

MEMO

To: Plaintiffs and Interested Parties

**From: Jim Pyles
Counsel for Plaintiffs**

Date: July 27, 2003

Re: Status of Citizens for Health v. Thompson

This is to report on the status of the litigation in Citizens for Health v. Thompson (Civil No. 03-2267) pending in Federal District Court for the Eastern District of Pennsylvania. The original complaint was filed on April 10, 2003, four days before the compliance date for the Amended Health Information Privacy Rule, and an amended complaint was filed on May 5, 2003, 21 days after the compliance date. Currently, the case has 16 plaintiffs presenting nearly 750,000 health care consumers and practitioners. The suit seeks to enjoin and declare invalid the provision in the Amended Health Information Privacy Rule that eliminated the right of individuals to decide whether their personal health information would be used or disclosed (the "right of consent").

On July 24, 2003, U.S. District Court Judge Mary McLaughlin issued an order adopting a briefing schedule negotiated by counsel for plaintiffs and the Department of Justice. That order calls for the case to proceed in accordance with the following schedule:

1. By August 1, the government will file the administrative record with the Court;
2. Plaintiffs will file their motion for summary judgment by September 4;
3. The government will file its motion for summary judgment by October 8;
4. Plaintiffs will file their opposition by October 23;
5. The government will file its reply by November 7 and
6. The Court will schedule oral argument on cross-motions for summary judgment after all briefing is completed.

There will be no discovery by either side. Based on the above schedule, it is likely that the case will be argued in November or early December and that a decision will be rendered in early 2004.

This is an extremely expedited schedule given the magnitude of the constitutional issues in the case and the massive size of the administrative record. The administrative record that is being filed with the Court is contained in 16 binders and three CD-ROMS.

We have reviewed hundreds of thousands of pages of comments submitted in connection with the Amended Rule that was adopted on August 14, 2002. That review shows that approximately 150 organizations representing more than 130 million health care consumers and practitioners filed comments

urging the government to retain the right of consent as set forth in the Original Privacy Rule. We also found that the comments in support of eliminating the right of consent were nearly all from insurers, health care facilities (such as hospitals) and their employees. Those comments, while numerous, reflected the views of only a few thousand individuals. In short, the rule making record of the Amended Rule shows overwhelming support among consumers and practitioners for preservation of the right of consent while support for elimination of that right was generally confined to health insurers and hospitals.

We understand that one of the arguments that the government will raise is that the plaintiffs do not have standing to challenge the rule because they have not suffered a concrete injury because of the operation of the Rule and that the case is not “ripe” for adjudication because no action has been taken that is harmful to the plaintiffs. We can argue that there has been concrete harm in that (a) your right to a full and fair rulemaking under the Administrative Procedure Act has been violated, (b) your right to privacy under the 5th Amendment has been eliminated, (c) your right to private communications with your physician under the First Amendment has been eliminated and (d) your right to increased privacy protections under the HIPAA statute has been violated.

It would be helpful, however, if we could cite some specific examples of privacy violations that you may have suffered since the April 14, 2003 compliance date. Please let us know if you believe that you have suffered any violations to your medical privacy rights including the following:

1. Your health information was used or disclosed without your consent.
2. You requested restrictions on the use and disclosure of your health information, and the request was denied or ignored.
3. You asked for a consent process, and your provider refused to provide it.
4. You were not given a notice of your privacy rights when you visited your provider.
5. You were given a notice of privacy rights that did not inform you of your privacy rights under state law, or contained some other defect.
6. You have been unable to locate a physician who will provide a consent procedure or agree to restrict uses and disclosures of your health information.
7. You filed a complaint with a covered entity or HHS that has not been resolved satisfactorily.

If you have received a notice of your privacy rights from any covered entities or providers since April 14, 2003 which you believe may be defective, please forward it us. You may contact me at:

jim.pyles @ppsv.com; (202)466-6550 voice or (202)785-1756.