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Health Care News

August 2005

Court in NYC Allows Lawsuit Against Nursing Home Under PHL §2801-d

Public Health Law §2801-d authorizes private lawsuits by nursing home residents who are injured as a result of being deprived rights or benefits established by state or federal regulations. The statute establishes a "floor" for compensatory damages, allows the recovery of attorneys fees and, in certain circumstances, punitive damages. Enacted in 1975, as part of comprehensive legislation to improve nursing home care, the law was intended to create an incentive for litigants and their attorneys to prosecute actions in situations where they might be reluctant to bring a negligence or malpractice claim because of limited financial resources or low damage awards due to shorter life expectancy. In April a New York State Supreme Court Judge in Manhattan, citing as authority a 2002 decision by the Appellate Division 4th Dept. in *Doe v. Westfall Health Care Center*, ruled that a claim under the statute may proceed in addition to and simultaneously with claims alleging wrongful death and negligence (*Morisett v. Terence Cardinal Cooke Health Care Center* (N.Y. Sup. Ct. Slip Op. No. 25158).

Proposed Settlement in Class Action Suit Against Excellus

In early July, physicians were notified by mail of their right to participate in the settlement of a class action lawsuit brought by the Medical Society of the State of New York and several individual physicians against Excellus. The lawsuit alleges that Excellus engaged in improper claims payment practices. The settlement calls for Excellus to materially change its claims payment practices, establish a new physician advisory panel and spend $1.25 million on various community health initiatives. In addition, Excellus would give actively practicing physicians various free in-kind services (many related to electronic medical records and claims filing), and would establish a $500,000 pool to be shared among retired or deceased physicians. Only physicians who provided services to Excellus patients after August 15, 1996 are eligible to participate in the settlement. Physicians wishing to participate must submit the claim form contained in the notice by October 4, 2005. Physicians wishing to opt out or object to the settlement must do so by September 6, 2005. While Hancock & Estabrook is not involved in this litigation, complimentary copies of the notice and claim form are available from our office.

Sign Up For Your National Provider Identifier

HIPAA-covered health care providers can now obtain their unique National Provider Identifier (NPI). Acceptance and use of the NPI in HIPAA standard electronic health care transactions is required by May 23, 2007 (or May 23, 2008 for small group health plans). The NPI will be used for allowing improved electronic data interchange between providers and health plans. Providers must obtain an NPI even if they use a third party to prepare or submit their transactions. A web-based application is available at https://nppes.cms.hhs.gov. A paper application with submission instructions can also be obtained at this web site or by calling the NPI Enumerator at 1-800-465-3203. Electronic submission of an NPI application will become available in the Fall. Guidance on the application process, including an instructional tool providing an overview of the NPI and its application process, is on the CMS web site at www.cms.hhs.gov/hipaa/hipaa2.

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DOJ and HIPAA Criminal Enforcement: Are Employees Off the Hook?

On June 1, 2005, the U.S. Department of Justice issued an opinion that prosecution for HIPAA violations should be limited to "covered entities". DOJ opined that under general principles of corporate criminal liability, direct liability may be imposed on directors and officers, but not on average employees. This opinion raises questions regarding the HIPAA-based conviction of Richard Gibson, a cancer center employee who admitted stealing patient information for purposes of credit card fraud. Critics say DOJ's opinion undercuts the legal theory of the Gibson prosecution. Others now want legislation to expand HIPAA's scope of liability to cover employees such as Mr. Gibson. In any event, covered entities are well advised to continue HIPAA compliance efforts, especially to the extent that DOJ's opinion reduces employee fears of personal liability under HIPAA. To access the opinion: http://www.usdoj.gov/olc/2005opinions.htm

Informed Consent: It Ain't What It Used To Be

In 2000, New York revised its definition of physician professional misconduct to include failing to advise a non-emergency patient of the identities of all physicians (except medical residents) anticipated to be actively involved in any treatment, procedures or surgery requiring anesthetics. Now CMS, in its Internet Only State Operations Manual, has taken things a step further, mandating that the patient be advised before the procedure, surgery or treatment of not only the primary physician's name, but also the names and specific significant surgical tasks expected to be performed by others. Unlike New York law, CMS makes no exception for medical residents, whose involvement and identity may not be known before the surgery. Also, even if the primary physician knows others who may be involved, he/she may not know which tasks they will perform. In response to the hue and cry from providers, CMS has promised to review this new standard.

Compliance Corner

Environmental Survey Distributed

In May, the United States Environmental Protection Agency distributed an environmental survey to over 500 health care facilities. This survey followed up on USEPA's December 2002 letter urging these facilities to take advantage of USEPA's Audit Policy by entering into audit agreements with the Agency. In exchange for entering into an audit agreement, USEPA would agree not to conduct an inspection of the health care facility. Many hospitals have conducted their own environmental audits, but fewer than 40 have entered into audit agreements, preferring to identify and address any compliance issues without notifying the USEPA, as required under the audit agreement. Given the uncertainties as to what the USEPA will do with the survey information, health care facilities may wish to exercise caution when generating any environmental compliance information through the survey. Even so, the survey is a reminder that USEPA continues to focus on hospital compliance with environmental laws and will likely continue random inspections of hospitals within New York State.

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