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Class Action Lawsuits Sweep Across Wisconsin's Health Care Providers

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There is a wave of litigation confronting Wisconsin health care providers: class action lawsuits alleging wrongful charges for medical record requests. Since May 2017, more than 40 class actions have been filed around the state. Patients have filed these cases after their personal injury attorneys requested and paid certain certification charges and retrieval fees for their health care records. The lawsuits allege that the health care providers and their vendors were not permitted to charge the statutorily-based fees to anyone whom the patient authorized in writing to obtain their health care records. The lawsuits demand the return of the allegedly wrongful charges, plus exemplary damages of between $1 and $25,000 per violation.

By filing these cases as class actions, plaintiffs' attorneys seek to include all instances where the health care provider or its release of information (ROI) vendor charged the certification charges and retrieval fees in the six years prior to filing the lawsuit. To date, targets of these lawsuits have included hospitals, physician groups, radiologists, chiropractors, physical therapists, ambulance companies, a pharmacy, and a long-term care facility, among others. Patients have brought suit in the following counties: Milwaukee, Waukesha, Dane, La Crosse, Marathon, Dunn, Barron, Portage, Wood, Washburn, Vernon, Eau Claire, Chippewa, Marathon, Ashland, Polk, Outagamie and Winnebago.

Driving the lawsuits is a Wisconsin Supreme Court decision, *Moya v. Aurora Health Care, Inc.*, which held that an attorney authorized by his or her client in writing via a HIPAA authorization form to obtain the client's health care records is a "person authorized by the patient" and is therefore exempt from certification charges and retrieval fees under Wis. Stat. § 146.83(3f)(b)4-5.[1] Notably, the Wisconsin Supreme Court decision, issued in May 2017, reversed a December 2015 published decision by the Wisconsin Court of Appeals that determined the patient's attorney was not a "person authorized by the patient" and thus was subject to the fees.[2]

Prior to the *Moya* decision, many health care providers or their ROI vendors charged patients' attorneys and other third-party requestors the $8 certification charge and/or the $20 retrieval fee. While the Supreme Court held that a patient's own personal injury attorney cannot be charged these amounts, some parties have argued that the Supreme Court left open the question of whether other third parties who present a patient's signed HIPAA release form, such as insurance companies and defense law firms, can be charged these amounts. Most recently, the Court of Appeals noted in *Harwood v. Wheaton Franciscan Services, Inc.* that there is nothing in the *Moya* decision stating that a "person authorized by the patient" is limited to a patient's attorney, as opposed to any person authorized in writing by the patient.[3]

To mitigate risk, many Wisconsin health care providers and their ROI vendors have stopped charging requestors presenting a patient's signed HIPAA release form the certification charges or retrieval fees contemplated under Wis. Stat. § 146.83. von Briesen & Roper's attorneys are currently defending several health care providers involved in these class action lawsuits. We welcome the opportunity to help health care providers assess their current charging practices, mitigate against future risk and evaluate and assist with any potential exposure.

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[1] *Moya v. Aurora Healthcare, Inc.*, 2017 WI 45, ¶ 2, 375 Wis. 2d 38, 894 N.W.2d 405.

[2] *Moya v. Aurora Healthcare, Inc.*, 2016 WI App 5, 366 Wis. 2d 541, 874 N.W.2d 336.

[3] *Harwood v. Wheaton Franciscan Services, Inc.*, 2019 WI App 53, 388 Wis. 2d 546, 933 N.W.2d 654.
