

**SEMINOLE COUNTY MEDICAL SOCIETY**

**May 18, 2010**

**HOT LEGAL TOPICS**

**BY**

**THE HEALTH LAW FIRM**

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**1. Health Reform Legislation Passed**

President Obama signed the Patient Protection and Affordable Care Act ("PPACA") and the Health Care and Education Affordability Reconciliation Act ("Reconciliation Act") on March 23, 2010. These are two of the three acts which constitute the "Health Care Reform" legislation. This health care legislation was the result of a heated year-long debate and will be the subject of continued debate and opposition for the foreseeable future. The legislation is designed to expand healthcare coverage to 32 million people not currently covered by health insurance. An earlier version of the legislation would have provided coverage for 37 million Americans. The reform legislation will still leave 23 million people without coverage.

**2. Litigation Against Health Reform Commenced**

A total of twenty (20) states have joined the lawsuit originally filed by Florida Attorney General Bill McCollum against the health reform legislation. The lawsuit alleges the health reform legislation violates the U.S. Constitution by requiring all citizens to obtain health care coverage

or pay a tax penalty. The lawsuit also alleges that the legislation places onerous burdens on the state Medicaid programs. Numerous physician groups oppose the health reform legislation despite the AMA's endorsement of it. Two state medical societies have also joined the suit. The National Federation of Independent Business also joined the suit according to the Amended Complaint filed in Pensacola, Florida, on May 14, 2010.

### **3. Proposed Amendment to Florida Constitution**

In November there will be a proposed amendment to the Florida Constitution on the ballot. The proposed amendment would prohibit any laws or rules that compel the purchase of health insurance or participation in any healthcare system.

### **4. Court of Appeals Allows Outrage Claim**

The Second District Court of Appeal in Lakeland, Florida, reversed a trial court's dismissal of a plaintiff's claim of outrage (intentional infliction of emotional distress) against a hospital in a malpractice case. The case involved a death following hip surgery due to cardiac arrest. According to the plaintiff, the patient received an overdose of Esmolol, which caused the death. The plaintiff also alleged a physician and two nurses agreed to conceal the true cause of death. The medical examiner did not do a full autopsy because the death was attributed to natural causes by the doctor and nurses. The plaintiff claims the medical examiner and the hospital's attorney called during the funeral to demand the return of the patient's body after learning the actual cause of death. The Court of Appeal said the false statements that led to the interruption of the funeral so that a second autopsy could be performed was "atrocious and intolerable behavior" sufficient to support a claim for outrage.

### **5. 21% Decrease In Physician Reimbursement Delayed Again**

On April 15, 2010, President Obama signed HR 4851, the Continuing Extension Act of 2010, which delays the twenty-one percent (21%) reduction in Medicare physician reimbursement until May 31, 2010. HR 4851 also applies retroactively for physician services provided between April 1, 2010, and April 15, 2010. According to CMS, any claims paid at the lower rate will be reprocessed automatically and paid and no physician action is required.

### **6. Florida Legislature Passed New Pain Management Legislation on April 29, 2010**

The Florida Legislature passed Senate Bill (SB) 2272 on April 29, 2010. This new law would repeal Sections 458.309(4), (5) and (6), Florida Statutes, relating to pain-management clinics and replace those sections with a new Section 458.3265, Florida Statutes. This new law would prohibit any pain-management clinic unless it is fully owned by licensed physicians or is

licensed as a health care clinic under Chapter 400, Florida Statutes. Under the new law, the Department of Health can revoke the license of any pain-management clinic that is owned by or employs a physician whose DEA registration/number has been revoked, whose application to prescribe, dispense or administer controlled substances has been denied by any jurisdiction, or who has been convicted of (including deferred adjudication), pleaded guilty to or pleaded nolo contendere to any felony concerning controlled substances. If the Department of Health revokes the license of a pain-management clinic, the physicians and other persons in control of the clinic are prohibited from obtaining a license for another pain-management clinic for five (5) years. The new law has yet to be signed by Governor Crist as of this date (May 18, 2010).

## **7. Zone Program Integrity Contractors (ZPICs)--A New Sheriff in Town**

The Centers for Medicare and Medicaid Services (CMS) has recently entered contracts with a number of private companies to function as Zone Program Integrity Contractors (ZPIC). These are similar to the Recovery Audit Contractors (RAC), but have different functions from the RACs. ZPICs have contracted with CMS to carry out certain functions that the Medicare regional carriers and fiscal intermediaries have traditionally performed. Most recently, these have involved audits for overpayments and detection of and recovery for possibly fraudulent activities

CMS's "Zone 7" includes Florida, Puerto Rico and the Virgin Islands; the Zone 7 ZPIC for 2010 is SafeGuard Services, LLC, with several offices in Florida, including in Jacksonville and the Miami area. If you are contacted by a ZPIC or receive a letter advising you of an audit, you should immediately contact a health care attorney familiar with ZPIC audits or one of the very few Medicare audit consultants who specialize in ZPIC audits.

A ZPIC will routinely telefax a letter to the practice shortly before close of business the day before a site visit/audit to that practice. The site visit/audit may be scheduled to occur at a branch office or remote location the practice has and not at the main office of the practice. Auditors will request to inspect the premises, will photograph all rooms, equipment, furniture and diplomas on walls. They will usually request copies of several patient records to review later. They will request copies of practice policies and procedures, treatment protocols, all staff licenses and certifications, drug formularies, medications routinely prescribed, and medications routinely used in the office. They will inspect any medication/narcotic lockers or storage cabinets and will request drug/medication invoices and inventories.

You will usually be contacted for follow-up information and documentation after the audit and will eventually be provided a report and, possibly, a demand for repayment of any detected overpayments.

## **8. Increased Medicare and Medicaid Fraud Initiatives**

Because of the severe state budget shortfalls and the federal deficit, we are seeing a tremendous increase in Medicare and Medicaid fraud initiatives, including but not limited to: audits by Medicare Program ZPICs and RACs, use of Medicaid Fraud Control Unit (MFCU) Investigative Subpoenas to obtain records, Medicaid Fraud Control Unit (MFCU) Search Warrants used to seize patient records, billing records and computers, Medicaid audit letters from the Agency for Health Care Administration (AHCA), and related activities. In one ten (10) day period, we had clients who had their offices searched and records and equipment seized by the Medicaid Fraud Control Unit (MFCU); we had another client who had 77 patient records subpoenaed by a MFCU investigative subpoena; and we had a client who experienced a site visit/audit conducted on less than 18 hours notice by a ZPIC for Medicare.

Medicare, Medicaid and TRICARE now routinely share audit results and information on repayments made by health providers. We had a client who conducted a self-audit and found an overpayment situation. The client made a voluntary disclosure and sent in a voluntary repayment of the amount it had overbilled Medicare. A few weeks later it received an overpayment demand from the federal TRICARE Program based on the same patients and the same claims for the co-pays and deductibles that had been paid by TRICARE.

Under recently enacted Florida law, if Medicaid audits your practice and determines an overpayment, you must repay the entire amount within thirty (30) days or your medical license will be suspended, even if you deny you owe the money and request a hearing.