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A PUBLICATION OF THE HEALTH LAW
SECTION OF THE NEW MEXICO STATE BAR



Health -E- News

WELCOME to the first 2004 Issue of Health-E News. May you have a Happy and Prosperous New year!

SECTION NEWS

The 2004 Health law Section Calendar

Board Meetings: The Board will meet on the following dates at the State Bar office, and any member of the Section is welcome to attend these meetings:

January 15 th	7:30 AM
February 18 th	11:30 AM
March 18 th	7:30 AM
April 15 th	11:30 AM
May 20 th	7:30 AM
June 17 th	11:30 AM

These dates and/or times may be subject to change, but all changes will be announced in the Health-E-News.

Section CLEs: The Section's CLE's are held at the State Bar Office. These are open to any member of the New Mexico State Bar. The charge for an early morning CLE will be \$35.00, which includes a continental breakfast and any handouts. When the CLE is held at noon, a brown bag lunch and the handouts will cost \$40.00. If you bring your own lunch, the cost is \$30.00. Lunch is consumed from 11:30 to 12:00.

January 22nd	7:30 AM	Fraud & Abuse: A Primer - Overview
February, 26th	11:30 AM	2004 NM Legislative Update on Health Care
March 25th	7:30 AM	Fraud & Abuse: State laws and Enforcement Policy
April 22nd	11:30 AM	Fraud & Abuse: Federal Laws - Civil Enforcement Policy
May 27th	7:30 AM	Fraud & Abuse: Stark I & II and Anti-Kickback
June 24th	11:30 AM	To be Determined

Members of the Board

The following lawyers will serve as Board members and officers for 2004.

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Section Board Approves Donation to Law School

At its annual meeting held in December, the Section's Board of Directors approved a donation of \$500.00 to the UNM Law School Library for the purchase of health-law-related materials. The library is used by many New Mexico lawyers, and in recent years has fallen behind in having the number of publications required for a law school of its size and stature. Under the current State Bar funding policies, one half of section funds that are not spent by the end of the year revert back to the general fund of the State Bar. By making this donation on behalf of section members, the Board believes it served a dual purpose – it used your dues in a meaningful way and it supported the law school library and those who use it for research.

NEW DEVELOPMENTS IN HEALTH CARE

State Strategies For Containing Medicaid Drug Costs Saves Millions

States have developed strategies to contain Medicaid outpatient prescription drug costs that have resulted in millions of dollars in savings, a new report by the Department of Health and Human Services (DHHS) Office of Inspector General (OIG) found. In fiscal year 2001, prescription drug costs accounted for 9% of Medicaid expenditures, and Medicaid prescription drug expenditures grew at more than twice the rate of total Medicaid spending between 1997 and 2001, resulting in pressure on the states to save money on Medicaid drug expenditures in light of severe budget shortfalls. The report, "State Strategies to Contain Medicaid Drug Costs" (OEI-05-02-00680), found that thirty-two states limit Medicaid reimbursement for drugs, thirty-nine states shifted use from higher to lower cost drugs, and twenty-five states limit the number of prescription drugs a beneficiary can obtain in a given time period to save money.

To read the OIG's report, go to

http://www.healthlawyers.org/docs/ask2003/OEI_05_02_00680.pdf

OIG Initiatives Save Over \$23 Billion In FY 2003

The DHHS OIG announced December 3 that its initiatives to prevent fraud, waste, and abuse in Medicare and other DHHS programs have resulted in over \$23 billion in savings in fiscal year (FY) 2003. The report, "Office of Inspector General Semiannual Report to Congress," summarizes the OIG's accomplishments for FY 2003. The savings were \$1 billion more than last year. The OIG reported that it excluded 3,275 individuals and entities for fraud and abuse of federal healthcare programs and 576 individuals or entities were convicted of crimes against departmental programs. The \$23 billion in savings is comprised of \$21.656 billion in implemented recommendations to better use funds, \$334 million in audit receivables, \$71 million in additional receivables, \$71 million in additional recoveries, and \$988 million in investigative receivables.

To read the OIG's report, go to

<http://www.healthlawyers.org/docs/ask2003/03FallSemi.pdf>

[Editor's Note: This year the Health Law Section will sponsor a series of luncheon CLE's on Fraud &

Abuse issues].

Federal Judge In Florida Rules Physicians May Proceed With RICO Claims Against HMOs

Judge Federico Moreno of the U.S. District Court for the Southern District of Florida December 8 refused to dismiss claims brought under the Racketeer Influenced and Corrupt Organizations Act (RICO) against various health maintenance organizations (HMOs) by physicians involved in a major class action alleging the companies systematically reduced or denied payments they were otherwise entitled to for treating the plans' members.

The multidistrict litigation consolidated actions brought by the physicians (plaintiffs) against the HMOs, alleging a number of claims, including breach of contract, unjust enrichment, and violations of RICO and various prompt pay statutes.

To read the case, *In re Managed Care Litg.*, MDL No. 1334 (S.D. Fla. Dec. 8, 2003), click here

Fraud & Abuse Update

- Metropolitan Hospital, an acute care facility in Grand Rapids, Michigan, and several related entities will pay the federal government \$6.25 million to settle allegations that they participated in financial relationships with physicians in violation of the Stark Anti-Kickback Statute. According to the Department of Justice (DOJ), the hospital received Medicare reimbursement for patients referred to the hospital by those physicians. The allegations arose from a qui tam lawsuit filed by a former vice president of a Metropolitan affiliate under the False Claims Act. To read the DOJ's press release announcing the settlement, go to http://www.usdoj.gov/opa/pr/2003/December/03_civ_679.htm
- A federal judge in Birmingham, Alabama sentenced five former officers of the HealthSouth Corp. December 10 in connection with their admitted roles in a scheme to inflate the company's revenues and reported earnings, the DOJ has announced. The five defendants were former vice president of finance Emery Harris, former accounting department vice presidents Angela C. Ayers and Cathy C. Edwards, group vice president Rebecca Kay Morgan, and assistant vice president Virginia B. Valentine. Harris, who pled guilty in March 2003 to a charge of conspiracy and willfully falsifying books and records, was sentenced to five months in prison for his role in the accounting scandal. Harris also was ordered to pay a \$3,000 fine, a \$200 special assessment, and \$106,500 in forfeiture. The other four officers, who pled guilty in April 2003 to conspiracy to commit wire and securities fraud, were each sentenced to four years probation and payment of a \$2,000 fine. Morgan was also ordered to pay \$235,000 in forfeiture. To read the DOJ's press release, go to http://www.usdoj.gov/opa/pr/2003/December/03_crm_678.htm

DHHS Announces Medicare Drug Discount Card Programs Will Be Available Next Spring

The Department of Health and Human Services (DHHS) has issued an interim final rule that will enable individuals to enroll in a Medicare-approved prescription drug discount program beginning in the spring of 2004. The interim final rule, scheduled to be published in the December 15 Federal Register, is the first regulation to implement the Medicare Prescription Drug, Improvement and Modernization Act of 2003 (Pub. L. No. 108-173), which was signed by President Bush on December 8. The drug discount benefit will be available starting in June and will continue until 2006 when the comprehensive Medicare prescription drug benefit will take effect. According to DHHS, seniors and individuals with disabilities will be able to use the discount cards for savings of approximately 10% to 15% of their total drug costs, with savings of up to approximately 25% on individual prescriptions.

To read DHHS' press release on the rule, go to <http://www.hhs.gov/news/press/2003pres/20031210a.html>

Not All Partial Birth Abortion Statutes are flawed.

Ohio's partial birth abortion statute, Ohio Rev. Code Ann. Section 2919.15.1, does not violate the Fourteenth Amendment, because it does not restrict the most commonly used procedure for second trimester-

ter abortions and because it provides an exception for significant health risks. WOMEN'S MED. PROF'L CORP. v. TAFT, No. 01-4124 (6th Circuit, December 17, 2003)

To read the full text of this opinion, go to:
<http://laws.lp.findlaw.com/6th/03a0446p.html>

Public Liability for Dispatchers

Public entities employing emergency dispatchers are not subject to direct liability for injury attributable in part to a dispatcher's failure or delay in responding to a 911 call, and vicarious liability is limited to cases involving gross negligence or bad faith.

EASTBURN v. REGIONAL FIRE PROT. AUTH., No. S107792 (Supreme Court of California, December 18, 2003)

To read the full text of this opinion, go to:
<http://caselaw.findlaw.com/data2/californiastatecases/s107792.doc>

Healthcare Arbitration Reversal of Position In Favor of Arbitration in California

The Supreme Court of California rules that *Bertero v. Superior Court* (1963) 216 Cal.App.2d 213 is outdated and should be disapproved to the extent it holds that a party's repudiation of a contract categorically precludes it from invoking an arbitration clause therein. Thus, defendant did not waive its contractual right to arbitration and that therefore its petition to compel arbitration should have been granted. SAINT AGNES MED. CTR. v. PACIFICARE OF CALIFORNIA, No. S111323 (Supreme Court of California, December 18, 2003)

To read the full text of this opinion, go to:
<http://caselaw.findlaw.com/data2/californiastatecases/s111323.doc>

DHHS Publishes Rule On Smallpox Vaccine Injury Compensation Program

The Department of Health and Human Services (DHHS) published in the *Federal Register* (68 Fed. Reg. 70079) December 16 an interim final rule for the new Smallpox Vaccine Injury Compensation Program. Under the program, certain individuals may be entitled to benefits for covered injuries suffered as a direct result of covered smallpox countermeasures or accidental inoculation. The smallpox countermeasures taken this year included the voluntary inoculation of certain healthcare workers, public safety personnel, and certain individuals in state and federal emergency plans. The interim final rule sets out the administrative policies, procedures, and requirements of the program. The interim rule also covers unvaccinated individuals who are injured after coming into contact with vaccinated members of an emergency response plan. The program is funded with \$42 million, and provides for financial and medical benefits for covered individuals. The interim final rule is effective December 16, and comments are due February 17, 2004.

To read DHHS' news release on the interim rule, go to <http://www.dhhs.gov/news/press/2003pres/20031212a.html>

DHHS OIG Approves Proposed Reintegration Of Medical Group And Hospital That Were Originally One Entity

In Advisory Opinion No. 03-15, issued on December 11, 2003 and posted on December 18, 2003, the Department of Health and Human Services (DHHS) Office of Inspector General (OIG) said it would not impose administrative sanctions under the Anti-Kickback Statute in connection with a proposal to reintegrate a medical group and a hospital that were originally a single entity.

"Simply put, the Proposed Arrangement is a restructuring and merger of the existing businesses of both the Group and Hospital within a unique historical context; in this instance it is not likely to generate measurable new business," the OIG said.

How Secure is your Dumpster?

Dumpster-Diving for Your Identity - "The Federal Trade Commission estimates that identity theft costs nearly \$53 billion annually. Some seven million people were victimized in 2002. Yet little is known about how the perpetrators actually operate. It's a popular perception that most identity theft happens on the Internet...Like many identity-theft rings in the United States, [the] enterprise employed scores of petty criminals...The "employees"... fell into several categories: "bucklers," who broke into cars; "cridders," who stole, from, say, mailboxes; and Dumpster divers, who rooted through garbage from hospitals, accounting firms, banks, law firms and other organizations known to be careless with personal information. Massey also employed a select few to transcribe documents onto neatly labeled 3-by-5 index cards...In one well-publicized case, an identity thief based in Chicago set up a fake Web site and sent e-mail messages to users of Microsoft's MSN Internet service, asking them to visit the page and update their account information -- including, of course, their credit-card numbers...."

<http://www.nytimes.com/2003/12/21/magazine/21IDENTITY.html?ex=1072931469&ei=1&en=7c6e242ce69ed165>

Is Windows 98 Secure Enough for HIPAA?

Microsoft has recently announced that effective January 2004 it will cease providing security patches for its Windows 98 product. Millions of computers used by health care providers are running on the Windows 98 platform. Members of the AHLA Health Information Technologies List serve have been asking if the use of Windows 98 – the least secure of the more recent Windows products – violates HIPAA. Here is a response provided by an AHLA member:

"While HIPAA says to 'maintain REASONABLE and APPROPRIATE administrative, physical, and technical safeguards...', it also calls for flexibility of approach (§164.306). Before answering yes or no outright to using Windows 98, you'd have to consider your rationale for continuing to use this operating system and then document why. The rationale should also consider what other alternatives were considered, if any, that could be taken in place of running Windows 98. For example, products on the market, such as VMware or Virtual PC, could be used to host Windows 98, and its legacy applications, on another computer (that uses Windows 2000, or some other host operating system) without having to purchase new hardware (thus eliminating cost as a factor). Note that the security features and settings of the particular virtual software being used to host and configure Windows 98 would also need to be considered.

Tax-Free Health Care Accounts Begin January 2004.

Read About them at

http://news.findlaw.com/ap/f/1310/12-23-2003/20031223081503_10.html

10th Cir. Package Insert decision.

THOM v. BRISTOL-MYERS SQUIBB CO., No. 02-8099 (10th Circuit, December 22, 2003) Warning contained in the package insert of a prescription drug manufactured by defendant was not adequate as a matter of law with regard to the risk of priapism. District court erred in holding that plaintiff's doctor did not read or rely upon the warning, and that therefore plaintiff was unable to establish that a different warning would have avoided his injuries; summary judgment for defendants is reversed.

To read the full text of this opinion, go to: <http://laws.lp.findlaw.com/10th/028099.html>

How to Get “New Provider” Status for reimbursement.

ASHTABULA COUNTY MED. CTR. v. THOMPSON, No. 02-3410, 02-3425 (6th Circuit, December 19, 2003) Plaintiff, seeking a higher rate of reimbursement for the care provided in its skilled nursing facility than that allowed by the U.S. Department of Health and Human Services, is entitled to "new provider" status pursuant to 42 C.F.R. section 413.30(e).

To read the full text of this opinion, go to: <http://laws.lp.findlaw.com/6th/03a0452p.html>

Health Care Stocks Gain.

Houlihan Lokey Howard & Zukin's Healthcare Quarterly Update reports that for the third quarter of 2003 healthcare services gained 15.0 percent, while biotech stocks gained 7.7 percent. However, medical devices were down 0.9 percent and Pharmaceutical stocks dropped 0.6 percent. In comparison, the S&P 500 gained 1.4 percent during the third quarter.

This Email Newsletter is a publication for the members of the Health Law Section of the New Mexico State Bar Association. Its contents may be time dated, and references to Internet sites may change. The Content of this Newsletter does not reflect the opinions of the Members of the Board of Directors of the Health Law Section of the State Bar. This Newsletter is informational only, does not constitute legal advice. Members of the Health Law Section may submit topics for the newsletter by emailing them, or the internet site at which they can be located, to JAB@NMCounsel.com