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Notes from the Editor



Welcome to the new format of the **BDB Health & Medicine Reporter**. After taking into consideration our readers' comments from Buckingham's newsletter survey, we restructured the **BDB Health & Medicine Reporter** to make it more readable and user friendly. In this issue, we explore a broad range of topics from preventive care for health care practitioners to the Ohio Supreme Court's decision on the damage-cap provisions under tort reform. Finally, there is a section welcoming new attorneys to the Health & Medicine Practice Group. I am confident that you will find these articles insightful and helpful.

For current information on health & medicine law, please visit our web site, www.bdblaw.com or call one of our Health & Medicine Practice Group attorneys. As always, we welcome your opinions and feedback.

Timothy A. Spírko
Editor of the *BDB Health & Medicine Reporter*

FEATURE ARTICLES

Preventive Care

By: David E. Schweighofer

Prophylaxis: from the Greek, to guard or prevent beforehand. A procedure whose purpose is to prevent, rather than treat.

As physicians and other health care providers see their reimbursements flat line or begin to shrink, it is only natural to begin to reign in costs. Unfortunately, one such "cost," that of legal counsel, is a service that all too often is delayed or eliminated. And all too often the provider or health care organization then finds itself facing significantly higher costs due to unforeseen litigation or administrative penalties.

Consider the following questions:

If you are the owner or operator of a nursing home, do your admission

agreements require that a resident submit to mandatory arbitration to settle disputes? Have you had these agreements reviewed to insure that they can withstand a legal challenge alleging that they are substantively and procedurally unconscionable?

If you are a physician with a private practice location, have you performed a HIPAA Privacy and Security audit? Is Protected Health Information readily visible in your office? Have you posted or distributed Privacy Notices to your patients?

If you operate an Ambulatory Surgery Center or Independent Diagnostic Imaging Center, are your leases for equipment and space fully compliant

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Preventive Care

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with the newly released Stark II Phase III regulations? How could you demonstrate to the Office of the Inspector General that the rents paid in association with these leases are Fair Market Value?

If you are supplier of Durable Medical Equipment, is a completed Certificate of Medical Necessity sufficient to fend off a CMS claim of overpayment for lack of medical necessity? (Hint: According to the Ninth Circuit Court of Appeals.....the answer is no).

A word of caution is appropriate in these challenging economic times. If you are not certain that your

policies, practices, procedures, contracts, leases and employment agreements are fully compliant, have your legal counsel review them for you. A prophylactic strategy will be more cost effective in the long run.



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The Ohio Supreme Court Upholds Damage-Cap Provisions of Tort Reform Law

By: Thomas R. Himmelspach

The Ohio Supreme Court recently upheld the caps on non-economic and punitive damages, both included in a 2005 tort reform law, as constitutional. In *Arbino v. Johnson & Johnson*, 2007-Ohio-6948, decided on December 27, 2007, the court rejected a multi-pronged challenge to the caps, ending a line of previous decisions overturning tort reform measures on constitutional grounds.

In 2006, Melisa Arbino sued Johnson & Johnson in federal court, alleging defendant's birth control product caused blood clots and other side effects. The plaintiff used a provision of the Supreme Court rules allowing the court to address the constitutionality of the damage cap provisions of the 2005 Ohio tort reform law.

The non-economic damage caps under the tort reform law apply to "non-catastrophic" tort injuries, and limit damages for pain and suffering to the greater of \$250,000 or three times the amount of the plaintiff's economic loss. The caps do not apply to claims for

wrongful death or for catastrophic injuries, defined as the loss of a limb or bodily organ system.

The caps on punitive damages under the tort reform law vary depending on whether the defendant is a large employer (employs over 100 people), an individual or a small employer. For individuals and small employers, punitive damages are capped at the lesser of two times the compensatory damage award, ten percent of the defendant's net worth, or \$350,000. For large employers, the cap is two times the compensatory damage award. Regardless of the classification of the defendant, punitive damage caps will not apply if the jury finds that the defendant acted purposefully or knowingly.

The plaintiff in *Arbino* argued that the caps violated her constitutional right to a trial by jury. The court disagreed. Plaintiff still received her right to have a jury determine liability and damages (punitive and non-economic); the statute limited only the effect of the jury's findings. In

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The Ohio Supreme Court Upholds Damage-Cap Provisions of Tort Reform Law

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other words, plaintiff's right to a jury trial on her claim for punitive and non-economic loss damages was preserved, even though the law would give effect to only certain measure of the damages.

The plaintiff also argued that the caps violated her due process rights, claiming the caps were not rationally related to the stated goal of the legislature in enacting them. The court found that the legislature had identified harm to the state's economy from "uncertain and potentially tainted" damage awards. It concluded, therefore, that the caps did not violate plaintiff's due process rights.

The court ended its decision by noting that a growing number of states had established similar damage caps, and that while some states had found the statutes unconstitutional, the decision put Ohio within a growing trend. Two of the court's seven justices dissented.

The non-economic damage caps under the tort reform law apply to "non-catastrophic" tort injuries, and limit damages for pain and suffering to the greater of \$250,000 or three times the amount of the plaintiff's economic loss. The caps do not apply to claims for wrongful death or for catastrophic injuries, defined as the loss of a limb or bodily organ system.



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Welcome New Health & Medicine Attorneys

Stacey A. Borowicz (Columbus) is an Associate in the Health & Medicine Practice Group. Her practice focuses on physician practices and related businesses including imaging centers, ambulatory surgery centers and joint ventures. She regularly performs health care business transactions, formations, mergers, acquisitions and employment-related transactions. She is also familiar with drafting compliance plans and performing antitrust, fraud and abuse, anti-self referral law, Medicare coding and billing compliance, HIPAA, and corporate compliance analyses.

Eric J. Plinke (Columbus) is an Associate in the Health & Medicine Practice Group. His practice will continue to focus on counseling corporate and individual clients in all aspects of health law. He has counseled clients in practice formation, joint ventures, contract review and preparation, compliance programs, HIPAA privacy regulations, and

fraud and abuse issues. He has also successfully represented both entities and providers in medical staff matters and third party payor audits and has significant experience representing physicians and other health care professionals in regulatory investigations and hearings.

David E. Schweighofer (Cleveland) is a Partner in the Health & Medicine Practice Group. His practice will focus on regulatory matters involving hospitals, physicians, and other health care providers. Prior to joining BDB, David served as the Regional Director of Behavioral Medicine for the Cleveland Clinic Health System/East Region. He designed, developed and implemented behavioral medicine services throughout the East Region of the CCF Health System, including new construction and renovated inpatient and outpatient programs.

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Kudos

Joseph F. Feltes (Canton) wrote an article for the *Akron/Canton M.D. News* March/April 2008 edition entitled, "Discovery of Electronically Stored Information, How Ohio's Proposed Civil Rules Might Affect Physician Practices." The article focused on how Ohio's proposed civil rules might affect physician practices.

Jeffrey D. Weinstock (Boca Raton) was recognized in the *Palm Beach Post* in February for his involvement in the organization, Kids in New Directions (KIND). Jeff serves as a member of the Board. In celebration of the opening of its newest Florida location, California Pizza Kitchen hosted a special Pizza Sales Donation Day, with 100% of all dine-in pizza sales going to KIND. Funds raised benefited KIND's Boca Raton-based after-school programs and related scholarships for disadvantaged children living in the community.

Save the Date for these Upcoming Presentations:

April 4

**Three Major Issues Facing Long-Term Care Facilities:
Falls, Wound Care and Wandering**

Thomas W. Hess (Columbus) and G. Brenda Coey (Canton)
 Cleveland, Ohio

Sponsored by: Menorah Park Institute for Health Care Education

April 7

**Medical Malpractice Cases: Current Trends and How to
Handle**

Stephen P. Griffin (Canton)

Akron, Ohio

Sponsored by: University of Akron School of Law

June 2008

**Criminal Background Checks
Workplace Investigations**

Jan E. Hensel and Thomas W. Hess (Columbus)

Columbus, Ohio

Sponsored by: Ohio Health Care Association Human Resource Conference

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