

HEALTH INFORMATION TECHNOLOGY AND THE 2009 STIMULUS BILL

by Daniel Martz, Esquire, and Luke Repici, Esquire

The recently enacted Stimulus Bill, (H.R.1 American Recovery and Reinvestment Act of 2009), included a significant, but less publicized section, specifically Title 13, entitled Health Information Technology for Economic and Clinical Health Act (or the HITECH Act). Portions of the Act make changes to existing HIPAA rules, including a new security breach notification requirement, toughened enforcement provisions, and provisions related to covered entity and business associate agreements and practices. Following are some of the highlights of these changes. (*Note that the HITECH Act also contains significant provisions concerning electronic medical records, including the creation of an Office of the Coordinator of Health Information Technology. This will be one of the topics at our upcoming Healthcare Summit on May 21.*)

First, the new rules require that any information about a patient or insured which is disclosed or discovered inappropriately is subject to security breach notice requirements set forth in the Act. Of interest, in some circumstances, notices are required to be provided to the Department of Health and Human Services and the media. An example would be when a patient cannot be located or a large number of patients are effected by a breach. (Section 13402). The enforcement provisions for violations have also been toughened, but still require an element of "willful neglect." (Section 13410).

Next, HITECH contains new rules for "business associates" of covered entities. Business associates are now subject to direct enforcement. (Section 13401).

Further, the law also sets forth individual rights to electronic medical records. It provides that once electronic health records are in place, an individual will be entitled to an accounting of all disclosures made of that person's records. Additionally, the changes define a patient's "right of access" to his or her medical records as a right to view these records in an electronic format. This may pose challenges for hospitals and health systems with electronic record-keeping already in place, but without adequate system design/architecture to allow non-providers/employees access to the software. (Section 13405).

Finally, with respect to federal pre-emption in this area (that is, whether these rules take precedence over state rules), it appears that as before, the new regulations will not pre-empt state law. This means that heightened privacy standards under state law, if they exist, will remain enforceable.

This is intended to serve as an overview of portions of HITECH. If you have questions about any aspect of HITECH or HIPAA, feel free to contact either of the authors, Dan Martz (martzd@whiteandwilliams.com, or 215.864.6320), Luke Repici (repicil@whiteandwilliams.com, or 215.864.7099) or the Chair of our Healthcare group, Don Ladd (laddd@whiteandwilliams.com, or 215.864.7118).

IN THIS ISSUE...

2 | FIRM ANNOUNCEMENTS

Strategic alliance formed to better serve healthcare clients

White and William opens Boston office

2 | COURT WATCH

Cases and verdicts at a glance

2 | WHITE AND WILLIAMS PRESENTS THE HEALTHCARE SUMMIT

Tackling emerging trends in healthcare beyond tort reform

3 | RECENT DEVELOPMENTS IN THE LAW

U.S. Supreme Court rejects pre-emption claim based on prior FDA approval of a drug's label

3 | LEGISLATIVE ALERT

Apology Rule: Potential new law in Pennsylvania?

3 | BEYOND HEALTHCARE

Asset protection and real estate planning

FIRM ANNOUNCEMENTS

WHITE AND WILLIAMS LLP AND TSOULES, SWEENEY, MARTIN, AND ORR, LLC

formed a strategic alliance Fall of 2008 to offer its broad client base – healthcare providers ranging from hospitals to solo practitioners to medical facilities – with a full scope of services that meets their needs. White and Williams has experienced litigators who have fought and won numerous cases in the courtroom as well as attorneys who provide general representation and counseling in various areas of healthcare law. Attorneys from TSMO add their knowledge of regulatory, compliance, and healthcare-transactional issues affecting the healthcare industry. The strategic alliance between the two firms means healthcare clients receive quality representation bringing complementary skills together in having one legal relationship with multi-specialty healthcare attorneys.

IN FEBRUARY 2009, WHITE AND WILLIAMS OPENED ITS TENTH OFFICE

in the heart of Boston's financial district. Backed by a regional network of attorneys and staff in Pennsylvania, New York, New Jersey, and Delaware, we offer an array of services to new and existing clients in New England. David B. Chaffin, partner, and Sarianna T. Honkola, of counsel, have joined White and Williams and will be practicing from the Boston office.

For more information on Mr. Chaffin and Ms. Honkola, please visit www.whiteandwilliams.com.

COURT WATCH



PETER SAMSON, Partner, Berwyn Office

Peter Samson, a partner in our Berwyn office, recently prevailed in a medical malpractice action in the Philadelphia Court of Common Pleas. He defended two physicians involving allegations of inappropriate anticoagulation following emergency surgery. The jury returned a defense verdict in half an hour.

Mr. Samson may be contacted at 610.240.4730 or samsonp@whiteandwilliams.com.



DANIEL MARTZ, Counsel, Philadelphia Office

Dan Martz, of counsel in the Philadelphia office, also obtained a defense verdict in a medical malpractice action tried in the Montgomery County Court of Common Pleas in February 2009. The case involved allegations of permanent nerve damage suffered due to negligent insertion of a peripheral IV. There was a claim against both the nurse and the institution, including a corporate claim for alleged inadequate training. A defense verdict was returned in two hours.

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EVENTS: WHITE AND WILLIAMS PRESENTS THE HEALTHCARE SUMMIT

TACKLING EMERGING TRENDS IN HEALTHCARE BEYOND TORT REFORM

The world of healthcare is vast and complicated. From physician-patient relationships, to reducing the cost of insurance, to liability issues, healthcare professionals must weave through existing and new trends and deal with the ever-changing legal and regulatory landscape.

On May 21, 2009, healthcare and appellate attorneys from White and Williams LLP will host a Healthcare Summit, bringing together physicians, nurses, hospital administrators, risk managers, insurance adjusters, and other experts from the industry for an in-depth look at developing trends in healthcare following the most recent legislative tort reform efforts.

The half-day event will include general and breakout sessions led by speakers from White and Williams LLP, Tsoules, Sweeney, Martin, and Orr, LLC, Geisinger Health System, the Commonwealth of Pennsylvania MCARE Fund, Temple University School of Medicine, Ringler Associates, Forensic Resolutions, Inc., and Trial Graphix.

Sessions include:

- The Case of the Missing and Altered Evidence
- Punitive Damages: Putting Square Pegs into Round Holes
- Beyond the Numbers: The Practical Effect of Liens on Healthcare Litigation
- Emerging Issues from the Appellate Courts
- Managing Physician Practice Risk: Linking Patient Safety and Quality to Best Business Practices

- Discovery of Electronic Health Records: Mountains of Paper and Back Again – An Attorney's Tale
- Minimizing Damages in Catastrophic Injury Cases in a Changing Economic Climate
- What you Need to Know Before Crossing State Lines: Important Distinctions in Multi-Jurisdictional Practice in PA, NJ, and DE

In addition to the sessions and networking opportunities, guest speaker Barbara Holland, Esquire, will share valuable insight as the Chief Counsel of the Pennsylvania Governor's Office of Healthcare Reform regarding the impact of tort reform on the healthcare industry in Pennsylvania. And, Dr. Brian McDonough — medical editor for a Philadelphia radio station and Chairman of the Department of Family Medicine of St. Francis Hospital in Wilmington — will deliver the keynote address on the threat of litigation and its effect on the practice of medicine and the physician-patient relationship.

"The Healthcare Summit will provide a forum for professionals to gain valuable insight from their peers in the healthcare industry," said Don Ladd, Chair of the Healthcare Practice Group of White and Williams LLP. "We will address current issues and identify emerging legal and regulatory trends."

The Summit will be held on May 21, 2009 at the College of Physicians of Philadelphia, the "Birthplace of American MedicineSM," from 8:00 a.m. to 12:00 p.m. For more information and to register, please visit www.whiteandwilliams.com.

RECENT DEVELOPMENTS IN THE LAW

U.S. SUPREME COURT REJECTS PRE-EMPTION CLAIM BASED ON PRIOR FDA APPROVAL OF A DRUG'S LABEL

In the much anticipated case of *Wyeth v. Levin*, the U.S. Supreme Court upheld a verdict in favor of a Vermont woman who claimed that the warning label on a drug manufactured by Wyeth was inadequate. In so holding, the Court rejected Wyeth's argument that the plaintiff's state tort claims were pre-empted by FDA approval of the drug's label. As a result, plaintiffs' attorneys may continue to file cases in state courts, including Pennsylvania, against pharmaceutical companies, as well as against physicians, regarding any alleged inadequate warnings concerning a drug.

For the full text of White and Williams' analysis of this opinion and its impact, please visit www.whiteandwilliams.com. For a written copy of the article, please contact Joelle Underwood in the Marketing Department at 215.864.6214 or underwoodj@whiteandwilliams.com.

LEGISLATIVE ALERT APOLOGY RULE: POTENTIAL NEW LAW IN PENNSYLVANIA?

State Senator Vance, joined by 29 others, introduced legislation in Harrisburg which would enact a Rule, often known as the Apology Rule, which would shield healthcare providers who offer an apology to a patient or patient's family following an unanticipated outcome. Many other states have passed similar legislation which would encourage open communication between healthcare providers and families, and protect against plaintiffs' attorneys using statements of apology and the like in Court as alleged admissions of wrongdoing. Under the proposed law, inadmissible evidence would include, "any benevolent gesture or admission of fault" made by a health care provider prior to the commencement of a medical professional liability action. It defines "benevolent gesture" as "any and all action, conduct, statement or gesture that conveys a sense of apology, condolence, explanation, compassion or commiseration emanating from humane impulses." The bill (No. 208) has been referred to the Judiciary Committee (as of February 2009) for consideration.

BEYOND HEALTHCARE

In this unstable economic climate, asset protection and estate planning becomes all the more important. The attorneys in White and Williams' Business Department will provide a free initial consultation and review of your estate planning portfolio, including wills, trusts, etc., and offer recommendations for asset protection, both personally and professionally.

For further information, contact William Hussey (215.864.6257 or husseyw@whiteandwilliams.com) or Michael Mentzel (215.864.7156 or mentzelm@whiteandwilliams.com).



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