Honigman Miller Schwartz and Cohn's April 2004

HEALTH LAW FOCUS

JOHNS HOPKINS TO PAY $2.6 MILLION TO SETTLE FALSE CLAIMS ACT CASE

On February 26, 2004, the Department of Justice announced that Johns Hopkins University and Johns Hopkins Bayview Medical Center will pay the U.S. more than $2.6 million to settle allegations that the institutions violated the False Claims Act in connection with federally sponsored research grants. The government has alleged that in the grant applications, Johns Hopkins University researchers overstated the percentage of work effort to be devoted to the grants. In addition, when drawing down grant funds, the government has alleged that the institutions overstated the percentage of actual work effort. The suit was filed in May 1999 by Faye Grau, an employee of Bayview, under the *qui tam* provision of the False Claims Act. As a result of the settlement, she will receive $439,582. Johns Hopkins has also agreed to work with the National Institutes of Health's Division of Grants Compliance and Oversight to address any necessary corrective actions or compliance activities to ensure the future integrity of the grants process.

For additional information, please contact Ann T. Hollenbeck.

KAISER HEALTH PLAN SUED FOR DISCLOSURE

The California Health Care Council, a consumer group based in California, sued Kaiser Foundation Health Plan on March 15 for allegedly disclosing to health plan attorneys the medical records of patients without prior authorization when litigation is threatened. The suit claims that the Plan and related medical group and hospitals allow attorneys to study medical records without first obtaining patient authorization. The suit claims that the disclosures are not necessary to provide health care services to patients and that Kaiser conceals its practice. The Council alleges that the disclosures violate California's privacy law. The filing also alleges unfair competition by the plan in representing to the public that it uses and discloses medical information in accordance with the law, but it uses and discloses such information unlawfully when investigating and defending lawsuits, arbitrations or other legal disputes.

For additional information regarding patient privacy, please contact Linda S. Ross or Valerie S. Rup.

DIRECTORS MAY BE PERSONALLY LIABLE FOR DELIBERATE INDIFFERENCE

In a recent case (*In Re The Walt Disney Company Derivative Litigation*), the Delaware Court of Chancery denied a board motion to dismiss and found that directors could be held personally liable for harm to the corporation if they failed to exercise any business judgment or to make any good faith attempt to fulfill their fiduciary duties. The court noted that while it would be unusual to impose liability on directors for breach of their duty of care, and it would not second-guess the directors' business judgment, the allegations surpassed merely negligent, or even grossly negligent conduct. The court stated that the facts alleged by plaintiffs, if true, indicate that the directors "consciously and intentionally disregarded their responsibilities, adopting a 'we don't care about the risks' attitude concerning a material corporate decision."

The plaintiffs allege that Disney's CEO, Michael Eisner, unilaterally decided to hire Michael Ovitz, his friend of more than twenty-five years, as president. He allegedly forced this decision on the Board, even though the three directors who initially learned of his plan protested. The Board's compensation committee met to discuss Ovitz's compensation, but devoted less than an hour of time to it and apparently did not analyze or consider all the details. The Board itself also spent very little time considering Ovitz's hiring. Ovitz was hired as president but left in less than eighteen months with a non-fault termination negotiated primarily by Eisner for Disney, allegedly without any Board involvement or approval. Ovitz is alleged to have received cash and stock options worth more than $140 million in severance.

For concerns involving potential director liability, please contact Gerald M. Griffith, Ann T. Hollenbeck or Cynthia F. Reaves.

COURT ORDERS REOPENING OF NOTICE OF PROGRAM REIMBURSEMENT

Two recent cases have clarified the effect of HCFA (now CMS) Ruling 97-2 that rescinded the U.S. Department of Health and Human Services' ("HHS") original interpretation concerning the calculation of a hospital's "disproportionate patient percentage" for purposes of its eligibility for the disproportionate share adjustment. The Ruling stated that HCFA recognized that its original interpretation of the statutory provision was contrary to holdings in four judicial circuits. Nevertheless, HCFA stated that the changed interpretation would apply only prospectively. Moreover, the Ruling expressly stated that HCFA would not reopen past Notices of Program Reimbursements ("NPR") on the basis of this changed interpretation. In response to the Ruling, two hospitals sought to have their NPRs for the fiscal years ending in 1993 and 1994 reopened.

In *Monmouth Medical Center v. Thompson*, the Court of Appeals for the D.C. Circuit concluded that the Ruling constituted notice to the fiscal intermediaries that HCFA's interpretation was inconsistent with applicable law and that applicable regulations imposed a clear duty on intermediaries to reopen disproportionate share payment determinations for the two hospitals. In *Baystate Health System v. Thompson,* the U.S. District Court for D.C. on March 26, concluded that the Ruling imposed a "clear, mandatory duty on Medicare intermediaries to reopen all intermediary determinations rendered in the three-year period prior to the Ruling" notwithstanding the plaintiff's failures to request reopenings or proceed through the administrative review process. The court also issued a writ of mandamus compelling HHS to reopen and revise the earlier payment determinations. *Baystate* is significant in that it may allow existing appeals with defects to be cured. It may also form the basis for appealing additional issues that were not appealed within 180 days, and possibly even within three years, of the date of the NPR.

For additional information regarding the potential impact of the Baystate decision, please contact Chris Rossman or Patrick G. LePine.

TWO IMPORTANT DEVELOPMENTS IMPACTING LAWSUIT AGAINST RESIDENT MATCHING PROGRAM

The U.S. District Court for D.C., on February 11, 2004, held that antitrust claims challenging the National Resident Matching Program (the "NRMP") and alleging a conspiracy that depresses and standardizes salaries paid to medical residents may proceed. In doing so, the court

Honigman is pleased to welcome back Patrick G. LePine, who rejoined the firm as a partner on March 29. He can be reached at (313) 465-7648.

rejected a motion to dismiss filed by the Association of American Medical Colleges, which services the NRMP and the teaching hospitals that employ medical residents. In addition, the court also rejected a motion to compel arbitration filed by the NRMP, ruling that the antitrust conspiracy claims had to be tried in one forum. The suit by medical residents seeks to abolish the NRMP, which places medical residents with teaching hospitals and other residencies, alleging that assorted medical associations and teaching hospitals conspired to keep work hours long and wages low.

On April 8, 2004, the U.S. senate approved a conference report on H.R. 3108 that includes a provision declaring the NRMP does not violate federal antitrust laws. The bill, entitled The Pension Funding Equity Act of 2004, confirms Congress' position that federal antitrust laws "do not prohibit sponsoring, conducting, or participating in a graduate medical education residency matching program..." President Bush is expected to sign the legislation shortly, which aims directly at the lawsuit discussed above.

For more information, please contact Ann T. Hollenbeck.

DIRECTORS HELD NOT INDEPENDENT BECAUSE OF COLLEGIAL TIES

A Delaware Court of Chancery held recently that two outside directors were not independent directors for conflict of interest. The decision arose in the context of securities derivative litigation (*In Re Oracle Corp. Derivative Litigation*) over alleged insider trading by directors, two of whom were also senior executives. Delaware law generally allows a corporation to terminate a derivative action if an independent board of directors, or committee composed entirely of independent directors, reviews the claims and determines that they should not be pursued. The board or committee must convince the court that it is completely independent so that it has only the shareholders' interests in mind. Because the Oracle board was not completely independent, a committee was formed with two directors who were not employed by Oracle. This committee conducted an extensive investigation and concluded that the action should be terminated.

Unfortunately for the defendants, the court found that these two directors serving on the committee did not have the required level of independence for the court to defer to their decision. The court found that while the two directors were not economically dependent on the defendants, they nonetheless had other ties that made it impossible for the court to treat them as truly independent. Both directors on the committee were highly respected tenured professors at Stanford University, and also graduates of Stanford. The court found that the defendant directors were such substantial donors to, and otherwise regularly involved with, Stanford that the directors on the committee would not be able to completely disregard their ties with the defendant directors. This was true even though the directors on the committee were not deemed to be at any risk of losing their positions or otherwise suffering financially if they made a decision to support the derivative action against the defendants.

For more information, please contact Zachary A. Fryer.

EMERGENCY ROOM PATIENT TRANSFERS PROHIBITED

Effective February 20, 2004, Michigan's Insurance Code and Nonprofit Health Care Corporation Act were amended to prohibit certain health insurers and Blue Cross and Blue Shield of Michigan from requiring a physician to transfer a patient before that physician has determined that the patient is stabilized. Stabilization is defined as the point at which no material deterioration of a condition is likely, within reasonable medical probability, to result from or occur during transfer of a patient. Importantly, health insurers may not deny payment for emergency health services provided before patient stabilization because of either the final diagnosis or lack of prior authorization. Although the federal Emergency Medical Treatment and Active Labor Act prohibits a physician or a hospital from transferring an emergency room patient to another facility before stabilization, it does not specifically apply to insurers. By applying that prohibition to health insurers, these amendments provide another mechanism to ensure that the sole decision-making responsibility with respect to whether a patient can safely be transferred is made by the emergency room physician.

To obtain more information regarding this amendment, please contact Michael J. Philbrick or Cynthia F. Reaves.

QUI TAM CASE ALLEGING LACK OF EFFECTIVE COMPLIANCE PROGRAM

Recently, the U.S. intervened in a *qui tam* case against Medco Health Solutions, Inc. in the mail order prescription drug business. One count in the complaint alleges that Medco's Board of Directors and officers knowingly, with deliberate ignorance or reckless disregard, failed to implement and maintain a compliance program reasonably designed to inform senior management and the Board of potential violations of law. Areas of concern with Medco's compliance program included: (1) most employees were unaware of the existence and details of Medco's compliance program; (2) no senior manager was directly responsible for oversight of the compliance program; (3) no compliance program personnel had direct access to the CEO or the Board; (4) no compliance officer within Medco was responsible for independently investigating or acting upon compliance matters; and (5) the compliance program was not monitored, audited or consistently enforced. Although not yet resolved, the Medco complaint provides insight as to the government's interpretation of deliberate ignorance or reckless disregard for purposes of the False Claims Act, as well as potential false claims liability with respect to compliance programs.

For additional information on the False Claims Act, please contact Patrick G. LePine, Chris Rossman, Gerald M. Griffith or Carey F. Kalmowitz.

STARK II REGULATIONS PUBLISHED

On March 26, 2004, the Centers for Medicare and Medicaid Services published the Stark Law Phase II regulations. These new regulations add a number of exceptions, grant leeway for temporary noncompliance in a variety of situations if promptly corrected, provide more flexibility for certain group practice arrangements and physician recruitment, allow more percentage compensation arrangements, approve select retention payments in shortage areas, broaden the potential pool of academic medical centers, revise the record keeping requirements and either clarify or restrict the scope of many other exceptions. In short, these new regulations could affect a variety of financial relationships with physicians. Providers should closely review their existing physician relationships to assure they are in compliance by the July 26 effective date of the new regulations.

To obtain more information on the Stark Law Phase II regulations, contact Gerald M. Griffith, Ann T. Hollenbeck, Carey F. Kalmowitz or Patrick G. LePine.

HOSPITAL FINED FOR SEEKING PAYMENT PRIOR TO TREATMENT

A Florida hospital recently agreed to pay $40,000 to settle a federal administrative investigation into whether an uninsured person was told to prepay or make other financial arrangements in order to receive emergency care. A spokeswoman for the Office of Inspector General said the 2002 incident at St. Mary's Medical Center in West Palm Beach violated the

Emergency Medical Treatment and Labor Act ("EMTALA"). According to the spokeswoman, the patient came to the hospital seeking treatment for an emergency condition, but before clinically evaluating the patient, the hospital personnel asked for insurance or payment information. According to St. Mary's, it has addressed the issue with a fine being agreed upon and paid, and the issue has been resolved to the satisfaction of all parties.

For more information concerning EMTALA compliance, please contact Michael J. Philbrick, Linda S. Ross or Cynthia F. Reaves.

MICHIGAN REVISES CON RULE

The Michigan Department of Community Health ("MDCH"), as part of its certificate of need ("CON") program, has clarified that a change in the ownership of a building, without more, does not require a CON. As of March 12, 2004, a change in the ownership of a building, without any change in the ownership of the licensee that provides health care services from that building and without any change in the lease terms, such as a change in licensed use, bed capacity or physical plant structure, does not require a CON. Section 22209 of Michigan's Public Health Code requires the issuance of a CON prior to the acquisition of a health facility. According to MDCH, while a building is a significant part of most types of health facilities such as nursing homes, the building itself is not the licensed health facility. A licensee, which must obtain a CON, is the business entity that operates a health facility. That licensee may own its building or may lease it. If it leases the building, and only the landlord changes, no CON is needed for that change in landlord. If the licensee changes, whether in conjunction with the acquisition of a building or otherwise, a certificate of need is required. The MDCH will request, as part of the CON application, the identification of the current landlord and, if applicable, a draft of the lease agreement. Thus, where the licensee changes and lease terms change, only one CON application will need to be submitted, with both the change of licensee and change in lease terms being identified.

For more information regarding this change or assistance with the CON process, contact Chris Rossman, Patrick G. LePine or Margaret A. Shannon.

U OF M ORDERED TO ALLOW ACCESS TO PROTECTED RECORDS

In an order pursuant to 45 CFR § 164.512(e) related to a government subpoena, the U.S. District Court for the Eastern District of Michigan ordered the University of Michigan to immediately permit access to records and information sufficient to identify records which are responsive to discovery requests to the plaintiff-doctor. The discovery requests were part of the federal government's first set of interrogatories directed to the plaintiff-doctor in a pending case in the U.S. District Court for the Southern District of New York regarding the constitutionality of a federal law banning a controversial method of abortion (*National Abortion Federation, et al. v. Ashcroft*). In addition, the court ordered that the University redact all patient identifying information from those records produced as defined in a previous protective order, including identifying the states of residence of any individuals who sought or obtained medical treatment from the University. The University may designate as "Confidential Health Information" any records produced pursuant to the order and such designated records will be subject to the protective order governing disclosure of the information. Any documents produced pursuant to the order may be used solely for purposes of the prosecution or defense in the case and two other specified cases. 45 CFR § 164.512(e)(1)(i) permits the disclosure of protected health information in the course of any administrative or judicial proceeding in response to an order of the court.

For additional information, please contact Linda S. Ross or Valerie S. Rup.

SPEAKING ENGAGEMENTS

HMS&C attorneys are frequently asked to speak at conferences and seminars. A calendar of scheduled upcoming speaking engagements is provided below.

Topic	Dates(s)	Event, Location	Speakers(s)
Special Reporting Issues for Cost Based Providers	March 31-April 2, 2004	American Health Lawyers Association - Institute on Medicare and Medicaid Payment Issues, Baltimore, Maryland	Chris Rossman
Physician Contract Negotiations, Salary Standards, Employment Options and Maternity Leave	April 24, 2004	Michigan State Medical Society Foundation - Conference for Women's Physicians, Troy, Michigan	Linda S. Ross
Negotiating and Managing Payor Contracts	May 12, 2004	Healthcare Financial Management Association, Indianapolis, Indiana	Chris Rossman, jointly with Neil Godbey of The Godbey Group
Tax Law Update and Excess Benefit Compliance	June 28-30, 2004	American Health Lawyers Association - Annual Meeting, New York, New York	Gerald M. Griffith
Vendor Relationships: New Complications	June 28-30, 2004	American Health Lawyers Association - Annual Meeting, New York, New York	Ann T. Hollenbeck
Alternative Risk Financing for Hospitals and Physicians	October 18, 2004	ASHRM Annual Conference Orlando, Florida	Julie E. Robertson

Honigman Miller Schwartz and Cohn LLP is a general practice law firm headquartered in Detroit, with over 190 attorneys at its three offices in Michigan. Our Health Care Department includes the attorneys listed below. Except as indicated, the attorneys are licensed to practice law in the state of Michigan only.

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Honigman Miller Schwartz and Cohn LLP's Health Law Focus is intended to provide information, but not legal advice, regarding any particular situation. Any reader requiring legal advice regarding a specific situation should contact an attorney. The hiring of an attorney is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience.

Honigman Miller Schwartz and Cohn LLP also publishes newsletters concerning antitrust, corporate, employment, environmental, immigration and tax matters. If you would like further information regarding these publications, please contact Lee Ann Jones at (313) 465-7224 or via email at LJones@honigman.com. Articles and additional information about our firm and its attorneys are included on our web site at www.hongiman.com.

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