

Health Law Vitals - A Healthcare Newsletter from Haynes and Boone, May 2018

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PRACTICES Healthcare Transactions and Regulatory, False Claims Act and Qui Tam Defense, Healthcare and Life Sciences, Litigation

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Healthcare Hazards Involving Medical Records During Bankruptcy

Companies in the healthcare industry face many unique challenges when undergoing a bankruptcy, including challenges arising due to the federal and state law framework governing the use and disclosure of medical information. In February 2018, the U.S. Department of Health and Human Services (HHS) announced that it had reached a settlement with the receiver appointed to liquidate the assets of Filefax, Inc., a medical record storage and transportation company, resolving claims against Filefax for potential violations of the Health Insurance Portability and Accountability Act (HIPAA). The HHS investigation, which commenced in 2015, indicated that Filefax impermissibly disclosed the protected health information (PHI) of 2,150 individuals by leaving the PHI in an unlocked truck in the Filefax parking lot, or by granting permission to an unauthorized person to remove the PHI from Filefax and leaving the PHI outside the Filefax facility for collection in an unsecured manner. During the investigation, Filefax stopped operating and was involuntarily dissolved. As part of the settlement, the receiver agreed to pay \$100,000 out of the receivership estate and to properly store and dispose of the remaining medical records in compliance with HIPAA.

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Ninth Circuit Decision Impacts Settling FCA Defendants

The False Claims Act (FCA) contains a number of provisions designed to prevent follow-on or parasitic lawsuits. One such provision is the government action bar, which prohibits a person from bringing an FCA action “based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.” In a 2-1 decision, the Ninth Circuit recently held that the government action bar prohibited a subsequent suit based on allegations that were made in a previously settled suit in which the government intervened, settled some of the claims, and dismissed the case, even though the previously-settled suit was no longer active. The Ninth Circuit’s decision is a big win for settling FCA defendants concerned about future suits based on similar allegations. Under the Ninth Circuit’s decision, as long as the government intervenes and settles some of the claims, then the government action bar would prohibit any future relator from bringing a later suit based on the same allegations. It should be noted, however, that the government continues to take an active stance against the Ninth Circuit’s decision, urging other courts to instead hold that the government action bar only applies while the government remains a party to an active suit.

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An Update on Telehealth in Texas and Beyond

Telehealth Initiatives on the Rise in Texas

As published in the [June 2017 issue of Health Law Vitals](#), Texas passed a new law (S.B. 1107) last year that enables healthcare providers to establish a doctor-patient relationship by telehealth—that is, using a telecommunications system without an initial face-to-face meeting. Accordingly, telehealth provider Teladoc voluntarily dismissed its lawsuit against the Texas Medical Board, which revised its rules to conform to the new law. The Texas Health and Human Services Commission is also in the process of amending the Texas Medicaid Telemedicine Services Medical Policy to implement S.B. 1107.

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Guidance to Avoid FCA Liability for Firms Investing in Healthcare Companies

The United States recently intervened in a lawsuit alleging that a pharmacy violated the False Claims Act, 31 U.S.C. §§ 3729 et seq. (FCA), by paying millions in kickbacks to marketers and submitting false claims for medically unnecessary prescriptions. Notably, the lawsuit named as a defendant the private equity firm that owns the pharmacy based on the firm's involvement in the alleged kickback scheme and the pharmacy's management. The government's intervention indicates that firms investing in healthcare companies could be liable under the FCA and, therefore, must exercise best practices and conduct due diligence with respect to the management of portfolio companies.

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