HEALTHCARE**LEGAL**NEWS

November 28, 2012 • Volume 2, Number 10

IN THIS ISSUE

DW HEALTH CARE TEAM - NEWS & SUCCESS STORIES

Tatiana Melnik & Ralph Z. Levy Jr., "Recommendations for Dialysis Providers and Nephrologists to Minimize Their Exposure to Data Breach Related Liabilities", *Nephrology News & Issues*, Vol. 26, No. 11, October 2012.

On December 5, 2012, **Brian Balow** will be speaking at the mHealth Summit on *BYOD: Now Please Make It Work!*

MEDICARE FINALIZES 2013 PHYSICIAN PAYMENT SCHEDULE

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

On November 1, 2012, the Centers for Medicare & Medicaid Services (CMS) finalized previously announced changes to the Medicare Physician Fee Schedule (MPFS) for services furnished by physicians during calendar year 2013. These payment changes will affect different specialties in different ways. For example, payments to family physicians will increase by approximately 7% and to other practitioners (including primary care physicians) between 3% and 5%. By contrast, CMS will reduce payments for services to physicians with certain other specialties during 2013 (for example, a 2% payment reduction to cardiologists and a 3% reduction to radiologists).

Included within the proposed payment schedule will be a new separate payment (if billed properly using a specific billing code) to a patient's community physician or practitioner (typically, a primary care physician, but other physicians such as cardiologists or oncologists could be entitled to the payment) for the coordination of care of patients during the first thirty (30) days after discharge from a hospital or nursing home stay. This payment for "transition care management" represents the first time that CMS has proposed to pay for the care required of patients as they transition back into the community after a stay at a hospital or skilled nursing home. This discharge transition care payment represents 4% of the proposed 7% increase in payments to family practitioners. In its prior announcement that accompanied the proposed regulations that are now final, CMS noted that this payment for discharge transition care management dovetails with the Affordable Care Act mandated program to reduce payments to hospitals that have excess readmissions for certain conditions.

CMS also indicated that unless Congress acts to postpone (or repeal) the previously scheduled payment reductions under the Sustainable Growth Rate (SGR) methodology, payments under MPFS will be reduced by approximately 27%. Since 2003, SGR cuts have

been averted by Congress on a year-to-year basis, but no long term solution has been adopted by Congress.

Also included within the final rules are changes to several previously implemented quality reporting initiatives, and as authorized by the Affordable Care Act, a program in which physician groups can participate on a voluntary basis through which their payments will be adjusted based on the quality and cost of care they provide to their patients. Groups with 100 or more eligible professionals that elect not to participate in the physician quality reporting program will be subject to a 1% payment reduction.

In a separate but related announcement, on November 6, 2012, CMS also finalized a previously proposed rule that will result in CMS-funded payments during both 2013 and 2014 to physicians (including osteopaths) who are engaged in family medicine, general internal medicine, pediatric medicine and related subspecialties, and who treat Medicaid patients in an amount at least equal to the reimbursement rate for those physician services if provided to Medicare patients. The objective of this rule, which implemented a provision in the Affordable Care Act, is to incentivize primary care physicians to continue to treat Medicaid patients. These supplemental payments will be fully funded by CMS, with CMS to reimburse the states for 100% of the cost of the supplemental payments.

EMPLOYMENT LAW NEWS

OHIO COURT RULES THAT A COURT CANNOT COMPEL A TERMINATED EMPLOYEE TO RETURN PHI TO THE FORMER EMPLOYER

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

In a July 2012 decision by an Ohio District Court, *Cabotage v. Ohio Hospital for Psychiatry LLC*, the Court ruled that it did not have the jurisdiction under HIPAA to compel Ms. Cabotage, a former employee, to return stolen records to the Ohio Hospital for Psychiatry, LLC (OHP) and Behavioral Centers of America, LLC (BCA), her former employer. However, citing its inherent authority, the Court precluded Ms. Cabotage from using the stolen records against the Defendants without first requesting that such documents be produced through normal discovery methods.

BCA employed Ms. Cabotage as a registered nurse at OHP. During her employment, she became suspicious that the Medical Director was engaged in illegal activities and began to document her suspicions. She recorded her observations on forms that listed patient information and she took the records home. She shared the records with the Department of Health and Human Services which declined to pursue a claim against OHP. Ms. Cabotage also contacted a patient's family member allegedly without authorization. OHP subsequently terminated Ms. Cabotage's employment for "fraternizing with patients' families outside of work," and she filed suit alleging violations of the False Claims Act, Ohio's Nurses Whistleblower Act, and Ohio's public policy. Through discovery requests, OHP learned that Ms. Cabotage had PHI and filed a Motion for Return of Confidential Patient Information, arguing that HIPAA requires OHP to seek the return of the documents. Ms. Cabotage, on the other hand, argued that she needed the documents in order to support her claims.

In denying OHP's motion, the Court ruled that HIPAA does not confer jurisdiction upon the Court "to remedy violations private parties bring to its attention." That is, by asking the Court to compel Ms. Cabotage to return the documents, OHP was asking the Court to enforce HIPAA. Because HIPAA does not provide a private cause of action, the court could not enforce HIPAA. Instead, HIPAA confers jurisdiction on the Secretary of Health and Human Services. "Thus, to the extent Plaintiff's continued possession of the documents at issue violates HIPAA, the Secretary of Health and Human Services (HHS), not this Court, is the only party authorized to enforce the Act."

Nevertheless, the Court relied upon its inherent authority and ruled that Ms. Cabotage was precluded from using the documents she stole because the documents contained sensitive and possibly privileged information of third-parties who were not parties to the litigation between her and her former employer. Instead, Ms. Cabotage was required to use normal discovery means to request the disclosure of the documents, at which point OHP could seek a protective order for its patient records.

This case serves as a reminder to covered entities and business associates that HIPAA cannot be used as both a shield and a sword. That is, just as HIPAA does not grant a private right of action to patients, it similarly does not grant a private right of action to covered entities and business associates. Thus, those seeking to redress violations of HIPAA must file a complaint with the Office of Civil Rights, which is the division of HHS responsible for enforcing HIPAA, and may not use the courts to fight such battles.

ANTITRUST NEWS

INSURER'S ANTITRUST ACTION AGAINST PHYSICIANS AVOIDS DISMISSAL

By: James M. Burns, a Member in Dickinson Wright's Washington D.C. office, who and can be reached at 202.659.6945 or JMBurns@dickinsonwright.com

On September 17, 2012, Judge Gustavo Gelpi, District Court Judge for the District of Puerto Rico, denied the defendants' motion to dismiss plaintiff's complaint in *Humana Health of Puerto Rico v. Vilaro*. In this case, Humana alleged that the defendant, Dr. Vilaro, in concert with several other physicians, unlawfully colluded during the course of their contract negotiations with Humana. Specifically, the Court noted that Humana had alleged that the physicians "included one another in

attempted negotiations with Humana via email, copied one another on each other's notification of termination to [Humana], and jointly provided a table setting forth proposed higher rates that were required as a condition to continue providing services to [Humana] patients."

In rejecting the doctors' motion to dismiss the complaint, the Court held that defendants' actions "ostensibly reflect concerted behavior, rather than unilateral conduct," and that "collective efforts to boycott and price-fix offend Section 1." In addition, the Court held that because Humana's complaint "satisfactorily alleges consequent injuries to itself and the community due to defendants' refusal to treat certain patients," Humana had also adequately pled an antitrust injury. Accordingly, the defendants' motion to dismiss Humana's complaint was denied, permitting the case to proceed towards trial.

GENERAL NEWS

DICKINSON WRIGHT ANNOUNCES HEALTHCARE BLOG

The Healthcare group at Dickinson Wright now has a weekly blog post. The goal of the blog is to give you up-to-date information in between issues of the *Healthcare Legal News*. You can visit the blog at www.dwhealthlawblog.com

Dickinson Wright Offices

Detroit
500 Woodward Avenue
Suite 4000
Detroit, MI 48226
Phone: 313.223.3500

Lansing
215 S. Washington Square
Suite 200
Lansing, MI 48933
Phone: 517.371.1730

Ann Arbor
350 S. Main Street
Suite 300
Ann Arbor, MI 48104
Phone: 734-623-7075

Troy
2600 W. Big Beaver Road
Suite 300
Troy, MI 48084
Phone: 248.433.7200

Grand Rapids
200 Ottawa Avenue, NW
Suite 1000
Grand Rapids, MI 49503
Phone: 616.458.1300

Saginaw
4800 Fashion Square Boulevard
Suite 300
Saginaw, MI 48604
Phone: 989-791-4646

Columbus
150 E. Gay Street
Suite 2400
Columbus, OH 43215
Phone: 614.744.2570

Washington, D.C.
1875 Eye Street, NW
Suite 1200
Washington, DC 20006
Phone: 202.457.0160

Toronto
222 Bay Street, 18th Floor
PO Box 124
Toronto, ON, Canada M5K 1H1
Phone: 416.777.0101

Nashville
424 Church Street
Suite 1401
Nashville, TN 37219
Phone: 615.244.6538

Phoenix
5009 East Washington Street
Suite 125
Phoenix, AZ 85034
Phone: 602.244.1400

Las Vegas
7201 West Lake Mead Boulevard
Suite 503
Las Vegas, NV 89128
Phone: 702.541.7888