NOT YET SCHEDULED FOR ORAL ARGUMENT
Case No. 07-5343

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CONSUMERS' CHECKBOOK, CENTER FOR THE STUDY OF SERVICES,

Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court for the
District of Columbia in Case No. 06-02201,
Judge Emmet G. Sullivan

BRIEF OF MOVANT-INTERVENOR AMERICAN MEDICAL ASSOCIATION

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May 1, 2008

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Movant-intervenor American Medical Association ("AMA") is a not-for-profit professional association of physicians whose purpose is to promote the art and science of medicine and the betterment of public health. The AMA has no parent corporation. It does not issue stock and hence has no shareholders.

RULE 28(a)(1) CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the AMA certifies as follows.

I. Parties and *Amici.*

The parties appearing in the district court were plaintiff Consumers' Checkbook, Center for the Study of Services, and defendants United States Department of Health and Human Services ("HHS"), Michael O. Leavitt (in his official capacity as Secretary of HHS), and Leslie V. Norwalk (in her official capacity as Administrator of the Centers for Medicare and Medicaid Services ("CMS")).

The American Medical Association filed a motion to intervene in this Court. On February 27, 2008, the Court directed the AMA to file a brief as movant-intervenor, and referred its motion to intervene to the merits panel to which this case is assigned.

The following physician professional societies gave notice of intent to participate in this Court as *amici curiae* on behalf of Appellants: American Academy of Dermatology, American Association of Neurological Surgeons, American Academy of Ophthalmology, American Academy of Otolaryngology—Head and Neck Surgery, American Academy of Orthopaedic Surgeons, American College of Cardiology, American College of Emergency Physicians, American College of Obstetricians and Gynecologists, American College of Osteopathic Surgeons, American College of Surgeons, American Osteopathic Association, American Society of Cataract and Refractive Surgery, Congress of Neurological Surgeons, Heart Rhythm Society, Medical Group Management Association, Medical Society of the District of Columbia, Society of Interventional Radiology, and the Society of Thoracic Surgeons

The American Association of Retired Persons gave notice of intent to participate in this Court as *amicus curiae* in Support of Appellee.

II. Rulings under Review.

The ruling at issue is the district court's order and opinion of August 22, 2007 granting summary judgment to plaintiff in *Consumers' Checkbook, Center for the Study of Services v. United States Department of Health and Human Services, et al.*, Civil Action No. 06-2201 in the federal district court for the District of Columbia. Judge Sullivan's opinion is reported at 502 F. Supp. 2d 79. *See* Joint Appendix ("JA"), pp. 268–90.

III. Related Cases.

The case on review has not previously been before this Court. Counsel for AMA is not aware of any related cases pending in the district court or this Court. A related case, *Florida Medical Association, Inc. v. Department of Health Education & Welfare*, 479 F. Supp. 1291 (M.D. Fla. 1979), was decided by the federal district court for the Middle District of Florida in 1979. Movant-intervenor American Medical Association was a plaintiff in *Florida Medical Association* ("*FMA*"), and appellant HHS (then known as the Department of Health, Education, and Welfare ("HEW")), was the defendant. The *FMA* case resulted in a permanent injunction enjoining HHS from releasing substantially the same records that are at issue in this case. *See* JA 295–96. That injunction has been neither materially modified nor vacated.

Respectfully submitted,

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*Authorities upon which this brief chiefly relies are marked with asterisks.

STATUTES AND RULES

OTHER AUTHORITIES

GLOSSARY

CMS:	Centers for Medicare and Medicaid Services
CPSC:	Consumer Products Safety Commission
DOD:	The decision of the United States Supreme Court in *Dept. of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487 (1994)
DOJ:	Department of Justice
FMA:	The decision of the Middle District of Florida in *Florida Medical Association, Inc. v. Department of Health, Education & Welfare*, 479 F. Supp. 1291 (M.D. Fla. 1979)
FOIA:	The Freedom of Information Act
HEW:	The Department of Health, Education, and Welfare, predecessor to the Department of Health and Human Services
QIO:	Quality Improvement Organization, entity that contracts with CMS to review medical care provided under Medicare
UPIN:	Unique Physician Identification Number, assigned to physicians and other providers of Medicare services

QUESTIONS PRESENTED

1. Does the 1979 injunction in *Florida Medical Association v. HEW* prohibit disclosure of the records that plaintiff seeks, and, if so, did HHS act "improperly" within the meaning of FOIA, 5 U.S.C. § 552(a)(4)(B), in withholding those records?

2. If the effect of the 1979 injunction on disclosure of the records sought by plaintiff is unclear, should the district court have stayed proceedings to enable the *FMA* court to clarify the scope of that injunction, lest a substantial risk be created that HHS would be subject to conflicting orders?

3. Should the AMA, as a party to the *FMA* case, be permitted to intervene in order to protect its interests and those of its members under the 1979 injunction and applicable law?

4. Applying FOIA Exemption 6, did the district court properly balance the public interest in disclosure of the records sought against the physicians' interests in the confidentiality of those records?

STATUTES AND REGULATIONS

Statutes and regulations are set forth in an addendum.

STATEMENT OF FACTS

I. The 1979 Injunction.

In 1979, the Middle District of Florida permanently enjoined HHS (then known as "HEW") from publicly disclosing the amounts that it paid to individual physicians, identified by name, under the Medicare program. *See Florida Medical Association, Inc. v. Department of Health Education & Welfare*, 479 F. Supp. 1291 (M.D. Fla. 1979) ("*FMA*"). The case arose after the agency ordered Medicare carriers in the various states to "prepare and publish by April 30, 1978, a list of all physicians and providers for whose services Medicare reimbursements had been paid in 1977." *Id.* at 1297. "The list was to include full names of the physicians and providers, their addresses, [and] the net total amount of Medicare reimbursement paid" for services provided by each physician and provider. *Id.*

The Florida Medical Association, along with several individual physicians, sought an injunction to prevent HHS from publishing records that would identify individual physicians and the payments they received from Medicare. *Id.* at 1294. The American Medical Association ("AMA") was permitted to intervene in the *FMA* litigation after having brought a nearly identical suit in federal court in Chicago. *Id.* at 1295. The court in Florida ultimately certified a class that included the AMA and all physician members of the AMA. *Id.*

The court ruled that the records the agency sought to publish were both (a) exempt from FOIA disclosure under Exemption 6 as "personal and medical files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(6), and (b) protected from public disclosure under the Privacy Act, 5 U.S.C. § 552a(b)(2). *See FMA*, 479 F. Supp. at 1303–07. The court recognized that the public has a legitimate interest in "knowing the amounts of public funds spent in reimbursing Medicare providers annually." *Id.* at 1304. However, it found that that interest was outweighed by several considerations counseling against disclosure of specific amounts to specific physicians. *Id.* at 1306. Having found that Exemption 6 applied, the court held that the Privacy Act, 5 U.S.C. § 552a(a)(4), (b), prohibited the agency's disclosure of the records.

The court issued a "permanent injunction on behalf of plaintiffs and the recertified class that they represent." *FMA*, 479 F. Supp. at 1311. In its "Final Declaratory Judgment and Permanent Injunction," the court ordered that any "disclosure of annual Medicare reimbursement amounts, for any years, in a manner that would personally and individually identify the providers of services under the Medicare program who are members of the recertified class in this case is

declared to be contrary to federal law." JA 296, ¶ 2. The agency did not appeal the ruling, and the injunction remains in force today.[1]

Since 1979, HHS has not publicly disclosed Medicare reimbursement amounts paid to specifically identifiable physicians. *See* JA 191 (statement of Medicare technical specialist that "Medicare data has not been released for the purpose of profiling individual physicians"). To the contrary, the agency understands that it is enjoined by the 1979 injunction from disclosing this information. *See* JA 280 n. 1.

II. This Litigation.

A. Proceedings Below.

In 2006, Consumers' Checkbook ("Checkbook") filed a FOIA request for records showing claims submitted for medical services provided by physicians under the Medicare program in Illinois, Maryland, Washington, Virginia, and the District of Columbia. Checkbook requested claims records identifying individual physicians by number, stating that "physician identifying information is essential to [its] request." JA 17. HHS denied the request. *See* JA 21–22. Checkbook then initiated this lawsuit.

In the district court, HHS noted that the injunction entered in *FMA* prohibited disclosure of the records sought and that Exemption 6 of FOIA did not require such disclosure. *See* JA 87–92, 94–95 ¶ 4. It explained that Medicare claims submitted by individually identified physicians could easily be combined with public information to show Medicare reimbursement

[1] The policy considerations underlying the decision in the *FMA* case also underlie the injunction in *American Ass'n of Councils of Medical Staffs of Private Hospitals, Inc. v. HCFA*, unpublished order, No. 78-1373 (E.D. La. 1980) (attached at Addendum B), which similarly continues to bind HHS as to disclosures on this topic. There, the court declared that "public disclosure by the defendants of the names or identity of plaintiff physicians and physician-members of the plaintiff organizations" in connection with reimbursements made to those physicians' patients for their unassigned Medicare claims was "contrary to law." App. 1. Any such disclosure was "permanently enjoined." *Id.*

amounts paid to those physicians. *See* JA 98, ¶ 6. HHS construed the 1979 injunction as barring disclosure of the records requested by Checkbook.

The district court nevertheless ordered production. *See* JA 289–90. The court did not dispute the continued existence of the 1979 injunction or that HHS is bound thereby. It did not dispute HHS's assertion that "releasing the requested information would also allow plaintiff to combine the information with a publicly available Medicare fee schedule in order to calculate the specific amount that a Medicare provider receives annually in Medicare reimbursements." JA 275. However, it dismissed the injunction in a single sentence in a footnote:

> As plaintiff seeks different records, however, the injunction is immaterial to this Court's analysis.

JA 280 n. 1. Notably, the court provided no explanation for this conclusion.

The court also rejected the argument that FOIA Exemption 6 applies to the records at issue. It assumed that these records were "similar files" within the meaning of Exemption 6. JA 274. Thus, it proceeded to balance physicians' privacy interests against the public interest in disclosure. The court opined that the public has an interest in "obtaining information that would help the public make more informed Medicare decisions" as well as an interest in "more information of [sic] how government funds are spent." JA 276. It then adopted Checkbook's claim that "[i]n order to perform these types of analyses [that Checkbook claimed an intention to perform], the Medicare claim information must include physician-identifying information linked to each Medicare service or procedure." *Id.*

Contrary to the court in *FMA*, the court below concluded that the physicians' privacy interests at stake are "minimal." JA 279. While acknowledging that the information in question would effectively disclose the "annual amounts of Medicare reimbursements paid to an individual physician," it asserted that such a disclosure would "not necessarily indicate to the

general public the annual salary of each physician. It will merely reflect a portion of the physician's interests." *Id.*

B. The Role of the AMA.

The AMA was a plaintiff in the *FMA* case. Its members have since been the beneficiaries of and relied on the injunction in that case. The protections of that injunction are significantly undermined, however, by the district court's contradictory order. Nevertheless, the AMA was never notified of this litigation even though it has an office in the District of Columbia. Neither the AMA nor any representative of the plaintiff class in *FMA* participated in the district court.

After learning about this litigation, the AMA moved to intervene before this Court. Its motion has not been decided, but the Court directed the AMA to file a brief as movant-intervenor by May 1, 2008 and to include arguments in support of the AMA's motion to intervene. *See Per Curiam* Order in No. 07-5343 (Feb. 27, 2008).

SUMMARY OF ARGUMENT

The 1979 injunction prohibits disclosure of "annual reimbursements to individually identified providers of services under the Medicare Act." *FMA*, 479 F. Supp. at 1311. Checkbook's request would require HHS to disclose information that is tantamount to the information covered by the injunction. Specifically, Checkbook seeks disclosure of all Medicare claims submitted for reimbursement by individually identified physicians in particular regions. *See* JA 269–71. As HHS has recognized, physicians' claims records can be easily used to determine reimbursements to those physicians. *See* JA 98, ¶ 6; JA 101–02, ¶ 16.

The district court's conclusion that the records sought by Checkbook are "different" from the records covered by the injunction is not supported by any findings or analysis and is, therefore, entitled to "no deference." *In re Sealed Case*, 121 F.3d 729, 740 (D.C.

Cir. 1997). Because HHS remains subject to the 1979 injunction prohibiting disclosure of the records in question, HHS did not act "improperly" within the meaning of 5 U.S.C. § 552(a)(4)(B) in withholding those records. *See GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375 (1980). For this reason, the judgment of the district court should be reversed.

Even assuming that the applicability of the 1979 injunction is unclear, it was improper for the district court to proceed without obtaining clarification from the court that issued that injunction. A district court is obligated to exercise significant restraint before entering an order that could interfere with another district court's authority or proceedings. Thus, the district court should not have proceeded without a clarification of the 1979 order and its applicability to this case. *See Morgan v. United States Dept. of Justice*, 923 F.2d 195, 197–98 (D.C. Cir. 1991). Accordingly, the order below should be vacated, and the case should be remanded—with instructions either to transfer the proceedings to the Middle District of Florida or to dismiss or stay the litigation until that court has an opportunity to interpret the 1979 injunction in light of the Checkbook request.

In any event, the AMA should be permitted to intervene under both Rule 24(a) and 24(b) of the Federal Rules of Civil Procedure. Its members have relied on the 1979 injunction for nearly 30 years. The decision of the district court with respect to both the injunction and FOIA Exemption 6 demonstrates that the AMA faces a substantial risk that its ability to protect its own and its members' interests under the injunction and governing law will be impaired or impeded. Those interests are not adequately protected by HHS—which has publicly stated that it "recognizes and shares the goals of Consumers Checkbook." *See* Statement of the Department of Health and Human Services Regarding Appeal of Consumers

Checkbook Decision (Apr. 16, 2008), online at http://www.hhs.gov/news/press/2008pres/04/20080416a.html. And the AMA motion to intervene was timely—particularly inasmuch as its participation in this litigation will not delay the appeal or any proceedings on remand.

Beyond Rule 24, failure to grant the AMA leave to intervene may leave HHS subject to contradictory orders. If the order of the district court is affirmed and the AMA is not a party, the AMA will be free to initiate contempt proceedings against HHS in Florida based on any release of the records. Thus, the AMA is a necessary party under Federal Rule of Civil Procedure 19(a).

Should the AMA be permitted to intervene, it is prepared to introduce evidence tending both to refute the asserted public interest in disclosure and to support the privacy interest in nondisclosure. Finally, quite apart from any supplemental factual showing, the AMA will demonstrate that the district court incorrectly balanced the public interest in disclosure against the physicians' privacy interests.

ARGUMENT

I. In Light Of The Conflict Between The Order Sought By Checkbook And The 1979 Injunction, The District Court Should Have Denied Checkbook's Claim And Granted Summary Judgment In Favor Of HHS.

A. The District Court's Order Conflicts With The 1979 Injunction.

The 1979 order in *FMA* permanently enjoins HHS from disclosing "any list of annual Medicare reimbursements amounts, for any years, which would personally and individually identify [ ] providers of services." JA 295–96, ¶ 1. It declares, moreover, that "[a]ny such disclosure of annual Medicare reimbursement amounts, for any years, in a manner that would personally and individually identify the providers of services under the Medicare program" is "contrary to federal law." JA 296, ¶ 2. Checkbook now seeks all 2004 claims for

reimbursement submitted by individually identified providers of services under the Medicare Act in multiple regions. JA 269–71. As HHS has recognized, compliance with Checkbook's request would put the agency in violation of the 1979 injunction. It would also contravene the declaration of federal law by the Florida court.

Nevertheless, although neither HHS nor Checkbook so argued, the district court ruled that Checkbook "seeks different records" from those at issue in *FMA*—and that the 1979 injunction is "immaterial to [the] Court's analysis." JA 280 n. 1. This ruling was not supported by any explanation whatsoever. Accordingly, the court's conclusion on this crucial point is not entitled to deference. *See In re Sealed Case*, 121 F.3d at 740 ("Because the district court not only failed to make factual findings but also failed to provide any explanation of its legal reasoning, we believe that no deference to the district court's [order] is appropriate.").

The lack of any analysis requires speculation as to the basis for the court's conclusion. There are, however, two possible bases:

(1) The records that Checkbook seeks are different in nature from the records covered by the 1979 injunction and declaration;

(2) The 1979 injunction and declaration extend only to the records HHS intended to disclose in 1978, not in later years.

Each of these is demonstrably incorrect.

First, the records sought by Checkbook are not substantially different from those covered by the 1979 injunction. To be sure, Checkbook has requested data on *claims* for reimbursement submitted by physicians, *see* JA 69–71 ¶¶ 2–3, 10—while the 1979 injunction prohibits disclosure of *reimbursement* amounts. 479 F. Supp. at 1311. But as HHS demonstrated below, disclosing the former is tantamount to disclosing the latter. *See* JA 98, ¶ 6;

JA 101–02, ¶ 16 (the claims information that Checkbook seeks "can be used to easily derive the total Medicare payments to an individual physician"). Checkbook has requested the UPIN number of Medicare providers. That number can be plugged into the publicly available website www.upinregistry.com to learn the physician's name and address. Checkbook has also requested a list of procedure codes submitted for reimbursement under each UPIN. Publicly available Medicare fee schedules state how much physicians are paid for each procedure. Accordingly, disclosing the UPIN and the claims for reimbursement submitted under that UPIN effectively discloses Medicare payments to individual physicians. JA 101–102, ¶ 16; JA 107. Even the district court appeared to accept HHS's assertion that the records in question would reveal "the annual amounts of Medicare reimbursements paid to an individual physician." JA 279. Thus, the data that Checkbook seeks is substantially equivalent to "annual reimbursements to individually identified providers of services under the Medicare Act"—the precise information disclosure of which is enjoined by the 1979 Order.[2]

Because of their substantial similarity, the two data sets warrant the same treatment under FOIA. *See FBI v. Abramson*, 456 U.S. 615, 625 (1982) (record that is "substantially the equivalent of" another record should be treated the same for FOIA exemption purposes); *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 33 (D.C. Cir. 2002) (when disclosure of record would enable discovery of other private information through publicly accessible resources, discoverable private information must be considered in Exemption 6

[2] Ironically, not even Checkbook argued in the district court that the records it sought were different from the records protected by the 1979 injunction. *See* Checkbook Memorandum in Support of Cross-Mtn. for S.J., Docket No. 16, p. 21–26 (arguing that the 1979 injunction does not control this case on grounds of intervening Supreme Court precedent on FOIA Exemption 6 and shifting public and private interests—not because the records Checkbook seeks are distinguishable from those subject to the 1979 injunction); Checkbook Reply in Support of Cross-Mtn. for S.J., Docket No. 23, p. 10–11 (same).

analysis). Any other result would turn FOIA analysis into a sterile exercise in semantic technicalities.

Second, the district court could not properly have found that the 1979 injunction somehow applied only to a one-time disclosure of records that HEW sought to make in 1978. By its terms, the 1979 injunction is "permanent." *FMA*, 479 F. Supp. at 1311. The injunction and declaration of unlawfulness apply to disclosure of reimbursement amounts "for any years." JA 295–96, ¶¶ 1–2. The 1979 injunction and declaration remain in force and continue to bar HHS from disclosing the requested records. *See, e.g.*, *System Federation No. 91, Ry. Emp. Dept., AFL-CIO v. Wright*, 364 U.S. 642, 646–47 (1961); *Assn. of Retarded Citizens of N. Dakota v. Sinner*, 942 F.2d 1235, 1239 (8th Cir. 1991); *Feller v. Brock*, 802 F.2d 722, 728 (4th Cir. 1986).

B. Because The 1979 Injunction Barred Disclosure Of Substantially The Same Records That Checkbook Sought, HHS Did Not "Improperly Withhold" Those Records.

FOIA authorizes district courts to enjoin federal agencies "from withholding agency records and to order the production of any agency records improperly withheld." 5 U.S.C. § 552(a)(4)(B). The district court's order in this case rests on a finding that HHS "improperly withheld" the records sought by Checkbook. *See* JA 272–73. However, because the 1979 injunction enjoined HHS from disclosing those records, HHS did not "improperly" withhold them.

The decision of the Supreme Court in *GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375 (1980), is controlling. There, a Delaware district court enjoined the Consumer Products Safety Commission ("CPSC") from releasing accident reports. Consumers Union subsequently sued the CPSC in the D.C. district court after the CPSC refused to disclose the accident reports in response to a FOIA request. The Supreme Court held that the CPSC's adherence to the Delaware court's injunction and resulting nondisclosure of the accident reports

was proper: "To construe the lawful obedience of an injunction issued by a federal district court with jurisdiction to enter such a decree as 'improperly' withholding documents under the Freedom of Information Act would do violence to the common understanding of the term 'improperly' and would extend the Act well beyond the intent of Congress." *Id.* at 387.

GTE Sylvania mandates judgment in favor of HHS. HHS remains subject to the 1979 injunction. Its refusal to disclose the records that Checkbook sought—substantially the same records that HHS has been ordered to withhold—constitutes "lawful obedience" to the 1979 injunction. The Florida district court had jurisdiction to enter that injunction. *See* 5 U.S.C. § 552a; 28 U.S.C. § 1331(a). Moreover, Checkbook cannot argue (and has not argued) that the *FMA* court's decision had "only a frivolous pretense to validity." *GTE Sylvania*, 445 U.S. at 386–87. Since HHS did not withhold the records "improperly," Checkbook's claim must be rejected as a matter of law. *See also Morgan v. Dept. of Justice*, 923 F.2d 195, 197 (D.C. Cir. 1991) (where an injunction prohibits agency from disclosing records, "FOIA does not compel the agency to release the information"); *Wagar v. Dept. of Justice*, 846 F.2d 1040, 1046 (6th Cir. 1988) ("the Department cannot be held to have acted improperly by withholding [records] when it did so in accordance with the plain language of" another court's order).

When HHS raised the 1979 injunction as proper grounds for withholding the records that Checkbook had requested, Checkbook could have sought a stay of the proceedings while it pursued modification or vacatur of the 1979 injunction in the Florida court. That is precisely the avenue suggested by the Supreme Court in *Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1994): "If respondents believed the Section 105 Injunction was improper, they should have challenged it in the" issuing court. That is because "[i]t is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by

orderly review, either by itself or by a higher court, its orders based on its decision are to be respected." *Id.* (*quoting Walker v. Birmingham*, 388 U.S. 307, 314 (1967)). This Court, too, has explained in the FOIA context that "those who object to a court order are expected to make their objection by means of the rules and procedures in accord with which the judicial system operates, for a court's ability to command adherence to its procedures and to resolve disputes depends on its ability to compel obedience to orders properly issued." *Lykins v. Dept. of Justice*, 725 F.2d 1455, 1460–61 (D.C. Cir. 1984). *See also Wagar*, 846 F.2d at 1047 ("the appropriate forum for [plaintiff's] attack upon the validity of [another district court's nondisclosure] order is with that district court").

In sum, the disclosure Checkbook seeks is contrary to the 1979 injunction. The district court should therefore have entered judgment for HHS. It had no authority to ignore or modify the injunction of a coordinate district court. For it to have done so involved "seriously undercutting the orderly process of the law." *Celotex*, 514 U.S. at 313.

II. Even If The Conflict Between The 1979 Injunction And The Relief Checkbook Sought Was Not Clear From The Face Of The Orders, The District Court Should Have Deferred To The Middle District Of Florida.

At a minimum, there is a colorable conflict between the 1979 injunction and the district court's order. Both AMA and HHS, parties on opposite sides of the 1979 litigation, agree that a conflict exists. Not even Checkbook has disputed that the 1979 injunction covers the records that it seeks. In light of what is at least a colorable conflict, the district court should be required to stay its hand pending a definitive interpretation by the Middle District of Florida as to the applicability of the 1979 order.

When it is unclear whether a conflict exists between a prior order of another district court and an order under consideration by a second district court, the second court should seek clarification of the prior order from the issuing court. *See Morgan v. U.S. Dept. of Justice*,

923 F.2d 195 (D.C. Cir. 1991). In *Morgan*, the District of Maryland had ordered that interview notes taken by an FBI agent be sealed. Morgan brought a FOIA action against DOJ in the D.C. district court seeking the same notes. This Court instructed that if the D.C. district court was unable clearly to determine whether the seal order in Maryland was intended to prohibit disclosure of the notes under FOIA, then it would be necessary to obtain clarification from the Maryland court. *Id.* at 198. "[T]he [D.C.] district court would reasonably exercise its discretion by staying its hand, on the government's motion, to allow a reasonable period of time for the DOJ to seek a clarification from the court that issued the seal." *Id.*

Similarly, the Fourth Circuit vacated a preliminary injunction entered by a West Virginia district court after that court inadequately considered the risk of conflicting judgments that its injunction created with regard to an earlier injunction entered by the D.C. district court. *See Feller v. Brock*, 802 F.2d 722 (4th Cir. 1986). "[I]ssuance of the preliminary injunction [by the West Virginia court] did a grave disservice to the public interest in the orderly administration of justice. … [T]here is an underlying policy of judicial administration which counsels against the creation of conflicts such as the one at bar." *Id.* at 727–28. The Fourth Circuit "chose[] not to decide the extent to which the orderly administration of justice or preclusion principles circumscribe further action by the West Virginia district court," *id.* at 728. Instead, it recommended that the West Virginia court consider transferring the case to the District of Columbia, because "the avoidance of conflict between coordinate courts[] may make the District of Columbia a more appropriate forum for this action." *Id.* at 729 n. 7. *See also Bergh v. State of Wash.*, 535 F.2d 505, 507 (9th Cir. 1976) (A. Kennedy, J.) ("When an injunction sought in one federal proceeding would interfere with another federal proceeding, considerations of comity

require more than the usual measure of restraint, and such injunctions should be granted only in the most unusual cases.").

By ordering HHS to disclose the requested records without regard to the 1979 injunction, the court below subjected HHS to a substantial risk of being subject to conflicting judgments. *See GTE Sylvania*, 445 U.S. at 387. If HHS indicates that it will release the records in question pursuant to the order of the court below, the AMA could initiate a contempt action in the Middle District of Florida. The precise situation cautioned against in *Morgan*, *Feller*, and similar cases would have materialized. Respect for the integrity of the federal court system requires that this result not be permitted to occur.

Instead, the district court below should have exercised "more than the usual measure of restraint." *Bergh*, 535 F.2d at 507. Comity concerns strongly support either a stay until the Florida court could review and interpret its 1979 order, dismissal without prejudice, or a transfer of this litigation to Florida pursuant to 28 U.S.C. § 1404(a). *See Exxon Corp. v. United States Dept. of Energy*, 594 F. Supp. 84, 91 (D. Del. 1984) ("Comity dictates a transfer of this case" under § 1404(a)). *Cf. United States v. Fluor Corp.*, 436 F.2d 383, 385 (2d Cir. 1970) ("Comity among the district courts would obviously be furthered if these issues were referred back to the court which originally considered them.").

In sum, at the very least, the substantial similarity between the records protected by the 1979 injunction and the records sought by Checkbook required that the district court obtain an interpretation of that injunction before ruling on Checkbook's request.

III. The AMA Should Be Permitted To Intervene.

A. The AMA Meets the Standards of Rule 24.

A litigant in whose favor an injunction is issued is entitled to the injunction's protective effects until that injunction is modified or vacated. The 1979 injunction at issue here

was entered in favor of the AMA and its members. Thus, the AMA, which represents those physicians whose privacy is at stake, should be permitted to intervene in order to defend the 1979 injunction.

This Court has "held that intervention in the court of appeals is governed by the same standards as in the district court," namely those standards set forth in Federal Rule of Civil Procedure 24. *Massachusetts School of Law at Andover, Inc. v. United States*, 118 F.3d 776, 779 (D.C. Cir. 1997) (*citing Building & Construction Trades Dept. v. Reich*, 40 F.3d 1275, 1282–83 (D.C. Cir. 1994)) (emphasis omitted).[3] Rule 24(a)(2) provides that a movant-intervenor may intervene "as of right" when it has an interest in the litigation, the movant-intervenor "is so situated that the disposition of the action may as a practical matter impair or impede its ability to protect" that interest, the movant-intervenor's interests are not adequately represented by existing parties, and the motion to intervene is timely. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003). In addition, Rule 24(b)(2) provides that the Court "may permit" intervention if the AMA "has a claim or defense that shares with the main action a common question of law or fact" and intervention will not "unduly delay or prejudice the adjudication of the original parties' rights." Here, the AMA satisfies the requirements for intervention as of right but, in any event, should be permitted to intervene under Rule 24(b).

[3] In its Opposition to AMA's Motion to Intervene (at 6), Checkbook cited *Amalgamated Transit Union Int'l v. Donovan*, 771 F.2d 1551, 1552 (D.C. Cir. 1985) (*per curiam*), for the erroneous proposition that intervention in the Court of Appeals is proper "only in an exceptional case for imperative reasons." That case involved a motion to intervene filed *after* this Court had heard argument and rendered its decision. *Id.* The Court emphasized that "if intervention is allowed *after appellate argument and decision*, both the judicial panel and the parties before the court are denied any meaningful opportunity to respond to any new arguments raised by a claimant who seeks to intervene." *Id.* at 1553 (emphasis added). Such concerns are not present in this case. In any event, this is an "exceptional case" and there are "imperative reasons" to permit intervention—as explained below.

1. The AMA Has An Interest In The Litigation That Would Be Impaired Or Impeded If It Were Not Allowed To Intervene.

Both the AMA and its members have an interest in this action.[4] AMA has an interest in vindicating the injunction that it obtained in 1979. AMA's member-physicians have an interest in the privacy of their income from treating Medicare patients. This interest is particularly great given that many physicians derive a high percentage of their income from treating patients 65 or older—the population covered by Medicare. Disposition of this case would, as a practical matter, "impair or impede" the ability of the AMA and its members to protect their interests.

The district court's order effectively setting aside the 1979 injunction and ordering release of the records sought by Checkbook makes that conclusion indisputable. Even if the AMA could potentially "reverse an unfavorable ruling by bringing a separate lawsuit" in the Middle District of Florida, "there is no question that the task of reestablishing the status quo if [Checkbook] succeeds in this case will be difficult and burdensome." *Fund for Animals*, 322 F.3d at 735 (finding that such an impairment of interest satisfied Rule 24 requirements).

2. The AMA's Interest Has Not Been, And Will Not Be, Adequately Represented By HHS.

Rule 24's requirement that the movant-intervenor's interest is not adequately represented by existing parties "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as

[4] The AMA undisputedly has Article III standing to intervene in this appeal. The AMA was a plaintiff in the *FMA* litigation. Moreover, as an association whose members include the very physicians whose records are at issue, the AMA has associational standing to seek redress of the injury those physicians would suffer if their financial records were released to the public. *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 341–45 (1977).

minimal." *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n. 10 (1972). "This burden [ ] is not onerous." *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986).

That burden is easily met here for two separate reasons. First, no existing party shares the physicians' privacy interest in the records at issue. While HHS may have some institutional interest in avoiding conflicting judgments or avoiding erroneous FOIA rulings, its personal financial records are not at stake. For similar reasons, private parties whose records are sought through FOIA actions often intervene in those actions to advocate against disclosure. *See, e.g.*, *Taylor v. Blakey*, 490 F.3d 965, 969 (D.C. Cir. 2007) (airplane manufacturer successfully intervened in FOIA suit against Federal Aviation Administration for release of airplane plans); *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 145 (D.C. Cir. 2006) (drug manufacturers successfully intervened in FOIA suit against FDA for release of records related to drug approval); *Public Citizen Health Research Group v. FDA*, 185 F.3d 898, 900 (D.C. Cir. 1999) (same).

Second, HHS does not adequately represent the interest of the AMA and its members in preserving the 1979 injunction. The agency sought in the *FMA* case authorization to disclose the same records that it now argues are protected. Further, in this case, HHS had earlier agreed to disclose the records Checkbook seeks. *See* JA 270.

Even though HHS has appealed the district court's decision, it has simultaneously made clear that it "shares the goals of Consumers Checkbook." In a public statement issued on the day it filed its opening brief in this Court, HHS announced that it "is appealing [the district court's] decision because of two conflicting court opinions that control HHS' release of data," and that it "seeks resolution of this conflict from the Court of Appeals." Statement of HHS on Consumers Checkbook Appeal. But, HHS emphasized, "[b]eyond the legal issues that must be

resolved, HHS recognizes and shares the goals of Consumers Checkbook." *Id.* HHS also announced that it "continues to explore additional opportunities to ensure that Medicare data is available." *Id.*. Thus, HHS does not adequately represent the AMA's member-physicians' privacy interests.

3. The AMA's Motion To Intervene Was Timely.

Neither the parties nor the Court notified the AMA that this litigation was proceeding in the district court. Once it became aware of the litigation and had a reasonable opportunity to review the proceedings, the AMA quickly moved to intervene. *See* Declaration of Counsel (Ex. 1 to AMA's Mtn. to Intervene) (filed in this Court Jan. 7, 2008).

"The most important consideration in deciding whether a motion for intervention is untimely is whether the delay in moving for intervention will prejudice the existing parties to the case." Wright & Miller, 7C *Federal Practice & Procedure* § 1916. Granting the AMA's motion to intervene will have no prejudicial effect on the existing parties. Because the AMA has been permitted to participate in the merits briefing on the same schedule as the existing parties, granting the AMA's motion now will not materially delay this appeal. Likewise, if this Court reverses and remands the case, the parties will suffer no delay for having the AMA participate in the litigation going forward.

In its Opposition to AMA's Motion to Intervene (at p. 7), Checkbook asserted that the AMA could be precluded from intervening because it filed a motion to intervene in *this* Court rather than in the district court. That argument is particularly specious since Checkbook did not see fit to inform the AMA of the pendency of the action, and the AMA did not find out about the litigation until after the court below had entered judgment for Checkbook. Not surprisingly, moreover, this Court has cast doubt on the argument that Checkbook advances. *See Massachusetts School of Law,* 118 F.3d at 780 ("for both (intervention [in the district court] for

purposes of appeal, intervention in an appeal), the effects are felt—at least initially—in the court of appeals").

4. The AMA Should Be Permitted To Intervene

Even if the AMA does not satisfy the requirements of Rule 24(a)(2), the claims of the AMA share common questions of fact and law with the defense presented by HHS. As noted above, permitting the AMA to intervene will neither delay the proceedings nor prejudice the parties. Thus, the AMA should be permitted to intervene under Rule 24(b).

B. The AMA Is A Necessary Party Under Rule 19

Rule 19 provides that a person "must be joined as a party if … disposing of the action in the person's absence may as a practical matter impair or impede the person's ability to protect the interest" and if failure to join the person would "leave an existing party subject to a substantial risk of incurring … inconsistent obligations." Fed. Rule Civ. Proc. 19(a)(1)(B)(i)–(ii). Both are true here. Disposing of the action in the absence of the AMA would, as noted above, impair the AMA's ability to protect the interests of its members under the 1979 injunction and the Privacy Act. Resolution of this case without the AMA as a party would subject HHS to a substantial risk of incurring an obligation in this litigation that is inconsistent with its obligation under the 1979 order. Thus, quite apart from Rule 24, the AMA must be permitted to participate in this litigation as a necessary party under Rule 19.

IV. If The AMA Is Permitted To Intervene, It Is Prepared To Offer Evidence And Argument On Remand To Influence The FOIA Exemption 6 Balance.

A. The AMA Is Prepared To Introduce Evidence Demonstrating That The Proper Balance Under Exemption 6 Strongly Favors Nondisclosure

Checkbook argued, and the district court agreed, that physician-identifying information was necessary to permit the public to analyze:

> (1) "whether the government is allowing and paying for Medicare physicians with less-than-optimal levels of experience to perform difficult procedures;" (2) "whether the government is allowing Medicare physicians with insufficient board certifications, histories of disciplinary actions, or poor scores on independent quality assessments to perform high volumes of difficult procedures for which they may not be qualified;" and (3) "whether Medicare physicians are exhibiting practice patterns that conform with existing guidelines (e.g. whether physicians treating patients with specific diagnoses are providing annual exams and screenings recommended for those patients)." In order to perform these types of analyses, the Medicare claim information must include physician-identifying information linked to each Medicare service or procedure.

JA 276 (district court opinion, *quoting* Checkbook Memorandum in Support of Cross-Mtn. for S.J.). The court found that physicians' privacy interest was "minimal." JA 279. If the AMA is a party to the litigation on remand, it is prepared to present evidence to alter the district court's calculus.

The AMA recently established a Task Force on the Release of Physician Data. The Task Force is in the process of compiling a report on appropriate principles for public release of accurate and useful physician data. While that report is presently in draft form, the AMA is prepared to present its reasoning and findings on remand. Among the report's recommendations are that only data measured against evidence-based quality of care measures and producing verifiably accurate results that reflect the actual quality and cost of care provided by the physician should be released for public information. Checkbook's proposal does not embrace either of these concepts.

Rather, Checkbook would release information rating physicians based only on the number, not quality, of various procedures performed on Medicare patients. Many studies have been conducted trying to link volume of procedures performed with favorable patient outcomes for hospitals or groups of physicians. While the results are somewhat mixed in their findings,

many, if not most, find a relatively low correlation between volume and positive outcomes. However, all studies indicate that an analysis of the bare quantity of procedures performed by individual physicians, as Checkbook intends to do, does not accurately predict those individual physicians' patient outcomes. *See* E. Halm, C. Lee, & M. Chassin, *Is Volume Related to Outcome in Health Care? A Systematic Review and Methodologic Critique of the Literature*, 137 Annals of Intern. Med. 511, 517 (2002) (concluding from meta-analysis of studies that though "for some procedures and conditions, higher volume among hospitals and physicians is associated with better outcomes," "the magnitude of the relationship varies greatly among individual procedures and conditions," and "volume does not predict outcome well for individual hospitals or physicians").

Additionally, the draft AMA report recommends that physicians be given the opportunity to respond to and correct inaccurate information; no such opportunity is available in Checkbook's plan. Both of these points go to the public interest in disclosure because information that poses a substantial risk of misleading the public is of little value—and can even be harmful.

The AMA is also prepared to draw on the expertise of its members in Medicare claims processing to establish that the records Checkbook seeks do not accurately reflect even the bare numbers that Checkbook seeks to publish. For example, the AMA is prepared to demonstrate that some physicians practice in group practices and bill Medicare using a group UPIN. The provider number used to submit the claim may or may not specify the physician actually performing the service. *See* JA 102, ¶ 17. Thus, the association of a Medicare claim with a particular provider number does not necessarily establish whether, for example, "the

government is allowing and paying for Medicare physicians with less-than-optimal levels of experience to perform difficult procedures."

In addition, the AMA is prepared to offer evidence tending to show that it will seem to the public that a single physician has submitted an unduly large number of claims—when in fact that number will reflect the claims of numerous physicians covered by the same provider number. Disclosure of such misleading information could raise a specter of impropriety, creating an unwarranted reputational injury to particular physicians.

The AMA is prepared to present evidence that any resultant confusion would harm not only physicians, but also patients. If patients receive a misleading picture of their physicians' income from Medicare or the state of their physicians' practices, the trust uniquely essential to an effective patient-physician relationship could be undermined. This result could in turn lead to disruption in continuity of care or an unwarranted loss of confidence in the physician by the patient. In sum, AMA's evidence regarding the nature of submission of claims to Medicare would simultaneously diminish the public interest in disclosure and increase the privacy interest in nondisclosure.[5]

B. The District Court Improperly Balanced The Relevant Interests Under FOIA Exemption 6.

Regardless of the further argument and evidence that AMA could provide, the district court improperly balanced the competing interests under Exemption 6 of FOIA. That exemption permits HHS to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Checkbook concedes that the records it seeks constitute "similar files" within the

[5] The AMA also adopts the arguments of the *amici* medical societies with respect to FOIA Exemption 6. Beyond their substance, those arguments confirm the need for the physician perspective to be represented by a party to this litigation.

scope of Exemption 6. JA 274. The question, then, is whether disclosure of those records amounts to a "clearly unwarranted invasion of personal privacy." Answering that question requires balancing the privacy interest of those physicians whose records Checkbook seeks against any cognizable public interest in disclosure. *See Dept. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 762 (1989); *Lepelletier v. Federal Deposit Ins. Corp.*, 164 F.3d 37, 47 (D.C. Cir. 1999) (*quoting Department of Air Force v. Rose*, 425 U.S. 352, 372 (1976)). That balance strongly favors nondisclosure.

1. The Privacy Interest Against Disclosure Is Substantial.

First, disclosing the payments that individually identified physicians receive under the Medicare program implicates a "substantial" privacy interest of those physicians. *See National Ass'n of Home Builders v. Norton*, 309 F.3d 26, 34 (D.C. Cir. 2002). "A substantial privacy interest is anything greater than a *de minimis* privacy interest." *Multi AG Media LLC v. Dept. of Agriculture*, 515 F.3d 1224, 1229–30 (D.C. Cir. 2008). The physicians' privacy interest here is substantial because the records include private financial information—namely, physicians' annual income for performing medical services for Medicare beneficiaries. "[T]his court has often held that individuals have a privacy interest in the nondisclosure of their names and addresses in connection with financial information." *Lepelletier*, 164 F.3d at 47 (*citing Painting and Drywall Work Preservation Fund, Inc. v. HUD*, 936 F.2d 1300, 1302–03 (D.C. Cir. 1991) (seeking release of name, address, and wage data); *National Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 875–76 (D.C. Cir. 1989) (requesting release of name, address, and annuitant status)).

This Court has further recognized a "particular[] concern[]" when the information sought for public disclosure "may be used for solicitation purposes." *Lepelletier*, 164 F.3d at 47. Here, pharmaceutical companies and medical device manufacturers would eagerly seek

information about which individual physicians perform which particular services. If the district court order is allowed to stand, such entities will later seek that information for solicitation purposes, and HHS will be required to provide it.

It is no answer that the privacy interest here relates to physicians' professional—*i.e.*, business—lives. Although the practice of medicine is physicians' "business," the payments made to a physician for medical care are often closely related to that physician's individual income. Just this year, this Court affirmed that when business information reveals financial information associated with an individual, it is within the scope of Exemption 6:

> Were we to deem an individual's financial information unprotected by Exemption 6 simply because it is found in a business record, a cardinal purpose of Exemption 6 would not be served. It is clear that businesses themselves do not have protected privacy interests under Exemption 6, but where their records reveal financial information easily traceable to an *individual*, disclosing those records jeopardizes a personal privacy interest that Exemption 6 protects. We thus hold that Exemption 6 applies to financial information in business records when the business is individually owned or closely held, and "the records would necessarily reveal at least a portion of the owner's personal finances."

Multi AG Media, 515 F.3d at 1228–29 (*quoting National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673, 685 (D.C. Cir. 1976)); *see also Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1189 (8th Cir. 2000) ("An overly technical distinction between individuals acting in a purely private capacity and those acting in an entrepreneurial capacity fails to serve the exemption's purpose of protecting the privacy of individuals."). Notably, the district court did not recognize this distinction. *See* JA 277.

Likewise, it is no answer that because many physicians receive income from other sources as well, their Medicare reimbursements do not implicate a substantial privacy interest. For many physicians, particularly those in specialties that treat a large number of elderly persons, payment from Medicare represents a large percentage of their total income. This Court has

recognized that even when factors outside the agency-held records have a significant impact on a person's overall financial picture—so that disclosure of the agency records alone will not reveal the individual's total income—"the privacy interest that would be compromised by disclosure of the files is greater than *de minimis*." *Multi AG Media*, 515 F.3d at 1230.

Nor is it significant that the records sought involve voluntarily accepted government funds. The physicians whose records Checkbook seeks provided Medicare services in reliance on the 1979 injunction's barring any disclosure by HHS of their private information; they did not waive their privacy rights simply by submitting claims to HHS. Second, physicians who receive Medicare payments, unlike government employees or contractors, are not performing services for the government. They are providing services for their patients. The government is simply acting as insurer. *See* 42 U.S.C. § 1395l(a) (Medicare benefits are paid when an "individual who is covered … incurs expenses for services"); 42 U.S.C. § 1395u(h)(1) (Medicare participating physicians "accept payment … on an assignment-related basis for all items and services furnished to individuals").

Finally, it is telling that Congress has determined that physicians have a strong privacy interest in nondisclosure of their individually-identifiable records. In the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101 *et seq.*, Congress required hospitals, boards of medical examiners, and other health care entities to report all medical malpractice payments, sanctions imposed, and adverse professional review actions associated with individual physicians to HHS. 42 U.S.C. §§ 11131–33. Significantly, Congress also expressly provided that such information was not appropriate for public disclosure: "Information that is reported under this subchapter is *considered confidential and shall not be disclosed* …." 42 U.S.C. § 11137(b)(1) (emphasis added). Congress made clear that it was specifically disclosure of

individual physicians' identities that was impermissible, for it provided that disclosure of the same information "in a form that does not permit the identification of any particular health care entity, physician, other health care practitioner, or patient shall not be considered confidential." *Id.* Likewise, here, the adverse effect on physician privacy from disclosing physicians' personal financial information can be averted by withholding physician-identifying numbers.

2. The Public Interest In Disclosure Is Minimal At Best.

The only public interest permitted to be weighed against physicians' substantial privacy interest is "the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" *Dept. of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 497 (1994) ("*DOD*"); *see also Nat'l Ass'n of Home Builders*, 309 F.3d at 34 ("unless a FOIA request advances 'the citizens' right to be informed about "what their government is up to,"' no relevant public interest is at issue.") (citation omitted). None of the purported benefits of disclosure sheds light on the performance of any statutory duty of HHS. *See DOD*, 510 U.S. at 497.

As this Court has previously recognized in a different context, merely identifying the individual recipients of federal funds does not necessarily provide useful information as to how the agency providing those funds is performing its statutory duty:

> The lesson for this case, *mutatis mutandis*, is that unless the public would learn something directly about the workings of the *Government* by knowing the names and addresses of its annuitants, their disclosure is not affected with the public interest. While we can see how the percentage of the federal budget devoted to annuities, the amount of the benefit an average annuitant receives, or other aggregate data might be of public interest, disclosure of those facts would not be entailed in (and could be accomplished without) releasing the records NARFE seeks here. The simple fact is that those records say nothing of significance about "what the[ ] Government is up to."

National Ass'n of Retired Federal Employees, 879 F.2d at 879 (emphasis and alteration in original). Similarly, "knowing the names" of the particular physicians whom Medicare beneficiaries have elected to consult for various procedures has nothing to do with HHS's "statutory duties" or what HHS is "up to." To the contrary, HHS is statutorily barred from playing any role in that arena. *See* 42 U.S.C. § 1395. Notably, the district court did not examine how disclosure of records including physician-identifying numbers would reveal anything about the workings of *HHS*, as opposed to the practices of non-governmental physicians. *See* JA 276.

Finally, the records Checkbook seeks will not add significantly to the already widespread governmental oversight of physicians. Physicians are licensed and regulated pursuant to state law. *See, e.g.*, 42 U.S.C. § 1395x(4). Their practices under Medicare are subject to scrutiny by the Medicare carriers, the Office of Inspector General, and the 53 Quality Improvement Organizations ("QIOs"). *See* HHS Office of Inspector General, Reports of the Office for Audit Services on CMS, online at http://www.oig.hhs.gov/oas/oas/cms.html (listing reports on, *e.g.*, Medicare carriers' review of claims entailing "high-dollar payments"); CMS, Overview on QIOs, online at http://www.cms.hhs.gov/QualityImprovementOrgs (QIOs "conduct case review to ensure that care provided to Medicare beneficiaries meets professionally recognized standards of healthcare and that Medicare pays only for services that are reasonable and necessary"). Moreover, physicians' actions in the private sector are constantly under scrutiny by managed care plans. *See, e.g.*, *Potvin v. Metropolitan Life Ins. Co.*, 997 P.2d 1153 (Cal. 2000).

Where there is limited public value in disclosure, that value will be outweighed by any substantial privacy interest. *DOD*, 510 U.S. at 500. Here, the privacy interest in nondisclosure outweighs any cognizable public interest served by disclosure. *See Retired Fed.*

Employees, 879 F.2d at 879. As the Florida court recognized nearly 30 years ago, disclosure of the records would bring about a clearly unwarranted violation of physician privacy as protected by Exemption 6.

CONCLUSION

The AMA's motion to intervene should be granted, and the order compelling disclosure of physician-specific records of Medicare claims should be reversed. This case should be remanded with instructions either (a) to grant summary judgment for HHS, (b) to stay proceedings pending clarification by the Middle District of Florida of the applicability of its 1979 injunction, or (c) to transfer the litigation to that District.

Respectfully submitted,

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RULE 32(a)(7)(C) CERTIFICATE

I, the undersigned, certify that the foregoing Brief for Movant-Intervenor American Medical Association complies with the type-volume limitations of D.C. Circuit Rule 32(a)(3)(B)(i). The brief contains 8,697 words according to the word processing software used to produce it.

_____

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ADDENDUM A

STATUTES AND REGULATIONS

STATUTES AND RULES

Except for the following, all applicable statutes, etc., are contained in the Brief for Defendant-Appellant HHS.

42 U.S.C. § 11131

42 U.S.C. § 11132

42 U.S.C. § 11133

42 U.S.C. § 11137

Fed. R. Civ. P. 19

Fed. R. Civ. P. 24

ADDENDUM B

Unpublished opinion and order in
American Ass'n of Councils of Medical Staffs of Private Hospitals, Inc. v. HCFA,
No. 78-1373 (E.D. La. 1980)

CERTIFICATE OF SERVICE

I, the undersigned, certify that, on May 1, 2008, I caused a copy of the foregoing Brief for Movant-Intervenor American Medical Association to be served by Federal Express on the following:

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