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HEALTH LAW INSTITUTE NEWSLETTER

Monitoring the pulse of health law

New Source of Stem Cells Could Alleviate Some of the Ethical Debate

By Amee Lakhani

Scientists at the Wake Forest University School of Medicine and Harvard School of Medicine say they have discovered a new source of stem cells that could one day repair damaged human organs. Instead of the controversial embryonic stem cells or the limiting adult stem cells, amniotic stem cells can be used to give rise to a variety of different tissue types with minimal risk. Researchers successfully extracted the cells from the amniotic fluid that fills the womb during pregnancy and then grew them in lab experiments.

According to lead author Anthony Atala, director of Wake Forest's Institute of Regenerative Medicine, "it's been known for decades that there are cells in amniotic fluid. The embryo is constantly shedding all these cells, as it's developing, to the amniotic fluid. The baby's actually breathing in, swallowing the fluid, and it's all coming out through all the pores and gets trapped in the placenta." Scientists extracted these cells from fluid samples taken as part of an unrelated routine diagnostic test during pregnancy, known as an amniocentesis, and then encouraged them to grow in the laboratory. Lab results indicated that these amniotic cells are pluripotent and are capable of giving rise to a variety of different cell types. The amniotic stem cells are able to transform into many different types of tissue found in fat, blood vessels, liver, muscles, and bone as well as the central nervous system.

These amniotic stem cells hold the greatest potential for treatment for the child from whose mother they are taken due to the exact genetic match. They can be used to treat birth defects in the newborn, or can be cryogenically frozen for use later in life. According to Atala, amniotic stem cells have two main advantages over embryonic stem cells. "First, no embryo needs to be harmed in harvesting the cells, sidestepping a major, hot-button political issue. Second, amniotic stem cells will not form tumor cells, as the considerably more raw embryo-derived cells can." However, Atala and other scientists emphasized that they don't believe these cells will make embryonic stem cells irrelevant. "There's not going to be one shoe that fits all," said Robert Lanza, scientific director at Advanced Cell Technology in Worcester, Massachusetts. "We're going to have to see which ones are most useful for which clinical conditions." ❑

References:
WashingtonPost.com, *Scientists See Potential in Amniotic Stem Cells* (Jan. 8, 2007), *at* http://www.washingtonpost.com/wp-dyn/content/article/2007/01/07/AR2007010700674.html; Scientificamerican.com, *New Source of Stem Cells: Amniotic Fluid* (Jan. 7, 2007), *at* http://www.sciam.com/print_version.cfm?articleID=F4BB3ACB-E7F2-99DF-349FD71C1164C66D.

EVENTS: SPRING 2007

Please join us for the Health Law Institute's Spring Colloquium! Each month, scholars, judges, practitioners, and community leaders from around the country share their research and answer questions.

Lectures take place during the lunch hour, providing law students with the opportunity to participate. For more information, please contact Rhea Banks at (312) 362-7271 or rbanks2@depaul.edu

Speaker: James Dechane, Partner at Sidley Austin LLP
Date: April 11, 2007
Time: 12:20pm-1:20pm
Location: DePaul Law Library, Rare Books Room

On April 26, 2007, from 5pm-7pm, the DePaul Health Law Institute will host an alumni reception at the University Club of Chicago.

Bayer Settles Action by 30 States Over Cholesterol Drug

By Erin Cullen

Thirty states have reached an $8 million settlement to resolve a consumer protection action initiated over concerns that Bayer had failed to adequately disclose safety risks associated with Baycol.

Baycol was introduced as a cholesterol lowering-drug, which Bayer began marketing in May 1988. Baycol is a type of statin, which is a drug that carries a known risk of myopathy, a weakening of the muscles. According to Florida Attorney General Bill McCollum, Bayer learned through studies performed post-marketing that the health risks associated with Baycol were significantly higher than other statins, especially when given in high doses and when combined with another particular cholesterol-lowering drug. Bayer voluntarily removed Baycol from the prescription drug market in August 2001, and an investigation was initiated by the thirty states in 2004.

The action alleged that Bayer failed to adequately warn consumers of the risk associated with Baycol, despite the fact that Bayer informed the U.S. Food and Drug Administration about adverse effects and higher risks. The settlement agreement was filed in Broward County, Florida. In it, Bayer Corporation agreed to pay a total of $8 million to the thirty states that brought the action. Bayer also agreed to register many of its clinical studies and post the results when each study is completed. Bayer is further required to fully comply with the state laws regulating the marketing, sale and promotion of its pharmaceutical and biological products and is prohibited from making false and misleading claims relating to any such product sold in the United States, according to Florida Attorney General

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NEWS OF INTEREST

A Recently Studied Health Insurance Model Boasts Greater Cost-Efficiency

By Camille Gourdet

A recent study revealed that a health insurance model based on "the overall value of clinical services" is more cost-effective than the current system of standard co-payment rates. This new model, Value-Based Insurance Design (VBID), aims to lower the cost for patients receiving less substantial health services, while charging more accurate prices for significant medical treatment.

There are two ways to implement the VBID model. In the first approach, the co-payment charge is directly tied to the service's degree of medical importance. This straightforward approach would not be difficult to implement. However, its failure to further measure the medical services' value to specific patients prevents it from being the most cost-efficient model. The second approach to VBID involves tailoring payments to the treatment costs of managing certain diseases and illnesses. Under this more individualized approach, payments would be based on a service's importance to the patient's overall condition. Though the long-term savings are evident, this type of VBID system requires more advanced data technology upfront.

A major advantage of the VBID model is its ability to reduce certain patient costs by charging a fee correlative to the actual worth of the services provided. This new payment structure would also neatly align with other value-based proposals such as "pay for performance."

The model, however, has its

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NEWS OF INTEREST

Illinois receives an "A" in the Fight Against Childhood Obesity

By Valerie S. Smith

Illinois received the highest grade possible in a University of Baltimore Obesity Report Card for the state's efforts to control and lower childhood obesity rates. The high mark is a result of several state initiatives, such as Governor Rod R. Blagojevich's hard work to ban junk food in elementary and middle schools, Illinois' participation in the nationwide CATCH (Coordinated Approach to Child Health) program and legislation for the collection of information relating to obesity including Body Mass Index (BMI) for students.

According to the most recent data from the Centers for Disease Control and Prevention, about sixteen percent of children ages six to nineteen in the United States are overweight. Overweight children experience either immediate health consequences or weight-related problems as adults including, but not limited to, cardiovascular disease, high cholesterol and high blood pressure. Other ailments children might face are asthma, Type 2 diabetes and sleep apnea.

Governor Blagojevich has worked to improve the health of Illinois' children. "Childhood obesity is one of the fastest growing diseases in America and most common health problem facing children today," Blagojevich said. "We're taking steps here in Illinois-like banning junk food from our elementary and middle schools-to keep our kids healthy." In addition to banning junk food in schools, Illinois began participating in the nationwide CATCH program in January 2004. CATCH is a multi-component health intervention program, which builds an alliance of parents, teachers, child nutrition personnel, school staff and community partners to teach children and their families how to be healthy for a lifetime. Approximately 6,000 elementary students participate in CATCH, which includes classroom curriculum, food service modifications, physical education improvements and family reinforcement.

These combined efforts led to Illinois being one of six states to receive an "A" from the University of Baltimore Obesity Report Card. The grade was based on the policies that states had enacted in the categories of nutrition standards at school, vending machine usage, body mass index measure, recess and physical education, and obesity programs and education.

The progress in fighting childhood obesity is nationwide. Chief Researcher Dr. Kenneth R. Stanton said, "This has been a great year in terms for our report card because there has been a lot of progress made across the country." ❑

References:
Press Release, Office of the Governor, Gov. Blagojevich announces Illinois receives an 'A' in the fight against childhood obesity (Feb. 1, 2007), *available at http://www.illinois.gov/PressReleases/PrintPressRelease.cfm?SubjectID=3&RecNum=5693.*

New York: Can the State Achieve Universal Health Care Coverage for all its Residents?

By Malcolm Harsch

Last month New York Governor Elliot Spitzer announced plans to reform health care in his state. His proposal was aimed at achieving universal coverage for all state residents, while also transforming the state's current "institution-centered" system to a "patient-centered" system. In a speech delivered at the Nelson A. Rockefeller Institute in Albany, NY, Spitzer described eight key health care reforms that will be included in his executive budget proposal for the upcoming year. The plan included such features as:

- **Expanding Child Heath Plus.** This is New York State children's health insurance program aimed at providing access to health insurance to all of the state's uninsured children.
- **Removing enrollment barriers.** This is intended to remove barriers that may be preventing people from enrolling and re-enrolling in Medicaid.
- **Initiating Medicaid reform measures.** This is aimed at redirecting and reinvesting Medicaid dollars towards reform.
- **Reducing Spending for pharmaceutical costs.** This would ensure that Medicaid Part D plans cover the drugs needed by all persons eligible for coverage.
- **Improving coordinated care for Medicaid patients with multiple medical needs.** This would include persons that require care across different systems.
- **Further developing the implementation of health information technology.** The thought is to invest in electronic health records, electronic prescriptions, telemedicine, and other innovative approaches.
- **Increasing Medicaid anti-fraud efforts.** This is intended to devote more resources to the state's Medicaid Inspector General. This would ultimately require the state legislature to enact a state false claims act.
- **Increasing funding for public health initiatives.** The focus would be on primary and preventative care programs.

Medicaid fills a significant portion of New York's state budget, accounting for over $45 billion a year. The plan would include funding cutbacks for some hospitals and nursing homes, but individual benefits would remain unaffected.

In his speech, Spitzer made sure to focus on the past failures surrounding health care. "What went wrong is that health care decision-making became co-opted by every interest other that the patient's interest. Government abdicated its responsibility to set standards, demand results and hold institutions receiving billions un state tax dollars accountable to the state and to the people the institutions serve."

Continued on page four

News of Interest

Government Will Not Sanction Hospital for Providing Free Dialysis

By Judy-Ann Smith

The Department of Health and Human Services, Office of the Inspector General (OIG) issued an advisory opinion regarding a public hospital's proposal to provide free acute dialysis treatment for chronic dialysis patients. The OIG concluded that administrative sanctions would not be imposed because the hospital's proposal posed little risk of abuse to federal health care programs.

The hospital, which provides care for many indigent patients, has dialysis services for its inpatients, but not for outpatient customers. Many chronic dialysis patients are, therefore, unable to obtain dialysis care. Chronic dialysis patients then present either to the renal clinic, which does not provide dialysis, or to the emergency department where they must be admitted, occupying hospital inpatient beds.

The hospital proposed admitting chronic dialysis patients for dialysis and then immediately discharging them after treatment. The hospital would not bill any third-party payors for this service, including Medicare and Medicaid. The OIG said that the hospital proposal could confer a substantial benefit on federal health care beneficiaries and potentially violate the civil monetary penalty (CMP) provision and the anti-kickback statute of the Social Security Act.

The OIG found, in connection with the CMP provision which prohibits beneficiary inducements, that it was unlikely that free dialysis treatments would influence federal health care beneficiaries to select the hospital for services reimbursed by Medicare or Medicaid. Specifically, the OIG stated that the hospital would place patients with outpatient dialysis centers, the hospital did not plan to advertise the free dialysis service, and even though the provision of free dialysis could create a "feeling of goodwill" toward the hospital and possibly influence patients to use non-dialysis services, this influence was "speculative and attenuate by circumstances beyond the hospitals control."

The OIG also discounted anti-kickback concerns because (1) the hospital would absorb the cost of providing the free dialysis, (2) a primary feature of the proposal was to help place patients with outpatient dialysis facilities, (3) in designing this proposal, the goal of the hospital was to free up inpatients beds and (4) free dialysis service was consistent with the hospital's statutory duty to provide healthcare services to the community. ❑

Reference:
OIG Advisory Opinion No. 07-01 (Dep't of Health and Human Services, Jan. 18, 2007)

Bayer Settlement *continued from page one*

Bill McCollum. Bayer has not admitted any wrongdoing in the settlement agreement.

The settlement is awaiting approval from a circuit court judge. Settlement payment will go towards paying for state consumer protection and enforcement programs. Four states (Pennsylvania, Vermont, Michigan and Connecticut) will each receive $600,000 from the settlement, and the other states (Arizona, Arkansas, California, Delaware, Florida, Illinois, Kansas, Kentucky, Maine, Maryland, Massachusetts, Mississippi, Montana, Nevada, North Carolina, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington and Wisconsin) will each receive $200,000. ❑

References:
Press Release, Office of the Attorney General of Florida, *McCollum Announces $8 Million Multi-State Settlement with Bayer* (Jan. 23, 2007), *available at* http://myfloridalegal.com/newsrel.nsf/newsreleases/5AB7E5066E09FDE28525726C005E4D97; *Idaho settles with Bayer: Drugmaker allegedly didn't warn consumers about cholesterol drug risks*, The Idaho Statesman, Jan. 24, 2007.

New Insurance Model *continued from page two*

drawbacks. Implementing a VBID system would require a great deal of initial planning, and entail significant start-up costs. Prioritizing the protection of patients' privacy and preventing fraud would be necessary. The methods of setting costs and then discerning where patients fit into the payment structure would need to be intentionally non-discriminatory, medically sound and thoughtful.

Ultimately, the VBID model could be a sensible step towards a health care system that offers a higher caliber of quality at more cost-efficient rates. ❑

References:
Michael E. Chernow, Allison B. Rosen, and A. Mark Fendrick, *Value-Based Insurance Design*, HEALTH AFFAIRS (Jan. 30, 2007), *available at* http://content.healthaffairs.org/cgi/content/abstract/hlthaff.26.2.w195.

New York Health Care Reform *continued from page three*

Many remain skeptical of the plan because in the past, similar freezes on Medicaid funding have not worked. Acknowledging this in his speech, Spitzer said, "I know that those who have benefited from the status quo will fight hard to resist these necessary reforms. I hope we can convince them to become part of the solution. But, if we can't, then I will do what the people elected me to do and fight for what I believe is right and for the good of all New Yorkers."

It remains to be seen just how much of a battle Spitzer has ahead of him. He should work closely with Hillary Clinton, his "health care reform friendly" Senator, if he truly intends to pass legislative reform. ❑

References:
New York State Governor Eliot Spitzer, *Health Care—Patients First*, Speeches (Jan. 26, 2007), *available at* http://www.ny.gov/governor/keydocs/0126071_speech.html.

California NAILS Unsafe Cosmetic Products

By Garrett Kerr

A new set of laws in California will protect consumers from the potentially harmful ingredients found in many cosmetic products. In the past, cosmetic companies were able to escape reporting all of the ingredients in their products. The protection of "trade secrets" allowed many companies to mask the inclusion of carcinogenic chemicals, such as formaldehyde and toluene, behind a curtain of more comforting language including "fragrance," "flavoring," and "other ingredients." The California legislature designed the new laws to safeguard consumers in two ways. The first law provides additional regulation on "cosmetologists, barbers, estheticians, manicurists, and electrologists." The second law requires cosmetic manufacturers, which are regulated by the FDA and have an aggregate annual sales figure of at least $1,000,000 "both within and outside of California," to disclose a list of all their products that contain chemicals known to cause reproductive toxicity or to be carcinogenic.

The law directly affecting cosmetic manufacturers, the California Safe Cosmetic Acts of 2005, is the first of its kind in the United States. However, the concept is not novel, as the European Union has been banning cosmetics with harmful ingredients since 2003. The California act will not ban the products; it only requires the manufacturers to disclose the unsafe components. To protect "trade secrets," the information regarding the specific chemical makeup will not be subject to traditional public access rules, but the producer will still be required to report the product's safety, or lack thereof. Ultimately, the goal is to incentivize cosmetic companies to reformulate their products rather than have to report that their product may cause cancer or birth defects.

A vast majority of the harmful ingredients are found in nail and hair care products. As such, the update to the Barbering and Cosmetology Act serves to protect consumers by regulating and disciplining salons and other enterprises for violating health and safety codes. Analysis by the state legislature revealed a shocking amount of skin infections in customers that had received professional services at nail salons. While many salons were not linked to unsafe practices and infections, the legislature still felt the incidents of contamination warranted further regulation to protect consumers from the few salons that were troublesome. The addition to the act allows the executive officer of the State Board of Barbering and Cosmetology to suspend a salon's license to "protect the public's health and safety." To satisfy due process rights, the suspension is stayed and the license is put on probation for one year while the licensee has the right to appeal the suspension to the Board's disciplinary committee.

The laws were of such importance to the legislature that they were enacted immediately. Both the California Safe Cosmetics Act of 2005 and the Barbering and Cosmetology Act are important steps in protecting the public from harmful carcinogens, reproductive toxins, and infections. The example set by California, as well as the European Union, should be emulated by other states in an effort to promote corporate responsibility and a duty to the public health. ❑

References:
Momo Chang, *New Laws Affect Nail Salons, Customers*, INSIDE BAY AREA, February 16, 2007, *available at* http://www.insidebayarea.com/ci_5056720?source=rss; The California Safe Cosmetics Act of 2005: Cal. Health & Safety Code §§111791-111973.5;
Barbering and Cosmetology Act: Cal. Bus. & Prof. Code § 7403.2.

"Good Samaritan" Law Extends Protection to Those Trained in First Aid by the National Safety Council

By Courtney Quilter

On January 25, 2007, Governor Blagojevich signed Illinois Senate Bill 1195, which protects people who attempt to help injured people from lawsuits. Senate Bill 1195 was sponsored by State Senator John J. Cullerton (D-Chicago) and State Representative John A. Fritchey (D-Chicago) and provides that any person who is currently certified in first aid by the American Red Cross, the American Heart Association, or the National Safety Council, and who acts in good faith to administer free first aid, is protected from being sued by the people they are trying to help. Willful and wanton misconduct on the part of the Good Samaritan in providing the emergency is excluded from protection.

In June 2006, Governor Blagojevich signed a new law protecting "Good Samaritans" trained in first aid by the American Red Cross or the American Heart Association from being sued for helping someone who is seriously injured. This law went into effect on July 1, 2006. Senate Bill 1195 extended protection to people who received first aid training from the National Safety Council and was effective immediately. The National Safety Council is headquartered in Illinois and provides safety training programs.

According to Representative Fritchey, "fear of litigation should not prevent a certified first aid provider from administering care, especially in situations where their help can mean the critical difference between life and death." ❑

References:
Illinois Government News Network, *Governor Blagojevich Signs Law Extending "Good Samaritan" Protection to People Trained in First Aid by National Safety Council* (January 25, 2007), *available at* http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=5668.

Case Notes

HDC Medical, Inc. v. Minntech Corp., 474 F.3d 543 (8th Cir. 2007)

By Elese Hanson

HDC Medical, Inc. was unsuccessful on appeal of its antitrust suit against Minntech Corporation, as the Eighth Circuit affirmed the lower court's grant of summary judgment.

Both companies produce a medical device known as a dialyzer reprocessing machine. While dialyzers serve as an artificial kidney for patients undergoing hemodialysis, dialyzer reprocessing machines sanitize reusable or "multiple-use" dialyzers. The companies also produce solutions for use with the dialyzer reprocessing machines.

In its complaint, HDC alleged that Minntech violated the Sherman Act, 15 U.S.C. §§ 1, 2, by modifying its machine such that HDC's solution could no longer be used. Minntech's motion for summary judgment was granted by the district court. HDC appealed.

In affirming the district court's dismissal, the Eighth Circuit first set forth the standard for establishing a prima facie claim of monopolization under the Sherman Act. The plaintiff must show that the "defendant 'possessed monopoly power in the relevant market' and 'willfully acquired or maintained that power.'" *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1490 (8th Cir. 1992). The Eighth Circuit recognized the importance of defining the relevant market and that the dispute centered on this issue. The district court defined the market broadly to include both single-use and multiple-use dialyzers. With this expansive market definition, the court concluded that Minntech did not possess monopoly power.

HDC argued that a separate market exists for each type of dialyzer. Furthermore, HDC argued that the district court failed to consider case law suggesting that price differential between products with the same use can establish reasonable interchangeability, supporting an inference of two separate markets. The Eighth Circuit, however, found that a price differential alone is insufficient to infer two separate markets. The Eighth Circuit distinguished the cases relied on by HDC and affirmed the district court's grant of summary judgment.

In addition, the Eighth Circuit found that HDC did not provide evidence of predatory or anticompetitive conduct sufficient to establish a claim of attempted monopolization. The Eighth Circuit found a legitimate business justification for Minntech's refusal to honor its device's warranty if a competitor's reprocessing solution was used. The Eighth Circuit did not see this policy as anticompetitive. Furthermore, the Eighth Circuit did not find any evidence that Minntech's modifications to its device were anticompetitive. ❑

United States v. Okoro, Slip Copy 2007 WL 98804

By Danielle Horstman

The 5th Circuit Court of Appeals recently upheld a physicians 151 month sentence after he was found guilty of mail fraud, health care fraud, and submitting false claims to the IRS. Dr. Okoro was a native of Nigeria who worked for various medical clinics and hospitals in the United States, in addition to traveling to Nigeria to provide care to impoverished communities.

In 1996, the FBI and IRS began investigating Dr. Okoro and discovered that he had been submitting claims to insurance companies for medical services of supposed victims of motor vehicle accidents. In fact, the accidents and services were a ploy to recover payment from the auto insurance company. Dr. Okoro had also falsely billed Medicare for physical therapy services and recovered over $300,000 between 1999 and 2001 for services he never provided. It was further discovered that Dr. Okoro billed Medicare for services in the United States when he was in Nigeria on mission trips. In 2002, Dr. Okoro was indicted by a grand jury on fifteen counts of aiding and abetting mail fraud, three counts of filing false income tax returns, and seven counts of healthcare fraud. He was sentenced by the district court to 151 months in prison.

Dr. Okoro appealed after *United States v. Booker* claiming that the *Booker* guidelines made the sentence unreasonable, and more specifically that the district court failed to consider his history and characteristics as required by the guidelines. The 5th Circuit found that the district court clearly examined Dr. Okoro's charitable work in Nigeria, but found that it was completely fraudulent as he submitted claims to Medicare for services during his charity work. The 5th Circuit found that the 151 month sentence was reasonable and factored in all the necessary guidelines imposed by *Booker*. ❑

Reference: *United States v. Booker*, 543 U.S. 220 (2005)

Central Indiana Podiatry, P.C., v. Krueger, 859 N.E.2d 686 (Ind. Ct. App. 2007)

By Jim Gay

An Indiana Court of Appeals reversed a trial court's denial of Central Indiana Podiatry, P.C.'s (CIP) request for a preliminary injunction against a former employee, Kenneth Krueger, D.P.M. CIP asserted that Krueger violated restrictive covenants contained in his employment contract.

The employment contract entered into between CIP and Krueger contained non-compete restrictions, which restricted Krueger's ability to divulge patient names to any third party or contact those patients for the purposes of performing podiatric services, and required that he not practice podiatry within 14 counties and not employ any CIP employees. After several years of employment with CIP, Krueger was terminated for cause. Shortly thereafter, Krueger obtained employment as a podiatrist with Meridian Health Group, to which he provided a list of former patient's he saw at CIP.

The trial court denied CIP's request for an injunction citing that Indiana law required Krueger to inform his patients of his changing practice. The trial court also stated

Continued on page seven

Bagent v. Blessing Care Corp., 2007 WL 121319 (Ill. Jan 19, 2007)

By Sarah Flotte

The Illinois Supreme Court recently held that a hospital was not liable for its employee's disclosure of confidential health information.

In 2003, plaintiff Suzanne Bagent was a patient at Quincy Medical Group. The hospital sent Bagent's blood samples to Illini Community Hospital were employee Misty Young analyzed the results. Young inadvertently revealed the test results, specifically that Bagent was pregnant, to Bagent's sister at a tavern.

Bagent sued Young and Blessing Care Corporation (doing business as Illini Community Hospital) under the theory of respondeat superior. Bagent alleged breach of confidentiality, invasion of privacy, negligent infliction of emotional distress and intentional infliction of emotional distress. The hospital moved for summary judgment arguing that Young's statement was not attributable to Illini Community Hospital because her actions were not within the scope of her employment.

The trial court granted the hospital's motion for summary judgment finding that Young's disclosure to Bagent's sister was not within the scope or in the course of her employment or to serve the purposes of the hospital. Therefore, the hospital could not be found vicariously liable. The Illinois Appellate Court reversed, finding that a question of fact existed as to whether the purpose of the Young's disclosure was motivated by a purpose to serve the hospital.

The Illinois Supreme Court reversed the appellate court's decision and held that for conduct to fall within the scope of an employee's employment it must meet three criteria. Specifically, the conduct must be of the kind the employee is employed to perform, it must occur substantially within the authorized time and space limits, and, finally, it must be actuated, at least partially, by a purpose to serve the employer. Based on the criteria, the Court found that Young's disclosure was not the kind of conduct she was employed to perform, the disclosure was not motivated to serve the hospital and that the hospital expressly forbade the employee to reveal patient information.

Therefore, the Court found no reasonable person could conclude from the evidence that the employee, who disclosed the information to a patient's sister at a bar, was acting within the scope of her employment. ❑

Wisconsin v. Amgen Inc., No. 06-C-582-C (W.D. Wis. Jan. 16, 2007)

By Matthew Rupsis

An ongoing Wisconsin lawsuit has taken yet another procedural turn. In July 2004, the state of Wisconsin filed a lawsuit in Dane County Circuit Court accusing numerous pharmaceutical companies of violating state laws. The complaint alleged that the companies illegally overpriced their drugs, which caused the state to overpay for drugs bought through the Medicaid program. On January 16, 2007, one of the defendants, Dey Inc., failed on its third attempt to remove the case to federal court.

The first removal attempt, filed by Dey in July 2004, asserted federal diversity jurisdiction based on 28 U.S.C. § 1332. The second removal attempt, filed in July 2005, asserted federal question jurisdiction under 28 U.S.C. § 1331. These attempts were rejected by the district court, and the case was remanded to state court in both instances.

In September 2006, the U.S. government intervened in a federal False Claims Act (FCA) qui tam action against Dey, which was based on claims similar to the state claims in the Wisconsin case. One month later, Dey again attempted to remove the case to federal court, arguing now that the court had original jurisdiction under 37 U.S.C. § 3732(b), which allows federal jurisdiction in a state law action for recovery of state funds, "if the action arises from the same transaction or occurrence as an action brought under [the FCA]."

The U.S. District Court for the Western District of Wisconsin rejected this latest attempt at removal. The court stated that § 3732 (b) would probably not confer original federal jurisdiction in the present case because it was filed three years before the federal qui tam action. Although the Court did not specifically rule on that issue, it noted that the removal attempt was untimely under 28 U.S.C. § 1446(b). The case has been remanded to state court, and Dey has been ordered to reimburse the state of Wisconsin for its costs in responding to the removal attempt. ❑

Central Indiana Podiatry *continued from page six*

that it believed CIP was seeking an injunction not to protect its good will, but rather to protect itself from lost profits, and that the non-compete agreement was overly broad because it covered more than 48% of the state, much of which CIP was not present.

The appellate court reversed, finding that "CIP had a legitimate protectable interest that could be protected by a covenant." Specifically, the court mentioned that CIP's good will was jeopardized when its former employee practiced podiatry nearby and that the business' good will included the names and addresses of customers.

Next, the Court held that the scope of the non-compete agreement was reasonable because the geographic restriction included counties where CIP clinics were located, as well as adjacent counties from where CIP drew patients.

Finally, the court determined that a preliminary injunction was warranted because there were no adequate remedies at law due to the fact that tracking patients lost and calculating the damages as a result of that loss would be difficult. The court found the clinic had demonstrated that the harm it would sustain outweighed any harm inflicted by the injunction. ❑

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