

If you have questions regarding the information in this alert or would like to receive further information regarding our Health Care Department, please contact:

Jennifer L. Benedict
313.465.7326
jbenedict@honigman.com

Scott D. Geromette
313.465.7398
sgeromette@honigman.com

Ann T. Hollenbeck
313.465.7680
ahollenbeck@honigman.com

Matthew R. Keuten
313.465.7510
mkeuten@honigman.com

Kenneth R. Marcus
313.465.7470
kmarcus@honigman.com

Erica D. Partee
313.465.7528
epartee@honigman.com

Linda S. Ross
313.465.7526
lross@honigman.com

**Angela Epolito
Sprecher**
313.465.7540
asprecher@honigman.com

Michigan Court of Appeals Weighs In on Patient Privacy and Enforcement of Physician Non-Solicitation Agreements

The Michigan Court of Appeals recently held in *Isidore Steiner, DPM, PC v. Bonanni*, No. 294016, 2011 WL 1327682 (Mich. App. April 7, 2011) that state privacy laws trump the Health Insurance Portability and Accountability Act (HIPAA) in the context of enforcing a contractual non-solicitation provision in a physician employment agreement. A copy of the Court's opinion can be viewed [here](#).

In *Isidore*, the plaintiff professional service corporation (PC) claimed, among other things, that the defendant physician stole the PC's patients in violation of a clause in the physician's employment agreement that prohibited the physician from soliciting or servicing patients of the PC after the physician left the practice. After the physician resigned from the PC, the PC sued the physician and sought disclosure of the physician's patient list in order to prove the PC's case. During discovery, the PC requested the "names, addresses and telephone numbers for every patient treated by defendant since he resigned." The physician argued that such information was protected by Michigan's statutory physician-patient privilege, which is more stringent than HIPAA.

The Court pointed out that HIPAA asserts supremacy in this area but "allows for the application of state law regarding physician-patient privilege if the state law is more protective of patients' privacy rights." The Court reasoned that in the litigation context, HIPAA allows disclosure of privileged information in response to a subpoena or discovery request without a court order if notice is given to the patient. Michigan law, however, provides patients with more protection and requires patient consent before disclosure of patient information. The Court held that because Michigan law is more protective of patients' privacy rights in the context of litigation, Michigan law—not HIPAA—applies to the PC's discovery of the physician's patient list. As a result, the court held that the patient names, addresses and telephone numbers requested by the PC were privileged and thus, could not be disclosed to the PC. Importantly, the Court limited its role to determining whether the patient list was protected from disclosure, and did not weigh in on the "wisdom of a physician's efforts to restrict with whom a patient may consult or the appropriate business or legal means by which a corporation can effectively protect its practice."

The *Isidore* decision serves as a good reminder that when analyzing issues involving the use and disclosure of patient information, state law as well as HIPAA must be considered. Further, employers seeking to enforce a non-solicitation provision and prove a case involving “stolen patients” should be aware of the potential roadblock now imposed by the *Isidore* decision, which may require more creative discovery efforts. For example, it may be possible to obtain information regarding patients in a manner that does not identify the patient. It remains to be seen how lower courts will apply this decision when a party seeks to identify stolen patients through other types of discovery requests not involving patient data. Finally, in light of this decision, employers should consider including non-competition and liquidated damages provisions in physician employment agreements, either in addition to or in lieu of a non-solicitation clause, as those provisions can be enforced without a need for patient information.

For questions regarding the *Isidore* decision or restrictive covenants in physician agreements, please contact any member of the Honigman Health Care Department.