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HEALTHCARE PROFESSIONALS Alert

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Liability Surcharge Abandoned by Connecticut OB-GYNs

by Jay B. Silverman, Esq., Chair

A group of 150 OB-GYNs in Connecticut have abandoned their plans to charge patients a surcharge of $500 per pregnancy after insurers agreed to raise reimbursement rates by $500 or more per pregnancy. The initiative came close on the heels of Connecticut's failure to pass tort reform laws that would protect its physicians.

Although Connecticut physicians supported Governor Rowland's veto of a proposed tort reform bill because it did not contain a cap on non-economic damages, many physicians are looking into the legality of imposing surcharges to recoup some of their malpractice costs directly from their patients.

In contrast, OB-GYNs in New York State learned earlier this year that the Court of Appeals, the highest court in the state, expanded a woman's right to damages for emotional distress in the event of a stillbirth or miscarriage as a result of malpractice.

The American Medical Association says New York is one of 19 states facing a medical liability insurance crisis that has physicians retiring early, moving to states where insurance rates are lower and cutting back on high-risk procedures.

In response to the malpractice insurance crisis, the American College of Obstetricians and Gynecologists found that an increasing number of its members are giving up certain aspects of their practice because of the liability risk. 14% of those surveyed have stopped practicing obstetrics, 22% have decreased the amount of high-risk cases they take and almost 6% gave up gynecologic surgical procedures.

Editor's Note: Last month the Office of the Inspector General (OIG) issued an advisory opinion which finds that an arrangement proposed by a medical center to subsidize part of the malpractice insurance premiums for its community-based obstetricians did not fit squarely in the anti-kickback safe harbor for insurance subsidies. Nevertheless, OIG stated that it would not impose administrative sanctions because the risk for fraud and abuse was mitigated, in part, by the following: insurance subsidies were temporary, the subsidy would not be a windfall to obstetricians who would still have to pay as much as they paid prior to the subsidy and the subsidy would cover the obstetricians regardless of whether or not services were provided at the medical center. Additionally, OIG noted that the plan would help underserved obstetrical patients.

First Conviction Based on Violation of HIPAA

Richard W. Gibson of SeaTac, Washington holds the dubious distinction of being the first person in the country convicted on charges of violating the privacy portion of the Health Insurance Portability and Accountability Act (HIPAA). Gibson, a former employee of the Seattle Cancer Care Alliance, admitted to using a patient's personal information to obtain four credit cards and then charging over $9,000 on those credit cards. What might have been a simple grand larceny and/or identity theft turned into a federal criminal case under HIPAA carrying stiff criminal penalties.

Gibson pled guilty to one count of "wrongful disclosure of individually identifiable health information," and accepted a sentence of 10 to 16 months in prison, plus restitution. Under the HIPAA Privacy Rule, criminal use of a patient's information for personal gain is punishable by imprisonment for up to 10 years and fines up to $250,000.

The case is interesting because it bolsters statements made by a number of US Attorneys' Offices throughout the country that HIPAA's criminal penalties apply to anyone violating the law – not just covered entities. Thus, employees, business associates and anyone handling "protected health information," as that term is defined in HIPAA, could be prosecuted criminally for any violation and should use caution to ensure the information is used and disclosed properly. Furthermore, the fact that the conviction of Mr. Gibson stemmed from an act of identity theft suggests that HIPAA penalties may apply to violations of other laws, including the False Claims Act.

Ruskin Moscou Faltischek, P.C., established in 1968, is a full-service law firm with a professional staff of 65 attorneys, 11 of whom are devoted full time to practicing Health Law. Within the specialized Health Law Department are three core groups: the *Health Law Transactional Group*, chaired by Melvyn B. Ruskin, Esq.; the *Health Law Regulatory Group,* chaired by Gregory J. Naclerio, Esq., previously the Director of the Long Island Regional Office of the Deputy Attorney General for Medicaid Fraud Control and the *Healthcare Professionals Group*, chaired by Jay B. Silverman, Esq., formerly the Assistant General Counsel for the Medical Society of the State of New York.

Colorado Hospitalists Get An Exclusive

by Leora F. Ardizzone, Esq., Editor

Internal Medicine Pulmonary & Critical Care Associates (IMPCCA), a 14-physician group based in Denver, CO, entered into a contract with Parker Adventist Hospital, a small suburban hospital, to provide hospitalist services. Subsequently, Parker Adventist elected not to accept additional applications from other hospitalist groups after awarding the contract to IMPCCA, thus affording them a *de facto* exclusive arrangement.

It would appear that IMPCCA is on the cutting edge of a national trend to have exclusive arrangements with hospitalists, just like the kind of arrangements hospitals have with emergency room physicians, radiologists, pathologists and other specialties.

Critics of the arrangement complain that exclusive contracts deny patients the ability to choose a physician and restrict referring physicians in their ability to refer their patients to a physician of their choice.

The issue of patient choice is difficult to nail down, since patients in a hospital setting are not able to choose their own pathologist, radiologist or other specialists. The argument lacks strength and is not dispositive with respect to quality of care.

Having an exclusive hospitalist group does take choice away from a referring physician, because any patient admitted in a hospital with an exclusive hospitalist group will be seen only by that group. This might pose a problem if the referring physician and the hospitalist do not communicate effectively with each other. However, it might be argued that physicians encounter the same lack of choice in connection with the assignment of an anesthesiologist or a pathologist who provides services on an exclusive basis in a hospital where the physician admits his patients.

Clearly, an exclusive arrangement is a great benefit to the hospitalist group who contracts with a hospital – in an exclusive arrangement, the hospitalist group treats both insured and uninsured patients. In a non-exclusive arrangement, the hospitalist always has to worry about the payor mix and achieving sufficient revenue to pay its staff while providing the level of services required by the hospital with whom it contracts. Further, in an exclusive arrangement, the hospitalist group will treat all patients admitted to the hospital subject only to the admitting physician's privileges and his desire and ability to treat his patient while in the hospital.

While some may argue that competition is best because it enables patients to choose and generally results in superior health care, the administration of Parker Adventist believed that a single group best fit their needs. By having a *de facto* exclusive arrangement, Parker Adventist had the luxury of knowing that they had a captive group in the hospital serving the needs of its inpatient population. Given its size (36 beds), one group provided for more efficient rounds and ensured adherence to hospital protocols. As an additional benefit, Parker Adventist reported shorter lengths of stay and high patient satisfaction.

Purchasing A Medical Practice: Which Is Better - Buying the Stock or Buying the Assets?

The benefit of a stock purchase versus an asset purchase really depends on which side of the transaction you are on and what you are hoping to achieve in closing the deal.

Generally speaking, the seller of a medical practice will seek to sell his stock. There are a number of benefits to the seller, not the least of which is that the sale of stock will result in the realization of a capital gain, whereas in an asset sale, income may be realized if the purchase price is not properly allocated. To read more, visit the firm's website at http://www.ruskinmoscou.com/article-buying-medical-practice.htm.

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