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HEALTH LAW NOTES

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COLORADO FEDERAL COURT DECIDES THERE IS NO PRIVATE RIGHT OF ACTION UNDER HIPAA

In August of this year, a Colorado Federal District Court decided there is no private right of action under the privacy provisions of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). Strangely, this case was not brought by an individual claiming the health care provider, a hospital, had violated the individual's HIPAA rights. Instead, the suit was brought by the hospital against a publishing company that owns a newspaper. The suit alleged that the newspaper had published the hospital's confidential peer-reviewed report that included negative information about a neurosurgeon on its staff.

The hospital sought an injunction to prevent use of the report and for its return. It argued that the report, which the newspaper had obtained from an undisclosed source, contained information protected by HIPAA. No specific "protected health information," as that term is defined by HIPAA, was identified in the court's opinion.

The court ruled that it could not decide the HIPAA claim and dismissed it, holding there is no private right of action to enforce HIPAA's privacy provisions. The court determined that Congress did not intend for there to be a private right to sue under HIPAA. The reasons it gave are that the law contains no express private right of action; it focuses on those to be regulated, as opposed to those to be protected, by the law; that the law's discernable enforcement mechanism suggests no implied private right of action; and that courts do not have the authority to imply a private right of action when Congress has not done so.

This ruling is consistent with other federal jurisprudence that has found no private right of action under HIPAA's provisions related to subjects other than confidentiality (for example, portability and coverage decisions). However, it is somewhat limited, for a couple of reasons. First, the hospital brought its HIPAA claim under HIPAA' criminal enforcement provisions, which made it easy to find no private right of action. Second, the claim was not brought by any individual claiming his privacy rights were violated, although the other cases were brought by individuals seeking to enforce HIPAA's provisions.

In any event, this decision provides at least some guidance for future decisions. The case is *University of Colorado Hospital Authority v. Denver Publishing Company*, No. 03-WM-1997 (D. Colo. 8/2/04), which can be found at 2004 WL 1925986.

Linda G. Rodrigue
225.382.3439
linda.rodrigue@keanmiller.com

OIG REVIEWS PATHOLOGY CONTRACTUAL JOINT VENTURE

The Office of Inspector General ("OIG") recently concluded in an advisory opinion that a proposed contractual arrangement for a Company to provide turn key pathology laboratory services on behalf of physician groups could potentially generate illegal remuneration under the federal anti-kickback statute. In this advisory opinion, the OIG emphasized its long-standing concerns with contractual arrangements between physician groups or other health care providers and entities that provide Medicare-covered health care services.

"...the OIG commented that the "retained profit" by a physician group would not be protected by any safe harbor."

Under the proposed arrangement, a Company would establish a surgical pathology lab through multiple contractual arrangements with a physician group (e.g., space lease, equipment lease, management agreement, pathology professional services agreement, administrative and billing services). A physician group would bill Medicare in its name for pathology services provided to the group's patients in this pathology lab.

This Company would establish separate pathology labs on behalf of up to five physician groups in a single building. This arrangement is similar to the "POD" arrangements that the OIG had previously expressed concern about in the 2005 Medicare Physician Fee Schedule.

The OIG commented that this arrangement in the advisory opinion is virtually identical to the suspect contractual arrangements described in the OIG's Contractual Joint Venture Bulletin issued in 2003. Although the separate contracts between each physician group and the Company would meet a safe harbor, the OIG commented that the "retained profit" by a physician group would not be protected by any safe harbor. These comments seem to imply that the OIG considered the pathology laboratory established under the arrangement to be actually the Company's pathology laboratory and the "retained profit" would be illegal remuneration to the physician group for patient referrals.

Some key aspects to the OIG's conclusion are that a physician group effectively contracted with a "would be competitor" to provide substantially, if not all, of the services and items to establish a pathology lab and that a physician group would have hardly any involvement in operating the pathology lab. The Company was considered to be a competitor in providing pathology services because the Company was owned by a parent company that also owned other companies that directly provided pathology laboratory services to physician groups. The OIG also commented that the proposed arrangement would allow the referring physician groups to capture a new line of business based entirely on their referrals from their own physicians, and that the physicians would have little or no risk because they could control the amount of business they referred to the pathology lab, and the monthly management fee was based on historical utilization data from each physician group.

Clay J. Countryman
225.389.3729
clay.countryman@keanmiller.com

BOND FOR MEDICAL REVIEW PANEL COSTS REQUIRED WHEN MEDICAL MALPRACTICE LAWSUIT IS FILED

In another move to make it more onerous for a plaintiff to file a medical malpractice lawsuit, the Louisiana Legislature amended La. R. S. 40:1299.47 by Acts 2003, No. 961 § 1 and No. 1263 § 1. The amendment added paragraphs (c) and (d) to La. R. S. 40:1299.47(I)(2). The provisions are mandatory and are effective as to medical malpractice claims filed on or after the effective date of July 7, 2003. There are also provisions for the claimant who files in forma pauperis.

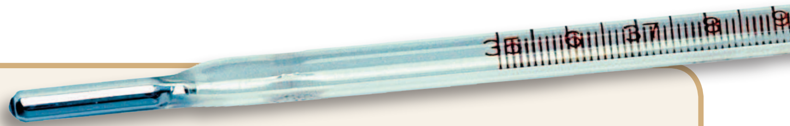
"...these provisions may offer yet another disincentive to claimants who file frivolous claims."

Paragraph (c) provides that a claimant who files a medical malpractice lawsuit after the medical review panel renders a unanimous opinion in favor of the health care provider must post a cash or surety bond in the amount of all costs of the panel. At the conclusion of the lawsuit, if the final judgment is in favor of the health care provider, the cash or surety bond must be forfeited to the health care provider for reimbursement of the costs of the medical review panel. If, however, a final judgment is rendered finding the health care provider liable to the claimant for any damages, the health care provider must reimburse the claimant for an amount equal to the cost of obtaining the cash or surety bond posted by the claimant.

The *quid pro quo* to the claimant is found in Paragraph (d). If the medical review panel renders a unanimous opinion against the health care provider, who fails to settle the claim before the claimant files a lawsuit, the defendant health care provider is required to post a bond for the medical review panel costs paid by the claimant. If there is a final judgment in favor of the claimant, the cash or surety bond posted by the health care provider will be forfeited. Conversely, if the final judgment is in favor of the health care provider, the claimant is required to pay an amount equal to the cost of obtaining the bond posted by the health care provider.

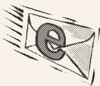
Like the per defendant filing fee now required for all claims filed with the Patient's Compensation Fund, these provisions may offer yet another disincentive to claimants who file frivolous claims.

Deborah J. Juneau
225.389.3703
deborah.juneau@keanmiller.com



UPCOMING HEALTHCARE EVENTS

The Kean Miller Healthcare Compliance Luncheon will be held during the Winter of 2005. This luncheon is hosted at Juban's Restaurant quarterly, and covers the most recent healthcare compliance regulations. If you would like more information regarding the Healthcare Compliance series, please contact Denise Duszynski at denise.duszynski@keanmiller.com or 225.389.3753.



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