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Attorney Compliance with the HIPAA Privacy Rule's Business Associate Agreement Requirement

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On August 21, 1996, Congress amended the Internal Revenue Code of 1986 by passing the Health Insurance Portability and Accountability Act of 1996 (HIPAA), which is designed to improve the portability and continuity of health insurance coverage in group and individual markets, to combat waste, fraud, and abuse in health insurance and health care delivery, to promote the use of medical savings accounts, to improve access to long-term care services and coverage, to simplify the administration of health insurance, and for other purposes.¹ The two most significant provisions of HIPAA are Title I, entitled "Health Care Access, Portability, and Renewability," and Title II, entitled "Preventing Health Care Fraud and Abuse; Administrative Simplification; Medical Liability Reform." The former helps provide continuity of healthcare coverage through, *inter alia*, limiting the use of preexisting condition exclusions and prohibiting discrimination based on health status. The latter intends to improve the efficiency and effectiveness of our national health care system by establishing standards for electronic transmission of health information designed to reduce health care costs and administrative burdens. Title II also contains requirements designed to improve patient confiden-

tiality and privacy, which are the subject of this article.

On December 28, 2000, and August 14, 2002, the U.S. Department of Health and Human Services ("HHS") published privacy regulations for individually identifiable health information that establish a set of basic national privacy standards and information practices (the "Privacy Rule").² These regulations apply to health plans, health care clearinghouses, and those health care providers that conduct certain financial and administrative transactions electronically ("Covered Entities").³ Although the Privacy Rule took effect on April 14, 2001, most covered entities have until April 14, 2003 to achieve compliance. (Small health plans, those with under \$5 million in receipts, have until April 14, 2004.) HHS' text of the final HIPAA privacy standards, as modified on August 14, 2002, is available at <http://www.hhs.gov/ocr/hipaa/finalreg.html>. HHS also issued a new FAQ in December, 2002, to address common concerns about the effect of the HIPAA Privacy Rules. It is available at <http://www.hhs.gov/ocr/hipaa/privacy.html>.

The Privacy Rule applies to both Covered Entities and other organizations or individuals, called "Business Associates," that in the course of performing services for Covered

Entities, use, create, receive, or have access to protected health information ("PHI"). While lawyers and law firms are not Covered Entities, they are considered Business Associates when they provide legal services to Covered Entities which involve the disclosure and use of confidential patient health information.³ Consequently, lawyers and law firms are required to comply with certain Privacy Rule requirements through the HIPAA-mandated "Business Associate Agreement."

The Privacy Rules require that before a Covered Entity (e.g., a health plan, health care clearinghouse or health care provider) discloses PHI to a Business Associate (e.g., an attorney or law firm), the Covered Entity must obtain "satisfactory assurance" from the Business Associate that it will appropriately handle and safeguard all PHI it receives from or on behalf of the Covered Entity.⁴ "Satisfactory assurance" is obtained through a written Business Associate Agreement

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2003 Health Care Issues in Wisconsin

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Overview

The open question, as the two year Wisconsin legislative 2003-04 session begins, is this:

With new public policy decision-makers in Wisconsin, will the unresolved health care issues have different outcomes than in the previous legislative session?

The 2003 Issues

By now, the many unresolved, hold-over health care issues from last year are well known. They include:

- **Escalating health care costs**
With much of the private business sector experiencing flat earnings at best, double-digit increases in health care costs have further strained budgets. In order to answer the demand for a solution, policy makers will need to analyze the multiple health care cost drivers including medical advances, aging population, lifestyle choices, higher consumer expectations, government mandates and regulation.
- **Medicaid cuts**
Large fiscal deficits in Wisconsin's current budget, plus the upcoming 2003-05 State Budget, place much pressure on cutting Medicaid/Title XIX spending. Which programs or services will incur cuts is yet to unfold.
- **Worker shortages**
As the demand for health care increases in Wisconsin, the shortage of nurses and other critical care providers is becoming more severe. Multi-year efforts are underway by hospitals and other employers to increase the number of health care workers. On the other hand, pressure is mounting for legislators to pass laws that prohibit mandatory overtime for nurses and others.
- **Medical errors**
Payors and consumers are becoming more informed about the frequency of medical errors. How best to reduce the frequency of those errors and to improve quality of care, is now being openly discussed by Wisconsin policymakers and others. Such discussions can be expected to result in several legislative proposals.
- **Medical malpractice insurance costs**
Recently, other states have experienced large increases in medical malpractice insurance premiums. With the investment returns of malpractice carriers now often negative, and with the severity (size) of malpractice claims reported to be rising nationally, we can expect the medical malpractice insurance debate to arrive in Wisconsin soon.
- **Medicare fair-share to Wisconsin**
It is well documented that a cost-shift is occurring in Wisconsin today, due to federal Medicare underpayments to Wisconsin health care providers. Time will tell if our Congressional delegation has enough clout in Washington to remedy the problems within the next 2 years.
- **Small business health care pool**
This idea of the National Federation of Business (NFIB) and others, has been revived by Governor Doyle, after it was nearly killed last session. Supporters agree with the concept and believe it will enable small businesses to pool buying power and negotiate lower premiums. Opponents are concerned about consumers being exposed to insurance fraud and the manipulation of benefit packages to attract healthier people and discourage sicker people from joining. Instead of reducing premiums, they believe such programs could drive up costs.
- **Prescription drug costs**
Additional initiatives are certain to surface in Wisconsin, in an effort to lower prescription drug costs to consumers. The clout of well-funded drug companies should not be underestimated, however.

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Recent Cases of Interest

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HEYDE COMPANIES, INC. V. DOVE HEALTH CARE AT EAU CLAIRE

No. 01-0863-FT, 2002 Wisc. LEXIS 1073 (Wis. December 27, 2002)

The Wisconsin Supreme Court held that a no-hire provision included in a contract between employers that restricts an employee's employment opportunities without the employee's knowledge and consent constitutes an unreasonable restraint of trade in violation of Section 103.465 of the Wisconsin Statutes and the public policy of the state, and thus, is unenforceable. *Heyde Companies, Inc. v. Dove Health Care at Eau Claire*, No. 01-0863-FT, 2002 Wisc. LEXIS 1073, at *2 (December 27, 2002).

Dove Healthcare, LLC ("Dove") is a health care provider that operates nursing homes. Heyde Companies, Inc. ("Heyde") owns Greenbriar Rehabilitation ("Greenbriar"), which provides physical therapists to nursing home facilities. In 1997, Dove and Greenbriar entered into a Therapy Services Agreement (the "Agreement") whereby Greenbriar provided Dove with physical therapists who worked in Dove's nursing home, but remained at-will employees of Greenbriar. The Agreement contained a "no-hire" provision that prohibited Dove from hiring any Greenbriar therapist for a period of one year after the Agreement expired unless Dove first obtained Greenbriar's written consent. If Greenbriar consented to Dove's hiring of a Greenbriar therapist, the Agreement required Dove to pay Greenbriar a fee of fifty percent of the therapist's annual salary.

In 1999, Dove terminated its Agreement with Greenbriar. Shortly thereafter, Dove hired one current and three former Greenbriar therapists without seeking Greenbriar's consent and without paying the contractually required fee. Subsequently, Greenbriar filed suit against Dove alleging that Dove breached the no-hire provision and seeking payment of the fifty percent contractual fee for each Greenbriar therapist hired by Dove. Dove moved for summary judgment on the grounds that the no-hire provision was an unlawful restraint of trade and unenforceable, but this motion was denied. Greenbriar and Dove then stipulated to the facts on the issue of liability and presented evidence on the issue of damages. The circuit court awarded liquidated damages to Greenbriar in the amount of \$62,124.40. The court of appeals reversed, holding that because the no-hire provision restricted the employment opportunities of the therapists without their knowledge and consent, it unreasonably restrained trade and violated public policy, and thus, was unenforceable. 637 N.W.2d 437, 438 (Wis. App. 2001), *aff'd*, No. 01-0863-FT, 2002 Wisc. LEXIS 1073 (Wis. December 27, 2002). Greenbriar appealed to the Wisconsin Supreme Court.

The Wisconsin Supreme Court focused on Section 103.465 of the Wisconsin Statutes to determine whether a no-hire provision included in an agreement between employers, without the knowledge and consent of the affected employees, constitutes an unreasonable restraint of trade. Section 103.465 provides that:

A covenant by an assistant, servant or agent not to compete with his or her employer or

principal during the term of the employment or agency, or after the termination of that employment or agency, within a specified territory and during a specified time is lawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer or principal. Any covenant, described in this subsection, imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint.

Greenbriar argued that, on its face, Section 103.465 did not apply because it governs restrictive covenants between employers and employees, not between two employers. The court rejected this argument and explained that "the explicit purpose of [Section] 103.465, as plainly stated in the statute is to invalidate covenants that impose unreasonable restraints on employees" regardless of whether a provision is labeled a covenant not to compete. *Heyde*, 2002 Wisc. LEXIS 1073, at *9. Because the no-hire provision had the same effect as a restrictive covenant on Greenbriar's employees, the court held that the provision should be analyzed as a restrictive covenant under Section 103.465.

A five-factor analysis is used to evaluate the validity of a restrictive covenant. Specifically, a restrictive covenant must: (1) be necessary to protect the employer; (2) provide a reasonable time limit; (3) provide a reasonable territorial limit; (4) not be harsh or oppressive to the employee;

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Recent Cases of Interest

Continued

and (5) not be contrary to public policy. With respect to the first factor, Greenbriar argued that the no-hire provision was necessary to protect its interest in retaining employees and to avoid serving as an involuntary recruiting agency for Dove. The court dismissed this argument, stating that even if some kind of restriction was necessary, Greenbriar could have adequately protected itself by entering into a covenant not to compete that complied with Section 103.465.

In considering the second factor, the court declared the one-year time limit to be reasonable. However, the court found the no-hire provision to be problematic in light of the third factor. At the time of termination of the Agreement, Greenbriar employed approximately 33 out of 273 therapists who worked in the Eau Claire/Chippewa Falls area and had contracts with approximately 35 nursing home facilities located in this area and other parts of eastern Wisconsin. The no-hire provision was included in the contracts Greenbriar had with other nursing homes and restricted the employment of its therapists at all of these facilities, including those facilities where the therapists had never worked. Greenbriar argued that its therapists were no less likely to be hired simply because of the fifty percent fee a new employer was required to pay. The court disagreed, explaining that Greenbriar therapists were disadvantaged in obtaining employment because nursing homes preferred to hire employees who were not subject to a fifty percent salary fee.

Turning to the fourth factor, the Court concluded that the no-hire provision was harsh and oppressive to Greenbriar's employees. The court noted that a valid covenant not to complete requires knowledge and

consideration by the affected employee. However, the Greenbriar therapists hired by Dove testified that they were unaware of the no-hire provision. Some therapists further stated that, upon inquiry, Greenbriar told them they would not be bound by a non-compete agreement. The court explained that Greenbriar was permitted to protect its interests in maintaining employees through a restrictive covenant that complied with Section 103.465. According to the court, however, the no-hire provision was an attempt by Greenbriar to circumvent the protections granted under Section 103.465 by restricting the employment opportunities of its therapists through contracts with other employers and without the knowledge or consent of the therapists. "An employer cannot indirectly restrict employees in a way that it cannot do directly under [Section] 103.465." *Id.* at *16-17. Further, the court found that the no-hire provision infringed upon the fundamental right of a person to make choices about his or her own employment.

The court distinguished this case from cases decided in other jurisdictions in which no-hire provisions between employers have been upheld. Specifically, the court explained that, unlike the provisions that have been upheld, the no-hire provision in the Agreement restricted the employment opportunities of Greenbriar therapists at all of the facilities Greenbriar contracted with, including those facilities where the therapists had never worked.

Finally, because the therapists were unaware of the employment restrictions imposed upon them when they accepted a job at Greenbriar, the court found that the no-hire provision amounted to an unreasonable restraint of trade in violation of Wisconsin's public policy. Accordingly, the court held that the no-hire provision was unenforceable as an unreasonable restraint of trade in violation of

Section 103.465 because it was harsh and oppressive to employees in restricting their employment opportunities without their knowledge and consent and in violation of public policy.

JENSEN V. MCPHERSON

No. 01-2912, 2002 Wisc. App. LEXIS 1237 (November 13, 2002)

A Wisconsin appellate court held that a minor was not considered a party to his parent's medical malpractice action merely because he was listed in the caption of their complaint. Further, the court held that although a minor's parent may be his or her "natural guardian," a parent or natural guardian is not deemed to be the guardian of a minor's property or guardian *ad litem* unless they have been appointed as such by the court. Consequently, when a minor is a party to an action, any judgment or order in the action may be vacated unless the minor has a court appointed guardian to protect his or her interests. *Jensen v. McPherson*, No. 01-2912, 2002 Wisc. App. LEXIS 1237 (November 13, 2002)

The parent of a minor child, Erik, filed a complaint against David McPherson, M.D., OHIC Insurance Company and the Wisconsin Patients Compensation Fund alleging medical malpractice and failure to obtain informed consent after Erik was injured during delivery. The complaint was filed in 1997 and went to trial in 1999. Immediately prior to trial, a settlement was reached with one of the defendants. Three days after trial began, the circuit court declared a mistrial due to misconduct by the plaintiff's attorney. At the time the settlement and mistrial occurred, Erik had not been appointed a guardian.

Following the mistrial, the court appointed a guardian *ad litem* to represent Erik's interests. In 2001, Erik, through his guardian *ad litem*, filed a medical malpractice against Dr. McPherson and the other two parties named as defendants in the 1997 action (collectively, "Dr. McPherson"). Dr. McPherson filed motions to dismiss Erik's action on grounds that another action was pending between the same parties for the same cause pursuant to Wisconsin Statutes Section 802.06(2)(a)(10). Subsequently, Erik filed a motion to consolidate the 1997 action with the 2001 action. The circuit court denied Dr. McPherson's motion to dismiss, granted Erik's motion to consolidate the two actions and determined that a new scheduling order would be submitted. Dr. McPherson appealed.

On appeal, a Wisconsin appellate court considered whether: (1) Erik should be considered a party-plaintiff to the 1997 action; (2) it was necessary for Erik to be represented by a guardian if he was a party-plaintiff and whether he was in fact represented by a guardian; (3) the circuit court erred in reopening the scheduling order after the mistrial was declared; and (4) the order should be reversed for public policy reasons. Before addressing these issues, the court highlighted two basic principles. First, when a minor is injured, the parents and the minor have distinct interests requiring two separate causes of action. Second, a minor's cause of action is a property right protected by the Due Process Clause of the Fourteenth Amendment. Accordingly, a minor is entitled to notice and an opportunity to be heard. As a general rule, minors are considered to be "the special objects of the solicitude of the courts and the government generally." *Id.* at *9. Further, under Wisconsin law, minors are to be considered the special objects of the solicitude of the courts *even after* the entry of judgment or final order. This is evidenced in

Section 803.01(3)(c)(2) of the Wisconsin Statutes, which provides that in any case where the court finds, after the entry of judgment or final order, that a minor was not properly represented in the action, the judgment or order shall be vacated on motion of the minor or the minor's personal representative.

With regard to the first issue raised on appeal, Dr. McPherson argued that Erik was a participating party-plaintiff in the 1997. In response, Erik argued that, based on the pleadings, he was not a properly named party-plaintiff to the 1997 action. The caption to the 1997 complaint identified the plaintiffs as: "KATHLEEN JENSEN and BRADLEY JENSEN *individually and as mother and father and next friend of* ERIK JENSEN a minor, and the State of Wisconsin Department of Health and Family Services." *Id.* at *11-12. The complaint also referred to Erik in various ways, including as "said child," "said minor," "the infant," and "said minor Plaintiff." *Id.* at *12. The court held that merely listing Erik's name in the caption to the complaint was not enough to make Erik a party-plaintiff. Further, the court noted that the complaint did not contain a separate paragraph describing Erik, his interests, or his specific request for relief. Accordingly, the court found that the 2001 complaint naming Erik as a party-plaintiff was not duplicative.

Next, Dr. McPherson argued that it was not necessary to have a guardian *ad litem* appointed to represent Erik as a party during the 1997 action because he was represented by his parents, as general guardians, and by the attorney who filed the 1997 action. The court disagreed and explained that Wisconsin Statutes Section 803.01(3)(a) requires that, in all cases where a minor is a party to an action, the minor have a guardian of the minor's property or a guardian *ad litem*. Therefore, because Erik's guardian *ad litem* was not appointed until 2001,

the question was whether Erik had a "general guardian of the property" as contemplated in Section 803.01(3)(a) when the 1997 action was filed.

Wisconsin Statutes Chapter 803 does not define the term "guardian" so the court looked to other chapters and found the definition provided in Section 880.01(3) to be applicable. Specifically, the court found that this Section clearly indicates that a guardian, either general guardian of the property or guardian *ad litem*, must be appointed by the court. The court disagreed with Dr. McPherson's argument that Erik's parents were his general guardians, stating that even though Erik's parents may be his "natural guardians," they were not the general guardians of Erik's property because they were not appointed as such by the court. Further, the court noted that it cannot be assumed that the attorney who represents a minor's parents also represents the minor, unless the attorney has been appointed by the court as the minor's guardian of the property or guardian *ad litem*.

Turning to the third issue, the court concluded that the circuit court did not err in reopening the scheduling order in light of Wisconsin Statutes Section 803.01(3)(c)(2), which permits a court to vacate any judgment or order when a minor was improperly represented in the action. Finally, the court dismissed Dr. McPherson's argument that the denial of the motion to dismiss Erik's 2001 action and to consolidate the 1997 and 2001 actions violated public policy because it allowed Erik to circumvent the rulings of the circuit court by refile his action through a guardian. While the court acknowledged that in the majority of cases, the parents' and minor's interests would coincide, it explained that the court appointment of a guardian is necessary to ensure that a minor's rights are fully protected.

Attorney Compliance with The HIPAA Privacy Rule's Business Associate Agreement Requirement

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that contains specific requirements dictated by the Privacy Rule, including but not limited to:

1. Use of appropriate safeguards to prevent disclosure of PHI except as permitted by the Business Associate Agreement or as required by law;
2. Reporting to the Covered Entity any known use or disclosure of PHI not permitted by the terms of the Business Associate Agreement;
3. Requiring any subcontractors or agents hired by the Business Associate who receive PHI to abide by the same restrictions as the Business Associate;
4. Making available to the Covered Entity PHI in the Business Associate's possession, so that the Covered Entity may respond to an individual's Privacy Rule requests for access or amendment (and incorporating any amendments of which the Covered Entity informs the Business Associate);
5. Providing information to the Covered Entity to allow the

Covered Entity to respond to an individual's Privacy Rule request for accounting of PHI disclosures;

6. Making its internal practices, books and records relating to the business associate relationship available to the HHS Secretary to allow HHS to audit the Covered Entity's compliance with the Privacy Rule;
7. Returning or destroying any PHI at the termination of the relationship, and if return or destruction of the PHI is not feasible, then maintaining the confidentiality of the PHI under the terms and conditions of the Business Associate Agreement; and
8. Consenting to the Covered Entity's right to unilaterally terminate the Business Associate Agreement if the Business Associate violates any material term of the agreement.

The August 14, 2002 changes to the Privacy Rule allow Covered Entities to continue to operate under existing contracts with Business Associates for up to one year beyond the April 14,

2003 compliance date. The additional time applies to existing written arrangements with Business Associates that were in effect on October 15, 2002, and will not be renewed or modified before April 14, 2004. These existing contracts will be considered HIPAA-compliant until the sooner of: (1) the Covered Entity either renews or modifies the contract after October 15, 2002; or (2) the Privacy Rule compliance date of April 14, 2004. Further, if an applicable contract renews automatically without any change in terms or other action by the parties, the contract is deemed compliant until April 14, 2004, notwithstanding its automatic renewal. The August 14 Privacy Rule modifications also include HHS' model Business Associate Agreement.⁵

1 Public Law 104-191.
2 65 Fed. Reg. 82,462 (Dec. 28, 2000); 67 Fed. Reg. 53,182 (Aug. 14, 2002).
3 The Privacy Rules' definition of "business associate" specifically refers to an entity that provides legal services to a Covered Entity. 45 C.F.R. §160.103, 65 Fed. Reg. at 82,798.
4 45 C.F.R. § 164.504(e)(1).
5 See 45 C.F.R. § 164.532.

Enhance the Value of Your Health Law Section Membership - Complete Our Membership Survey!

It's not too late! If you haven't done so already, please take a few moments of your time to fill out and return the 2003 Health Law Section Member Needs Questionnaire. Your responses will greatly assist us in providing the kinds of information and services of most value to our membership. The survey was distributed via e-mail to members of the Health Law Section on January 27, and was mailed to section members without e-mail addresses on file with the Bar. If the Bar does not have your e-mail address, you can send that information to service@wisbar.org.

Thanks for your help!

2003 Health Care Issues in Wisconsin

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New Decision-Makers

As we begin 2003, in Wisconsin we have:

- Our first new Democratic Governor, Jim Doyle, in 16 years.
- A new Secretary of the Department of Health and Family Services, Helen Nelson.
- A new Insurance Commissioner, Jorge Gomez.
- A new Republican-controlled State Senate.
- A new Speaker in the State Assembly, plus a number of new Committee Chairs.

Such shifts in power and control in state government create new dynamics. Change is certain; we just don't know for sure the specifics of what outcomes will be produced.

Conclusion

One's first, superficial view of a Democratic governor and a Republican legislature in Wisconsin might be that they may largely cancel each other out, thereby preserving the status quo. However, there is so much pent-up demand for change in health care that policymakers may feel compelled to do something meaningful.

Exactly what will pass is not foreseeable, so stay-tuned for future health care public policy developments in Wisconsin!

Exciting Line-Up Planned for Health Law Section Program at the 2003 Annual Convention

Mark your calendars now and plan to attend the Health Law Section's 2003 Annual State Bar Convention program! Our program is slated for Wednesday, May 7, 12:30 to 4:20 p.m. The program will feature a panel discussion segment entitled "Civil & Criminal Investigations of Health Care Providers." Panel members include Mullen Dowdal of the U.S. District Attorney's office in Madison, Nathan Fishbach of Whyte Hirshboeck Dudek's Milwaukee office and William E. Hanrahan of the Wisconsin Department of Justice in Madison. Brian Purtell of the Wisconsin Health Care Association will serve as moderator. We will also present a segment on "Emerging Trends in Health Care Transactions." Later in the program, Brian will also present the Annual Health Law Update. See you there!!

State Bar Annual Convention Wednesday, May 7 to Friday, May 9 at the Midwest Airlines Center – Milwaukee

Two Outstanding Spotlight CLE Programs

- Thursday a.m. – "Lawyers, Poets and Other Alchemists: Looking for Gold in the Twenty-first Century." Presentation by Andrei Codrescu, author, humorist, and National Public Radio commentator.
- Friday a.m. – "Echoes of the Past: Landmark Issues, Famous Cases, and Legal Giants Shaping Wisconsin Yesterday and Today." This program features local historian, judge, and attorney presenters.

Thursday Showcase Luncheon

Featured speaker is ABA President-elect Dennis Archer, former Mayor of Detroit and Michigan Supreme Court Justice.

Thursday Art Fest 2003

A gala reception featuring the artistic and creative talents of Wisconsin's legal community.

Friday Membership Recognition Luncheon

Recognizing 134 Bar members who have been lawyers for 50 years.

Register by April 7 and save!

Call the State Bar at (800) 728-7788 or go to www.wisbar.org/convention.



HEALTH LAW SECTION

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