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Health -E- News

Issue 4

SECTION NEWS

February's HLS CLE will address 2004 NM Legislative Update on Health Care

Please Note the Change in the Date to February 25th!

It will start **at noon** on **February 25th** at the State Bar Office. If you want to network over a brown bag lunch, bring your own bag and meet at 11:30 AM. The program is free unless you want one hour CLE credit and the handouts. For Section members the CLE credit and materials will cost \$20. For non-section members the cost will be \$25. The Section hopes to have a list of House and Senate Bills that were passed. At this point the Governor will probably not have acted on any so the bills, but those who attend will know what he can sign and what he can veto. Lunch is not being provided at this CLE. Bring your own lunch and join us at 11:30 to "talk health law."

The next Board Meeting is March 18, 7:30 AM at the State Bar Office.

Teleconference on Prescription Drug Benefits/Drug Card Benefit Under Medicare: What it means for Health Care Consumers and Providers.

Friday, February 27, 2004 at 11:00 a.m. Contact the State Bar Office for more information

Members of the Board

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

Jennifer Stone (Chair)	505-842-1950	jstone@mstlaw.com
John Bannerman (Chair Elect.)	505-837-1900	jab@NMCounsel.com
Susan Sullivan	505-827-2962	ssulliva@doh.state.nm.us
Charles Gurd	505-856-1468	cgurd@aol.com
Diane Garrity	505-983-6956	dgarrity@sgmnlaw.com
W. Ann Maggiore	505-844-0777	wamaggiore@btblaw.com
Caralyn Banks	505-524-9617	clbanks@reeveslaw.com
Barbara Quissel	505-816-4224	Barbara-Quissel@bcbsnm.com
Gabe Parra	505-923-6505	gparra@phs.org
Kathleen Hessler (Past Chair)	505-828-1150	khessler@worldnet.att.net
Brenda Maloney (YLD)	505-765-5900	bmmaloney@rodey.com

The Health-E-News Needs Your Help

This newsletter has been very well received, but the Board would like to see more information re-

garding New Mexico legal decisions (trial or appellate), administrative developments, and other health related information. If while handling a matter for a client, you come across an issue that you think might be worthy of sharing with other members of the Section, send it to the Editor at JAB@NMCounsel.com.

NEW DEVELOPMENTS IN HEALTH LAW

Deal Makers Beware of the “One Purpose” Rule.

Many transactional lawyers handle contracts for health care providers without regard to some specific statutes that regulate the relationship between providers and entities they own (Stark I and Stark II laws and federal regulations), and between providers and third parties (Federal Anti-Kick Back statutes and related regulations). These statutes apply if any federal funds are used to pay for referrals, services, etc. In this day and age, few New Mexico providers can claim that they do not treat Medicare or Medicaid patients. Those that began their practice avoiding federally funded health care programs, but later obtained provider numbers for Medicare and Medicaid may now be at risk and not know it.

It is safe to say that very transaction between two or more health care providers should be examined from a Stark or Ant-Kickback perspective. In today’s world the federal government may look at the set of golf clubs a drug company sales representative gives to a doctor as a “kickback.” The Health Law Section is sponsoring a series of early morning and noon time CLE on this subject.

If the Anti-Kickback statute applies, the federal courts have taken the position that the statute is violated if **one purpose** of a contract or organizational scheme is to influence referrals through some form of illegal kick back. These arrangements are often referred to as “pay-for-patients” or “pay-for-service” schemes. The first Circuit to take this position was the Ninth Circuit in *United States v. Katz*, 871 F.2d 105 (9th Cir, 1989). The Tenth Circuit adopted the One Purpose Rule in 2000 in *United States v. McClatchey*, 217 F.3d 823 (10th Cir. 2000), and reaffirmed its position in *United States v. LaHue*, 216 F.3d 993 (10th Cir. 2001).

Because of the “One Purpose Rule,” creative lawyering” may result in everyone involved in the deal getting a “Go To Jail” card. The U.S. Attorney has indicted and taken to trial Anti-Kick back cases against lawyers who allegedly conspired with providers to put together transactions that violated the statute. See the *LaHue* case in which two of the defendants were lawyers! They were acquitted, but who in their right mind would want to be accused!

To know more about the scope and impact of these important laws, attend the upcoming HLS CLEs this Spring.

[Contributed by John Bannerman, Bannerman & Williams, P.A.]

OMB Revises Receipt Date For Phase II Stark II Regulations

The Office of Management and Budget (OMB) has revised the receipt date for the physician self-referral regulations on their Web site to December 17, 2003. This means that publication of the rule could be pushed back to March 16, 2004.

To access the OMB Web site listing the Stark rule, go to <http://www.whitehouse.gov/omb/library/OMBREGSP.html#HHS> and search under HHS-CMS, No. RIN: 0938-AK67.

Health Law Cases

CGB OCCUPATIONAL THERAPY, INC. v. RHA HEALTH SERVS. INC., No. 02-4372 (3rd Circuit, January 28, 2004). The jury incorrectly found that defendant's execution of new contracts amounted to tortious interference with the separate contracts between plaintiff and co-defendant. Since the jury did not allocate its punitive damages award between the two instances of contractual interference that it found, the case must be remanded for a new trial on the question of punitive damages.

To read the full text of this opinion, go to:
<http://caselaw.lp.findlaw.com/data2/circs/3rd/024372p.pdf>

KOLB v. THE PAUL REVERE LIFE INS. CO., No. 03-1031 (8th Circuit, January 28, 2004). Complications arising from elective eye surgery, which rendered the insured totally disabled, constituted an accidental bodily injury rather than sickness. He is therefore entitled to benefits for life.

To read the full text of this opinion, go to:
<http://caselaw.lp.findlaw.com/data2/circs/8th/031031p.pdf>

BLOUIN v. SPITZER, No. 02-7997 (2nd Circuit, February 02, 2004). No federal law barred defendants from effectuating the state's interest in prolonging the life of a terminally ill citizen. In insisting that the patient's care be continued, despite uncontroverted testimony that the care was medically inappropriate and was causing her significant pain, defendants are entitled to qualified immunity.

To read the full text of this opinion, go to:
<http://caselaw.lp.findlaw.com/data2/circs/2nd/027997p.pdf>

US v. THURSTON, No. 02-1966, 02-1967 (1st Circuit, February 04, (2004)
Defendant unsuccessfully appeals his conviction for conspiring to defraud the Medicare program by inducing physicians to order and to certify as medically necessary a large number of unnecessary ferritin blood tests. Downward departures, based on the disparity in sentences among co-defendants and on the defendant's good works, were unwarranted; on remand, a fine must be imposed.

To read the full text of this opinion, go to:
<http://laws.findlaw.com/1st/021966v2.html>

RODDE v. BONTA, No. 03-55765 (9th Circuit, February 05, 2004)
Defendants were properly enjoined from closing the Rancho Los Amigos National Rehabilitation Center without continuing to provide medically necessary services to disabled individuals elsewhere. The services plaintiffs would lose with Rancho's closure fall within the scope of care the county must provide to plaintiffs consistent with the ADA.

To read the full text of this opinion, go to:
<http://caselaw.lp.findlaw.com/data2/circs/9th/0355765p.pdf>

KING v. HARTFORD LIFE & ACCIDENT INS. CO., No. 02-3934 (8thCircuit, February 09, 2004)
Deceased insured's voluntary intoxication did not render his death a "self-inflicted injury" under the accidental death policy issued by defendant. The plan administrator must consider whether the insured person subjectively expected the harmful result, and then determine whether that subjective expectation falls within what a reasonable person in the insured's particular position would objectively expect.

To read the full text of this opinion, go to:
<http://caselaw.lp.findlaw.com/data2/circs/8th/023934p.pdf>

CMS Proposes LTCH Payment Update For 2005

The Centers for Medicare and Medicaid Services (CMS) issued in the January 30 Federal Register (69 Fed. Reg. 4753) a proposed rule that would increase Medicare payment rates for long term care hospitals (LTCHs) by 2.9%. The rate increase would become effective July 1, 2004. LTCHs are hospitals that have an average Medicare inpatient length of stay greater than twenty-five days. The LTCH prospective payment system was intended to ensure appropriate payment for services to the medically complex patients generally treated in LTCHs while also providing an incentive for the hospitals to provide more efficient care.

To read the proposed rule, go to
http://www.healthlawyers.org/docs/ask2004/69FR_4753.pdf
(Note: link will open an Adobe Acrobat PDF file)

Helpful Website Links:

Do you need quick information about a drug and your Physician's Desk Reference (PDR) was published in 1997? Try out Drug Digest.Org's website. It claims to be a non-commercial, evidence-based, consumer health and drug information dedicated to empowering consumers to make informed choices about drug and treatment options. Under the Drug Library button you will also find Herbs and supplements. Check it out.

<http://www.drugdigest.org>.

If you come across a helpful web link, pass it on to the Health-E-News Editor; at JAB@NMCounsel.com.

Treasury And IRS Issue Guidance On New Health Savings Accounts

The Treasury Department and the Internal Revenue Service (IRS) issued December 22 guidance on the new Health Savings Accounts (HSAs) that were created by the Medicare bill, which was signed by President Bush on December 8.

Beginning on January 1, 2004, eligible individuals may establish HSAs and make tax-favored contributions to an HSA that may be accumulated over the years or be distributed on a tax-free basis to pay for qualified medical expenses. HSAs are open to individuals with high deductible insurance plans, and the funds can be used for health insurance deductibles and co-payments, prescriptions, over-the-counter drugs, long term care insurance, and to pay healthcare premiums during any period of unemployment.

The only limitation is that the health plan annual deductible must be at least \$1,000 for individual coverage, and at least \$2,000 for family coverage. The guidance, Notice 2004-2, is in a question and answer format, and includes a request for comments concerning other HSA issues.

To read Treasury's press release, go to <http://www.treasury.gov/press/releases/js1061.htm>

[Editor's Note: *This issue is receiving a lot of attention in the Albuquerque Journal and its business publication, the Outlook. AARP's February magazine (OK I just dated myself) had a long article on the new Prescription Benefit Bill, and its discussed HSAs. Under prior federal law, one could open a Medical Saving Account (MSA). Few people did this, and it was not advantageous for employers to promote the use of MSAs. Smaller employers may be able to provide high deductible basic health care coverage, and assist in funding the employee's HSA. If you or members of your firm represent small employers this might be worth pursuing. The Treasury press release has links to more information].*

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