CASE NO. 10-2076

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

OWATONNA CLINIC-MAYO HEALTH SYSTEM,

Plaintiff-Appellee,

vs.

THE MEDICAL PROTECTIVE COMPANY OF FORT WAYNE, INDIANA,

Defendant-Appellant.

Appeal from the United States District Court
For the District of Minnesota
0:08-cv-00417-DSD-JJK

BRIEF OF *AMICI CURIAE* MINNESOTA MEDICAL ASSOCIATION MINNESOTA HOSPITAL ASSOCIATION AMERICAN MEDICAL ASSOCIATION

SUPPORTING THE DECISION OF THE DISTRICT COURT ON THE ISSUE OF SUBSTANTIAL COMPLIANCE WITH NOTICE REQUIREMENTS

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Dated: August 31, 2010

RULE 26.1 DISCLOSURE STATEMENT

Amicus Curiae Minnesota Medical Association states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Amicus Curiae Minnesota Hospital Association states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Amicus Curiae American Medical Association states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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The three Amici Curiae submitting this brief—the Minnesota Medical Association, the Minnesota Hospital Association and the American Medical Association—represent the majority of practicing physicians in Minnesota and the United States, as well as the majority of Minnesota hospitals. The vast majority of physicians purchase claims-made medical malpractice insurance policies. The Associations submit this brief to provide the Court with information about the history of medical malpractice insurance, and the policy and privacy implications of adopting the "strict compliance" notice standard that Med Pro advocates, and that the District Court rejected.

The Minnesota Medical Association (MMA) is a professional association representing approximately 11,000 physicians, residents, and medical students in the State of Minnesota. The MMA seeks to promote excellence in health care, to insure a healthy practice environment, and to preserve the professionalism of medicine through advocacy, education, information and leadership. For more than 150 years, the MMA and its members have worked together to safeguard the quality of medical care in Minnesota as well as the future of medical professionalism.

The American Medical Association (AMA) is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all U.S. physicians, residents and medical students are represented in the AMA's policy making process. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health. AMA members practice in every medical specialty area and in every state, including Minnesota.

The AMA joins this brief on its own behalf and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state, plus the District of Columbia, whose purpose is to represent the viewpoint of organized medicine in the courts.

Minnesota Hospital Association (MHA) is a trade association that represents Minnesota's hospitals and health systems. MHA works to develop, promote and implement progressive health policy in the state and nation that benefits hospitals' employees, patients and communities. MHA strives to partner with health plans, businesses, community groups, providers and others to advance common interests.

SUMMARY OF ARGUMENT

The decision in this case will affect many physicians, clinics, hospitals and other health care providers in Minnesota and other states located within the 8th Circuit because almost all medical malpractice insurance policies are claims-made policies. Adopting the position of The Medical Protective Company of Fort Wayne, Indiana's (Med Pro) to require "strict compliance" to trigger coverage under a claims-made medical malpractice policy would be fundamentally unfair to health care providers. It would jeopardize coverage for many existing adverse incidents that have been reported to insurers but have not yet resulted in claims, and would result in additional administrative costs and litigation. It also would encourage the premature and unnecessary disclosure of private patient information to insurance companies.

ARGUMENT

1. Because almost all medical malpractice insurance policies are claims-made policies, a decision in this case to adopt the "strict compliance" notice requirement will affect many physicians, clinics, hospitals and other health care providers in Minnesota. While every health care professional strives to have positive outcomes in every case, accidents and mistakes happen. To protect patients who may be harmed and to protect themselves, health care professionals

obtain medical malpractice insurance coverage. Having medical malpractice insurance is a critical part of every health care provider's practice. Approximately 97% of all new physicians entering practice are offered malpractice insurance as an employment benefit, and nearly all of these policies are "claims-made" policies. American College of Physicians Career Counseling, Malloy, Patrick J. (Planning Your Entry into Medical Practice: Mahnasset, 1998). Because almost all medical malpractice insurance policies are "claims made" policies, a decision in Med Pro's favor in the present litigation would affect the insurance coverage of virtually all health care providers in Minnesota.

2. Requiring doctors, clinics, hospitals and other health care providers to provide notice under a "strict compliance" standard would be fundamentally unfair to doctors. The elements of this unfairness include jeopardizing coverage for incidents that have been reported but have not yet become claims; elevating form over substance; and increasing the costs of health care through increased administrative burdens to track coverage for incidents that have not become claims. In common insurance industry parlance, the present litigation is about the coverage "trigger" of Owatonna's 1999 insurance policy with Med Pro.

The "trigger" of Med Pro's coverage obligations to Owatonna read as follows:

> [T]he receipt, by the Company during the term of the policy, of written notice of a medical incident from which the Insured reasonably believes allegations of liability may result. In order to be deemed a claim, notice of a medical incident shall include all reasonably obtainable information with respect to the time, place, and circumstances of the professional services from which liability may result and the nature and the extent of the injury, including the names and addresses of the injured and of available witnesses.

Med Pro Appendix 7 (emphasis added.)

As this Court is aware, Owatonna, on behalf of itself and its physician-employee, provided notice of the Jodi Schroeder/Chase Huisman incident when it provided Med Pro with notice of the Minnesota Board of Medical Practice investigation involving those individuals. This litigation arose when Med Pro refused to cover the claim, asserting that Owatonna failed in 1999 to report the incident in "strict compliance" with the reporting provisions of the insurance policy.

A. The proposed "strict compliance" standard would be fundamentally unfair to physicians, clinics, hospitals and other health care providers because it would jeopardize coverage with respect to incidents that have already been reported but have not yet resulted in a claim or demand. If the Court adopts Med Pro's proposed "strict compliance" requirement, physicians and other health care providers who believe they have secured coverage for incidents they previously reported may suddenly find themselves without

coverage. A "strict compliance" standard would allow the insurer to accept the notice, do nothing, and then later declare there is no coverage because the insured's notice lacked any of several "required" elements such as, in the present litigation, names and addresses of patients and witnesses.

The more reasoned result is that if an insurer receives a notice about an incident and believes the notice to be inadequate, it must notify the insured or promptly request the information necessary to meet the reporting requirements. Such a result appropriately places the burden of following-up on the insurance company, rather than the often unsophisticated health care provider who is simply trying to ensure that it has insurance coverage. Especially in the context of a claims-made policy, it is fundamentally unfair to the insured to have the insurer wait six years, as Med Pro did, and then assert a defense of inadequate notice and deny coverage for the claim.

B. The proposed "strict compliance" standard would be fundamentally unfair to physicians, clinics, hospitals and other health care providers because it would elevate form over substance when giving notice of an incident that has not yet resulted in a claim or demand. Currently, when an insured makes a claim it is up to the insurance company to determine whether there is coverage under the policy. Med Pro's proposed "strict compliance" test instead

would allow the insurer to reject claims on procedural grounds without ever getting to substantive coverage issues.

To illustrate this point, suppose an insured community hospital sent a letter to its insurance company informing them of an adverse medical incident. Such a letter might read as follows:

> A 67 year-old patient was seen last week in our emergency room for complaints of chest pain. Our employee physician, Dr. Smith, evaluated the patient and sent him home with directions to follow-up with a cardiologist within 10 days. The patient's daughter contacted our administrator two days later explaining that the patient died four hours after leaving the emergency room. The daughter stated that Dr. Smith shouldn't have let the patient go home. We wanted to notify you of this matter and request your assistance.

Based on this letter, the insurance company retained a lawyer to meet with Dr. Smith. The lawyer evaluated the care provided to the patient and advised Dr. Smith and the Administrator on how to respond to the daughter's concerns. The insurance company neither requested additional information about the incident nor indicated the insured's notice was inadequate. The policy period ended six months later and shortly thereafter the patient's wife brought a lawsuit against the physician and the hospital.

Under Med Pro's proposed "strict compliance" standard, the insurer—despite its knowledge and involvement with the incident—would be free to deny coverage based on alleged inadequacies in the notice, such as the failure to provide

the patient's name, address, or the names of witnesses. Such a denial would be purely procedural, and would not take into account the plethora of information the insurer had access to once learning of the incident. Minnesota law should not elevate form over substance, and should not allow such a result.

In the case that is the subject of this litigation, it is clear that the insurer knew of the incident, because it had already provided a defense for the Board of Medical Practice proceeding. There is no indication that the insurer was hampered in any way by not knowing the name or address of the patient initially; indeed, if it had considered such information to be important (and if it had not received such information already through its defense of the physician-employee before the Board of Medical Practice), it simply could have asked for that information. An insurer's assertion of the "strict compliance" test serves no purpose other than to elevate form over substance to allow insurers to avoid providing coverage for incidents that would otherwise be covered.

C. The proposed "strict compliance" standard would be fundamentally unfair to physicians, clinics, hospitals and other health care providers because it would allow insurers, who have much more expertise in insurance matters than health care providers, to take advantage of insureds who do not have a high level of insurance expertise The proposed "strict compliance" test is fundamentally unfair to physicians and other health care

providers because it would require health care providers to not only be health care experts, but to also be insurance experts. Insurers already have the upper hand in dealing with insureds on insurance matters. They have more expertise about the structure and contents of insurance policies than ordinary insureds because they work on insurance matters every day. They draft the insurance contracts, which are often filled with terms or concepts unfamiliar to many insureds, and most insureds have little if any ability to negotiate the language of the policy.

In this context, a "strict compliance" standard inverts the correct party upon whom to place the burden of complying with the requirements of the policy. This is not a case where there was no notice provided; rather, Med Pro's assertion is that imperfect notice was provided. If notice is imperfect, though, the insurer is in the best position to speak up and advise what is necessary to perfect notice. The burden of such a requirement on the insurer is not heavy, either, given their knowledge of the policy and requirements. In turn, the burden placed on the insured – who is often inexperienced in insurance matters – under a "strict compliance" standard is far greater, and far more costly if not done correctly. Indeed, if an insurer denies a claim under the "strict compliance" standard, the health care provider's only recourse is to defend against the malpractice claim itself, and then bring legal action against the insurer. While Owatonna Clinic fortunately had the resources to seek relief in the Courts, many insureds have

neither risk management departments to follow and manage claims, nor the resources to challenge the insurer's denial of coverage.

D. Adopting the "strict compliance" notice standard would also increase the cost of health care through increased administrative costs, increased insurance costs, and increased litigation and litigation costs. Despite Med Pro's strenuous argument that "strict compliance" is required, Med Pro has not articulated how it was harmed by the alleged lack of "strict compliance" with the policy notice provisions. The harm to insureds, though, is clear: adopting a "strict compliance" test would open the door for insurance companies to retroactively review their incident reporting provisions and deny previously-submitted claims because their insureds did not strictly comply with the incident reporting provisions. Going forward, a strict compliance standard also would allow Med Pro and other insurers to accept reports or notices of incidents, sit by quietly, and then when a demand is made deny coverage because each and every element of the claim notice provision was not met. Allowing insurers this kind of latitude will transfer the business of determining coverage from insureds and insurers to the courts.

To adopt the Med Pro "strict compliance" test would allow insurance companies to avoid otherwise applicable coverage provided by their policies by arguing that the notice requirements were not met, and require the courts to decide

whether the strict and technical reporting requirements have been met. Thus, if the "strict compliance" standard is adopted, it will divert time and attention from patient care towards additional administrative time and expense. Health care providers will need to spend more time submitting, reviewing and following up on insurance claims to ensure that when a notice of an incident that has not resulted yet in a claim is submitted, the insurer has committed in writing that the reported incident will be covered in the event that there is a claim or demand in the future.

Adopting the Med Pro "strict compliance" test also would require physicians, hospitals and clinics to buy more insurance. Under current practice, a physician or health care provider who has claims made coverage will typically only purchase "tail" coverage when moving from one employer to another, or upon retirement from the practice of medicine. But under the Med Pro "strict compliance" test, any physician, clinic or hospital would now face an additional peril when changing insurers. This is because if the triggering event for coverage is unclear, or if the notice is possibly insufficient, the individual or group changing insurers will be compelled to purchase "tail" and "prior acts" coverage just to avoid the kind of situation that became the subject of this lawsuit. Thus, the "strict compliance" standard would restrict competition by discouraging health care providers from changing insurance companies, and it would increase costs because it would require doctors and hospitals to purchase additional "tail coverage" and/or

"prior acts coverage" not just when they change employers or stop practicing, but whenever they change insurance providers.

3. <u>Med Pro's "strict compliance" standard would require premature and unnecessary release of confidential patient information to insurance companies without patient consent, in violation of the spirit of both ethical standards and of state and federal privacy acts.</u> The privacy and confidentiality of patient records is paramount, whether or not there is a reportable incident. Numerous ethical and statutory provisions state and restate this fundamental tenant of health care practice.

The AMA Code of Medical Ethics requires a physician to keep patient information confidential. It states:

> [T]he information disclosed to a physician by a patient should be held in confidence....The physician should not reveal confidential information without the express consent of the patient, subject to certain exceptions which are ethically justified because of overriding considerations…. When the disclosure of confidential information is required by law or court order, physicians generally should notify the patient. Physicians should disclose the minimal information required by law…

American Medical Association, Code of Ethics, Opinion 5.05 – Confidentiality (2010). (Emphasis added.)

Minnesota state law provides similar strict confidentiality for patient records. The Minnesota Health Records Act, Minn. Stat. 144.291 *et seq.*, provides

confidentiality for patient records. Likewise, the Minnesota Government Data Practices Act, Minn. Stat. 13.02, and its provision on medical data (Minn. Stat. 13.384), impose similar confidentiality requirements and applies to patient records of government-owned health care providers and providers of health care services under contract with the government.

Under federal law, the Health Insurance Portability and Accountability Act (HIPAA) 42 U.S.C.1301 *et seq.*, allows disclosure of patient information to business associates such as insurance companies for judicial and administrative proceedings. See 45 C.F.R. 164.512(e) and 45 C.F.R.504(e)(1). However, HIPAA does not allow release of private patient information for possible claims; it only extends to judicial and administrative proceedings that have actually begun. Like the AMA Code of Ethics and the Minnesota Health Records Act, HIPAA also requires that providers release the minimum necessary amount of information to accomplish the purpose at hand. See 45 C.F.R.502(b)(1).

All of these provisions stress the importance of patient confidentiality and privacy. But Med Pro's incidence on a strict compliance standard does not foster the goal of privacy; it fosters full-out disclosure, which oftentimes will be both premature and unnecessary. While health care providers certainly want to work with their medical malpractice insurance companies to provide them the

information they need to trigger insurance coverage, health care providers simultaneously need to preserve patient confidentiality. For that reason, the Court should not adopt a standard – such as a "strict compliance" standard – that would encourage physicians, hospitals and clinics to disgorge all of a patient's private health information (such as a patient's entire file) just to ensure compliance with the standard. Rather, physicians, clinics and hospitals should be assured that when they in good faith try to make a notice of an incident to their insurance carrier, the carrier will come back and request any additional information necessary to perform their analysis of the claim and comply with the terms of the policy. Such a compromise will allow the insurer to obtain the information it deems necessary, while also preserving patient confidentiality.[1]

CONCLUSION

For the reasons stated above, the Amici Curiae urge this Court to affirm the decision of the lower court with respect to the continued use of the "substantial compliance" test when providing notice of a medical malpractice claim under a claims-made medical malpractice insurance policy.

Dated this 30 day of August, 2010.

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[1] Of course, once a claim or demand by the patients is made, the patient has waived the privilege, and a physician, clinic or hospital is able to disclose necessary confidential information to its insurer for purposes of preparing a defense.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

1. This brief contains approximately 3989 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman using Microsoft Word 2007.

Dated: August 30, 2010

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CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 28A9d)(2)

I certify that pursuant to Rule 28A(d)(2) of the Eighth Circuit Court of Appeals, that the PDF file of the brief submitted to this Court has been scanned for viruses and that no virus has been detected.

Dated: August 30, 2010

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CERTIFICATE OF SERVICE

Mary Martin hereby declares and certifies that on August 30, 2010 she served the Motion of the Minnesota Medical Association, Minnesota Hospital Association and American Medical Association For Leave to Appear as Amici Curiae and Brief of Amici Curiae Minnesota Medical Association, Minnesota Hospital Association and American Medical Association upon the following:

Katie C. Pfeifer Dorsey & Whitney LLP 50 S.6th Street Suite 1500 Minneapolis, MN 55402	James K. Horstman Cray Huber Horstman Heil & VanAusdal LLC 303 W. Madison, Suite 2200 Chicago, Illinois 60606

By depositing one print copy of the Motion and two print copies and one CD ROM containing one PDF file of the Brief in the United States Mail, sealed and with proper postage attached, at West St. Paul, Minnesota; and

By sending a PDF file of the Motion and the Brief to the following email addresses:

jkh@crayhuber.com
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Dated this 30th day of August, 2010.

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