HEALTHCARE**LEGAL**NEWS

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DW HEALTHCARE TEAM - NEWS & SUCCESS STORIES

Out Now

- Brian Balow authored the *Allocation and Mitigation of Risk* chapter in the BNA E-Health Treatise, E-HEALTH, PRIVACY, AND SECURITY LAW, 2nd Ed. (Dec. 2011)

On **June 5**, Brian Balow and Tatiana Melnik will be speaking on *Impacts of FDA Regulations On Mobile Health Apps* at a Webinar hosted by Online Tech. Please contact Tatiana at tmelnik@dickinsonwright.com if you are interested in additional details on the webinar.

On **June 28**, Brian and Tatiana will be speaking on the legal issues surrounding mobile health at the Health IT Innovation Summit – mHealth in California. You can learn more about the event here: http://www.weyond.com/himss/socal/hitis/2012/

PRIVATE CIVIL ENFORCEMENT ACTIONS INCREASING: THE AMERITOX VS. MILLENNIUM LAWSUIT

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As healthcare and antitrust enforcement by governmental agencies increases, private parties are increasingly bringing antitrust and state unfair competition claims.

On April 9, 2012, clinical laboratory Ameritox, Ltd. filed suit against its competitor Millennium Laboratories, Inc. in the United States District Court for the Middle District of Florida alleging false advertising, unfair competition and unfair trade practices. Specifically, Ameritox alleges that Millennium's nationwide marketing strategy violates the Lanham Act, which protects competition by prohibiting false or misleading advertising, and the state unfair competition laws of Florida, California, and New Hampshire.

Ameritox and Millennium are laboratories which market and provide drug testing services to doctors who prescribe medications for the treatment of chronic pain and addiction. These companies provide unique laboratory tests, which permit physicians to

determine whether their patients are taking medication as prescribed or are also taking other prescription and non-prescription drugs.

Importantly, both companies work with doctors whose patients are covered by Medicare and Medicaid. Ameritox's principal allegation is that Millennium misled doctors about the payment of Medicare co-pays and deductibles. Millennium allegedly provides free training and distributes commercial advertisements to physicians informing them of the means to code their medical tests to increase their reimbursement rates. Ameritox alleges that such coding practices are illegal and "misleadingly implied that those Health Care Providers could implement this improper and abusive scheme in good faith." This, among other actions, led Ameritox to claim that Millennium is manipulating the market by "effectively corrupt[ing] the Health Care Provider's decision-making process by improperly introducing enormous financial incentives that mislead Health Care Providers into believing that it is lawful for them to accept illegal inducements."

Ameritox also accuses Millennium of providing doctors financial incentives, such as free supplies, which constitute illegal kickbacks under the Federal Anti-Kickback Statute, and several state anti-kickback statutes. Ironically, two years ago, Ameritox settled its own False Claims Act lawsuit for $16.3 million. That lawsuit accused Ameritox of engaging in similar conduct (*i.e.*, paying doctors illegal kickbacks in exchange for their business, including their Medicare business).

Ameritox asked the court to enjoin Millennium's allegedly illegal practices, award Ameritox all profits Millennium derived from its allegedly illegal acts as well as treble damages, punitive and exemplary damages, and attorneys' fees.

Ameritox's lawsuit begs the question of whether competitors like Ameritox and Millennium can garner a competitive advantage through private civil enforcement actions. Some companies have found litigation of this type to be fruitful. In 2002, for example, a Texas District Court awarded Healthpoint, Ltd. $6,349,030 in damages under the Lanham Act and $3,174,515 in punitive damages, under its common law unfair competition claim and found that Ethex Corp. deliberately made false representations meant to damage Healthpoint. In the increasingly competitive healthcare arena, companies appear to be more willing to file private civil enforcement actions as a means to protect their own business interests, which may produce quicker action than if they were to rely solely on governmental enforcement, which may take years.

LITIGATION NEWS

RECENT CASES ARE REMINDERS OF NEED FOR CAREFUL DRAFTING OF AGREEMENTS WITH PHYSICIANS

By Ralph Levy, Jr., Of Counsel in Dickinson Wright's Nashville office, can be reached at 615.620.1733 or rlevy@dickinsonwright.com

Two recent cases are reminders of the need for care in drafting agreements with physicians and providers of similar services. In both cases, the courts ruled in favor of the "employing" practice group and the practitioner-employee was found to have breached the agreement.

In yet another breach of physician employment contract case from the state of Kansas (see article by this author on *Braun v. Promise Regional Medical Center-Hutchison Inc.*, which appeared in Volume II, Issue 2, of this Newsletter), the United States District Court for the District of Kansas found that as a result of the breach by an interventional cardiologist of a "no moonlighting" clause in his employment agreement, the practice group's termination of the agreement "for cause" was justified and the physician should account to the employer for the over $300,000 he received from these extracurricular services during his employment by the practice group.

After a recruitment effort that resulted in his relocation from New York to Wichita, Kansas, Dr. Philip Totonelly entered into a five-year employment agreement with Galichia Medical Group, P.A. (GMED) to provide full-time services for the practice group (defined in the agreement as not less than 40 hours per week). With a limited exception (services as an expert or pertaining to litigation), the agreement provided that unless GMED "agreed in advance in writing that Doctor [Totonelly] may retain such payment [for moonlighting services], Doctor shall immediately pay such amount to Employer [GMED]". Shortly after joining GMED's employment, Dr. Totonelly began to review and report on cardiac nuclear studies for his former employer in New York. Soon after finding out about these activities (slightly over one year into the five year term of the employment agreement), GMED terminated Totonelly's employment for cause and demanded in writing that he account to GMED for the fees he had received from moonlighting. Dr. Totonelly did not respond to this letter, but instead moved back to New York within a week after he received the letter.

Dr. Totonelly filed suit in Kansas federal court against GMED and asked the court to find that GMED should not have terminated his employment and that he was entitled to unpaid compensation and other payments contemplated by the employment agreement. In defense, GMED filed for summary judgment and asked the District Judge to rule that as a matter of law, Dr. Totonelly's moonlighting activities constituted a breach of his employment agreement that justified GMED's termination of his employment for cause. In granting GMED's motion, the federal judge found that the uncontroverted facts showed that the cardiologist had breached his employment agreement with GMED by engaging in prohibited outside work. The court further indicated that the one exception to the anti-moonlighting clause (litigation support and expert testimony) had been carefully negotiated by counsel to the parties and that there was no intention in the agreement that the services of the type provided by Dr. Totonelly to his former employer in New York were to be covered by the exception.

In another case, the Supreme Court of Montana found that payments under a partnership agreement should be reduced to three psychologists who were formerly partners of the practice but who separated from a multi-specialty medical practice. Under the group's partnership agreement, a partner who departed from the practice group was entitled to receive certain payments that included

the partner's share of operational profits and capital contributions. However, the amount of this payment was subject to a reduction for certain separations, including those in which the departing partner engaged in "the practice of medicine" within three years from the departure either in the county in which the partner primarily practiced while a group partner or in any contiguous county.

At issue in the case decided by the Montana Supreme Court is whether this payment reduction provision applied to the three psychologists who separated from the group and continued to practice psychology within the restricted geographic area specified in the partnership agreement. The psychologists had initiated legal action against the practice group in Montana state court and sought a declaratory judgment that the payment reduction did not apply to them in that as practicing psychologists, they were not engaged in the "practice of medicine" after separating from the partnership.

The Montana high court upheld the trial judge's grant of summary judgment in favor of the practice group and reasoned that in the context of the partnership agreement, which only used the phrase in question once and did not make distinctions between physicians and psychologists, the phrase unambiguously applied to psychologists and that as a result, the payment reduction should apply to the three plaintiffs in the case. Although the parties could have referred to in their partnership agreement a technical definition of the term "practice of medicine" that was provided by statute in Montana, they chose not to. Accordingly, the phrase in question needed to be understood in its ordinary and popular sense rather than in its technical sense. The court concluded that "[t]he ordinary and common usage of the term 'practice of medicine' is thus broad enough to include the practice of medicine".

These two cases indicate that care should be taken in drafting agreements with physicians and other service providers. In the *Totonelly* case, the parties to the physician's employment agreement included provisions that not only required the physician to work full time not less than a specified number of hours per week, but that also specifically addressed moonlighting for third parties during the term of the agreement. Even though a dispute arose after termination of the physician's employment, these specifically negotiated and carefully drafted provisions enabled the District Court to grant summary judgment in favor of the terminating employer GMED without a lengthy and expensive trial on the merits of the case. By contrast, in the partnership agreement that was construed by the Montana Supreme Court, there was no distinction between physicians and psychologists, a fact relied upon by the court in reaching its decision that the parties did not intend to distinguish between the two sets of healthcare professionals. If care had been taken in drafting the partnership agreement for this multipractice specialty group that took into account the diverse practices of the existing and potential new members of the practice, perhaps litigation by the departing psychologists could have been avoided.

HEALTHCARE INFORMATION TECHNOLOGY NEWS

ON THE HEELS OF OCR ACTION AGAINST A PRIVATE PRACTICE, ONC RELEASES A GUIDE TO PRIVACY AND SECURITY OF HEALTH INFORMATION FOR PHYSICIANS

By Tatiana Melnik, an associate in Dickinson Wright's Ann Arbor office, can be reached at 734.623.1713 or tmelnik@dickinsonwright.com

On April 29, 2012, the HHS Office of Civil Rights (OCR) announced that it entered into a settlement agreement with Phoenix Cardiac Surgery, P.C. (PCS), a private physician practice providing cardiothoracic surgery services in Arizona. As part of the settlement, PCS agreed to pay $100,000 to resolve the matter and enter into a Corrective Action Plan that will remain in effect for one year.

OCR began its investigation of PCS on February 19, 2009. While it is not abundantly clear, it appears from the Resolution Agreement that the investigation arose out of two complaints against PCS. As a direct result of the investigation, OCR found the following violations, among others: (1) PCS failed to provide and document the training of each workforce member for 6 years; (2) PCS posted over 1,000 separate entries of ePHI on a publicly accessible internet-based calendar over a 2 year period; and (3) PCS transmitted ePHI from an internet-based email account to workforce members' personal internet-based email accounts on a daily basis. With respect to violations (2) and (3), OCR found that PCS failed to obtain satisfactory assurances by entering into business associates agreements with each of the companies that provided the internet-based calendar and the internet-based public email.

With its release of the Guide to Privacy and Security of Health Information on May 9, 2012, the Office of the National Coordinator (ONC), another division of HHS, demonstrates that HHS is getting more serious about privacy and security enforcement. The target audience for this Guide is medical practices, with ONC noting that compliance with the HIPAA Privacy and Security Rules is a core requirement of the CMS Meaningful Use incentive program.

Medical practices need to take this opportunity now to evaluate their compliance with the HIPAA Privacy and Security Rules. In its action against PCS, OCR made clear that if protected health information is shared through electronic means, satisfactory assurances are required. This means that, if an office uses e-mail, text messages, or other similar options to communicate with its patients or amongst each other, office management must ensure that proper business associate agreements are in place.

EMPLOYMENT NEWS

SOCIAL MEDIA: ARE YOU REQUESTING YOUR PROSPECTIVE EMPLOYEES TO PROVIDE THEIR USER NAMES AND PASSWORDS TO THEIR PERSONAL ONLINE ACCOUNTS?

By Tatiana Melnik, • tmelnik@dickinsonwright.com

Social media has come to play an increasingly important role in the hiring process of new employees. Employers are scouring Facebook, Twitter and other social networking websites to weed out applicants. Recent reports have shed further light on this practice. Some employers have gone so far as to ask applicants to provide them with their usernames and passwords to their personal social media accounts or have asked that applicants log into their accounts from a company computer during the interview. Employers who are engaging in this practice should be aware that Maryland has become the first state to pass a bill prohibiting this practice, entitled the *User Name and Password Privacy Protection and Exclusions Act*, and other states are considering similar legislation.

The Maryland bill provides that an "employer may not request or require that an employee or applicant disclose any user name, password, or other means for accessing a personal account or services through an electronic communications device", which includes computers, telephones, personal digital assistants and other similar devices. Upon its signing by the Governor, the bill will take effect on October 1, 2012. Notably, however, the bill does not provide that employees and applicants who were asked for their user names and passwords have a private cause of action against their employers.

Additionally, several states, including California, Illinois, Michigan, Minnesota, New Jersey, New York, and Washington, are considering proposed legislation that will specifically prohibit employers from making requests to access social media accounts. In Michigan, the bill prohibits an employer from "request[ing] an employee or applicant for employment to disclose access information associated with the employee's or applicant's social networking account." Unlike the Maryland bill, the Michigan bill does permit an individual to "recover actual damages or $1,000.00, whichever is greater, and reasonable attorney fees and court costs." Further, the bill makes requesting such information a misdemeanor punishable by imprisonment or a $1,000 fine, or both.

Aside from being aware of the passed and pending legislation, employers should understand that reviewing the social networking accounts of prospective employees puts them at risk to claims that decisions not to hire were unlawful discrimination or retaliation for activity that is protected by law. Existing laws prohibit employers from basing their hiring decisions on a person's age, race, national origin, religion and marital status. In Michigan, the Elliott-Larsen Act also prohibits discrimination based on height and weight.

Social media has allowed employers to gain more access about potential employees than ever before. But care needs to be taken to make sure that federal and state laws are not violated either during the employment screening process or thereafter during employment.

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