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NOW THAT THE DUST HAS SETTLED, HOW WILL MEDICAL LIABILITY BE REFORMED?

During this year's presidential election, the Bush-Cheney and Kerry-Edwards' campaigns agreed that a medical liability crisis exists in the United States warranting national reform. However, they disagreed on the extent of the crisis, its causes, and how to resolve it. Now that Americans have re-elected President Bush, and the dust from the presidential campaign rhetoric has settled, it may be helpful to review the Republican and Democratic plans to address medical liability issues, as the Republican plan heads to Congress. In an effort to refresh your recollection, this article addresses the Democrat and Republican Presidential Candidates' plans for medical liability reform, and contains a brief discussion of their views on the severity of the nation's medical liability crisis and its causes to shed light on their respective plans.

Kerry-Edwards Plan

The Kerry-Edwards' ticket adopted a non-cap approach to reforming medical malpractice liability. Among other ideas for reform, the plan would have prevented the award of punitive damages absent intentional misconduct, gross negligence, or reckless indifference to life. Also, similar to Minnesota's current law, the plan would have banned individuals from filing a medical liability claim unless a qualified specialist (medical expert) reviewed the claim and determined that the claim was reasonable. Further, the plan would have implemented mandatory sanctions for claims and defenses that were presented for an improper purpose or were unwarranted by existing law. Last of all, according to a report published by the American Academy of Family Physicians in January 2004, the plan would have required insurance companies to dedicate at least 50% of the annual savings to reducing malpractice premiums for health care providers.

Bush-Cheney Plan

The Bush-Cheney plan addresses the nation's medical liability crisis through multiple avenues. First, the plan calls for a statutory cap that limits non-economic damages, such as pain-and-suffering awards and punitive damages, to $250,000. According to the Bush-Cheney campaign, the $250,000 cap is a common sense limitation on non-economic damages that allows injured plaintiffs to be compensated, yet still allows other Americans affordable access to health care. The plan will also place a statutory cap, based on a sliding scale, on attorney contingency fees.

Additionally, the plan implements a “collateral offset rule,” which will allow both parties to enter into evidence proof of payments made by outside parties. Furthermore, the plan entails a joint and several liability reform that limits physicians' liability to the amount or percentage of care they provided to the Plaintiff. Lastly, the Bush-Cheney plan establishes a uniform limitation of actions (with the exception of a claim brought on behalf of a minor) that limits the time in which medical liability claims can be filed.

Candidates' views on the severity of the crisis and its causes

Although the candidates acknowledged that high malpractice insurance premiums have driven health

NOW THAT THE DUST HAS SETTLED.. continued on page 2

WHAT'S INSIDE

	page
Feds Warn Against Rent-A-Lab Plans	3
Health Care Attorneys	4
NEWS: STAT!	5
Welcome Our New Attorneys	6

NOW THAT THE DUST HAS SETTLED continued from page 1

care providers away from certain procedures or away from their practice altogether, the underlying causes of the crisis was a focal point of debate. The Kerry-Edwards campaign, while recognizing that frivolous malpractice lawsuits posed a problem, questioned the severity of the problem and contended that the cost of frivolous lawsuits represented less than one percent of the total cost of health care. According to the Kerry-Edward's campaign, the larger cause of the medical crisis was the decreased value of the insurance companies' investments. Specifically, Senator Kerry stressed that the increased premiums were directly connected to the downturn in the insurance companies' economic cycle, which was driven by such factors as insurer mismanagement and changing interest rates.

To the contrary, the Bush-Cheney campaign urged that the cause of the high insurance premiums was the rise in jury awards and the rising costs of defending frivolous malpractice claims. President Bush contended that his plan could save between $60 billion and $108 billion in health care costs annually resulting from a decrease in frivolous lawsuits and a substantial decrease in "defense medicine," which is a term used to describe the situation where a physician is forced to order unnecessary or overcautious tests or procedures to protect themselves from potential malpractice claims. The Bush-Cheney campaign stressed that the $250,000 cap on non-economic damages is a common sense limitation and solution to the nation's medical liability crisis.

What can we expect in the upcoming year?

Since President Bush was elected into office, we can expect that the Bush-Cheney plan or one similar to it will begin winding its way through Congress. Of course, as we are all well aware, the President must work with Congress to enact legislation. Thus, perhaps, the appropriate question is whether Congress' composition will allow the President to implement his plan.

The Republican Party picked up seats in both the Senate and the House of Representatives in the 2004 election increasing its control in Congress. Given the increased Republican control in Congress, it is not unreasonable to assume that President Bush has a better than even chance to enact his Medical Liability Reform Plan before his term is up. Time will tell!

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2005 FELHABER SEMINARS

Please attend one of our upcoming seminars, with discussions on a variety of timely legal topics. The seminar presenters include our firm attorneys who have expertise in the seminar subject matter. Recent seminars we have hosted include the following topics: estate planning, labor & employment, real estate, and multi-employer benefits. Seminars include a complimentary continental breakfast and/or luncheon.

SEMINAR SCHEDULE

Topic	Date	Location
Workers Compensation	Friday, April 15	Town & Country Club, St. Paul
Association Management	Tuesday, May 3	DoubleTree Hotel, St. Louis Park
Business & Corporate	Thursday, May 12	Town & Country Club, St. Paul

If you are interested in receiving a seminar invitation, **e-mail kdyck@felhaber.com**. State your name and address with the name of the seminar(s) you wish to attend. You may also log on to **www.felhaber.com**, which will have online seminar registration available approximately three weeks prior to the seminar date.

Felhaber Law Firm was recently named an HRCI (Human Resource Certification Institute) Approved Provider for a three year period. HRCI is an affiliate of the Society for Human Resource Management. What does this mean to Felhaber and its clients? For upcoming seminars with presentations that "add to a certified professional's knowledge of the HR field" the firm is eligible to determine PHR and SPHR recertification hours to its seminar attendees.

FEDS WARN AGAINST RENT-A-LAB PLANS

The U.S. Department of Health and Human Services Office of Inspector General issued an Advisory Opinion in December which should put the kibosh on new efforts to financially reward physicians for patient referrals. The OIG determined that a plan to essentially rent pathology labs to physician groups may violate the federal antikickback statute and, if the requisite intent were proven, serve as the basis for felony criminal convictions as well.

The OIG provides advisory opinions to "requestors" who voluntarily provide information about their planned financial relationships. The OIG makes clear that the resulting advisory opinion only applies to the requestor and can't be relied upon by any other individual or entity. The health care community watches OIG advisory opinions carefully, though, because they serve as a window into the federal government's enforcement mind.

The requestor in OIG Advisory Opinion 04-17 was a company that arranges for the provision of pathology laboratory services. Although this company didn't bill Medicare, Medicaid or other health insurance carriers for its services, it had a sister corporation that was a Medicare-certified pathology laboratory.

Under the proposal submitted to the OIG, the requestor planned to set up as many as five independent and self-contained pathology labs within a single building. The company would then enter into a series of contracts with one physician group per pathology lab. Physician groups would only be eligible to enter into the contracts with the company if the groups specialized in urology, gastroenterology or dermatology - essentially, types of medical group practices likely to utilize pathology lab services.

Each physician group would enter into four separate contracts with the company; a Management Agreement, a Sub-Lease Agreement, a Technical Personnel Agreement, and a Pathology Services Agreement. Under the terms of the Management Agreement, the company would lease equipment to the physicians necessary for the operation of a pathology lab. Under the terms of the Sub-Lease Agreement, the company would lease to the physicians the physical space in which the lab would operate. Under the terms of the Technical Personnel Agreement, the company would lease all of the lab technicians and other personnel who would provide the lab services. Finally, under the terms of the Pathology Services Agreement, the company would provide the part-time services of a pathologist (who was also employed by the company's sister corporation) to supervise the operations of the lab, and to provide the professional analysis of the specimens sent to the lab.

The physicians' contractual obligations were simple. They were to pay the company for the services provided under the terms of the four agreements. They were contractually obligated to keep up their credentials as physicians. Finally, the physicians were required to bill government and private insurance carriers for the lab services.

So why would the company rent out all of the space, equipment and people necessary to operate a lab to a group of physicians? And why would a group of physicians decide it wanted to operate a pathology lab - but in someone else's space with someone else's technicians and equipment?

The answers to these questions form the basis of the OIG's legal concerns.

> As with most questionable financial relationships, the probable motive can be discerned by following the money - looking to see who makes money BEFORE the relationship and who makes money AFTER the relationship.

If these physician groups never entered into these contracts with the company, they presumably would continue treating their patients, and continue ordering laboratory tests when medically necessary. However, since the physicians would not have their own pathology lab, those tests would be rendered at an outside lab. The laboratory that performed the tests would bill Medicare, Medicaid and other insurance companies for those tests, and the laboratory would keep the money.

If the physician groups entered into these series of contracts with the company, however, the physician groups would be viewed by Medicare and Medicaid as

the "provider" of the laboratory tests, and the physician groups would be able to bill insurance carriers for those tests and keep the proceeds. And, the amount the physician groups would receive from Medicare, Medicaid and other insurance carriers would exceed the amounts the physicians would have to pay the company under the terms of the four contracts. So, the physicians would make a profit on the provision of lab services.

The federal antikickback statute makes it a criminal offense knowingly and willfully to offer, pay, solicit, or receive any remuneration to induce or reward referrals of items or services reimbursable by a federal health care program.

If the remuneration is paid purposefully to induce or reward referrals of items or services payable by a federal health care program, the anti-kickback statute is violated. The OIG noted that "by agreeing effectively to provide services it could otherwise provide in its own right for less than the available reimbursement, the [company] would potentially be providing a referral source - a physician group - with the opportunity to generate a fee and a profit". The OIG determined that providing a physician group with the opportunity to generate a fee and a profit was providing "remuneration" within the meaning of the antikickback statute. The OIG noted that "based on the facts presented here, we are unable to exclude the possibility that the parties' contractual relationship is designed to permit the Requestor to do indirectly what it cannot do directly; that is, pay the physician groups a share of the profits from their laboratory referrals".

The company likely submitted its request for an OIG advisory opinion at least in part because it thought it had landed on a series of contractual relationships with the physician groups that complied with the so-called "Stark" law, and therefore should be permissible. In very general terms, the "Stark" law prohibits referrals by a physician to entities in which the physician or a member of her family has a financial interest. Conduct prohibited under Stark is similar in many ways to conduct prohibited under the federal antikickback statute. Both bodies of law have exceptions (Stark) or safe harbor regulations (antikickback) which protect financial relationships that would otherwise run afoul of the law. Many of the Stark "exceptions" have antikickback safe harbor equivalents. There are Stark law exceptions and antikickback safe harbors protecting certain types of space rental, equipment rental and personal services and management contract agreements.

Here, the company argued with the OIG that each of its four contracts with the physicians would fit within an applicable Stark "exception" and there-

FEDS WARN AGAINST.. continued on page 5

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FEDS WARN AGAINST.. continued from page 4

fore the entire financial relationship between the company and the docs should pass federal muster. The OIG disagreed. First, the Centers for Medicare & Medicaid Services (the agency with authority to issue opinions about the application of the Stark law) has repeatedly taken the position that just because conduct complies with Stark is no guarantee that it also complies with the antikickback law. Second, the OIG noted that even if each of the four contracts complied with some Stark exception and near-equivalent antikickback safe harbor, that would only protect the remuneration paid under each of those contracts (i.e., the actual rent paid for the equipment under the equipment rental agreement). None of those exceptions or safe harbors would protect the physician groups' retained profit from the pathology services.

OIG Advisory Opinion 04-17 may have particular relevance here in the Upper Midwest, where contractual joint ventures similar to this one have sprouted up in recent years in a variety of health care fields, including oncology services and diagnostic imaging. Some of these newly minted joint venturers attempt to avoid the reach of the federal antikickback statute by excluding services rendered to federally insured patients, such as Medicare beneficiaries and Medicaid recipients. In Minnesota, those efforts may succeed in avoiding attention from the federal cops, but not from state law enforcement. Minnesota has a state law prohibiting all conduct which would violate the federal antikickback statute no matter which insurer pays the bill. Therefore, state enforcers (including Attorney General Mike Hatch) will likely have legal concerns about rent-a-lab and similar schemes even if only privately insured patients are referred for services.

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NEWS: STAT!

The Centers for Medicare and Medicaid Services (CMS) released the long-awaited Prescription Drug and Medicare Advantage Final Rule on January 21, 2005. The Rule implements the revised Medicare Part C (the Medicare Advantage program), and the new Medicare Part D prescription drug benefit program. The final rule was published in the Federal Register on January 28, 2005.

The Minnesota Court of Appeals determined on December 14, 2004 that it did not violate the so-called "corporate practice of medicine" doctrine or the Minnesota Professional Firms Act for chiropractors, physical therapists or massage therapists to work as employees of a corporation owned and operated by a lay person. Two insurance companies had refused to pay claims submitted by Isles Wellness in part because the clinic was owned by a layperson not licensed as a healthcare provider. The insurance companies have filed a petition for review with the Minnesota Supreme Court. Isles Wellness Inc. v. Progressive Northern Insurance and Allstate Indemnity Company.

The Minnesota Court of Appeals also determined on January 18, 2005 that a law firm did not violate a woman's health privacy rights when it provided the woman's medical records to an expert physician witness retained by the law firm to defend its client against a negligence action brought by the woman. The Court of Appeals relied entirely on an analysis of Minnesota state law for its decision, with nary a word about HIPAA. Newman v. Brendel & Zinn, Ltd.

WELCOME OUR NEW ATTORNEYS

Felhaber, Larson, Fenlon and Vogt, P.A. is pleased to announce that Ryan M. Olson & Kristine M. Rock have joined our firm. Please join us in welcoming them to Felhaber.

KRISTINE M. ROCK

has joined the firm's Minneapolis office. Ms. Rock focuses her practice in the area of general litigation. Ms. Rock graduated with a B.B.A. in Management, with honors, from the University of North Dakota in 2001. She received her law degree *with distinction* from the University of North Dakota School of Law in 2004, where she was a member of the *Order of the Coif*.

RYAN A. OLSON

has joined the firm's Minneapolis office. Mr. Olson focuses his practice in the area of general litigation. Mr. Olson graduated with a B.S. in Business Administration, with honors from North Dakota State University in 1999. He received his J.D., *magna cum laude*, from Indiana University - Indianapolis in 2004, graduating in the Top 6% of his class.

Health Law Monitor

The Health Law Monitor is an update on legal developments. It is not intended to be legal advice and should not be relied upon without consulting counsel.

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