



ROBINS KAPLAN JUSTICE REPORT

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ROBINS  KAPLAN^{LLP}

REWRITING THE ODDS

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DISCOVERY IN THE FACE OF TODAY'S ELECTRONIC HEALTH RECORDS

BY **LEAH FITZGERALD**



**LEAH
FITZGERALD**

Today, electronic health records (EHRs) are part of healthcare organizations' and providers' daily workflows, but it has not always been that way. In 2009, the Health Information Technology for Economic and Clinical Health Act, commonly known as HITECH, was enacted as part of the American Recovery and Reinvestment Act (ARRA). This law set the groundwork for the nation's widespread adoption and transition to electronic health records. It was also the birth of "meaningful use," attempting to link technology to healthcare.

Remarkably, less than 10 years ago, only 10 percent of all hospitals were using EHRs in clinical practice. This number drastically changed by 2015, when Medicare implemented a reimbursement reduction for healthcare organizations and providers that failed to "meaningfully" use an EHR. According to the Office of the National Coordinator for Health Information Technology, as of 2016, over 95 percent of Medicare-eligible hospitals have achieved the meaningful-use standard through the use of an EHR.

The intended purpose of HITECH was to drive patient safety and quality of care. Not surprisingly, the creation and utilization of EHRs has generated a whole new host of fissures of care coordination that directly relate to the technology. Not to mention, EHRs have changed the way providers communicate with each other and how they communicate with their patients.

SELECTED CASE RESULTS



**PHILIP
SIEFF**



**CHRIS
MESSERLY**



**JASON
PFEIFFER**

\$15.4 MILLION SETTLEMENT FOR VICTIM OF INDUSTRIAL ACCIDENT

Philip Sieff, Chris Messerly, and partner Jason Pfeiffer (of the Robins Kaplan Business Litigation Group) recently completed a settlement for a 32-year-old male with third-degree burns over 70 percent of his body resulting from an industrial accident. The injured man settled with defendants for \$15.4 million.



**TONY
SCHRANK**



**PETER
SCHMIT**



**PATRICK
STONEKING**

\$1.75 MILLION SETTLEMENT FOLLOWING FATAL MOTORCYCLE CRASH

Tony Schrank, Peter Schmit, and Pat Stoneking represented the family of a 50-year-old unmarried woman with adult children who died from a vehicle vs. motorcycle crash. As the woman was out for a motorcycle cruise in a Northern Minnesota city, a driver failed to yield to her right of way, causing a crash that led to her death. The case resulted in a pre-suit settlement of \$1.75 million.

\$1.6 MILLION SETTLEMENT FOR FAMILY OF MOTOR VEHICLE ACCIDENT VICTIM

Philip Sieff and Tony Schrank recently settled a case involving the wrongful death of a 22-year-old single female resulting from a motor vehicle accident. Pre-suit settlement with defendants equaled \$1,630,000.

MASS TORT INVESTIGATIONS

Robins Kaplan LLP is currently investigating many new potential cases. Please contact our Mass Tort team if you have any questions or know of any individuals whose case should be evaluated.

- **Abilify** – This atypical antipsychotic—used to treat a variety of disorders, including schizophrenia, bipolar, and depression—may cause impulse-control behaviors, including compulsive gambling.¹
- **Benicar** – Popular blood pressure medication can cause intestinal problems known as sprue-like enteropathy, with chronic diarrhea, weight loss, nausea, and vomiting.²
- **Premature Hip Implant Failures** – Litigating cases involving DePuy ASR, DePuy Pinnacle, Stryker Rejuvenate, Stryker LFIT COCR V40, Wright Profemur, Wright Conserve, and Biomet M2a-Magnum.³
- **Invokana, Farxiga, and Jardiance** – These Type 2 Diabetes drugs can cause ketoacidosis—very elevated blood acid levels—which may require hospitalization.⁴
- **Stockert 3t Heater-Cooler Device** – This device used during open-heart surgery has been linked with a specific type of rare, nontuberculous mycobacterium infections, which can occur up to five years after exposure.⁵
- **Taxotere** – Studies and reports have associated permanent hair loss (alopecia) with the use of chemotherapy drug Taxotere (docetaxel).⁶
- **Viagra** – Use is associated with increased risk of melanoma.⁷
- **Zofran** – This anti-nausea drug prescribed “off label” for morning sickness is associated with increased risk of cleft palate and congenital heart defects.⁸
- **Whistleblower/False Claims Act** – Cases involving companies who defraud government entities, including unpaid or underpaid obligations, over billing, healthcare, or construction fraud.

If your legal practice involves medical records in any way, it is safe to say you need to understand how EHRs work and, more so, evaluate your case beyond the “paper” copy of the EHR produced in discovery. It is also important to understand the difference between the legal health record and designated record set.

According to the American Health Information Management Association (AHIMA), the legal health record is “the official business record of an organization for evidentiary purposes,” which is “a subset of the entire patient database.” Whereas, the designated record set is defined under the HIPAA Privacy Rule (a provision in the Health Insurance Portability and Accountability Act) as the records maintained by or for a covered entity that include medical and billing records – in large, the protected health information (PHI), used in whole or in part to make healthcare-related decisions. The designated record set is defined to clarify the rights of individuals and the access to that information.

So what constitutes the designated record set and legal health record? The answer is, it depends. There is no one-size-fits-all definition across the board. Healthcare organizations must take a multidisciplinary approach, but they have discretion in defining both the designated record set and legal health record. It is imperative to know what information you are asking for and, more importantly, what the organization considers to be the designated record set and legal health record.

While all of these mandates have focused on increasing the quality of care and patient safety, the EHRs have created more disconnection in the continuity of care and shifted the communication path between care providers from face-to-face interactions to an electronic medium. The way patients communicate with their care providers is also an artifact of the induction of EHRs.

Most EHR systems include online portals for patients to have web-based access to their health information and their providers. Some organizations have gone as far as to say that, by enrolling in an online portal, the patient agrees to the portal being their primary means of communication for test results. This means patients can be notified, essentially by email, of critical lab values that are outcome-definitive. Yet, the online portal contains only selected parts of the EHR information, and the organization reserves the right to discontinue the patient’s access to the portal at any time and for any reason. It is important to recognize that organizations rarely consider portal communications as part of the designated record set and therefore do not produce them as part of the medical record unless specifically requested.

Another element to cogitate over is the other systems used by the organization as part of its health information technology. While the most common element of health informatics is the electronic medical record, healthcare organizations employ a multitude of other technologies, too. When you consider discovery regarding the EHR, it is important to dissect the potential system-related problems that can happen.

Often the records for lab and imaging are fragmented EHRs, and the patient encounter is not located in the same system. The pharmacy may have a system that interfaces with the EHR only, which can negate any built-in alerts to ensure the intended medication gets dispensed. The absence of those alerts could be where the negligence lies.

The short story is that, when you request a patient’s medical record in discovery, what is produced is a segmented view of the EHR. It is impossible to print out the entire electronic version of the record, including all of the templates, alerts, and algorithms that have been built behind the scenes. By making these requests in discovery, you open the door for evidence to prove your case.

ROBINS KAPLAN'S SILICON VALLEY CONSUMER CLASS ACTION PLAINTIFF PRACTICE

Consumer protection statutes are powerful tools for individuals to protect themselves from corporate misconduct. Robins Kaplan's consumer class action attorneys operate nationwide, using these statutes to help consumers who have been the victims of defective products and services. We represent consumers who have purchased defective or unsafe cars or home building products such as siding, roofing, plumbing systems, and gas fireplaces.

We also prosecute class and collective actions on behalf of consumers victimized by unfair, fraudulent, or unlawful services and sales practices.

Our current class action cases include *Gold v. Lumber Liquidators*, where we have certified six state classes for defective bamboo flooring; *Fowler v. Wells Fargo*, where Wells Fargo unlawfully charged interest on home mortgage loans after the loans were paid in full; *McAdams v. Monier*, in which a jury has ruled that Monier had sold defective roofing tiles to a certified class of tens of thousands of homeowners; and *Chandler v. JPMorgan Chase*, which alleges that Chase has failed to pay the legally required interest on mortgage borrowers' escrow accounts.

MEET THE TEAM



**MICHAEL
RAM**

MICHAEL RAM

A steadfast supporter of consumers' rights, Michael F. Ram has devoted his career to representing people who have suffered financial losses from defective products or were defrauded by banks. Backed by 36 years of experience, Michael has served as co-lead counsel on a number of national and statewide consumer class actions.

Michael is a 1982 graduate of Harvard Law School. Prior to joining Robins Kaplan, he was a founding partner at a San Francisco law firm where he focused his practice on the representation of plaintiffs in consumer class action disputes and other complex business litigation. Michael is admitted to practice in a number of state and federal jurisdictions, including the U.S. Supreme Court. He does pro bono work for East Palo Alto Community Legal Services.



**SUSAN
BROWN**

SUSAN BROWN

Susan handles product defect, false advertising, and financial services class and mass actions. She is especially passionate about protecting consumers from investment fraud and from extortionate and hidden banking fees. Originally from Canada, Susan is licensed to practice on both sides of the border and has won compensation for both Canadian and American victims of defective products and fraudulent services. Dedicated to protecting all consumers, she volunteers with the Bar Association of San Francisco's low-income pro bono clinic and with the Lawyers Committee for Civil Rights of San Francisco.

**To contact our consumer class action team,
call Susan Brown at 650.784.4019.**

KATHLEEN FLYNN PETERSON NAMED A PLAINTIFFS' TRIAL TRAILBLAZER BY *THE NATIONAL LAW JOURNAL*



**KATHLEEN
FLYNN
PETERSON**

Kathleen Flynn Peterson, a partner in Robins Kaplan's Minneapolis office, has been recognized as a 2018 Plaintiffs' Trial Trailblazer by *The National Law Journal*.

This annual list recognizes innovative plaintiff attorneys who have moved the needle in terms of practice, policy, and other advancements in their field. Flynn Peterson is one of only 26 lawyers named to this year's list, and she is the second consecutive Robins Kaplan partner to be recognized.

For nearly 40 years, across two different professions, Flynn Peterson has been a constant champion for victims of injustice—often women and children—in the healthcare system. A registered nurse turned lawyer, she worked the night shift at St. Paul-Ramsey Medical Center while earning her J.D. Despite the institutional resistance of juries and policymakers to see fault in medical professionals, she has obtained millions of dollars in verdicts and settlements, many of them record-setting, to secure justice for individuals and families who have experienced injury or death as a result of medical negligence.



**RAYNA
KESSLER**

RAYNA KESSLER NAMED A NEW LEADER OF THE BAR BY THE *NEW JERSEY LAW JOURNAL*

We are pleased to announce that Rayna Kessler has been named to the *New Jersey Law Journal's* 2018 New Leaders of the Bar list. She is one of 32 New Jersey attorneys under the age of 40 recognized for having already demonstrated their talent and dedication, and for building impressive careers for themselves, serving their clients, and leading the legal profession in New Jersey.

An attorney in the firm's Mass Tort Practice Group, Kessler's practice centers on representing individuals who have been injured by dangerous drugs and medical devices, medical malpractice, or received other catastrophic personal injuries. In particular, Kessler has been recognized for her leading role in the litigation surrounding the prescription blood pressure medication Benicar, where a global settlement agreement was recently announced totaling \$358 million. She is also representing plaintiffs in litigation relating to the antipsychotic medication Abilify.

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1. <http://healthycanadians.gc.ca/recall-alert-rappel-avis/hc-sc/2015/55668a-eng.php>
2. <http://www.fda.gov/Drugs/DrugSafety/ucm359477.htm>; <http://www.ncbi.nlm.nih.gov/pubmed/22728033>
3. *Concerns about Metal-on-Metal Implants*, available at www.fda.gov
4. <http://www.fda.gov/drugs/drugsafety/ucm446845.htm>
5. See <https://www.cdc.gov/hai/outbreaks/heater-cooler.html>
6. See, e.g., Kluger, *Permanent Scalp Alopecia Related to Breast Cancer Chemotherapy by Sequential Fluorouracil/Epirubicin/Cyclophosphamide (FEC) and Docetaxel: A Prospective Study of 20 Patients*, *Annals of Oncology* at 1 (May 9, 2012); Prevezas et al., *Irreversible & Severe Alopecia Following Docetaxel or Paclitaxel Cytotoxic Therapy for Breast Cancer*, 160 *Br. J. Dermatology* 883-885 (2009); Tallon et al., *Permanent Chemotherapy-Induced Alopecia: Case Report and Review of the Literature*, 63 *J. Am. Academy of Derm.* 333-336 (2010).
7. Wen-Qing Li, et al. *Sildenafil Use and Increased Risk of Incident Melanoma in U.S. Men: A Prospective Cohort Study*. *JAMA Intern. Med.* (June 2014)
8. M. Anderka et al. *Medications Used to Treat Nausea and Vomiting of Pregnancy and Risk of Selected Birth Defects*. *Birth Defects Res A Clin Mol Teratol.* (Jan. 2012); JT Anderson et al. *Ondansetron use in Early Pregnancy and the Risk of Congenital Malformations - A Register Based Nationwide Cohort Study*. *Pharmacoepidemiology and Drug Safety.* (Oct. 2013)

ROBINS KAPLAN LLP CELEBRATES 80 YEARS

CELEBRATING
80 YEARS



ROBINS / KAPLAN LLP

Robins Kaplan LLP celebrates its 80th anniversary this year, continuing to honor the premise on which it was created – to provide equal access to justice to all.

What started as a two-person partnership in Minneapolis in 1938 has grown to a national powerhouse litigation firm with eight offices spread across the United States. Through it all, the firm has stayed true to the foundation on which it was established: the bottom-line conviction that wrongs should be righted, regardless of the odds.

A central core belief of the firm since these early beginnings is that everyone deserves equal access to the justice system regardless of race, religious beliefs, nationality, or economic situation. That ideal is exemplified in the firm's personal injury, medical malpractice, and mass tort groups, where our attorneys have worked for decades to protect the rights and interests of those who have been harmed by another party's negligence.

A sampling of some of the firm's most notable cases that demonstrate this principle include:

1983

Dalkon Shield Litigation: Represented over 500 women suing the manufacturer of an intrauterine birth control device. Following two settlements and two favorable verdicts, the firm resolved all of the remaining cases in a landmark settlement.

1988

Cu-7 IUD Litigation: Resolved approximately 135 cases for women implanted with the Cu-7 IUD. The first case tried in Minnesota resulted in an \$8.5 million verdict on behalf of the plaintiff. All cases were ultimately settled.

2004

Robins Kaplan served as counsel for the families of Senator Paul Wellstone, his wife and daughter, and three staff members who died in a chartered plane crash. The case resulted in a \$25 million settlement with the aviation charter company and its corporate affiliates.

2010

Robins Kaplan attorneys were leaders among a consortium of attorneys representing the victims of the 2007 collapse of the I-35W Bridge in Minneapolis. In 2010, engineering services provider URS Corporation agreed to pay more than \$40 million to settle the consortium clients' claims. Our firm represented all clients free of cost.

2017

In *Birmingham v. Emergency Care Consultants*, the jury returned a verdict in the amount of \$20.6 million, which is the largest wrongful death verdict of any kind in Minnesota state history.

In addition, our attorneys have pursued landmark, precedent-setting cases that have advanced the practice of law for the benefit of all. These include *McCormack v. Hanks Craft*, which established the doctrine of strict liability in Minnesota, *Cornfeldt v. Tongen*, which established the principle of informed consent, and *Sherlock v. Stillwater Clinic*, which established the principle of wrongful conception.

Throughout our history, we've won landmark victories for our clients, promoted equality and justice across the country, and touched the lives of countless people in our communities. We look forward to continuing this good work in the years to come.

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