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Circumventing HIPAA's Absence of Private Right of Action

Consumers do not have a private right of action under the Health Information Portability and Accountability Act (HIPAA). The HHS Office of Civil Rights enforces HIPAA regulations and provides assistance in meeting the requirements of the regulation. Lack of a private right of action may not, however, completely preclude health care collectors from liability if consumer privacy violations occur.

In the past, HIPAA violations for private lawsuits brought by patients were discarded. More recently, however, consumers are filing lawsuits under state law when HIPAA privacy violations occur, asserting negligence and contending state law requires providers comply with HIPAA's privacy regulations. Lawsuits pursued under state laws are gaining traction because under some state constitutions there is a broad right to privacy, and some courts have held federal law may be a legitimate element of a state law claim.

For instance, Health Net recently notified almost two million members that their information was breached. As a result, a class-action lawsuit, *Gardner v. Health Net, Inc.*, No. 2:10-cv-02140-PA-CW (C.D. Cal. May 14, 2010), was filed on behalf of Health Net's members alleging violations of California's Confidentiality and Medical Information Act, which prohibits the release of consumer protected health information (PHI) except under certain circumstances. In the complaint, the consumers asserted Health Net was required by HIPAA to make sure the class members' health information was protected. When the class members' protected health information was breached, the consumers asserted Health Net was in violation of its security contract and California's constitutional right to privacy.

Other cases have asserted liability under state law when providers disclosed PHI in a negligent manner. A recent case in Missouri attempted to use HIPAA to establish a standard of care violation of state law. In *I.S. v. The Wash. University*, No. 4:11CV235SNLJ, 2011 WL 2433585 (E.D. Mo. June 14, 2011), the consumer asserted the medical provider disclosed confidential medical information to the consumer's employer without authorization. The consumer was being treated for colon cancer and asked the provider to send information regarding the colon cancer treatments to her employer for medical leave purposes. The provider sent the consumer's entire medical record, including HIV status, mental health issues and insomnia treatments.

The consumer brought a state claim for negligence per se, claiming the provider had a duty to protect her health information under HIPAA and negligently failed to comply with the law.

The U.S. District Court for the Eastern District of Missouri allowed the case to proceed on the theory the consumer could argue HIPAA sets forth a standard of care by which entities are required to comply. The court found the consumer's "negligence per se" claim could stand under state law despite its exclusive reliance upon HIPAA because, "a federal statute which does not provide a private cause of action may be a legitimate element of a state law claim." The court held the facts alleged by the consumer in her complaint satisfied the elements of a "negligence per se" claim under state law.

In a similar but older case, *Harmon v. Maury Country, Tenn.*, No. 1:05

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U.S. Health System Performance Falls Short

The *National Scorecard on U.S. Health System Performance, 2011*, a survey conducted by the Commonwealth Fund Commission, provided a comprehensive assessment of U.S. population health and health care quality, access, efficiency and equity.

Based on the Scorecard's 42 indicators of health system performance, the U.S. earned an overall score of 64 out of a possible 100 compared with 67 in 2006 and 65 in 2008—well below its benchmarks.

Hospitals, nursing homes and home health care agencies showed marked improvement in patient treatment; however, the Scorecard highlighted the nation's limited access to health care, rising cost of health care and lack of preventative health care measures.

> The U.S. health system earned a score of 64 out of a possible 100.

Overall, the National Scorecard found the United States is losing ground in the effort to ensure affordable access to health care. Although there were promising improvements on key indicators; quality of care in the U.S. remains uneven.

The survey noted, access to care is essential for improving the U.S. health care system. Additionally, better primary care, care coordination and focus on preventative care offer the potential for improved outcomes at lower costs. The Affordable Care Act targets many of the gaps identified by the National Scorecard.

To view more information related to the *National Scorecard on U.S. Health System Performance, 2011* visit *http://www.commonwealthfund.org/Publications/Fund-Reports/2011/Oct/Why-Not-the-Best-2011.aspx?page=1*.

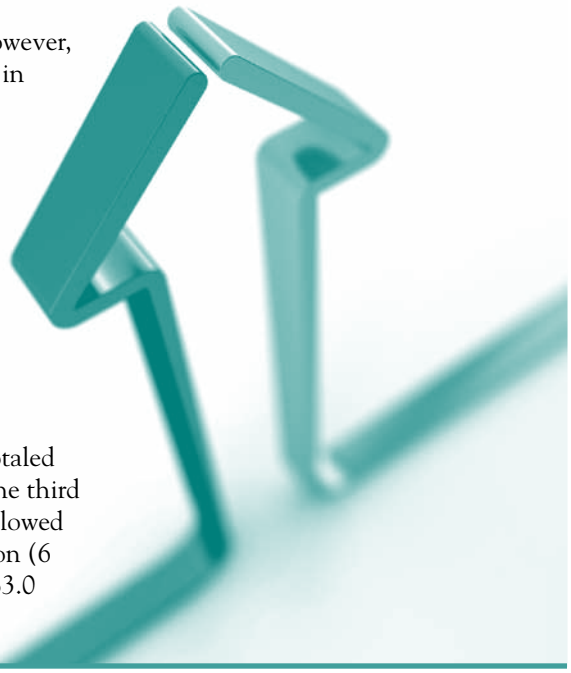
Third Quarter Health Care Mergers and Acquisitions Results

On Oct. 17, 2011, Irving Levin Associates, Inc. announced its preliminary findings regarding mergers and acquisitions in the health care industry during the third quarter of 2011. According to the report, there were a total of 217 M&A deals in the third quarter, with the total value of the deals reaching $58.4 billion. This was a strong showing for health care M&As, especially considering the recent turmoil in equity markets.

The breakdown of deals shows health care services posted 111 deals and health care technology posted the remaining 106 deals. By individual sector, the top areas of M&A activity were medical devices with 47 deals, long-term care with 27 deals and physician medical groups with 25 deals. Together, these three sectors accounted for 46 percent of the third quarter's total health care M&A volume. This is a departure from the more typical trend of the health care technology sectors dominating M&A deal volume. Instead, investment in the health care services sectors has been overtaking the health care technology sectors.

A closer look at the data, however, shows that much of the activity in the health care services sector was due to a single deal: Express Scripts' proposed $29.1 billion acquisition of its competitor Medico Health Solutions. The Express Scripts-Medco deal aside, the third quarter results show a more typical pattern with health care technology still dominating much of the total deal volume. Medical devices totaled $12.9 billion, or 22 percent of the third quarter's total dollar volume, followed by pharmaceuticals at $3.6 billion (6 percent) and biotechnology at $3.0 billion (5 percent).

More information on the third quarter M&A results is available at *http://www.levinassociates.com/1110mamhead*.



Report Addresses Identity Theft and Security Breach Strategies for the Health Care Industry

Electronic data sharing has led to new privacy and security challenges for the health care industry. Namely, the occurrence of security breaches and incidents of identity theft are on the rise. A September 2011 report by PwC's Health Research Institute (HRI)—which is based on a survey of more than 600 health care professionals—demonstrates these concerns, but also provides common strategies that may be used to bridge gaps yielded under current regulations.

The HRI report notes more than half of covered entities (CEs) surveyed experienced at least one breach in the last two years. Through research and interviews with health care executives, HRI whittled the scope of this concern into four key areas:

1. Access to Electronic Health Records (EHR) and sharing of health information: Only 58 percent of providers reported including appropriate EHR use as a component of their employee privacy training.
2. Business associates (BA): Since September 2009, 55 percent of reported breaches involved BAs and only 38 percent of CEs perform pre-contract BA assessments.
3. Secondary data: While nearly three-quarters of CEs use or intend to use some form of secondary data, less than half have addressed privacy and security ramifications.
4. Virtual touchpoints: Less than 50 percent of CEs have included the approved uses of social media and mobile devices in company privacy training.

In addition, HRI cited medical identity theft as the fastest growing form of identity theft. Since 2009, identity theft incidents accounted for 66 percent of reported security breaches. Over one-third of CEs surveyed noted they have experienced consumers who have sought services under another individual's name. HRI additionally noted the Ponemon Institute estimated 1.42 million Americans were affected by medical identity theft in 2010, with a total economic impact of $28.6 billion.

Although the aforementioned challenges are complex, HRI's report provides four key strategies to make such concerns more manageable. The implementation of these strategies may assist in bridging the gap between situations not specifically addressed under current regulations:

Strategy #1-Integrate privacy, security, and compliance approaches and frameworks. An integrated framework will allow CEs to address regulatory requirements and address vulnerabilities often not addressed in regulatory frameworks.

Strategy #2-Make minimum controls and standards a prerequisite to play. CEs that maintain a minimum set of internal and external privacy and security controls provides an opportunity to assume control of negotiations with BAs.

Strategy #3-Deputize all workers as privacy champions. CEs that educate their employees and hold employees accountable for privacy will create a culture of confidentiality where everyone is responsible for adhering to privacy standards.

Strategy #4-Make privacy part of the consumer experience and brand. CEs will benefit from connecting with consumers about the importance of privacy within the context of the value of their protected health information in advancing care and improving the health care delivery system.

HRI's full report, "Old Data Learns New Tricks," can be obtained at *http://www.pwc.com/us/en/health-industries/publications/old-data-learns-new-tricks.jhtml*.

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CV 0026, 2005 WL 2133697 (M.D. Tenn. Aug. 31, 2005), the consumer asserted state law claims, including a "negligence per se claim" for disclosing his prescription drug records in violation of HIPAA. The court held HIPAA's provisions do not completely preempt state law and the consumer's claims fell within that broad class of state law claims based on federal regulations that could be brought in state court. The district court noted, "state claims in the state courts are often based on a federal regulation," and HIPAA expressly preserves consistent state laws.

Cases such as the ones mentioned above may become more common as consumers and attorneys try to effectively clear the "no private cause of action" hurdle provided under HIPAA and seek creative ways to pursue action against covered entities. As these lawsuits become more common it is increasingly important for providers to establish strong privacy protection procedures within their agency and in their business associate agreements.

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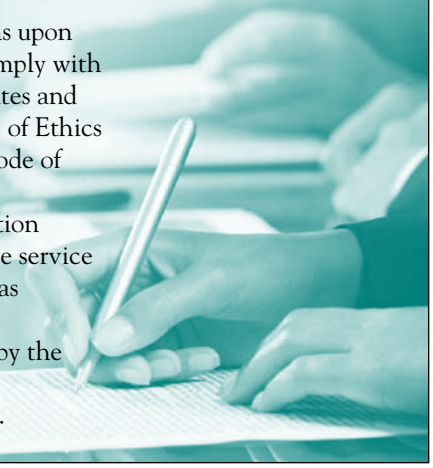
Did You Know?

ACA members can voluntarily commit to align their practices with ACA's *Health Care Collection, Servicing and Debt Purchasing Practices – Statement of Principles and Guidelines*. Those who are committed to the principles agree to:

- Perform services or payment operations upon receipt of information necessary to comply with all applicable laws, regulations, mandates and duties as prescribed by the ACA Code of Ethics and Professional Responsibility and Code of Operations.
- Clarify and disclose permissible collection recovery methods in the contingent fee service agreement or the debt sale agreement as applicable.

To view other commitments set forth by the guiding principles, visit ACA's website at *http://www.acainternational.org/hcguidelines*.



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