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HEALTH LAW NOTES

What's Inside

LOUISIANA SUPREME COURT'S REHEARING OF BOREL V. YOUNG.....1

OIG OPINES FAVORABLY ON ELECTRONIC KIOSKS PROVIDED BY PHARMACEUTICAL MANUFACTURER.....2

LOUISIANA SUPREME COURT'S REHEARING OF BOREL V. YOUNG

The Louisiana Supreme Court issued its new opinion after a rehearing in *Borel v. Young*, again affirming the Third Circuit's ruling and dismissing the lawsuit against late-added physician defendants, but on different grounds. The supreme court's decision on rehearing solved an apparent dilemma for the plaintiffs created by the original opinion: the plaintiffs were precluded from filing suit until after the medical review panel had rendered an opinion but, in any case, were required to file suit within three years of the alleged medical malpractice. Since the three year period could not be suspended during the pendency of the medical review panel, the plaintiffs faced the possibility that their claims would be barred by the three-year peremptive period before the panel convened to consider their claims.

In *Borel*, the plaintiffs timely filed a request for a medical review panel. The panel rendered an expert opinion in favor of the health care providers. The plaintiffs then timely filed suit against one of the health care provider defendants named in the panel claim and later sought to add the remaining physician defendants over three years from the date of the alleged malpractice. In the original opinion, the supreme court affirmed the dismissal of the lawsuit against the late-added physicians, finding the physicians were added more than three years after the date of the alleged malpractice.

In the original opinion, the supreme court held that La. R.S. 9:5628 set a one-year prescriptive period and a three-year peremptive period for bringing a medical malpractice claim. The supreme court held that a claim for medical malpractice was extinguished if brought against a health care provider more than three years after the date of alleged medical malpractice. The three year peremptive period could not be suspended, interrupted, or revoked. On rehearing, the supreme court reaffirmed its prior decision, holding that both periods were prescriptive, subject to suspension, interruption, or revocation.

Prescription is interrupted against when a lawsuit is filed. However, prescription may be suspended for various reasons. For example, prescription is suspended when a medical review panel request is timely filed and remains suspended for 90 days after notification by certified mail of the medical review panel opinion. Also, prescription may be suspended under the doctrine of *contra non valentum*, where a plaintiff did not know and could not have reasonably discovered the cause of action. This "discovery rule" allows a plaintiff to file a claim within one year of the date of discovery of the negligent act or omission giving rise to a claim, even if that is more than one year from the date of the alleged negligence. The supreme court, on rehearing, also interpreted La. R.S. 9:5628 as making the discovery rule exception to prescription inapplicable after three years from the date of alleged medical malpractice, thus setting a maximum three year period for a medical malpractice claim to be filed.

In explaining its decision on rehearing, the supreme court stated the filing of an initial request for a medical review panel suspended the running of prescription against all alleged joint or solidary defendants, until 90 days after the notification as required of the medical review panel opinion. This suspension protected plaintiffs who were required to submit their claims to a panel before filing suit. Once the suspension ended, the plaintiffs had any remaining time left in the prescriptive period to file suit against the health care provider defendants named in the request for the medical review panel. The supreme court confirmed that the more specific provisions of the Louisiana Medical Malpractice Act, rather than the general Civil Code provisions, applied regarding the interruption of prescription against jointly liable defendants. Thus, in *Borel*, the claim against the defendant physicians were prescribed, even though suit was timely filed against another defendant health care provider, because the physicians were not added to the lawsuit

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for more than three years after the alleged medical malpractice. Ordinarily, prescription would be interrupted as to all defendants who are jointly or solidarily liable, when a lawsuit is filed against any one of them.

The *Borel* opinion, on rehearing, seems to have eliminated the bright line rule created in the original opinion that a lawsuit alleging medical malpractice, under all circumstances, must be filed no later than three years after the date of alleged malpractice. However, the opinion on rehearing affirms that the special rules set forth in the Medical Malpractice Act operate to the exclusion of the more general rules related to interruption of prescription and also affirms that the discovery rule, which would otherwise suspend the prescriptive period, ceases to be applicable after three years from the date of the alleged malpractice. Thus, the ultimate result reached is the same as in the original opinion.

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OIG OPINES FAVORABLY ON ELECTRONIC KIOSKS PROVIDED BY PHARMACEUTICAL MANUFACTURER

In Advisory Opinion No. 08-05, issued February 15, 2008, the OIG concluded that an arrangement whereby a pharmaceutical company placed electronic kiosks in physician offices would not generate prohibited remuneration under the anti-kickback statute. Further, the OIG opined that the arrangement would not violate the federal prohibition against giving anything of value to a Medicare or Medicaid beneficiary that is likely to influence the beneficiary's selection of a particular provider.

In Opinion 08-05, a pharmaceutical company requested an opinion regarding a proposal to place electronic kiosks offering free disease state screening questionnaires in primary care physicians' offices. The questionnaires would address four disease states, each of which could be treated with drugs provided by the pharmaceutical manufacturer. The kiosks would be placed in waiting rooms and would replace current informational brochures found in the waiting rooms. These kiosks would offer interactive questionnaires about the four disease states, but their use by patients would be voluntary. Moreover, patients would be free to share or not share the information obtained from participating in the questionnaire with his or her physician. For those patients who wished to share the information, a printout with the results of the questionnaire would be available.

The proposed electronic questionnaires would not mention the manufacturer's drug products or contain any advertisements or incentives for using the kiosks. Patient names would not be entered into the system, and the questionnaires would contain a privacy statement. The questionnaire would not mention any particular drugs, but would carry a small image of the requesting company's logo and a copyright notice. Further, participating physicians would not be paid, nor would they pay the requesting company, for hosting the kiosks. The physicians whose waiting rooms would contain the kiosks need not have prescribed any of the requesting company's drugs. Additionally, participating physicians would not be required to prescribe any such drugs. Finally, sales representatives of the requesting company would not have access to the database created by patient participation in the questionnaire.

The OIG opined that this arrangement would not generate prohibited remuneration under the federal anti-kickback statute, nor would it violate the federal statute prohibiting the giving of anything of value to a Medicare or Medicaid beneficiary to induce the person to use a particular provider of items or services for which the government pays. According to the OIG, the arrangement would not provide prohibited remuneration to the physicians whose waiting rooms would house the kiosks. The OIG found it unlikely that the questionnaires would save any appreciable amount of physician or staff time, and it did not believe that the kiosks would enhance the attractiveness of the participating physicians' offices such that it would influence the selection of a particular physician by government beneficiary patients. The OIG also opined that the kiosks would not have remunerative value to the patients because no incentives for using the kiosks would be offered. Additionally, the kiosks, while electronic, would be analogous to the paper brochures that are placed in physician offices at present. However, the OIG mentioned that it might have reached a different result if the kiosks were used to communicate any form of offer of remuneration to patients, such as coupons, gifts or services.

The OIG also noted with approval that the proposed arrangement included safeguards, such as a patient privacy protection, the fact that the names of patients would not be entered into the system, and that sales representatives would not have access to the database created by the questionnaires.

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