The Bittinger Law Firm is dedicated to customer service. To stay abreast of the latest developments, we review proposed and current developments in the law. We monitor business and financial trends that affect your businesses. The Firm provides this information to support your decision making processes.

IN THE NEWS

Florida Hospital Pays $15.4 Million to Resolve Alleged Kickbacks

Larkin Community Hospital in Miami, Florida has agreed to pay $15.4 million to resolve fraud allegations on November 30th levied by the Department of Justice (DOJ). The government filed a False Claims Act case in 2004 against former and current owners of the hospital. The DOJ alleges that in 1997 Dr. Jack Michel, a former employee and current owner of the hospital, was paid by then owner Dr. James Desnick for patient admissions that he and his brother George made to the hospital. Dr. Michel purchased the hospital in 1998. From 1998 to 1999, the DOJ alleges that Jack and George Michel along with Morris and Phillip Esformes, Frank Palacio, and Claudia Pace conspired to admit patients to Larkin for unnecessary treatment. Some of the patients came from assisted living facilities owned by Michel and the Esformes.

The government can construe just about any financial relationship between referral sources that is not fair market value as a kickback. Make sure contract with referral sources fit within the anti-kickback statute's safe harbor.

Fraud Abuse Recovery Tops $3.1 Billion

Fiscal Year 2006 was a record breaking year in fraud recoveries for the Department of Justice. The final tally for the fiscal year was $3.1 billion, a whopping 72% coming from healthcare related recoveries. "Recoveries in health care fraud climbed more than a billion dollars over last year" said Peter D. Keisler, Assistant Attorney General of the department's Civil Division. This includes an astounding False Claims Act settlement of $920 million with Tenet Healthcare Corp.

The DOJ partly attributes the increase in recoveries to whistleblower actions brought under the FCA's qui tam provisions. These whistleblowers were awarded $190 million last year for their efforts.

One way to protect against whistleblower actions (in which employees "blow the whistle" on the employer's alleged activities) is to listen to employees and to have an effective compliance plan in place. Your healthcare attorney can provide a compliance plan for you.

Absent On-Call Neurosurgeon Found to Owe Duty to Patient Who Died

A Missouri Appeals Court ruled that a neurosurgeon owed a duty to a patient who sustained a head injury during the neurosurgeon's on-call shift at Forest Park Hospital. Dr. Greg Bailey was unavailable for his shift and failed to notify the hospital that he made provisions for a colleague, Dr. Wetherington, to cover the shift.

The patient, while being treated at Forest Park for pneumonia, fell and hit her head causing an epidural hematoma. Dr. Wetherington answered the on-call page, even though he did not have staff privileges at

Forest Park, and after a brief examination of the patient, determined that further evaluation was needed and asked that the patient be transferred to a hospital where Dr. Wetherington had privileges or where neurosurgeons were available at all times. The patient waited three hours before being transferred and after five hours of additional testing, finally under went a craniotomy to stop the bleeding in her brain. The patient died approximately two weeks later as a result of "pneumonia complicating closed head injury".

Dr. Bailey appealed a Wrongful Death verdict which awarded the plaintiffs (the patient's children) $400,800 and found Dr. Bailey to be 50% responsible. Dr. Bailey argued that the patient was not a reasonably foreseeable emergency patient because she was already admitted to the hospital when she fell. The Missouri Appeals Court upheld the lower court's decision. By signing an agreement with Forest Park to perform on-call duties, Dr. Bailey accepted responsibility "for all patients in that facility that are in need of his specialty". The Appeals Court further found that the risk of harm to the patient resulting from Dr. Bailey's failure to notify Forest Park of his unavailability was reasonably foreseeable. Brown v. Bailey, No. ED86387 (Mo. Ct. App. Nov. 14, 2006).

This case illustrates the importance of understanding medical staff call responsibilities, making sure call partners have staff privileges at all hospitals that the group covers and communicating call issues with the hospital.

U.S. Court Refuses to Dismiss Unfair Billing Claim by Florida Uninsured Patient

A federal trial court in Florida ruled against a motion to dismiss an uninsured patient's claim that a hospital charged her 600% more for services than insured patients. Under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), plaintiff Barbara Colomar alleged that Mercy Hospital, Inc. is in breach of contract arguing that the open price term in the "Authorization and Guarantee" contract she signed as an uninsured patient agreeing to pay all non-covered bills was unreasonable.

After receiving treatment, Colomar received a bill from Mercy for close to $13,000. She paid $1,750 on the bill before it was sent to collections.

Colomar's initial complaint was dismissed due to lack of specific allegations. This new claim specifies that the actual costs for services provided to her was $2,098 and that Mercy charges uninsured patients 450% of Medicare reimbursement rates. Based on these as well as the claim that Catholic Health East, Inc. (CHE), the parent company of Mercy, charges in the top 13% of all hospitals and the cost-to-charge ratio is among the top 10%, the court decided to allow the claim to proceed.

Court Approves Use of HIPAA Regulations as Evidence of Standard of Care

A North Carolina appellate court has accepted HIPAA regulations as evidence of standard of care in a lawsuit in which Heather Acosta, an employee and patient, at Psychiatric Associates of Eastern Carolina, owned by Dr. David R. Faber and managed by Robin Byrum, claims that her private medical information was accessed and released to third parties by both Dr. Faber and Ms. Byrum.

The initial claim was thrown out for several reasons including failure to state a claim because HIPAA does not grant a private cause of action.

In the appeal, Ms. Acosta argued that she was not stating a claim under HIPAA but merely using HIPAA to set up a standard of care at the practice. The appellate court agreed.

Although this decision is binding in North Carolina only, the use of HIPAA as evidence of standard of care is likely to become more common. If you don't have a HIPAA Privacy and Security Plan or if you'd like yours reviewed by a board certified health law attorney, email us.

Florida Supreme Court Rules: Changes to Florida's Prompt Pay Laws May be on the Way.

In the case of Foundation Health v. Westside EKG Associates, the Florida Supreme Court ruled that physicians can invoke the prompt pay provisions in the Florida HMO Act when filing a cause of action against HMOs for not paying claims in a timely manner.

Before this ruling, physicians would sue HMOs for breach of contract and attempt to claim a ten percent statutory interest on outstanding payments. Since there is no provision for a private call of action in the Florida HMO Act, providers are unable to assert said cause of action under the existing Act. This would commonly weaken the provider's overall case.

While this ruling doesn't go as far as to say that providers can now seek damages against HMOs under the prompt pay law, it does open the door for providers to claim certain breach of contract issues using the prompt pay provision.

Are Your ARNP Protocols Up to Date?

The Board of Nursing will soon begin implementing a new law that requires the review of ARNP protocols. If they find your protocols are not in compliance they will report you to the Department of Health. Rick Garcia, the Boards Executive Director, announced that the reviews will most likely begin in spring. If you would like help reviewing your protocols to ensure that you are in full compliance with Florida's regulation requirements, contact a healthcare attorney.

BUSINESS TIP OF THE DAY

Download the Medicare Immunization Billing Chart

The *Quick Reference Information: Medicare Immunization Billing* chart is available from the Medicare Learning Network. The two-sided laminated chart is a tool for Medicare fee-for-service health care professionals to help in filing claims for influenza, Pneumococcal Polysaccharide (PPV) and Hepatitis B (HBV) vaccines.

To download the chart, please visit http://www.cms.hhs.gov/MLNProducts/downloads/qr_immun_bill.pdf. You can also order a hardcopy of the chart by visiting http://cms.meridianksi.com/kc/main/kc_frame.asp?kc_ident=kc0001&loc=5.

WE'VE MOVED!

Stop by and see our new office. Located near Hodges Boulevard and Butler Boulevard, our new address will be: 13500 Sutton Park Drive South, Suite 201, Jacksonville, FL 32224. 904-821-9000 (p)

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