

# Health Care Compliance LETTER

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Contributing Editor**

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## CMS, OIG Medicaid fraud control efforts examined by Senate

**by Catherine Hubbard, M.A., Contributing Editor**

The federal government is planning to use funds dedicated by the Deficit Reduction Act of 2005 (DRA) to increase its efforts to combat fraud in the Medicaid system, according to witnesses who testified at a March 28 Senate hearing.

With the passage of the DRA, CMS is now planning the implementation of the Medicaid Integrity Program, said Dennis Smith, director of the CMS' Center for Medicaid and State Operations. CMS will enter into contracts with eligible entities to carry out reviews, audits, and identification and recovery of overpayments, he said. Also, CMS will increase its oversight of state program integrity efforts as well as provide training and best practices guidance to state program integrity units, Smith said at a hearing of the Homeland Security and Governmental Affairs Subcommittee on Federal Financial Management, Government Information, and International Security.

**OIG's priorities.** The Office of Inspector General (OIG) also will continue to collaborate with CMS, state auditors, the Department of Justice (DOJ), and other government enforcement agencies to identify, prevent, and deter fraud and abuse, according to Daniel Levinson, HHS Inspector General.

In the current and coming fiscal year, OIG's antifraud priorities in Medicaid will include:

- working more closely with Medicaid Fraud Control Units (MFCUs), CMS and partner states;
- focusing on areas of the Medicaid program that are known to be vulnerable in the Medicare arena;
- working with MFCUs and state agencies to identify patterns of potential fraud;
- initiating projects that cross state and program lines, such as reviewing billing data from providers that bill more than one state, or bill both Medicare and Medicaid to determine if the volume of claims reveals the potential for false billing;
- expanding work on quality of care;
- partnering with MFCUs, the State Survey and Certification teams, DOJ, and state prosecutors; and
- supporting outreach and education efforts to MFCUs, Attorneys General Offices and licensing boards to refer matters to OIG for exclusion action.

**Developing a comprehensive plan.** In implementing the DRA provisions related to the Medicaid Integrity Program, "CMS has a unique opportunity to strengthen its leadership of state and federal efforts to control fraud, waste and abuse," according to

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## Fraud & Abuse (cont.)

Leslie Aronovits director of the Government Accountability Office Health Care, Program Administration and Integrity Issues. The most immediate challenge will be to develop its comprehensive plan that will provide strategic direction for CMS, the states, and law enforcement partners, she added.

Chairman Tom Coburn (R-Okla) noted that under the DRA, CMS and OIG are required to develop a comprehensive plan together. Smith replied, "We will be working with all of our partners in developing that."

Sen. Daniel Akaka (D-Hawaii), used the hearing to call for repeal of a provi-

sion in the DRA that requires individuals applying or reapplying for Medicaid to verify their citizenship through additional documentation requirements, saying the requirements create "barriers to healthcare." ■

*CCH Washington Bureau, March 30, 2006.*

## Trends

### The legal health record in the electronic age: What's in, what's not

by Catherine Hubbard, M.A.,  
Contributing Editor

If your facility's health records are subpoenaed, will you have the right documents in your legal health record? The appropriate documents to include in the record have changed in the electronic age, so it's important to redefine what should be included and left out of the record.

Cheryl Servais, vice president and compliance and privacy officer, and Deborah Rowan, senior health information management consultant for electronic health record implementation, both with Precyse Solutions, Wayne Pennsylvania, provided tips for defining the legal health record during an American Health Information Management Association audio seminar on February 28, 2006.

**Defining "legal health records."** Traditionally, records consisted of documents you can hold in your hand, such as medical documents, bills and X-ray films. But now they may include e-mails between consulting physicians, electronic pop up reminders and even patient health records that patients have forwarded to their physicians, said the speakers. "There are a lot of issues that have to go into defining the legal health record," Servais noted.

When deciding what to include, health information managers should first look at federal and state laws, regulations and standards, according to Rowan. Even though the exact language of these laws and regulations may refer to paper record requirements, they still can apply to the electronic equivalent, Servais stressed.

**Using a grid.** Rowan recommended using a grid to redefine the legal health record, which is a subset of the designated record set. A designated record set is a group of records maintained by or for a covered entity. "It's good to develop a grid to differentiate the documents that are in the legal health record and the designated record set," she said.

The grid should indicate the source of the information, such as whether it was scanned into the electronic health record, whether the media is paper or electronic, and who the owner of the data is, she suggested.

**Identifying a complete record.** Providers also need to decide when a record is complete, Rowan said. "This is probably something you want to discuss with your legal counsel," she recommended.

Definitions of when a record is complete could be based on a set time period, when a signature is affixed, or when the discharge summary is completed, she said. "It is up to your organization to come up with that actual time period," Rowan added.

Organizations need to decide whether to include working notes in preparation of a final report; data gathering tools such as questionnaires, worksheets, psychotherapy notes; and printed documents from the electronic health record with notations, Servais said. She recommended organizations assess how the information is used; determine if it is pertinent to documentation of patient care, and whether there are other sources for data.

**Patients' personal health records.** More and more patients are requesting their personal health records and in some cases are forwarding them to their physicians. These records also may be part of the legal health record, since they may be the basis of a diagnosis or treatment decision, Servais said. For example, the

information in personal health records on a diabetic patient's insulin and glucose monitoring can help the physician make

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## Trends (cont'd)

treatment decisions, Servais explained. "If you are going to include it, you need to make sure that patients are aware that you are including it as part of your record," she said.

**Documented responses to electronic reminders.** Electronic reminders that pop up on a computer screen or a handheld device are useful tools that can help in clinical decision making, said Servais. For instance, she said, they can remind physicians when to refill a prescription. While, the tools themselves are not part of the medical record, the documented response to the tool is part of the legal health record, she said.

**Corrections to the record.** In addition, Servais recommended developing policies and procedures for corrections, addendums, and documentation of errors. Organizations also should keep original and amended versions of the health record, she added, noting that many systems will allow the user to keep both.

**Back up systems.** All electronic systems need to be backed up. According to Servais, during times the computer systems and programs are down, most organizations will rely on paper or stand-alone systems. "Downtime documents must be part of legal health record," she said.

**What to leave out.** Also important is deciding what to leave out of the legal health record, Servais said. It's not necessary to include notices of privacy practice, practice guidelines, registry or research data, and other documents related to regulatory and administrative requirements, she noted.

Information left out of the legal health record can be retained elsewhere, she reminded listeners. "If you say 'no it's not part of our legal health record, it doesn't mean it goes away,' it just means you wouldn't release it in response to a subpoena," Servais said. ■

*CCH Washington Bureau, March 3, 2006.*

## HIPAA

### GAO finds information security weaknesses at CMS, HHS

by Sheila Lynch-Afryl, JD,  
Contributing Editor

Controls designed to protect the confidentiality, integrity, and availability of CMS' and HHS' sensitive information and information systems have significant weaknesses, according to the Government Accountability Office (GAO). The GAO attributed these weaknesses to CMS' and HHS' failure to fully implement elements of their information security program.

HHS relies extensively on computerized systems to support its critical operations and store the sensitive information it collects. It uses these systems to support the department's financial and management functions, maintain sensitive personnel information, and process financial and medical data for millions of health care recipients.

**Weak controls.** The GAO found that HHS did not consistently configure network services and devices securely to prevent unauthorized access. For example, antivirus software was not always installed or up-to-date on workstations, and HHS did not encrypt certain information that traversed its networks. In addition, HHS did not adequately control user accounts and passwords to ensure that only authorized individuals were granted access to its systems, and it granted access rights that

gave users more access than they needed to perform their jobs.

HHS also failed to effectively implement physical controls. For example, one Medicare contractor used a privately owned vehicle and an unlocked container to transport 25,000 Medicare checks over a one-year period. Furthermore, HHS did not always sufficiently segregate computer functions or document changes to application programs.

**Reasons for weaknesses.** Although HHS laid the foundation for a department-wide information security program, it did not fully implement key

elements of the program at all of its operating divisions. HHS also did not develop nor document department-wide policies regarding minimally acceptable configuration requirements that govern security over the agency's computing environment. In addition, HHS failed to provide adequate security training to employees with significant security-related responsibilities.

Finally, HHS failed to fully implement risk assessments, remedial action plans, incident planning, and continuity of operations. ■

*GAO Report, GAO-06-267, Feb. 2006.*

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# A step forward in recognition of compliance efforts: The SEC's January 2006 statement concerning financial penalties

by Michael E. Clark, Contributing Editor

*The surge of corporate scandals that emerged a few years ago remains in recent memory. The actions by misguided individuals in several formerly well respected companies (such as Enron, Adelphia, and WorldCom, to name just a few) caused other businesses to suffer as investors lost faith in reported earnings and the economic downturn deepened.<sup>1</sup> As has happened before, the revelation of these scandals coincided with a major economic downturn (attributable in large part to the implosion of the long hot “technology” or “new economy” markets).<sup>2</sup> Many pundits and government officials considered these scandals to be evidence of a widespread failure in our nation’s complex system of corporate governance controls and began calling for more regulatory oversight and harsher penalties.<sup>3</sup> In short order, sweeping reform legislation was enacted in a popular law now commonly called “Sarbanes-Oxley.”<sup>4</sup>*

After the various provisions of the Sarbanes-Oxley Act of 2002 began to take effect, federal and state regulators (including, among others, the Department of Justice (DOJ), the Securities & Exchange Commission (SEC), and the New York Attorney General’s Office) along with self-regulatory organizations (such as the NASDAQ and the New York Stock Exchange) began to ratchet up the minimum compliance standards for publicly-traded entities, and they demanded greater cooperation from any entities hoping to avoid or minimize sanctions.<sup>5</sup>

In 1999, before the economic downturn and scandals emerged, the DOJ had issued internal guidelines entitled the “Federal Prosecution of Corporations” (commonly called the “Holder Memorandum”) that delineated factors for prosecutors to consider in deciding whether to seek criminal charges against business entities and their officers.<sup>6</sup> In October 2001, the SEC issued a report (commonly known as the “Seaboard Report”) that outlined similar factors for its staff to consider when determining whether and how to punish business entities.<sup>7</sup> Then, on January 20, 2003, after Sarbanes-Oxley’s provisions became effective, then Deputy Attorney General Larry Thompson issued another DOJ internal guidance<sup>8</sup> that tightened the Holder Memorandum’s standards:

*The main focus of the revisions is increased emphasis on and scrutiny of the authenticity of a corporation’s cooperation. Too often business organizations, while purporting to cooperate ..., in fact take steps to impede the quick and effective exposure of the complete scope of wrongdoing under investigation. The revisions also address the efficacy of the corporate governance mechanisms in place*

*within a corporation, to ensure that these measures are ... [not] mere paper programs. (Emphasis supplied).<sup>9</sup>*

In the aftermath of the Seaboard Report and the Holder/Thompson Memorandum, so many businesses have tried to follow the limited pathway that the government regulators have provided to avoid or minimize sanctions<sup>10</sup> that the level of “cooperation” has reached unprecedented levels. While cooperation in general is a valuable thing, the baseline for what regulators now consider to be adequate cooperation has gotten progressively stricter—which has not been a good thing for publicly-traded companies because it has made it harder for them to defend against securities class actions and other dangers. “Since only the Eighth Circuit has recognized ... selective privilege waivers, the value of sincere promises from ... [government] attorneys to try to maintain the confidentiality of information provided ... by corporate entities ... should be discounted.”<sup>11</sup>

Now, after what has seemed to be an escalating contest among regulators about who can impose the largest fines and settlements,<sup>12</sup> the SEC may have slowed down this spiral by means of expressing its concerns about the wisdom of indiscriminately imposing large fines under its administrative powers — since doing so runs the risk of penalizing innocent shareholders.

This article examines the SEC’s announcement and what it portends for publicly-traded entities, including large companies that operate within the healthcare sector. But, before immediately moving into the details of the January 4, 2006, “Statement of the Securities and Exchange Commission Concerning Financial Penalties,”<sup>13</sup> more background information

is helpful – beginning with a brief discussion about analogous problems seen in class action securities fraud litigation and how the courts and Congress have tried to provide relief.

## The Civil Class Action Securities Fraud Conundrum: Does Transferring Money from One Group of Innocent Shareholders to Another Properly Solve the Underlying Problems?

Commentators have argued that the class action procedures have been abused in securities cases<sup>14</sup> despite the benefits provided to plaintiffs who may not otherwise obtain representation and relief.<sup>15</sup> Many believe that civil securities fraud class actions really only result in transferring losses from one group of innocent shareholders to another (i.e., the ones within the designated class) – less the sizeable attorneys' fees and litigation costs involved. In 1995, former SEC Commissioner Steven Wallman said as much in a speech given at Stanford Law School:

[S]ecurities litigation reform has ... been one of the more hotly debated issues on Capitol Hill. Clearly there is some dysfunction in the present system. Currently, corporations and their shareholders pay other shareholders and their lawyers very large amounts, both in terms of defense costs and settlement fees, while those responsible for perpetrating serious frauds ... frequently emerge unscathed unless the Commission itself sues them.<sup>16</sup>

During the past 10 years, three reform measures have been enacted to address such concerns:

- (1) The Private Securities Litigation Reform Act of 1995 (which, among other things, imposes heightened pleading standards on class action plaintiffs);<sup>17</sup>
- (2) The Securities Litigation Uniform Standards Act of 1998<sup>18</sup> (limiting the availability of securities fraud class actions in state courts and making removal jurisdiction mandatory to the federal district court in which a related federal action is pending); and
- (3) The Class Action Fairness Act of 2005<sup>19</sup> (expanding federal court subject matter jurisdiction over class actions in which at least one class member is diverse in citizenship from the defendant and the amount-in-controversy exceeds \$5 million).

Also, last year in *Dura Pharmaceuticals, Inc. v. Broudo*,<sup>20</sup> the Supreme Court was convinced to unanimously reject the Ninth Circuit's interpretation of the pleading standards in securities fraud class actions that plaintiffs could meet the required "loss causation" standard by alleging that a company's stock price was inflated on the day of the sale. At bottom, the courts and Congress have become increasingly concerned about the fairness of the results obtained in civil securities fraud matters and sensitive to ensuring that the victims of such actions are properly represented and compensated.

This background provides the necessary context for now moving on to discuss the SEC's recently expressed concerns about over-penalizing innocent shareholders in regulatory securities fraud matters.

## The SEC's Statement of Principles

The Statement of the Securities and Exchange Commission Concerning Financial Penalties ("Statement") was one of three related documents that the Commission issued on January 4, 2006. The others were:

- **Litigation Release 19520: *Securities and Exchange Commission v. McAfee, Inc.***, Civ. No. 06-009 (PJH) (N.D. Cal.), Jan. 4, 2006, (describing the Commission's civil suit against McAfee and the circumstances by which the company agreed to settle and pay a \$50 million penalty),<sup>21</sup> and
- **Administrative Proceeding Release No. 33-8651: *Matter of Applix, Inc.***, Cease-and-Desist Order issued pursuant to Section 8a of the Securities Act and Section 21c of the Exchange Act.<sup>22</sup>

In addition, Linda Chatman Thomsen, the Director of the SEC's Division of Enforcement, also gave a speech that day in which she discussed the announced principles by contrasting and comparing the reasons for the different outcomes reached in the *McAfee and Applix matters*.<sup>23</sup>

The Statement sets out two overarching principles concerning the appropriateness of imposing a penalty on a corporation in a particular case:

1. **The presence or absence of a direct benefit to the corporation as a result of the violation.** As to this principle, the Commission elaborates that "the strongest case for the imposition of a corporate penalty is one in which the shareholders of the corporation have received an improper benefit as a result of the violation; the weakest case is one in which the current shareholders of the corporation are the principal victims of the securities law violation."
2. **The degree to which the penalty will recompense or further harm the injured shareholders.** As to the second principle, the Commission explains that "[t]he likelihood a corporate penalty will unfairly injure investors, the corporation, or third parties weighs against its use as a sanction."

In addition to these two overarching principles, the Commission lists seven factors that its staff also will consider when determining whether to impose penalties against corporations:

- **The need to deter the particular type of offense.** The Commission noted that the prevalence of unique circumstances that render a particular offense unlikely to be repeated weighs against imposing a penalty on the corporation.
- **The extent of the injury to innocent parties.** The Commission noted that the egregiousness of the harm, the number of injured investors, and the extent of societal harm if the corporation's infliction of such injury on innocent parties goes unpunished are significant considerations.

## On the Front Lines (cont'd)

- **Whether complicity in the violation is widespread throughout the corporation.** The Commission noted that isolated conduct by a few individuals militates against imposing a corporate penalty and that the Commission also will consider whether responsible individuals have been replaced.
- **The level of intent on the part of the perpetrators.** The Commission noted that a corporate penalty is less likely to be imposed if the violation was not due to deliberate, intentionally fraudulent conduct.
- **The degree of difficulty in detecting the particular type of offense.** The Commission noted that such offenses require additional deterrence.
- **The presence or lack of remedial steps by the corporation.** The Commission noted that exemplary conduct by management weighs against imposing a corporate penalty, while the failure to do so weighs in favor of a corporate penalty.
- **The extent of cooperation with Commission and other law enforcement.** The Commission noted that the degree to which a corporation has self-reported or otherwise cooperated with investigating and remediating the offense is also considered.

As noted, the SEC's Division of Enforcement explained the different outcomes in the *McAfee* and *Aplix* matters in light of these principles and factors. Ms. Thomsen explained that in the *McAfee* case, "the fraud was implemented and concealed through the use of various artifices and accounting ploys, including: (1) secret payments and discounts to McAfee's distributors as inducement to not return product to McAfee; (2) the creation of a wholly-owned subsidiary to repurchase oversold McAfee product from its distributors while guaranteeing the distributors profits on such resales; and (3) false entries on McAfee's books and records and the manipulation of reserve accounts to cover the costs of the distributor payments." Moreover, "[d]uring the time period of the fraud McAfee used its overvalued stock to acquire other companies, capitalizing on the artificial value it had created through its fraud."

By comparison, in *Aplix*, neither the company nor its shareholders benefited from the fraud, which involved two accounting violations: (1) improperly recognizing income upfront, instead of over a 12-month period, in a software licensing transaction; and (2) recognizing income in a transaction in which the customer had not accepted the product. Because *Aplix* is a relatively small business, a financial penalty could have "a disproportionate effect on its financial situation with hardship flowing to its shareholders." In contrast, McAfee is a healthy company, had benefited from the fraud by making acquisitions using its inflated stock, and paying the agreed penalty would not unfairly harm its shareholders.

### Conclusion: The SEC Principles Reemphasize the Importance of Compliance and Cooperation

The announced principles provide welcome clarification about the standards by which the Commission will seek to punish or

reward companies that choose to effectively comply and cooperate (or fail to do so) in the event of discovered wrongdoing. The SEC, like other federal regulatory agencies, continues to rely on the "carrot and stick" approach made popular by the U.S. Sentencing Commission through the seven factor test set out in the Organizational Sentencing Guidelines that have been incorporated into virtually all effective compliance programs.

Whether the SEC's announcement will encourage other key federal regulatory and enforcement agencies to revisit the wisdom of indiscriminately seeking potentially ruinous fines on other wrongdoers in the future remains to be seen. In the meantime, however, the announced principles offer counsel for businesses and an opportunity during settlement negotiations with other agencies to discuss factors that may not have been considered or should be given greater consideration.

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<sup>1</sup> See, e.g., Joel Seligman, *Rethinking Private Securities Litigation*, 73 U. CIN. L. REV. 95, 112 (2004) ("By the middle of 2002, securities regulation seemed to have returned to where it had been in the ... late 1920s. In only seven months ... , financial markets were shaken by the multibillion dollar financial scandals involving Enron and WorldCom. Major audit failures at Global Crossing, Tyco, Adelphia, and others took a heavy toll—on July 23, 2002, the Dow Jones Industrial Average closed at 7702. Between 1997 and 2002, federal securities class actions filed against Fortune 500 firms increased five-fold, from 3 to 16.") (Internal notes omitted).

<sup>2</sup> As I have written elsewhere, "[t]he economy had entered a "bubble" formed as more and more investors began believing that this "new economy" — driven by technological gains (telecommunications, computer technologies, and the Internet) — was so fundamentally different from earlier boom-and-bust cycles that it wouldn't be as subject to the basic laws of gravity." Michael E. Clark, *Hamstrung or Properly Calibrated?—Federalism and the Appropriate Role of Government in the Post-Sarbanes-Oxley World*, 1 INT'L J. DISCLOS. & GOVERN. NO. 3, 385, 388 (Oct. 2004) (Internal note omitted).

<sup>3</sup> See, e.g., Robert Prentice, *Enron: A Brief Behavioral Autopsy*, 40 AM. BUS. L.J. 417 (2003); William S. Lerach, *Plundering America: How American Investors Got Taken for Trillions by Corporate Insiders (The Rise and Fall of the New Corporate Kleptocracy)*, 8 STAN. J. L. BUS. & FIN. 69 (2002); William H. Donaldson, Chairman, SEC, Testimony Concerning Implementation of the Sarbanes-Oxley Act of 2002 before the Senate Committee on Banking, Housing and Urban Affairs (Sept. 9, 2003); and, David M. Walker, CPA, U.S. Comptroller General, *Integrity: Restoring Trust in American Business and the Accounting Profession* Nov. 26, 2002.

<sup>4</sup> The legislation commonly known as "Sarbanes-Oxley" was formally entitled the "Public Accounting Reform and Investor Protection Act," (PubLNo 107-204), 116 STAT. 745 (2002).

<sup>5</sup> See generally Michael E. Clark, *The Growing Importance of Securities Regulation for Publicly-Traded Entities in the Post-Sarbanes-Oxley Marketplace*, Ch. 4 in HEALTH LAW AND COMPLIANCE UPDATE, 2006 Edition (Aspen Publishers).

## On the Front Lines (cont'd)

- <sup>6</sup> See Mark Robeck, Amy Vazquez, and Michael E. Clark, *Corporate Cooperation in the Face of Government Investigations*, 17 THE HEALTH LAWYER NO. 2, 20, at 22 n.33 (April 2005), referring to Eric Holder, Deputy Attorney General, U.S. Department of Justice, *Memorandum: Bringing Criminal Charges against Corporations*, June 16, 1999. Among other things, the Holder Memorandum instructed that, “[i]n gauging the extent of the corporation’s cooperation, the prosecutor may consider the corporation’s willingness to identify the culprits within the corporation, including senior executives, to make witnesses available, to disclose the complete results of its internal investigation, and to waive the attorney-client and work product privileges.”
- <sup>7</sup> Securities & Exchange Comm’n, *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions*, Release No. 44969, Oct. 23, 2001; available at [www.sec.gov/litigation/investreport/34-44969.htm](http://www.sec.gov/litigation/investreport/34-44969.htm). (Last visited on February 25, 2006.)
- <sup>8</sup> Larry D. Thompson, Deputy Attorney General, U.S. Department of Justice, *Memorandum: Principles of Federal Prosecution of Business Organizations* Jan. 20, 2003.
- <sup>9</sup> *Id.* Introductory comment.
- <sup>10</sup> Companies are advised to conduct internal investigations as soon as possible; identify wrongdoers and properly discipline them (which sometimes not only means firing them, but also not advancing legal fees even if such are authorized by indemnification agreements), provide government investigators with relevant information and access to witnesses, and, many times, to waive privileges.
- <sup>11</sup> Michael E. Clark, *Corporate Compliance Programs, Privilege, Work Product, and Words to Save Them*, Course Materials for ABA Health Law Section Teleconference, “Health Law Contracting is Expanding: Your Toolkit for Health Law Negotiating, Drafting, and Contracting,” Feb. 16, 2005. *Compare Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977) (en banc) (the minority rule that permits selective waiver of privileges) with *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 304 (6th Cir. 2002) (holding that the company’s confidentiality agreement with DOJ didn’t protect it from a privilege waiver).
- <sup>12</sup> An alphabetical compilation of “Multimillion Dollar Fines & Settlements Paid by Corporations” is provided at <http://www.endgame.org/corpfines3.html>. As this compilation reflects, in 2003 alone, the following companies paid huge amounts to settle alleged wrongdoing: *Abbott Laboratories* (\$622,000,000); *Bear Stearns* (\$80,000,000); *Canadian Imperial Bank of Commerce* (\$80,000,000); *Citigroup/Salomon Smith Barney* (\$400,000,000); *Credit Suisse First Boston* (\$200,000,000); *GlaxoSmithKline* (\$90,000,000); *Goldman Sachs Group* (\$110,000,000); *J.P. Morgan Chase* (\$80,000,000); *Lehman Brothers Holdings* (\$80,000,000); *Lucent Technologies* (\$517,000,000); *McAfee* (\$50,000,000); *Merrill Lynch* (\$200,000,000); *Morgan Stanley* (\$125,000,000); *U.S. Bancorp Piper Jaffray* (\$32,500,000); *UBS Warburg* (\$80,000,000); and *WorldCom* (\$500,000,000).
- <sup>13</sup> The Statement is available at [www.sec.gov/news/press/2006-4.htm](http://www.sec.gov/news/press/2006-4.htm). (Last visited on February 25, 2006.)
- <sup>14</sup> See, e.g., Adam C. Pritchard, *Should Congress Repeal Securities Class Action Reform?* (Working Paper), University of Michigan, John M. Olin Center for Law & Economics, at 4; available at [www.law.umich.edu/centersandprograms/olin/papers.htm](http://www.law.umich.edu/centersandprograms/olin/papers.htm). (Last visited on July 18, 2005.) (“The overwhelming majority of securities fraud class actions have little effect on capital allocation because the corporations sued are not selling securities. In the typical securities fraud class action, plaintiffs’ attorneys sue the corporation and its officers ... for alleged misrepresentations regarding the company’s operations, financial performance, or future prospects that inflate the price of the company’s stock in secondary trading markets .... Because the corporation has not sold securities ..., it has no institutional incentive to spend real resources in executing the fraud. That type of fraud ... differs from what we typically consider fraud in that there is no net wealth transfer away from investors, at least in the aggregate. Instead, the wealth transfers caused by fraud on the market overwhelmingly occur between equally innocent investors. For every shareholder who bought at a fraudulently inflated price, another shareholder sold: The buyer’s individual loss is offset by the seller’s gain.”) (Internal notes omitted.)
- <sup>15</sup> See generally Edward F. Sherman, *Consumer Class Actions: Who Are The Real Winners?*, 56 ME. L. REV. 223, 223 (2004) (“The class action is one of the most controversial procedural devices in the American legal system. In the years since an expanded class action rule was adopted in 1966, class actions have grown in scope and number, and suits by consumers have accounted for an increasing share of class actions suits. By allowing individuals to sue not only for themselves, but also ... [for] others similarly situated, the class action empowers plaintiffs to bring cases that otherwise either would not be possible or would only be possible in a very different form.”). (Internal citations omitted citing Deborah R. Hensler et al., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 58-59 (Rand Institute for Civil Justice 2000).)
- <sup>16</sup> Remarks of SEC Commissioner Steven M.H. Wallman, Stanford Law School’s “Tools for Executive Survival” Program June 22, 1995, available at <http://www.sec.gov/news/speech/speecharchive/1995/spch049.txt>. (Last visited on February 27, 2006.) Later in his presentation, Commissioner Wallman elaborated more about this problem:
- There is a flaw, however, in our current system of securities litigation that makes ANY analysis of the appropriate balance more difficult. [In] ... the normal fraud on the market suit, INNOCENT investors are hurt whenever a claim is filed against the issuer. ... [T]he lawsuit, of course, is not and cannot be against the benefiting shareholders. Instead it is against the ISSUER and, by extension, all its CURRENT shareholders. The result ... is a wealth transfer from one group of innocent shareholders – the current shareholders ... to the defrauded investors. Despite their innocence, the current shareholders pay for the damages award .... (Emphasis in the original.)
- <sup>17</sup> PubNo 104-67, 109 STAT 737 Dec. 22, 1995, codified, as amended, in 15 U.S.C. §78u-4.
- <sup>18</sup> PubLNo 105-353, 112 STAT. 3227 (“SLUSA”) (codified, as amended, in 15 U.S.C. §§77p & 78bb(f)).
- <sup>19</sup> PubLNo 109-002, 119 STAT. 4, Feb. 18, 2005 (codified in scattered sections of 28 U.S.C.).
- <sup>20</sup> *Dura Pharmaceuticals, Inc. v. Broudo*, 125 S.Ct. 1627 (2005).
- <sup>21</sup> Litig. Rel. 19520: *Securities and Exchange Commission v. McAfee, Inc.*, is available at <http://www.sec.gov/litigation/litreleases/lr19520.htm>. (Last visited on February 27, 2006.)
- <sup>22</sup> Admin. Proc. Rel. No. 33-865 I: *Matter of Applix, Inc.*, is available at <http://www.sec.gov/litigation/admin/33-865I.pdf>. (Last visited on February 27, 2006.)
- <sup>23</sup> Ms. Thomsen’s speech is available at <http://www.sec.gov/news/speech/spch010406lct.htm>. (Last visited on February 27, 2006.)

## Tax Exemption

### Discussions delay Illinois charity care bill

by Stacey Fahrner, J.D., M.P.H.,  
Contributing Editor

Voting on the controversial Illinois Tax-Exempt Hospital Responsibility Act (HB 5000), which would require not-for-profit hospitals to provide a minimum percentage of free services to maintain their tax-free status, has been delayed until the 2007 legislative session. Both the Illinois Attorney General's Office and the Illinois Hospital Association (IHA), the strongest opponent of the bill, cited the complexity of the issues involved as the reason for the delay.

Earlier this year, the Attorney General's Office and the IHA successfully negotiated an agreement regarding a companion bill, the Fair Hospital Billing & Collections Practices Act (HB 4999), which will prohibit hospitals from taking legal action against uninsured patients who have shown that they cannot afford to pay their bills. Anne Spillane, Attorney General Lisa Madigan's Chief of Staff, stated that "it was clear that there was not enough time remaining in this legislative session to devote to HB 5000 at that same level of care." Spillane stressed that the bill remains a high-priority. During the break, the Attorney General's Office will continue to meet with hospitals on the issue and will reintroduce the bill next year.

Danny Chun, media spokesperson for the IHA commented on the complexity of the charity care issue. Specifically, he stated that the charity care legislation should not only consider free care to indigent patients, but also recognize other ways in which hospitals benefit communities, such as immunizations, health education, and meals on wheels, which can cost Illinois hospitals billions each year. According to Chun, the current bill also overlooks services offered by hospitals at a loss, such as emergency and trauma care. In addition, the IHA would like the proposed legislation to safe guard a hospital's tax exempt status. In other words, a hospital that is complying with bright line charity care standards also should be protected from collateral attacks on its tax-exempt status. "The IHA hopes to work through these issues and come up with a workable legislation," Chun concluded. ■

*CCH Chicago Bureau, April 7, 2006.*

## In the News

### Committee-approved budget contains no specific Medicare, Medicaid cuts

A fiscal year 2007 budget resolution that contains no specified Medicare and Medicaid cuts; was approved by the House Budget Committee on March 29, 2006. Reconciliation instructions, however, would require the House Ways and Means Committee to achieve \$4 billion in mandatory savings over five years. The plan does not include funding for Transitional Medical Assistance, nor does it include funds either to address the looming State Children's Health Insurance Program (SCHIP) shortfall, James Horney, a senior fellow with Center on Budget and Policy Procedures said. The Senate budget plan contained funding for both. Without such funds, hundreds of thousands of low-income people could join the ranks of the uninsured he said. The Senate approved a budget resolution in March that excludes the \$36 billion in Medicare cuts and nearly \$6 billion in Medicaid cuts proposed by President Bush. The plan assumes entitlement spending reductions, but does not direct committees with jurisdiction to produce them. The budget resolutions are nonbinding. ■

*CCH Washington Bureau, March 30, 2006.*

### Comments sought on certification process for EHRs

The public and healthcare information professionals are invited to participate in a survey assessing the progress of the Certification Commission for Healthcare Information Technology (CCHIT) in developing a certification process for electronic health record (EHR) products to be used in outpatient or office-based settings. Stakeholders—from healthcare information technology professionals to product vendors to providers—are encouraged to take the survey through April 28 by visiting the Web site at [www.cchit.org](http://www.cchit.org). In addition, March 31, 2006, marked the end of a month long public comment period on CCHIT's criteria, inspection process, pilot test results, and draft handbook for commercial certification of ambulatory EHR products. Work groups currently reviewing comments to consider final changes. ■

*CCHIT Press release, April 3, 2006.*

### Mistrial declared in second Alvarado kickback case

For the second time a mistrial was declared in the case United States of America v. Barry Weinbaum because the jury was unable to reach a verdict concerning certain physician relocation agreements. Parent company Tenet Healthcare, Alvarado Medical Center, and Alvarado Chief Executive Officer Weinbaum were accused of violating the Anti-kickback statute by offering overly generous physician relocation agreements. Tenet maintains that the physician relocation agreements entered into by Alvarado are common practice in the industry. Under federal law, hospitals are permitted to assist physicians financially in relocating to a new community if the hospital can demonstrate that there is a need for the physician's services in the hospital's service area. Tenet general counsel Peter Urbanowicz stated that "because there is no reason to believe any other jury would produce a different result, we earnestly hope that the prosecutors will decide not to re-try this case a third time." ■

*Tenet Healthcare Corp. Press Release, April 6, 2006.*