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AMCNO Participates in Privacy Summit

By J. Ryan Williams, J.D.

The Ohio Health Information Partnership (the "Partnership," formerly know as "OHIP") had a busy summer. The Partnership worked, and continues to work hard, to develop, revise, finalize, and implement various policies and procedures for Ohio's health information exchange ("HIE") known as CliniSync. The Partnership appears to have finalized a key policy for CliniSync — the policy concerning patient consent. This policy is critically important to the success of CliniSync and has the potential to transform the way healthcare providers share health information in Ohio. Recognizing this significance, AMCNO has monitored and remained actively involved with the Partnership concerning the patient consent policy.

Last month, the Partnership convened a privacy summit to discuss the development of the CliniSync patient consent policy, and discuss whether a need exists for legislative initiatives to clarify and update Ohio law regarding the electronic exchange of health information. Over 30 attendees, consisting of privacy and compliance officers, in-house and outside counsel, participated in the summit. AMCNO was also present and provided useful feedback on the health information sharing practices of physicians in Northern Ohio. Attendees of the summit were treated with an educational overview and demonstration of CliniSync. Representatives of Medicity (the vendor of CliniSync) and the Partnership fielded numerous questions from attendees regarding the infrastructure, mechanics and operation of CliniSync. Representatives also discussed the role and expectation of the participants (i.e., healthcare providers, hospitals, physicians, etc.) in establishing administrative access to CliniSync.

As a brief overview, CliniSync is the electronic infrastructure (or software) that will enable the electronic exchange of health information between healthcare providers in Ohio.

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Ohio Providers May Face Perpetual Liability for Malpractice Claims

By Erica M. James, M.D., J.D.

How long after alleged medical malpractice occurs may a plaintiff bring a claim against his provider? In April, the Court of Appeals, Twelfth Appellate District of Ohio held that a plaintiff could bring that claim within one year of when he became aware of the alleged malpractice, regardless of how long ago the alleged malpractice occurred. In September, the Supreme Court of Ohio agreed to review that decision.

The underlying case, *Ruther v. Kaiser,* involves malpractice that allegedly occurred in the 1990s and allegedly caused a patient's death in 2009. Timothy Ruther, while a patient of Dr. Kaiser, had lab work done in 1995, 1997, and 1998 that showed significantly elevated liver enzymes. These lab results were received by Dr. Kaiser's office, but Dr. Kaiser did not notify Mr. Ruther of the abnormalities. Mr. Ruther ceased to be a patient of Dr. Kaiser's and, in December 2008, was diagnosed with hepatitis C and liver cancer. Mr. Ruther alleged that it was around the time of his diagnoses that he became aware of his abnormal lab tests from the '90s. In May 2009 Mr. Ruther brought a claim against Dr. Kaiser and his practice. Mr. Ruther died approximately one month later, and his claim was continued by his wife.

The trial court held that Mrs. Ruther could maintain the malpractice claim, despite the alleged malpractice having occurred 10-14 years before the claim was brought, because the Ohio statute that would prevent her from doing so was unconstitutional. The Court of Appeals affirmed.

Effect of the Medical Malpractice Statute of Repose

The challenged statute, R.C. 2305.113, is what is referred to as a "statute of repose," a statute that provides an absolute cut-off for potential liability. R.C. 2305.113 was enacted

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by the legislature in 2003 as part of tort reform and prevents plaintiffs from bringing medical malpractice claims based on underlying acts that precede the claim by more than four years.

Medical malpractice claims are additionally governed by a one-year statute of limitation, which provides that medical malpractice claims must be brought within one year of the alleged malpractice. The statute of limitation may be extended, or tolled, if the plaintiff has not and could not reasonably have discovered the alleged malpractice. This "discovery rule" allows a plaintiff to bring his malpractice claim within one year of when the alleged malpractice is or reasonably should have been discovered.

When the trial and appellate courts held the medical malpractice statute of repose to be unconstitutional, they effectively held that providers can be sued for malpractice for an indefinite amount of time after the alleged malpractice, if the plaintiff discovered the alleged malpractice within one year of bringing suit.

Why was the Medical Malpractice Statute of Repose Held to be Unconstitutional?

The trial and appellate courts held that the medical malpractice statute of repose was unconstitutional on the grounds that it conflicted with the guarantees given to plaintiffs under the Ohio Constitution. Article I, Section 16 of the Ohio Constitution provides: "All courts shall be open, and every person, for an injury done him in his * * * person * * * shall have remedy by due course of law * * *." The Supreme Court of Ohio found an earlier version of the medical malpractice statute of repose to be unconstitutional because the statute denied a remedy to plaintiffs who were not able to discover that they were injured within four years, thus violating the Open Courts provision. See *Hardy v. VerMeulen* (1987), 32 Ohio St.3d 45.

In *Ruther v. Kaiser,* the trial and appellate courts compared the current version of the medical malpractice statute of repose to the earlier version found unconstitutional by the Court and did not find any significant differences between them. The trial and appellate courts concluded that the newer version of the statute also conflicted with the Open Courts provision and was also unconstitutional.

Why do Proponents of the Medical Malpractice Statute of Repose Argue it is Constitutional?

Dr. Kaiser and his practice, the appellants, argue that the medical malpractice statute of repose does not violate the Open Courts provision because it does not bar plaintiffs from pursuing a vested right. As noted above, when the discovery rule tolls the medical malpractice statute of limitation, the one-year statute of limitation starts to run from the time a plaintiff discovers or reasonably should have discovered the alleged malpractice. The appellants argue that the discovery of the alleged malpractice is the point of time when the plaintiff's right to sue vests, or becomes legally guaranteed. When a plaintiff fails to discover alleged malpractice within four years of the date it has occurred, that plaintiff's right to sue never vests. Thus, if the four-year medical malpractice statute of repose acts to cut off the plaintiff's ability to sue, the statute of repose does not take away a vested right.

To support their argument, the appellants point to other statutes of repose that Ohio courts have upheld as constitutional in recent years. In 2008, the Supreme Court of Ohio held that the statutes of repose applicable to product liability claims and real property improvement were constitutional. *Groch v. General Motors Corp.,* 117 Ohio St.3d 192, 2008-Ohio-546; *McClure v. Alexander,* 2008-Ohio-1313. Relying of the Court's decision in *Groch,* the Twelfth District upheld the constitutionality of the wrongful death statute of repose in 2008. *Nickell v Leggett and Platt, Inc.,* 2008-Ohio-5544. Appellants argue that these statutes of repose did not differ significantly from the medical malpractice statute of repose.

Appellants propose that the medical malpractice statue of repose strikes a fair balance between the rights of plaintiffs to bring suit for their harm and for defendants to be protected from stale litigation. They further point out that the legislature's adoption of the medical malpractice statute of repose is consistent with the position taken by a majority of states.

An amicus curiae expressing support for the appellate's position in this case has been filed by two state medical associations, the American Medical Association and the Ohio Alliance for Civil Justice (OACJ) – the AMCNO is a longstanding member of the OACJ and supports the appellate position in this case. ■

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