Auction Aims to Cut Participants’ Premiums, MODERN PHYSICIAN, July 1, 2000, at 23 (describing the first national health insurance auction that pitted over 50 HMO’s against each other for the contract of large employers, thereby saving three purchasers about $1.1 million in annual premiums).

15 See Early Success at eAuction Website Prompts Medibuy.com to Add Layers, HEALTH INDUSTRY TODAY, Aug. 1, 1999.


17 See id.

18 See, e.g., Douglas D. Bradham et al., The Information Superhighway and Telemedicine: Applications, Status and Issues, 30 WAKE FOREST L. REV. 145, 161-64 (1995). The Telemedical Center at the Medical College of Georgia was the first medical center in the country to be reimbursed for telemedicine consultations. See id. at 164.
away, thereby cutting costs and improving access to high quality health care.  

As the technology has improved, interactive cybermedicine techniques have emerged so that patients and health care providers can communicate over the Internet to enhance their health care experience.  For example, the website Cyberdocs enables patients in Massachusetts or abroad to describe their symptoms to a physician and then receive advice on the appropriate measures to take.  The physician can then decide whether a physician visit is appropriate, or even whether to prescribe a pharmaceutical to her cyberpatient.  

Though much less widespread than medical information or medical advice websites, several websites have auctioned different types of surgeries. For example, the largest private hospital group in South Africa, Netcare, has auctioned off surgeries such as breast reductions, skin resurfacing and liposuctions, where the “winner” received a recovery stay at a plush Johannesburg hotel.  Another website offered a raffle for breast implants for those who bought a raffle ticket for $20 to $50.  Wellesley College even auctioned off a vasectomy as part of a fundraiser.  

Perhaps these events were calculated more for their publicity value than as serious attempts to provide quality medical care. These examples represent discretionary cosmetic procedures that are usually excluded from health insurance coverage. However, auctions may not be limited purely to plastic surgery; one Wisconsin company plans to start offering more serious, non-discretionary surgeries for auction this year, including open-heart surgery, orthopedic procedures

19  Paul J. Chang, M.D., Director of the Division of Radiology Informatics, discussant at the Medical Information: Security and Privacy in the Era of the Internet, Donald A.B. Lindberg Lecture and Symposium, University of Pittsburgh Center for Biomedical Informatics, Pittsburgh, PA (July 14, 2000).

20  “Cybermedicine” is generally described as a separate but similar development as “telemedicine.” Whereas telemedicine typically refers to the use of “preconvergence telephony, satellite and video, used to patch geographical holes in health coverage, . . . cybermedicine is a broader concept . . . [that] encompasses not only the technology and legal issues of telemedicine, but also a far greater array of nontraditional and unique, technology-enabled interactions among health care providers and consumer-patients.” Nicholas P. Terry, Cyber-malpractice: Legal Exposure for Cybermedicine, 25 AM. J. L. MED 327, 327-28 (1999). Another commentator has defined cybermedicine as “medicine in cyberspace: the science of applying Internet and global networking technologies to medicine and public health, of studying the impact and implications of the Internet, and of evaluating opportunities and the challenges for health care.” Gunther Eysenbach et al., Shopping Around the Internet Today and Tomorrow: Towards the Millennium of Cybermedicine, 319 BRIT. MED. J. 1924 (1999). Due to the unlimited possibilities of developing Internet technology, telemedicine and cybermedicine will probably converge as cybermedicine further broadens its application beyond its current boundaries.


22  See id.

23  See Bid for Breast Reduction or a Tummy Tuck in Net Surgery Auction, BIRMINGHAM POST, July 25, 2000, at 9. The auction was conducted on www.bidorbuy.co.za.


such as total hip replacements, neurosurgeries and tumor resections. The site will attempt to provide comprehensive data about quality and outcome to enable the high-income uninsured or those covered by indemnity plans to bid on the major procedures.\textsuperscript{27}

Very little information is available about the profitability or usage rates of surgical auction websites, but one site claims to have facilitated over 600 surgical procedures through its Internet auction site.\textsuperscript{28} While it remains to be seen whether these concepts represent feasible business models, the potential extension of auction technology to surgery and all other aspects of health care services is virtually unlimited.

IV. THE MEDICINEONLINE.COM SYSTEM

Among the several surgical auction sites in business on the Internet, a California site called MedicineOnline.com has gotten the most press by offering nearly forty procedures such as cosmetic surgery, cosmetic dentistry, LASIK vision correction surgery, and podiatry on its “Bid for Surgery” website.\textsuperscript{29} MedicineOnline.com uses a reverse auction system whereby the prospective patient selects the desired procedure, such as a rhinoplasty or a breast augmentation,\textsuperscript{30} and then completes a medical and surgical history questionnaire.\textsuperscript{31} Physicians specializing in the selected procedures and registered to bid in the MedicineOnline.com system then have seventy-two hours to view the patient’s requests and to bid on the procedure by indicating the total package price for which

\textsuperscript{26} See Del Quentin Wilber, Patients Go Online to Solicit Doctors: Cheap Surgery Goal of Auctions on Web, THE BALTIMORE SUN, Sep. 25, 2000, at 1A (discussing the website PatientWise <http://www.patientwise.net>).

\textsuperscript{27} See E-Surgery Bids Offer New Patient Opportunities; Spur Ethical Debate, HEALTHCARE PR & MARKETING NEWS, May 25, 2000.

\textsuperscript{28} As of early June, 2000, MedicineOnline.com had completed over 600 transactions after just three months in existence. See Deborah Belgum, Plastic Surgery Web Site Faces Off Against Critics, ORANGE COUNTY BUS. J., June 26, 2000. This number is surely much higher by now, but the website has not posted any more recent estimates in over a year. See MedicineOnline.com (visited July 28, 2001) <http://www.medicineonline.com/>.


\textsuperscript{31} See id. In order to more fully understand the process that a prospective patient would have to undergo to receive a procedure through the MedicineOnline.com system, I completed the questionnaire to solicit bids for LASIK vision correction surgery. Samples of the questions on the patient information questionnaire include the following: general health status; social history; medication history; hospitalization history; serious illness and surgical history; vision-specific questions about glasses and contacts, including prescriptions and reasons for desiring LASIK; and personal preference questions such as how far you are willing to travel, and your specific expectations and desired outcomes for the surgery. See MedicineOnline.com, Bid For Surgery Registration, Request Bid for LASIK Surgery (visited Feb. 16, 2001) <http://www.medicineonline.com/bidforsurgery/RegisterUser.asp?> (copy on file with author).
they are willing to offer the surgery.\textsuperscript{32} At the end of the bidding period, the names and contact data of the responding doctors are revealed to the patient.\textsuperscript{33} Patients are encouraged to review the bids and the credentials of all the responding physicians before selecting a physician and scheduling a mandatory face-to-face consultation.\textsuperscript{34} Then, at the consultation, the physician performs a pre-operative examination and explains the procedure and fee structure to the patient before performing the surgery.\textsuperscript{35} According to the website, either the patient or the surgeon may decline to proceed with the procedure.\textsuperscript{36}

Recognizing that "[y]ou'd never select a doctor on price alone," the site does not require a patient to choose the lowest bid from a physician.\textsuperscript{37} Rather, it allows the consumer to investigate all the bids and recommends that the patient select "the doctor with the most preferred combination of credentials, qualifications and price."\textsuperscript{38} MedicineOnline.com does not verify the credentials of the physicians who use their service,\textsuperscript{39} but the website does offer advice on how to research the credentials and competence of the surgeons who post bids, and it provides links to such official references as the American Board of Medical Specialties.\textsuperscript{40}

Supporters of the online surgical auctions maintain that they supply a greater amount of information so that consumers and prospective patients can make more informed choices regarding their elective, aesthetic health care concerns.\textsuperscript{41} Patients can learn more about the potential costs of the procedures in order to budget accordingly, as well as to ask in anonymity the potentially embarrassing questions that would otherwise go unanswered.\textsuperscript{42} According to the supporters, these

\textsuperscript{32} See MedicineOnline.com, Bid For Surgery, How It Works (visited Feb. 16, 2001) <http://www.medicineonline.com/bidforsurgery/default.asp?Whichpage=12>. Surgeons are encouraged but not required to give a price quote that reflects the total cost to the patient for the procedure, including pre-operative and post-operative care, anesthesia, and ancillary services. See id.

\textsuperscript{33} See id.

\textsuperscript{34} See id.

\textsuperscript{35} See id. According to the website, if either party declines to proceed, they have no obligation to the other. See id. However, for a discussion of potential liability issues in this situation, see infra part VI.D and VI.E and accompanying notes.


\textsuperscript{41} See id.

\textsuperscript{42} See Linda O. Prager, Doctors May Face Liability Risks in Bidding for Patients on Web Auction Sites, AM. MED. NEWS, Sept. 4, 2000, at 12 (visited Sep. 19, 2000) <http://www.ama-assn.org/sci-pubs/amnews/ pick_00/prsa0904.htm>. Some patients may be reluctant to speak to a surgeon in their local
newly empowered patients can take control over their care by evaluating all the options to get the best value for their health care dollar.\textsuperscript{43} In the end, patients can save money and time, and can make more educated decisions about who performs surgical procedures on them.\textsuperscript{44} However, this utilitarian view of the surgical auction has not been adopted without serious criticism.

V. THE INDUSTRY AND PUBLIC RESPONSE TO SURGICAL AUCTIONS

"The AMA doesn't believe that patients should select physicians based on price alone. Going online, getting the lowest bid and then going to that individual, we don't think that is good medicine."\textsuperscript{45}

"The concept is just scary. You have the least sophisticated patients in search of the most desperate or least qualified physicians, so it's a potential disaster waiting to happen."\textsuperscript{46}

"If you cut prices to be competitive, you can expect people to start cutting corners. This is not like an airline seat; these are human lives."\textsuperscript{47}

"I do not believe that medical care that is only a commodity to be sold at the lowest price is in the best interest of the patient."\textsuperscript{48}

Some key players and organizations in the profession have flagged the potential dangers of online surgical auction sites and have taken official positions


\textsuperscript{45} Donald Palmisano, M.D., Member, American Medical Association Board of Directors, \textit{quoted in} Wilber, supra note 26, at 1A.


in opposition to the practice. They argue that the decision to have a potentially life-threatening cosmetic surgical procedure should not be price-determinative like buying a book or an airline ticket online. Rather, the services are fraught with the potential for abuses and provide no way to accurately verify the credentials and competency of the surgeons bidding on the auction websites. For example, one psychiatrist who posed as a plastic surgeon and claimed to perform breast augmentations has already been caught trying to slip into the system.

Critics also argue that the auctions may give false hopes to a prospective patient before the surgeon can provide truly informed consent and thereby evaluate not only the medical but also the emotional readiness of the patient to undergo a major procedure. The implied commitment of the surgeon to perform the procedure may eliminate one of the most important aspects of informed consent—an adequate explanation of the benefits or risks of not undergoing the procedure. Other opponents of the sites think they are targeting young patients who cannot really afford surgery by financing the operations with a minimal down payment and then charging nearly usurious interest rates.

While some of these organizations have been vocal in their opposition to the practice, several well-known surgical boards and representative surgeons’ groups have not adopted an official position on the implications of online surgical auctions. Although the American Medical Association has not yet taken an

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49 For prime examples, one need only consider the four quotations presented in the text accompanying footnotes 44-47.
50 See The American Society for Aesthetic Plastic Surgery, Online Surgery Auctions—Official ASAPS Position (visited Feb. 4, 2001) <http://www.surgery.org/news_releases/oct-2000-online.html>. The organization is concerned that only truly informed consent is in the best interests of both the patient and the surgeon, whereas the online surgical auctions bypass the traditional referral systems and are fraught with the potential for abuses. See id.
51 See id.
52 See Barker, supra note 46, at C3.
53 See id.
54 See id.; see, e.g., Truman v. Thomas, 27 Cal. 3d 285 (1980) (holding that a doctor may be liable for injury resulting from a failure to warn a patient of the risks of not undergoing a procedure, because all information material to the patient’s decision should be given). Just because an operation is elective does not make it safe or appropriate for all people seeking it to have the procedure. Rather, numerous medical complications, such as previous reactions to anesthesia or various cardiovascular and pulmonary diseases may increase the risk of surgery or provide a contraindication altogether. See Judi M. Woolgar, Preoperative Medical Evaluation, in KELLEY’S TEXTBOOK OF INTERNAL MEDICINE 168 (H. David Humes ed., 4th ed. 2000).
55 See Joyce Howard Price, Cut-rate Plastic Surgery Website Hit on Several Fronts; Doctor: Patient May Pay More in Time for Novice’s Work, THE WASHINGTON TIMES, Aug. 4, 2000, at A3. For example, MedicineOnline.com advertises its financing plans in several different places on its website. Because it costs nothing for a patient to bid, perhaps financing of surgeries may be the primary profit-seeking activity of the venture. Does this create a higher burden to disclose the financial arrangements of the website to prospective patients?
56 In response to my inquiries as to the official position of the organization on online surgical auctions, the American Society for Laser Medicine and Surgery, the International Society of Refractive
official position, the president of the nation’s largest physician group, who is also a surgeon, has stated, “It’s dangerous to consider that a patient’s care could be reduced to a commodity, like a plane ticket or hotel room.” \(^57\)

At least one major medical malpractice liability insurance company has warned its policyholders not to engage in online surgical auctions because it may expose the physician to contractual liabilities if the procedure is not actually performed, and to breaches of the standards of professional ethics. \(^58\) The insurer warned that standard medical malpractice policies do not cover contractual issues, nor do they, in some cases, cover actual medical malpractice arising from such situations. \(^59\) The company also issued a warning that it may attach an endorsement to its standard policies specifically denying coverage of claims arising from surgical auctions. \(^60\)

The insurance company’s warning did not specify which online sites were the most problematic, but it has contacted MedicineOnline.com in regard to questions over the appropriateness of the warning. \(^61\) The company intimated that the focus of its concern is the lack of proper patient selection and preoperative evaluation, and suggested that because MedicineOnline.com requires a preoperative consultation, perhaps there are no legal concerns with its operations. \(^62\) Until some legislative, regulatory or judicial intervention determines the legal boundaries of Internet surgical auctions, a healthy debate over the medical, ethical and economic implications of the practice can be expected to continue.

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57 See Imagine William Shatner Peddling Health Care; Auctioning Elective Surgery, MEDICAL ECONOMICS, June 5, 2000, at 29 (quoting Randolph Smoak, M.D., President, American Medical Association).

58 See THE DOCTORS’ COMPANY, RISK MANAGEMENT BULLETIN (2000) (visited Oct. 30, 2000) <http://www.thedoctors.com/rm/bulletins/ias/index.htm>. The Doctors’ Company, a major medical malpractice insurance policy provider, issued the following risk management bulletin to all its policyholders, warning of the legal and ethical risks of engaging in surgical auctions and urging them to refrain from the practice:

The Doctors’ Company (TDC) Risk Management Department warns physicians – particularly plastic surgeons, dermatologists, ophthalmologists, and otolaryngologists – against participating in any practice involving the offer of professional services for auction or the sale of medical procedures within any bidding system.

Id. The bulletin warns against both types of surgical auction, one in which a surgeon offers a particular procedure to the highest patient bidder, and another where a patient seeks a particular procedure from the lowest bidding physician (also called a “reverse auction,” like those conducted by MedicineOnline.com). See id.

59 See id.

60 See id.

61 See Prager, supra note 42, at 12.

62 See id.
VI. THE LEGAL IMPLICATIONS OF ONLINE SURGICAL AUCTIONS: PHYSICIAN-BASED LIABILITY THEORIES

Although no cases concerning a negative outcome from a cybermedicine consultation have yet been decided in American courts,\textsuperscript{63} it is inevitable that patients or prospective patients will seek legal recourse for a perceived wrong. One commentator suggested that due to the fleeting, ephemeral nature of the relationship formed in cyberspace, patients or their families may be more likely to bring suit against a cyberdoctor than their own hometown physician with whom they have formed a long-term, trusting, personal relationship.\textsuperscript{64} Indeed, a tech-savvy patient who is likely to both desire cosmetic surgery and to shop for it in cyberspace on a system specifically designed to accentuate price in the decision-making may also be more predisposed to initiate litigation for a less than satisfactory outcome. In determining the respective rights and duties of the parties, legal questions of personal jurisdiction, formation of the physician-patient relationship, the proper standard of care to apply, the duty owed to the patient, and state-based licensure may prove to be significantly more challenging with cyberconsultations than in traditional medical litigation.

A. Malpractice

Several authors have warned of the great potential for malpractice liability of physicians engaging in cybermedicine.\textsuperscript{65} The pivotal issue in finding liability for medical malpractice is whether a duty of care was owed to the patient after the formation of a physician-patient relationship.\textsuperscript{66} In physical space, the formation of a physician-patient relationship is derived from physical contact, examination and dialogue.\textsuperscript{67} Traditionally, the relationship is formed "when the professional services of a physician are accepted by another person for the purposes of medical or surgical treatment."\textsuperscript{68} To find a physician-patient relationship, courts generally require privity between the physician and patient created by either express or implied consent by both parties.\textsuperscript{69}

It is still unclear what exactly triggers a physician-patient relationship, and

\begin{footnotesize}
\begin{enumerate}
\item See Tyler, supra note 21, at 265.
\item See Jan Greene, Sign On and Say 'Ah-h-h-h-h-h!', 71 HOSPS. & HEALTH NETWORKS, Apr. 20, 1997, at 45-46.
\item See, e.g., Tyler, supra note 21; Kelly K. Gelein, Note, Are Online Consultations a Prescription for Trouble? The Uncharted Waters of Cybermedicine, 66 BROOK. L. REV. 209 (2000).
\item See Gelein, supra note 65, at 213.
\item See Nicolas P. Terry, Structural and Legal Implications of E-Health, 33 J. HEALTH LAW 605, 606 (2000) [hereinafter Terry, Structural and Legal Implications].
\item Gelein, supra note 65, at 213 (citing STEVEN E. PEGALIS & HARVEY WACHSMAN, AMERICAN LAW OF MEDICAL MALPRACTICE 24 (2d ed. 1992).
\item See id.
\end{enumerate}
\end{footnotesize}
thus the assumption of a duty of care, in e-health space. Some question has been raised as to whether the minimal contact made by the physician and patient on a website is sufficient to create a physician-patient relationship.\textsuperscript{70} Perhaps it is analogous to a telephone consultation resulting in advice rendered or prescriptions dispensed.\textsuperscript{71} If a cyberpatient has an adverse medical outcome, he may contend that a physician-patient relationship has been formed because he has been given medical advice through an e-health site.\textsuperscript{72} However, this approach is based on the outcome of the contact; although there was no physical contact, the physician essentially agreed to provide care, and did so by dispensing either the advice or the prescription.

It is a slightly different problem for online surgical auctions, however. For example, MedicineOnline.com claims that the relationship does not begin until the face-to-face consultation takes place at the surgeon’s office.\textsuperscript{73} If the surgeon who offered the surgery on the auction site does not perform the procedure because the patient is not a proper candidate or is medically unable to undergo the surgery,\textsuperscript{74} the surgeon may argue that no relationship has been created by the denial of service. “Generally, both the physician and the patient are free to enter into or decline the relationship. A physician may decline to undertake the care of a patient whose medical condition is not within the physician’s current competence.”\textsuperscript{75} However, the patient may argue that the requisite contact necessary to examine the patient and to determine his unfitness for the procedure created the relationship and thus triggered the duty of care. In that situation, the physician could argue that if a physician-patient relationship was created, then he properly discharged his duty of care by appropriately denying the service because of its higher risk profile.

If the surgeon actually performed the surgery offered on the Internet auction site, there can be little doubt that a physician-patient relationship was created by the provision of the service regardless of the prior interaction through the website. By necessity, at least in the current state of medical technology, surgery must still be conducted in person. Therefore, malpractice claims arising from the procedure will probably follow the standard litigation playbook, whether initiated through an auction or not. Thus, malpractice liability arising from online

\textsuperscript{70} See Prager, supra note 42, at 12.

\textsuperscript{71} See Terry, Structural and Legal Implications, supra note 67, at 608, n.25.

\textsuperscript{72} See Gelein, supra note 65, at 243.


\textsuperscript{74} Although mortality rates from general anesthesia have declined and surgeons have become capable of conducting surgery on a broader patient base, significant impediments to proceeding with the surgery may exist that could not have been elicited from the patient questionnaire, or were not properly disclosed by the patient on the form. For example, electrocardiograms are indicated for anyone over 45 years old facing the prospect of surgery, which could uncover a previously undisclosed cardiovascular abnormality that raises the risk of the surgery. See Woolger, supra note 54, at 168.

surgical auctions may be less problematic than in cybermedicine consultations in which the physician never meets or sees the patient.

B. Informed Consent

Obtaining adequate informed consent from a patient after explaining all the relevant risks and benefits of undergoing a certain procedure is fundamental to the surgeon’s craft. California has a patient-centered standard of disclosure requiring a doctor to inform patients about all information reasonable patients would consider material to informed decisions about medical treatment, before rendering the care. Caselaw in California has established that patient values, such as life expectancy information, and research and economic interests that reach beyond the medical care alone, are relevant to a physician’s duty to disclose information to patients.

Under certain conditions, a patient might establish a cause of action for lack of informed consent for the failure of the physician to disclose the nature of his potential personal conflict of interest as a result of a surgical auction. For example, if the physician’s financial arrangement with the website could affect his medical judgment in relation to the instrumentation used or the anesthesia care provided (such as substituting a C.R.N.A. for an anesthesiologist to cut costs), perhaps the surgeon has a higher burden to disclose the adverse incentives. Because a person who seeks out cosmetic surgery through an Internet auction rather than more traditional means may be expected to place a heightened awareness on financial factors of the transaction, one might conclude that the physician-website financial arrangement would meet California’s materiality criterion, thereby necessitating disclosure for adequate informed consent.

C. Unauthorized Practice of Medicine: State-based Licensure Requirements

The inherent anonymity of the Internet raises substantial questions about the traditional state-based licensure systems governing all healthcare professionals. Some states have made legislative attempts to permit limited forms of telemedicine by non-licensed providers, and there have been theories promulgated suggesting either a national licensure system for physicians, or

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77 See id. at 1033 (discussing two well-known non-battery informed consent cases in California, Moore v. Regents of the University of California, 793 P.2d 479 (Cal. 1990), and Arato v. Avedon, 858 P.2d 598 (Cal. 1993)). California was singled out for examples because the primary operation and use of the MedicineOnline.com system occurs in California.


79 See Terry, Structural and Legal Implications, supra note 67, at 607.

making cybermedicine a separately licensable specialty.\textsuperscript{81}

State boards of medicine tend to take a rather protectionist approach to medical licensure, and providers face a significant risk of sanctions by their state medical boards for engaging in the unauthorized practice of medicine.\textsuperscript{82} Unauthorized practice has been suggested to be a significant risk for virtual office visit websites if the physician actually diagnoses a patient's condition and prescribes pharmaceuticals online.\textsuperscript{83} Due to this concern, the medical advice website CyberDocs only accepts patients who are physically in the state in which CyberDocs physicians are licensed to practice.\textsuperscript{84}

However, as with concerns for medical malpractice liability, there may be less risk of committing an unauthorized practice violation in a surgical auction scenario than in a cybermedicine consultation. If the surgeon actually performs the procedure on a patient obtained from a surgical auction, the surgeon must be licensed to practice medicine in the location in which he performs the procedure. In the majority of cases, the surgery will be performed where the surgeon already has hospital privileges for all conventional surgeries, and so this should be less of a concern in surgical auctions than in other cyberconsultations in which the actual location of the provision of care is less easily determined.

\textbf{D. Contractual Liability}

Another potential source of physician liability is the combined words and actions of a surgical auction website causing the surgeon to be contractually bound to a certain course of action. If a plaintiff can show that she and the physician entered into an enforceable contract for the services, then her cause of action may be based in part on a breach of contract theory.

One of the foundational requirements in the formation of an enforceable contract is the presence of mutual assent between the parties, or a "meeting of the minds" on the basis of the bargain agreed upon.\textsuperscript{85} Because surgeons participating in MedicineOnline.com auctions require a face-to-face consultation before performing the surgery, and because language on the website warns that they do not intend to create a contract until that consultation,\textsuperscript{86} the physicians could probably argue that there has been no mutual assent and thus no contract was formed before the consultation took place.

\begin{itemize}
\item See Gelein, \textit{supra} note 65, at 251.
\item See Terry, \textit{Structural and Legal Implications, supra} note 67, at 607.
\item See Gelein, \textit{supra} note 65, at 229-30.
\item See Tyler, \textit{supra} note 21, at 285. However, it is unclear how the site could enforce the policy against clever browsers by verifying the actual location of the cyber-patient with the currently available technology, unless the prospective patient uses a static Internet Protocol (IP) address.
\end{itemize}
However, it is not obvious that no contract has been formed simply because the parties have not yet met. For example, the famous case of Hand v. Tavera demonstrates a court finding that a physician-patient relationship had been formed even though the two had never met or spoken.87 The relationship had been created by contract because the patient had paid in advance for the physician’s services, and thus had a legally cognizable relationship.88 If a patient is expected to pay before the surgery is conducted or even before the consultation, perhaps a similar argument could be made establishing contractual liability in surgical auctions. However, MedicineOnline.com patients do not pay in advance of the surgery.89

Whether a contract was made between the physician and the prospective patient depends on whether the bid was a valid offer.90 If the physician’s bid in a surgical auction is tantamount to an offer that is then accepted by the prospective patient, then perhaps a contract is formed between the parties.91

By the very nature of the procedures desired and the personal choices necessary to make the decision to enter the auction, patients eager to then receive the cosmetic surgery may balk at being told during the face-to-face consultation that there is some medical or other impediment to them receiving the procedure.92 With the money in hand to tender for payment, they may try to enforce the “contract” that was created by their acceptance of the bid in the auction.93

If a valid contract is shown to exist, physicians may be exposed to the damages that result from their breach. However, some medical malpractice insurance policies exclude from coverage any losses from contract actions. For example, one widely held professional liability policy states:

III. Exclusions from Coverage.

A. No coverage is provided by the policy for any of the following: . . .

B. Liability assumed by an insured under any contract or agreement, whether oral, written or implied, except to

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87 864 S.W.2d 668 (Tex. 1992) (holding that when a patient who has enrolled in a health plan seeks care and the plan’s designated doctor on call is consulted, a physician-patient relationship exists, thus giving rise to a duty of care).

88 See Gelein, supra note 65, at 246.


90 See CHIRELSTEIN, supra note 85, at 30. The first step in the formation of an enforceable contract between parties with legal capacity is an offer by one party to form a contract. See id.

91 See id.

92 See Woolger, supra note 54, and the text of note 54. In addition, does MedicineOnline.com have some obligations in designing its questionnaire, for example, to ask the medically appropriate questions to elicit a disqualifying medical condition?

93 See Prager, supra note 42, at 11-12.
the extent that coverage for such liability would be available to such insured in the absence of such contract or agreement;94

Therefore, if a claim arose from a breach of contract, physicians could be denied coverage and may be individually liable for the full extent of the damages.95 Although damages could be limited to the price of the surgery for the breach of contract because punitive damages are not usually available in contract actions, the physician could be liable for other consequential damages from his failure to perform.

However, in certain circumstances, it is possible that some courts may construe other medical malpractice insurance policies to cover a breach of contract action for failure to perform a contracted surgery. For example, another medical malpractice carrier’s policy states:

Protection for damages assumed under contract or agreement only applies to damages resulting from: . . .

○ Your providing or withholding of professional services;96

If a plaintiff could make the case that the defendant physician contracted to perform a particular surgery, and afterward withheld his professional service, then perhaps the physician breached the contract. Because this action may fall under the general terms of this policy, the insurance company may be liable to pay the breach of contract damages incurred by the physician.97

If such liability exposure does exist with other policies, then insurance companies offering physician malpractice policies to surgeons may be expected to quickly end any potential ambiguity in the coverage language of the policy. For example, The Doctors’ Company has warned its members that if online surgical auctions continue, they may attach an endorsement to their policies specifically denying coverage from claims arising from the auctions.98

E. Promissory Estoppel for Precontractual Liability

If a plaintiff cannot establish that an enforceable contract has been created

95 However, litigation would necessitate judicial interpretation of the qualification made in the final clause, read in pari materia with the other policy provisions.
97 Under this language, fact-finding would be necessary to determine whether the withholding of the services stemmed from the contractual arrangement, or from purely clinical medical judgment.
between the surgeon and the patient, perhaps he can succeed on a claim of promissory estoppel for precontractual liability. The Restatement (Second) of Contracts suggests that a promise may be binding if “the promisor should reasonably expect to induce action . . . on the part of the promisee . . . and which does induce such action . . . .”\textsuperscript{99} A plaintiff must show that he actually relied on the promise to his detriment in order to recover under the theory of promissory estoppel.\textsuperscript{100}

A claim against a physician could potentially proceed on a theory of promissory estoppel under the following hypothetical scenario: the patient was led to believe from her interaction with the website that she was a candidate for the surgery and that she would in fact have the surgery, and then expended $1,500 for travel and lodging costs to travel to California for the face-to-face consultation. If, after examination, the physician ultimately tells her that she is not a candidate for the particular surgery that she desired for some medical reason,\textsuperscript{101} and if the patient reasonably relied on the representations of the website and physician ahead of time, then perhaps she can show the requisite detrimental reliance needed to establish a promissory estoppel claim.\textsuperscript{102}

\section*{F. Ethical Violations}

In addition to these legal ramifications based on contract and other theories, surgical auction participation could also portend an ethical violation by the surgeon for failure to perform the procedure. For example, according to the American Medical Association’s code of ethics, “physicians who are obligated under preexisting contractual arrangements may not decline to accept patients as provided by those arrangements.”\textsuperscript{103}

Physicians engaging in online surgical auctions may also be exposing themselves to ethical violations as a result of performing the procedure. If the physician committed to perform the surgical procedure without having conducted a proper preoperative medical evaluation of the patient, he may have violated a code of medical ethics. For example, The Doctors’ Company suggested that a plastic surgeon in such a situation would be in violation of the American Society of Plastic

\textsuperscript{99} \textit{Restatement (Second) of Contracts} § 90 (1979).

\textsuperscript{100} See \textit{Chirelstein, supra} note 85, at 22.

\textsuperscript{101} For examples of medical contraindications to surgery, see \textit{supra} note 54.

\textsuperscript{102} Proposing a similar hypothetical in its official position denouncing surgical auctions, the American Society for Aesthetic Plastic Surgery suggested that an implied commitment has been made by both the physician and the patient. \textit{The AMERICAN SOCIETY FOR AESTHETIC PLASTIC SURGERY, Online Surgery Auctions – Official ASAPS Position} (visited Feb. 4, 2001) <http://www.surgery.org/news_releases/oct-2000-online.html>.

\textsuperscript{103} \textit{American Medical Association, Code of Medical Ethics: Current Opinions with Annotations}, Opinion 9.12 (1997). However, this language was probably drafted to prohibit non-treatment for discriminatory reasons, rather than to encourage physicians to uphold their contractual obligations.
Surgeons code of ethics. However, because MedicineOnline.com mandates that patients receive a face-to-face medical consultation before the procedure occurs, The Doctors’ Company suggested that this may not be a concern for that particular website. Physicians obtaining patients through other auction websites may not be similarly situated.

Physicians are exposed to these and possibly other unresolved legal and ethical questions from their participation in surgical auctions on the Internet. However, physicians are not the only entities exposed by the auctions. The websites themselves may have some liability exposure for their roles in organizing and conducting the auctions.

VII. THE LEGAL IMPLICATIONS OF ONLINE SURGICAL AUCTIONS:
WEBSITE LIABILITY

“‘You can’t price your bodies like a commodity. Who is likely to quote the lowest bid, the busy surgeon or the not-so-busy surgeon? Buyer beware.’”

In the traditional medical setting, the physician not only examines and diagnoses, but also ideally educates the patient and explains the medical intricacies of the suggested treatments. However, the explosion in the public use of Internet health information websites may be changing the typical interaction to a three-party information exchange. Eventually the health websites could provide such comprehensive peer-reviewed and reliable information about the particular procedures offered, that they could effectively disintermediate the surgeon such that he becomes the mere technician of the transaction, rather than the sole teacher and information provider prior to the procedure. Ideally, patients could learn as much as possible about the procedure through these computer-oriented “infomediaries” and then ask the surgeon performing the procedure specific questions from their reading. While it may seem that physicians would

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105 See Prager, supra note 42, at 12. However, this problem may be very real for other websites taking fewer legal precautions than MedicineOnline.com.

106 Roger Greenberg, M.D., Past President, California Society of Plastic Surgeons, quoted in Wilber, supra note 26, at 1A.

107 Although estimates of the number of people using health information websites range all over the map, the trend is overwhelmingly toward more pervasive use. The Pew Internet & American Life Project suggested that upwards of 55 percent of American Internet users surf for health information. See Tessa Romita, Diet, Exercise, Internet, BUSINESS2.COM, Feb. 20, 2001, at 110. One industry expert has predicted that fully 90 percent of the nation’s population will be utilizing e-health applications on the Internet by the year 2005. See E-Health: E-Health Tools Help Pare Inefficiencies; Increasingly Used by Senior Populations, Health Care Daily Rep. (BNA), Jan. 24, 2001.

108 See Terry, Structural and Legal Implications, supra note 67, at 608. This phenomenon may
disapprove of being replaced from their traditional paternalistic role in providing information, patients who become well-informed by medically credible and factually accurate websites could actually lead to more effective visits in a shorter time, which is clearly a desirable result in the era of managed care.

However, with the expanding role of the health websites in providing information and allowing interaction between patients and health care providers, and thereby inducing a greater reliance on the information gathered therein, consumers and patients bringing actions against physicians may also try to implicate the websites from which they obtained either access to the physician’s services or information about the procedure. Creative plaintiffs may establish a cause of action against the websites based on several different theories of liability arising from their interaction with the technology.

If the quotation preceding this subsection is accurate,\(^9\) then plaintiffs may not be able to recover much money from a financially strapped surgeon, nor from a young physician just out of residency or fellowship training, struggling with mountainous student loan debt and little personal net worth. Furthermore, if the surgeon’s malpractice insurance does not cover the transaction,\(^10\) then an injured plaintiff will likely seek compensation from the other “deep-pocketed” participants in the exchange, including the surgical auction website operators, and the hospitals where the surgery was performed.

A. Obtaining Personal Jurisdiction Over the Website

The first major hurdle in bringing the surgical auction website into a civil action will be to obtain personal jurisdiction over the cyber-entity. Because the minimum contacts test is not an ideal way to analyze a defendant in cyberspace,\(^11\) two different judicial standards have emerged to determine whether personal jurisdiction over a defendant operating a website comports with traditional notions of constitutional due process. In the Calder v. Jones “effects test,” the U.S. Supreme Court indicated that jurisdiction over a cyberspace transaction is likely to be found if the effects of the defendant’s actions are felt in the forum state.\(^12\) Because state courts attempt to protect their citizens from actions of nonresident defendants, and because the effect of the physical harm caused by a surgical procedure gone awry is felt in the plaintiff’s forum state, courts may find that the auction website was a participant in the overall transaction that caused the harm in

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\(^{9}\) See quotation supra in text accompanying note 106.

\(^{10}\) See discussion supra part V.L.D.


\(^{12}\) See id.
the plaintiff's home state, and therefore that jurisdiction is proper under the "effects test."

In the past few years, however, the national trend is for courts to adopt the Zippo sliding scale approach of analyzing the interactivity of a website to determine whether jurisdiction is proper.113 The Zippo sliding scale test focuses not on the actual injuries to the plaintiff, but rather on the "nature and quality of commercial activity that an entity conducts over the Internet."114 On the end of the scale disfavoring jurisdiction are websites of a purely passive nature, limited to posting information on the website.115 On the other extreme, courts should find jurisdiction proper where the defendant is conducting business through the website, entering into contracts with forum residents and making a profit in a way that constitutes purposeful availment of the forum state's laws and business.116 If a defendant falls in the vast middle of the sliding scale, the court must examine the level of interactivity of the website and the commercial nature of the exchange of information that occurs with its end users, as well as the website's related and non-Internet contacts directed at the forum state.117

Under the sliding scale approach of Zippo and its progeny, a court could consider the highly interactive questionnaire required to solicit bids for a procedure, the mandatory physical examination and the payment system of a surgical auction website in finding that jurisdiction is proper in whatever forum the action is brought.118 Thus, surgical auction websites would likely be subject to personal jurisdiction in the forum state under either the Calder v. Jones effects test, or the sliding scale approach of Zippo and its progeny.

B. Agency Theory & Enterprise Liability

Once personal jurisdiction over a defendant is obtained, plaintiffs may try to establish a cause of action against the website by showing that the surgeon involved was an agent of the website with apparent authority to bind it by his actions. However, this is unlikely to succeed unless the plaintiff can persuade the

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114 Zippo, 952 F. Supp. at 1124.

115 See id. Thus, these "passive websites" probably do not have the requisite contacts with the forum state to warrant finding that jurisdiction comports with traditional notions of constitutional due process.

116 See id.

117 See Millennium Enters. v. Millennium Music, LP, 33 F. Supp.2d 907, 917-19 (D. Ore. 1999) (expanding the Zippo test to further differentiate websites falling in the "middle" group by analyzing the combination of their online and offline contacts with the forum state).

118 In fact, the MedicineOnline.com website calls its own auction "dynamic, interactive and anonymous," making it even easier for a court to conclude the same. See MedicineOnline.com, Bid For Surgery, How It Works (visited Feb. 16, 2001) <http://www.medicineonline.com/bidforsurgery/default.asp?Whichpage=12>.
trier of fact that the auction site held itself out as offering and rendering quality health services. In the context of lawsuits by plaintiffs attempting to hold hospitals liable for the actions of its physicians, one of the judicial doctrines used to implicate the hospital granting staff privileges is the Sword test:

for a hospital to be liable for the negligence of a health care professional under the doctrine of apparent agency, a plaintiff must show that the hospital acted or communicated directly or indirectly to a patient in such a manner that would lead a reasonable person to conclude that the health care professional who was alleged to be negligent was an employee or agent of the hospital, and that the plaintiff justifiably acted in reliance upon the conduct of the hospital, consistent with ordinary care and prudence.¹¹⁹

In online surgical auctions, the level of interactivity between the patient and the website shows the necessary communication between the two parties, but it may be unlikely that a court would find that a reasonable, prudent person would think the “winning” surgeon is an employee or agent of the website. Further, it may be less likely that a patient, with due care and prudence, could act in reliance on the website rather than on the physician performing the surgery. For example, MedicineOnline.com advertises itself as an intermediary between independent surgeons and the consumers seeking the procedures, rather than either a health care provider itself or a referral service.¹²₀

However, the financing arrangements available through the website could obscure the clear distinction and provide fodder for a plaintiff’s argument against the site.¹²¹ For example, if other websites pay the physician to join their service, then it will be easier for a plaintiff to bring the website into the lawsuit by establishing the agency authority of the physician.

The doctrine of agency theory may also be applicable when the hospital itself sponsors the surgical auctions. For example, the South African hospital that advertised and auctioned breast reductions and liposuctions on the Internet may have directly implicated itself in the care given because the surgeons performing the procedures appeared to be agents of the hospital offering the service.¹²² Under

¹²¹ See discussion supra note 23 and its accompanying text (referring to the Netcare auction conducted on bidorbuy.co.za.). Obviously this example from South Africa is purely hypothetical because this article is limited to potential claims in American jurisdictions.
the *Sword* test, it may be considerably easier for a plaintiff to show that she justifiably relied on the conduct of the hospital hosting the website, and that the surgeon was either an employee or agent of the hospital sponsoring the auction.

C. **Peer Review and Credentialing**

Traditionally, hospitals have a duty to take responsibility for the credentials and privileges of the physicians they hold out as associated with the hospital, primarily through peer review and credentialing processes. Perhaps websites that sponsor surgical auctions also have an obligation to conduct peer review and credentialing investigations of the physicians offering services. This may depend on the employee/agency status of the physicians and whether they have any other significant relationships with the websites.

MedicineOnline.com, for example, takes no responsibility for the veracity of the information that surgeons provide to the site. A physician and member of the board of MedicineOnline.com stated, “If a doctor wants to lie on a resume’, that’s not MedicineOnline’s problem. It’s the consumer’s problem. That keeps liability costs low and out of [MedicineOnline’s] lap.” Contrary to this hands-off sentiment, the website boasts that the information they provide about the surgeons in their system is “thoroughly complete – making them trustworthy, verifiable online references.”

Hospitals that also sponsor Internet surgical auctions may have a particular responsibility for all aspects of the services offered on its website, including the quality of the care rendered by its surgeons. Even hospitals that have no connection whatsoever to the websites sponsoring the surgical auctions may nonetheless have a continuing obligation to monitor the source of patients of the surgeons with staff privileges at its facilities, and thereby may have an obligation to ensure that its surgeons are adequately qualified to provide the services competently.

D. **Information Torts & Warranty Liability**

In general, health websites may have some responsibility for maintaining

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123 *See supra* text accompanying note 117.

124 Increasingly, hospitals may be exposed to corporate liability for failure to monitor adequately the competence and quality of its medical staff, as examined through the effectiveness of the hospital’s credentialing process. *See BARRY R. FURROW ET AL., HEALTH LAW: CASES, MATERIALS AND PROBLEMS 455 (3rd ed. 1997).*


126 Richard Van Meter, M.D., Board of Directors, MedicineOnline Inc., *quoted in* Stepanek, *supra* note 8, at EB 90.

the accuracy and reliability of the medical information that they post on the Internet. Some cases brought against health advice and content websites may be based on a liability theory of negligent misrepresentation for the unintentional supply of poor quality advice or content.\textsuperscript{128} Perhaps a plaintiff could bring a tort claim against a surgical auction website if the information posted inaccurately describes the seriousness or risks of a procedure. The inherent interactivity between auction sites and prospective patients may provide the requisite targeting necessary to imply foreseeability in a tort claim.\textsuperscript{129}

The Supreme Court of the United States has held that any governmental attempts to regulate or prohibit information posted on websites that is not defamatory may violate constitutional free speech protections,\textsuperscript{130} and the Communications Decency Act immunizes from liability websites that merely host or sponsor information provided by others.\textsuperscript{131} However, perhaps a website that authors its own content published on the site may be susceptible to content-related liability in certain circumstances.\textsuperscript{132} For example, one author has suggested that regulatory efforts to protect consumer health and safety might be upheld.\textsuperscript{133} Because misleading claims about surgical procedures on auction websites could lead to disastrous and injurious consequences, a court may determine that regulation of the information provided on the sites would protect consumer health, and therefore is constitutional.

Some plaintiffs may also seek to characterize the content on a website as creating a quasi-warranty about the competence of the surgeons involved, or that the information posted creates a product-related liability claim.\textsuperscript{134} Professor Terry suggested that liability theories based on substandard advice are unlikely to be successful, but that there may be more substance to a warranty and product-related liability claim.\textsuperscript{135} Perhaps a plaintiff could establish that a surgical auction promotes and sells the services of a surgeon as a package that creates some type of express warranty that the service will be performed appropriately and competitively. Even if a court is unlikely to include professional services in any type of warranty rather than a typical medical malpractice case, all the other actions and promises of


\textsuperscript{129} See id. at 334.

\textsuperscript{130} See Reno v. ACLU, 117 S. Ct. 2329 (1997).

\textsuperscript{131} See Terry, Cyber-Malpractice, supra note 128, at 364-65 (citing the Communications Decency Act, 47 U.S.C. § 230 (1994)).

\textsuperscript{132} See id.

\textsuperscript{133} See James G. Hodge, Jr. et al., Legal Issues Concerning Electronic Health Information: Privacy, Quality and Liability, 282 JAMA 1466 (1999). Thus, perhaps a regulatory body could attempt to regulate the practice of surgical auctions under the rubric of protecting all the potential patients within the body’s jurisdictional reach.

\textsuperscript{134} See Terry, Cyber-Malpractice, supra note 128, at 351.

\textsuperscript{135} See id.
the website itself could create an express or implied warranty, the breach of which may be actionable.

E. Regulatory Violations

Few governmental agencies had the foresight to plan for the difficult questions that arise in the e-health space. However, privacy of medical records became a priority in the waning days of the Clinton administration.\(^{138}\) E-health sites such as MedicineOnline.com will be subject to the recently promulgated federal regulations on privacy, security, and electronic transmission standards arising out of the Health Insurance Portability and Accountability Act (HIPAA) of 1996.\(^{137}\) Under HIPAA, any covered entity possessing medical records must protect the privacy of all “individually identifiable health information,” and the Act provides stiff penalties for any person who knowingly and wrongfully obtains or discloses the information.\(^{138}\)

Adequately protecting the information according to the regulations may prove to be a costly and difficult undertaking, requiring encryption software and strict record handling protocol.\(^{138}\) However, Professor Terry has suggested that compliance with HIPAA is only the first hurdle in protecting patient privacy and confidentiality: our cultural and legal expectations must evolve as well to embrace the new technology and to create system-wide privacy.\(^{140}\)

In addition to HIPAA compliance concerns, the financial arrangements between auction sites and the surgeons may also be scrutinized for other potential regulatory violations. For example, if the physicians are paying a website to become listed on the site, or are being paid by the auction website to participate in the system, then perhaps the professional independence of the surgeons will be called into question. These and other possible financial arrangements may be perilously close to running afoul of the federal Stark anti-kickback and anti-self-referral regulations.\(^{141}\)

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\(^{139}\) The cost of compliance could be staggering for physicians and hospitals. Of the HIPAA regulations for privacy, security, and electronic transmission standards, the HHS rule estimated the cost of compliance for only the electronic transmission standards at about $4000 for a currently automated practice of three or more physicians. See Landers, *supra* note 137, at 5.

\(^{140}\) See Terry, *Structural and Legal Implications*, *supra* note 67, at 610. All employees of “covered entities,” not just the health care providers, must learn to respect the privacy of health information, and to understand the legal ramifications of failure to comply with the high standards now expected and required by law.

\(^{141}\) See Bruce Fried, *Regulating the Internet: Limits Can Advance E-Health*, MODERN HEALTHCARE,
MedicineOnline.com maintains that it is not a referral service, and currently, physicians can place bids on the service for free. However, the company has plans to charge consumers a user fee of two percent of the cost of the procedure in the future, which could raise other Stark regulation concerns. In addition, although none of MedicineOnline.com’s services would be reimbursed by Medicare, the U.S. Dept. of Health and Human Services Office of Inspector General could pursue an auction website if it hyperlinks to facilities or providers within the Medicare system.

In addition to the federal regulations, state regulatory actions may also stifle the expansion of online surgical auction sites. For example, there is some concern that the auctions may promote “capping and steering,” or profiting from giving patient referrals or getting a cut by passing along potential customers. California, the home state of MedicineOnline, has regulations prohibiting the practice. However, until the use and potential abuse of surgical auction sites becomes more common, perhaps the state and federal governments will spend their scarce enforcement resources on more widespread and egregious abuses of the health care system.

F. Violations of E-Health Codes of Ethics

At least three consumer protection groups have promulgated codes of ethics by which e-health websites are expected to self-regulate. A group of major health websites called Hi-Ethics released a code of ethics that applies when health care professionals use health web sites to provide professional care. Their code requires its members to “provide conspicuous and appropriate information” that permits consumers to know “when they are and are not in an interaction with a health care professional that is covered by the ethical standards of the profession.”

Another major code, the eHealth Code of Ethics, was put forth by the eHealth Ethics Initiative 2000, a consortium of the scholars, legislators, and major

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144 See Barker, supra note 46, at C3.


146 See id.

147 See id.


149 Id.
} The eight principles of their Code place on health professionals essentially the same ethical standards that govern their face-to-face relationships.\footnote{See id.} Finally, the Health on the Net Foundation’s Code of Conduct suggests that health care information on the web should merely augment rather than replace the normal information exchange between health care professionals and their patients.\footnote{See Health on the Net Foundation, HON Code of Conduct (HON Code) for Medical and Health Web Sites: Principles (visited Feb. 17, 2001) <http://www.hon.ch/Conduct.html>.}

Due to their association with the surgeons, online surgical auction websites may be implicated in the actual provision of surgical care rather than simply providing general health information to Internet surfers. Because very detailed and private information including past surgical and medical history must be obtained from potential patients prior to participation in the auctions, the auction websites may be expected to follow the privacy and confidentiality standards not only of the federal regulations, but also of these independent codes of ethical conduct when handling patient information. Any breaches of these codes could be used as persuasive evidence to the detriment of the websites in a legal action.

G. 

\textit{Learned Intermediary Doctrine}

Perhaps the online surgical auction sites can partially insulate themselves from liability by borrowing the “learned intermediary” doctrine from the pharmaceutical industry. Under this doctrine, pharmaceutical manufacturers can transfer to physicians the costs and duties of providing drug-risk information to patients, and thus be immunized from “failure to warn” product-related liability actions.\footnote{See Terry, Cyber-Malpractice, supra note 128, at 331-32.} Because the physician stands between the manufacturer and the patient as a “learned intermediary,” she is in the best position to explain adequately the inherent risks and benefits of the drug or therapy to the patient.\footnote{See id.} Therefore, the physician is held accountable for certain adverse outcomes rather than the pharmaceutical company that produced the causative agent.

One justification of the learned intermediary doctrine is that the physician actually selects the appropriate drug or therapy for the patient, and should therefore be responsible for explaining all the ramifications of that therapy to the patient.\footnote{See Tracy v. Merrell Dow Pharmaceuticals, Inc., 569 N.E.2d 875, 880 (Ohio 1991).} However, in the context of surgical auctions, the prospective patient typically chooses the particular elective cosmetic procedure he or she desires before ever contacting the bidding surgeons.\footnote{For example, on the MedicineOnline.com system, the patient chooses the particular procedure for}
cosmetic surgical procedure that she desires may be analogous to the selection of contraceptive measures such as the birth control pill and intrauterine devices. In those situations, the physician typically does not make an intervening medical judgment as to whether the patient should choose to be on a contraceptive method.\textsuperscript{157} Rather, the physician gives limited input on the actual method from among the several choices that could be used, or the doctor gives medical reasons not to use the contraceptive.\textsuperscript{160} In many cases, the patient decides whether to initiate contraceptive therapy based on “effectiveness, convenience or cost, rather than medical necessity. While a physician may recommend one method over another, the final choice remains that of the woman.”\textsuperscript{160} Similarly, prospective patients surfing on cosmetic surgery auction sites may be using a healthy dose of vanity in addition to “effectiveness, convenience or cost, rather than medical necessity”\textsuperscript{160} when self-prescribing a cosmetic surgical procedure such as breast augmentation or liposuction. As with the prescription of a contraceptive method, a surgeon may be willing to perform the patient’s desired operation with her informed consent, barring any medical reason to refrain from conducting the surgery.\textsuperscript{161} Perhaps this creates a duty on the website to offer complete and accurate information that will permit the prospective patients to self-prescribe a procedure with a minimum of risk.

Because the learned intermediary doctrine is founded upon the low level of interaction between the patient and the drug manufacturer, perhaps the premise cannot withstand the scrutiny of a patient’s substantial interaction with an online surgical site.\textsuperscript{162} For example, it has been suggested that direct to consumer web-marketing by the pharmaceutical companies may be eroding the protection of the doctrine.\textsuperscript{163}

In addition, the financial arrangement between the surgical auction website and the surgeon could limit the protection of the doctrine. For example, a plaintiff could argue that the physician, because of her financial arrangement with the

\begin{itemize}
  \item \textsuperscript{157} A sexually active woman is probably more likely to have already decided that she wants to initiate a contraceptive measure. Then she visits her physician merely to get the prescription or perhaps for help in selecting the best choice from among the different options for contraception.
  \item \textsuperscript{158} For example, the physician may discuss the cost or therapeutic differences among the numerous brands of contraceptives, or he may warn the woman of the increased risk of adverse cardiovascular events if she is an active smoker over the age of 35, or has a history of venous thrombosis or estrogen-sensitive breast cancer. See, e.g., NEVILLE F. HACKER & J. GEORGE MOORE, ESSENTIALS OF OBSTETRICS AND GYNECOLOGY 460 (2d ed. 1992) (discussing the absolute and relative contraindications to the use of oral contraceptives).
  \item \textsuperscript{159} Hill v. Searle Laboratories, 884 F.2d 1064, 1070-71 (8th Cir. 1989) (finding that the trial court erred in applying the learned intermediary doctrine to an intrauterine device case).
  \item \textsuperscript{160} \textit{Id.} The sentence gives the opinion of the author, but references the citation from \textit{Hill} given in the text accompanying note 159.
  \item \textsuperscript{161} For examples of medical contraindications to surgery, see supra note 54.
  \item \textsuperscript{162} See Terry, \textit{Cyber-Malpractice}, supra note 128, at 332.
  \item \textsuperscript{163} See \textit{id.} at 346-47.
\end{itemize}
website, is apparently acting as an agent of the website rather than a true learned intermediary with independent judgment,\textsuperscript{164} thus exposing the website to liability.

VIII. CONCLUSION

Thus far, Internet surgical auction websites have been more effective as publicity stunts than as serious ways to increase patient load. Whether or not it is a sustainable business model and becomes more widely used remains to be seen. Among its advantages, the new technology provides prospective patients the opportunity to learn more about a particular surgical procedure in complete anonymity before deciding to proceed. Once a patient decides to have a particular surgery, she may solicit bids from several different qualified surgeons, and then research the credentials and experience of the surgeons offering their services. This could potentially help her to make a better choice of surgeon than by using the traditional route of referrals from a friend. Meanwhile, she may consider all the other factors important to her particular circumstance, including cost, convenience, or location, which are more likely to be relevant for an elective procedure than for acute medical care covered by private health insurance.

However, critics of online surgical auctions abound, decrying the notion that the decision to undergo life-altering surgical procedures can be likened to any other consumer purchase.\textsuperscript{165} In addition, many legal questions remain as to the liability exposure of the surgeons and websites participating in the surgical auctions. Before the proverbial auctioneer’s hammer falls in the growth of online surgical auctions, several judicial gavels must be struck to define their legal and ethical parameters. The first court to wade through these uncharted waters will have no easy task.

\textsuperscript{164} See id. at 347.

\textsuperscript{165} See supra part V and the accompanying quotations and notes.