

LAW & MEDICINE

The Right to Physician Information

A case decided in January by a federal appeals court has some interesting implications for physician privacy—at least as it concerns the Freedom of Information Act.

Consumers' Checkbook, Center for the Study of Services v. United States Department of Health and Human Services was decided 2-1 in favor of the government by the U.S. Court of Appeals for the District of Columbia.

Consumers' Checkbook filed a Freedom of Information Act (FOIA) request in 2006 with the Centers for Medicare and Medicaid Services, for data that included diagnosis, type, and place of service, and Medicare identification number of the physician who performed the service. The request targeted physicians in the District of Columbia, Illinois, Maryland, Washington, and Virginia.

The CMS denied the FOIA request. Checkbook appealed to the CMS deputy administrator, and late in 2006, filed a legal proceeding under the FOIA in the

federal district court in Washington. The CMS argued that what Checkbook was asking for was not only exempt from disclosure under the FOIA but also was protected by a federal court ruling 29 years earlier in Florida, barring disclosure of such information from any member of the American Medical Association.

In 2007, the federal court in Washington granted Checkbook's request for disclosure.

An appeal followed. The issue before the appeals court was whether what was being requested "would compromise a substantial...privacy interest." If so, the court would have to balance the "privacy interest in nondisclosure against the public interest." Disclosure is not required if it "would constitute a clearly unwarranted invasion of personal privacy."

The majority of the panel reiterated a known principle in this area of law: An individual has a substantial privacy interest under the FOIA in his financial information, including income.

What Checkbook wanted disclosed would indeed reveal the total Medicare payments received by a physician for covered services. The court concluded at this point that "physicians have a substantial privacy interest in the total payments they receive from Medicare for covered services."

This privacy interest had to then be balanced against the public disclosure interest. To do this required an analysis of whether disclosure "would serve the core purpose of the FOIA," which is to contribute "significantly to public understanding of the operations or activities of the government."

Checkbook said it would do so in three ways: First, payments made to doctors would show how the HHS is performing in maintaining and enhancing quality and efficiency of services provided under Medicare. Second, they would show the agency's ability to uncover fraud and abuse. Third, they would highlight the agency's compliance with various transparency initiatives. The court disagreed and said that in the end, the public's interest under the FOIA is not well served because dis-

closure of such information reveals little or nothing about the HHS' own conduct.

Of particular interest is that the appeals tribunal said Checkbook had not shown that the financial data requested relate to the quality of care Medicare beneficiaries receive, and that the "medical community has not reached a consensus on whether the number of procedures performed by a physician correlates [with] the quality of those procedures." Also, the court was not persuaded by Checkbook that disclosure would determine if Medicare is paying doctors with insufficient certifications, disciplinary histories, or poor evaluations for a large number of procedures.

In addition, the HHS recently proposed a new system of record-keeping whereby consumers could compare the quality and price of health care services and make informed choices. The HHS and the CMS have initiated other projects to ensure quality of care for Medicare beneficiaries, so the data requested will do no service above and beyond what is already in the public domain.

While physicians hail this de-

cision as one less intrusion into their private financial affairs, the literature notes considerable waste in the manner in which health care is delivered and its incredibly high cost; certainly health care fraud and abuse are never far away from one's lips either. So while it is certainly useful to have financial data that may impact improvements in both cost and delivery, the FOIA route proved ineffective. There may be yet another day to achieve what Checkbook sought to do in this case.

For now, even though a partial dissent was filed, the court's majority said that no public interest here exists; consequently, no public interest under the FOIA is served by requiring disclosure of payments physicians receive through the Medicare program. Every Medicare provider can breathe a sigh of relief, knowing that his or her payments will be exempt and thus private, at least under the FOIA. ■

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BY MILES J. ZAREMSKI, J.D.

POLICY & PRACTICE

AMA Sues Aetna, Cigna

The American Medical Association and several state medical associations have filed separate class-action lawsuits against insurers Aetna Health Inc. and CIGNA, each suit claiming that the company used faulty data to undercompensate physicians. Filed last month in New Jersey federal court, the two lawsuits are similar to an earlier AMA suit against the owner of the Ingenix billing database used by Aetna and CIGNA, UnitedHealth, to determine fees for patients' visits to out-of-network physicians. As a result of the UnitedHealth lawsuit and an investigation by New York Attorney General Andrew Cuomo, UnitedHealth agreed to shut down the database and pay \$50 million to establish a new database run by a nonprofit organization. Among other things, the suits against Aetna and CIGNA seek a declaration that the insurers violated federal antitrust law and that they're liable to the plaintiffs for three times their damages, costs, and attorney fees. The medical associations also want the insurers to calculate and issue unpaid benefits to physicians. "We can no longer ignore the improper business practices of health insurers who decide to play by their own rules without regard to patients or the legitimate costs required to care for them," said Dr. Nancy H. Nielsen, AMA president.

Many People Go Without Drugs

More children and working-age adults are failing to take needed prescription medications because of cost concerns, according to a national study by the Center for Studying Health System Change. In 2007, 1 in 7 Americans younger than age 65 years reported not filling a prescription in the previous year because they couldn't afford the medication, up from 1 in 10 in 2003. Rising prescription drug costs and less-generous drug coverage probably contributed to the change, the report said. Uninsured, working-age Americans saw the biggest jump in unmet prescription needs during 2003-2007, with the proportion going without medications rising from 26% to almost 35%, the report said. But a growing proportion of working-age Americans with employer-sponsored health insurance also reported going without prescription medications.

FDA on High-Risk List

The Food and Drug Administration faces significant challenges that compromise its ability to protect Americans from unsafe and ineffective products, the Government Accountability Office said in adding the FDA to its biennial "high-risk" list. The GAO gives that label to government programs or agencies that need to address mismanagement within them. In its 2009 report, the GAO said the FDA needs to beef up its foreign-drug in-

spection program, better manage its reviews of companies' promotional materials, and ensure that drug makers properly present clinical data.

Report Finds HIPAA Inadequate

The government's main health privacy rule does not adequately protect people's health information, yet it hinders important health research, a report from the Institute of Medicine concluded. The privacy rule, stemming from the Health Insurance Portability and Accountability Act, is difficult to reconcile with other federal regulations governing research and personal information, the IOM report said. In addition, organizations that collect and use health data vary greatly in how they interpret and follow HIPAA, leading to potential privacy problems, the report said. Congress should create an entirely new approach to protecting personal health information in research, separate from the HIPAA rule, an IOM panel recommended.

Poll: Affordability Is Tops

Making health insurance more affordable trumps improving quality and expanding coverage among the public's priorities for health care reform, says a new poll. The survey from the Kaiser Family Foundation and the Harvard School of Public Health found that most people believe that action on health care is important to help the nation out of recession. But when asked to choose between coverage expansion, cost reduction, and delivery-system change, 4 in 10 named affordability as most important, followed by 3 in 10 who said that expanding coverage is the top priority. Roughly 2 in 10 picked improving the quality and cost-effectiveness of the health care delivery system. Two-thirds of those surveyed favored requiring all individuals to have health insurance, but when told that some may then have to buy health insurance they consider too expensive or don't want, support for the mandate dropped to 19%.

—Joyce Frieden

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