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Practice Area: Health Information Privacy and Security & Healthcare Billing and Collection

A recent case out of the United States District Court for the Eastern District of Wisconsin underscores the need for physicians and other health care providers to exercise great care when using patient health care records to prove the physician's/provider's claims in collection actions. The issue arises under Wisconsin's patient confidentiality statute, § 146.82. While generally requiring informed consent for the release of patient health care records, the statute provides an exception "to the extent that the records are needed for billing, collection or payment of claims."

The definition of "patient health care records" under Wisconsin law includes "billing statements and invoices for treatment or services provided by a physician or other health care provider." While such billing records clearly are needed as part of a physician's/provider's proof in a collection action, a significant question is whether the "billing and collection" exception allows the physician/provider to attach these records in their entirety, or whether the statute requires the physician/provider to submit these records only in a redacted form. That is the question that was presented to the district court in the case of *Ortiz v. Aurora Health Care, Inc.*, which arose out of the federal bankruptcy court.

In *Ortiz*, the court assumed that the provider needed to attach itemized lists of services at the time that it filed its proofs of claim. The provider complied with the applicable federal Bankruptcy Rule as well as the instructions accompanying the form relating to filing of claims (Official Form 10).

While the provider thus appeared to have complied with all applicable requirements of the *federal* court, the district court nevertheless concluded that the release went beyond the extent needed for collections purposes under *state* law since the provider could have filed the itemized list of services in a redacted form and requested permission to file the unredacted documents under seal. The court reached its conclusion even though the Wisconsin patient confidentiality statute does not expressly require redaction of records under the billing, collection or payment exception.

Violation of the patient confidentiality statute can have significant financial consequences. A related Wisconsin statute (§ 146.84(1)) allows "any person injured as a result of the violation" to recover actual damages, exemplary damages of not more than $25,000, and costs and reasonable and actual attorneys' fees. In the *Ortiz* case, the district court discussed the provider's potential exposure when a disclosure goes beyond "the extent necessary" under the billing and collections exception. The court concluded that the plaintiffs could recover exemplary damages even if they had not suffered any actual damages, so long as they could show that they were "injured" as a result of the violation.

There are a number of practical considerations arising out of the district court's decision in *Ortiz*. For physicians/providers who are filing new claims in bankruptcy court, Official Form 10 now requires filers to limit the disclosure of confidential healthcare information as part of their proof of claim. Thus, the issue presented in *Ortiz*, is unlikely to recur on a going–forward basis.

That leaves open the question of how health care physicians/providers should deal with past filings in bankruptcy court where the physician/provider may have included unredacted information in good faith reliance on bankruptcy rules and the official form in effect at the time of filing. In those situations, providers should consider taking the following steps:

- Physicians/providers may contact the Electronic Case Filing ("ECF") Help Desk for the bankruptcy court to request that the proof of claim be blocked from public access pending further discussion. The ECF Help Desk and the bankruptcy court clerk's office does its own quality control review of filed proofs of claim and will redact or block access if it is clear that the claim includes private information that should not be disclosed to the general public. In addition, upon request, the ECF Help Desk may block a claim at a creditor's request to remedy the potential violation.

- Physicians/providers should also contact their counsel to discuss additional or follow-up options for remedying any potentially inappropriate disclosures. This may include filing a motion to seal the claim or to treat the claim as having been filed under seal.

The *Ortiz* case also has implications for physicians/providers pursing collection actions in state court. As an initial matter, it is important to note that the district court in *Ortiz* is a *federal* court interpreting a matter of *state* law. State courts need not follow the *Ortiz* court's interpretation of the billing and collection exception under § 146.82 and, indeed, it is expected that the provider in *Ortiz* will appeal the district court's decision to the United States Court of Appeals for the Seventh Circuit. Unless the Seventh Circuit overturns the decision in *Ortiz*, and until this issue has been squarely addressed by the Wisconsin state courts, physicians/providers are well–advised to adopt similar safeguards when pursuing collection actions in state court.

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