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Katten Muchin Rosenman LLP

HEALTH CARE UPDATE

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The Katten Muchin Rosenman LLP Health Care Practice is pleased to present this newsletter to keep our clients informed on developments in health care law and the implications for their business.

Katten Forms Health Care Litigation Practice

The firm's Health Care Litigation Practice consists of experienced trial lawyers who have successfully represented hospitals, health care systems, HMOs, managed care organizations, pharmaceutical companies, medical equipment and device manufacturers, and ancillary health care companies in civil and criminal matters and investigations throughout the country. Attorneys in our Health Care Litigation Practice have advocated for our health care clients in a wide array of matters, ranging from False Claims Act claims and state and federal agency investigations to intellectual property litigation and alternative dispute resolution.

Click here to learn more.

Katten Wins Key Federal Antitrust Class Action Ruling on Behalf of Children's Memorial Hospital

Katten won a significant victory in a federal antitrust wage fixing class action brought by registered nurses against its client, Children's Memorial Hospital, and four other Chicago-area health care providers that were represented by separate legal counsel. On September 29, the U.S. District Court for the Northern District of Illinois issued an order denying class certification in a major antitrust action filed against Children's Memorial Hospital, Advocate Health Care, NorthShore University HealthSystem (formerly known as Evanston Northwestern Healthcare), University of Chicago Hospitals, and Resurrection Health Care, alleging that they had conspired, in violation of the Sherman Act, to depress the base hourly wages paid to Chicago-area registered nurses.

Read more.

Katten Successfully Represents New York City Department of Education in DOJ Investigation

On July 20, after six years of resisting federal Medicaid audit disallowances and threatened False Claims Act litigation, Katten New York attorneys Joseph Willey, Catherine Patsos, Steve Katz and Jowita Walkup finalized, on behalf of client New York City Department of Education (DOE), a three-way $540 million agreement with the Department of Justice and New York State to settle allegations that the State and the DOE submitted false Medicaid claims to the federal government for health services furnished to school children in special education from 1990 to 2001. The City is responsible for paying $100 million of the settlement amount, which will be paid over time. The federal audits had sought recoupment of over $1 billion, and the Department of Justice threatened

PRACTICE NEWS

D. Louis Glaser Joins Health Care Practice

This year, Katten added Louis Glaser to the firm as a partner in the Health Care Practice. Mr. Glaser focuses his practice on corporate, transactional and regulatory health care law. Read more.

Accolades

Katten's Health Care Practice was once again highly ranked by *Chambers USA: America's Leading Lawyers for Business*, and attorneys Michael Callahan, Laura Keidan Martin, Kenneth Davis, Steven Olson, Louis Glaser and Peter Nadel were recognized for their work. In addition, Mr. Callahan, Mr. Glaser and Mr. Nadel were included in the 2010 guide to *The Best Lawyers in America*.

to seek treble damages and penalties under the False Claims Act if the matter proceeded to litigation. The State, but not the DOE, will also be subject to a three-year compliance agreement with the federal government.

Read the *New York Times* article on the settlement.

HMOs Move to Enforce Rates Against Non-Participating Physicians

HMOs often have sufficient leverage to negotiate physician contracts with acceptable rates for services to health maintenance organization (HMO) members. But, in cases where the physicians are in a position to reject the HMOs' fee schedules and opt not to renew their provider contract, they may find the HMO nevertheless seeking to enforce the contract rates—and to the surprise of some, the courts may lend aid in the effort.

In some recent cases, HMOs have sued to enjoin formerly participating physicians from so-called balance billing of HMO members, i.e., accepting payment of the amount that the HMO is willing to reimburse and then seeking the remainder of billed charges from the patient. In cases where the state HMO statute requires the HMO to hold its members harmless from charges in excess of deductibles and co-payments, HMOs have sued non-participating physicians seeking to prevent them from charging HMO members fees in excess of the contract rates. Although no contract exists between the HMO and the physicians, the HMOs have claimed that they are "forced" to deal with non-participating physicians in geographic areas where the HMO lacks sufficient in-network physicians. Where state statutes require the HMO to hold its members harmless from excess charges, the HMO claims that the physicians should be paid pursuant to the previously negotiated HMO rates, usual and customary charges, or in accordance with principles of *quantum meruit*, i.e., reasonable payment for services rendered in the absence of a contract—rather than charging the published rates.

In one recent case the court refused the HMO's request for a temporary restraining order to prevent a non-participating physician group from balance billing HMO members, but subsequently denied the group's motion to dismiss the suit, which sought to limit the physicians' charges. Although the court voiced sensitivity to freedom of contract principles and noted that the HMO and the physicians had no contract, it held that the HMO's allegations were technically sufficient to state a claim for *quantum meruit*. This holding was unique because, among other things, claims for *quantum meruit* have typically been reserved to the party that provided or received the services. In this case, the HMO neither provided nor received the physician services, but was rather obligated under its contract with its members to reimburse them for physician charges.

The lesson for physicians is that the absence of a contract with the local state-licensed HMO may not provide complete insulation from claims to enforce the "contract" rates, especially if the HMO can credibly claim that the physicians enjoy market power based on an absence of in-network physicians in the relevant geographic area. Until such time as the legislative bodies enact clear rules governing physician charges or reaffirming the freedom of contract between non-participating physicians and patients, it is logical to expect courts to make differing and piecemeal rulings to achieve politically desired results—making the evolution of law in the area very difficult to predict.

Authored by Katten litigation partner James W. Hutchison for the American Health Lawyers Association October 15 Health Briefs e-Newsletter.

HHS Security Breach Notice Rule Now Effective

On August 24, the Department of Health and Human Services published its rule implementing the provisions of the HITECH Act that require covered entities and their business associates to provide notice of breaches of unsecured protected health information. The Rule, which applies to breaches occurring on or after September 23, 2009,contains key information about what constitutes a "breach," how to determine if breach notification is required (or not), and how to create a compliant breach notification process. It also updates the earlier HHS guidance document specifying encryption and destruction as the two technologies and methodologies for rendering PHI "secure"—such that breach notification requirements can be avoided altogether.

Read more.

New Laws Mandating Continuing Medical Coverage for Older Dependents Take Effect

A new federal law that protects full-time college students from losing their health insurance in the event of a serious medical condition came into effect on October 9. "Michelle's Law" amends ERISA, the Internal Revenue Code and the Public Health Service Act to extend coverage for the lesser of one year after the first day of the medically necessary leave of absence or until the date on which the plan would otherwise terminate such coverage. This follows Illinois Public Act 95-0958, which went into effect on June 1, to expand dependent coverage under health insurance policies. In addition to enacting a requirement similar to Michelle's Law, the new Illinois statute provides that policies of accident and health insurance or managed care plans that cover dependents shall not terminate or deny an election of coverage for an unmarried dependent due to age before the dependent's 26th birthday.

Read more.

Upcoming Events

The HITECH Act's New Breach Notification Requirements: Are You in Compliance?

October 30
8:00–10:00 a.m.

The Offices of Katten Muchin Rosenman LLP, 19th Floor Conference Center
525 West Monroe Street, Chicago

Katten Muchin Rosenman LLP and Grant Thornton LLP will present a breakfast and roundtable discussion on how the breach notification requirements affect covered entities and business associates.

Topics include the following:

- Investigating the breach: Did it really happen?
- Controls companies can implement to prevent a breach
- Elements of an effective breach notification process
- Why all of this matters—the new HIPPA enforcement landscape

Register now. (CLE Eligible)

Health Care Investments in the Era of Health Reform

November 3
5:30–8:00 p.m.

The Penn Club
30 West 44th Street, New York

Partners Laura Keidan Martin and Brian Richards will present this roundtable discussion on health care investment opportunities under the Obama administration, how health care reform may impact future health care investment risks and rewards, and other business trends impacting health sector investments.

Register now.

Financial Management Strategies and Operations

Presented by the Healthcare Financial Management Association

December 7–9
Swissôtel Chicago
323 East Wacker Drive, Chicago

Partner Louis Glaser will speak on "Physician-Hospital Alignment: Maximizing Collaboration and Minimizing Subsidizations" on Wednesday, December 9. The program will address the struggle to develop joint venture arrangements for ambulatory services and the structuring of collaborative physician employment agreements.

For more information, click here.

Presentations Available Online Now

Radiology Business Management Association's 2009 Fall Education Conference

Partner Kenneth Davis presented "To Merge or Not to Merge: The Business and Legal Issues When Radiology Groups Combine with Other Groups." Download the presentation.

Best Practices in Structuring Call Coverage After the Recent OIG Advisory Opinion 09-05

At this American Health Lawyers Association webinar, partner Louis Glaser presented the "Hospital Perspective," which reviews hospital structural considerations, design of payment methodology and the rationale for the advisory opinion. Download the presentation.

Health Care Investments Under the Obama Administration

Partner Laura Keidan Martin discussed health care investment opportunities and their risks and rewards, regulatory and reimbursement changes, and how to avoid regulatory pitfalls in business structuring at a seminar sponsored by the Private Equity Practice. Watch or listen to the podcast. (CLE Eligible)

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