

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Appellate Docket No. 04-2550

Citizens for Health, American Psychoanalytic Association, American Association for Health Freedom, New Hampshire Citizens for Health Freedom, American Mental Health Alliance, American Association of Practicing Psychiatrists, Health Administration Responsibility Project, Congress of California Seniors, National Coalition of Mental Health, Professionals and Consumers, California Consumer Health Care Council, American Association of Practice Psychiatrists, Sally Scofield, Eugene B. Meyer, Daniel S. Schragar, Morton Zivan, Michaele Dunlap, Tedd Koren, Jane Doe, Janice Chester, Deborah Peel

Appellants

v.

**Tommy G. Thompson, Secretary,
U.S. Department of Health
and Human Services**

Appellee

**Appeal from Summary Judgment Order Issued by
United States District Court for the Eastern District of Pennsylvania**

**BRIEF OF AMICUS CONSUMER ATTORNEYS OF CALIFORNIA IN
SUPPORT OF APPELLANTS**

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION,
TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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SHARON J. ARKIN

STATEMENT OF INTEREST

The Consumer Attorneys of California (“Consumer Attorneys”) is a voluntary membership organization representing approximately 6,000 associated attorneys practicing throughout California. The organization was founded in 1962. Its membership consists primarily of attorneys who represent individuals subjected in a variety of ways to personal injury, employment discrimination, and other harmful business and governmental practices. Consumer Attorneys has taken a leading role in advancing and protecting the rights of injured consumers in both the courts and the Legislature.

The issue in this case is one of grave importance to consumers. As discussed below, maintaining the privacy of their medical information is universally an issue that consumers care very deeply about. Because the Amended Rule significantly impacts the right to medical privacy, it is an issue which Consumer Attorneys believes it has a responsibility to address with this Court. Additionally, the response of the medical industry in California has been to apply the Amended Rule as though it had preemptive effect and has resulted in significant breaches of California’s own privacy statutes. Accordingly, Consumer Attorneys has a vital interest in protecting California consumers from unwarranted

and illegal violations of their medical privacy which result from the inappropriateness of the Amended Rule.

Counsel for the Consumer Attorneys is familiar with the issues and the arguments presented by the parties whom this brief is submitted in support of and this brief is intended to emphasize the public policy considerations underlying the legal analysis presented by the Appellants.

LEGAL ARGUMENT

1.AS A MATTER OF PUBLIC POLICY, CONSTITUTIONALITY AND STATE LAW CONCERNS, MEDICAL PRIVACY IS AN ISSUE OF OVERWHELMING IMPORTANCE " \1 2

The right to privacy, generally, is not only an issue of constitutional magnitude, it is an issue of overwhelming importance to the average person. This is evident from the decisions of the United States Supreme Court, from state constitutional amendments and from statutes passed by Congress itself:

- The Supreme Court recently reiterated the importance and fundamental nature of the right to privacy in striking down the Texas anti-sodomy law. (*Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003).)
- California's constitution was amended to confirm privacy as a fundamental

right. (Cal. Const., Article 1, section 1.)

- Congress passed the Gramm-Leach-Bliley Act in order to specifically protect citizens' financial privacy. (See 15 USC section 6801, et seq.)

The importance of the right to privacy was recognized over a century ago - even before the advent of the "Information Age" and the Internet. In 1890, Louis Brandeis and Samuel Warren acknowledged in their Harvard Law Review article that "[o]f the desirability - indeed of the necessity - of some protection [of privacy], there can, it is believed, be no doubt." (Warren & Brandeis, 4 Harv. Law. R., No. 5, December 15, 1890.)

Ironically, one of the most compelling discussions of the importance of medical privacy was made by the Secretary himself in enacting the Original Rule. (See 65 Fed. Reg. 82,462.) The Secretary first recognized that "[p]rivacy is *a fundamental right*." (*Id.*, at 82,464; emphasis added.)

More specifically with respect to the goals and purposes of HIPPA, the Secretary acknowledged that the purpose of the regulations authorized by Congress under HIPPA was to "establish[] standards and *protections* for health information systems." (*Id.*, at 82, 463; emphasis added.) Further, the Secretary declared that "[i]n enacting HIPPA, Congress recognized the fact that *administrative*

simplification cannot succeed if we do not also protect the privacy and confidentiality of personal health information.” (*Id.*; emphasis added.)

Finally, the Secretary concluded that, because of the high level of public concern about the confidentiality of medical records, privacy protections are essential “for the effective delivery of health care, both to individuals and populations” and “is a *necessary foundation* for delivery of high quality health care.” (*Id.*, at 82,467.) Most compellingly, the Secretary noted:

“In short, *the entire health care system is built upon the willingness of individuals to share the most intimate details of their lives with their health care providers.* The need for privacy of health information, in particular, has long been recognized as *critical* to the delivery of needed medical care. More than anything else, the relationship between a patient and a clinician is based on trust.

* * *

Individuals cannot be expected to share the most intimate details of their lives *unless they have confidence that such information will not be used or shared inappropriately.* Privacy violations reduce consumers’ trust in the health care system and institutions that serve them. Such a loss of faith can impede the quality of the health care

they receive, and can harm the financial health of health care institutions.

The Secretary's analysis in this regard emphasizes that the protection of medical privacy is the foundation upon which efficiencies in the delivery of health care must be built. In other words, it is not a situation where a balancing can take place, that is, where privacy protections can be abrogated in order to enhance the efficient delivery of health care. This is a situation where, as the Secretary acknowledged, efficient delivery of health care cannot be achieved in the first instance *unless* adequate privacy protections are in place *first*.

The Original Rule, in fact, accomplished this. It established the minimum protections necessary for patient privacy, thereby enhancing the efficient delivery of medical care at the micro level, i.e., between the patient and the health care provider. The Original Rule then built upon that foundation a process for maximizing the efficiency of health care communications and interactions, *while maintaining the foundational privacy protections*.

The Secretary's abrogation and revocation of the Original Rule and implementation of the Amended Rule violated the very precepts the Secretary acknowledged as critical to the goals of HIPPA. The District Court's upholding of

the conduct was error.

**2.THE DISTRICT COURT’S DECISION APPLIED AN
ERRONEOUSSTANDARD IN CONCLUDING THAT IMPROVING THE
EFFICIENCY OF THE DELIVERY OF MEDICAL SERVICES
SUPERCEDES THE IMPORTANCE OF PROTECTING PATIENTS’
PRIVACY IN THE PROCESS " \1 2**

The findings by the Secretary in promulgating the Original Rule belie the District Court’s conclusion that the overriding purpose and intent of HIPPA was to enhance the efficiency of the delivery of health care. While improvement of health care delivery was *a* goal of the Act, it was not to be achieved at the sacrifice of personal privacy. In fact, as the Secretary noted, “a basic level of protection and peace of mind [] is *essential* to [Americans’] full participation in their care.” (*Id.*, at 82,464; emphasis added.)

First, the District Court relied on the Secretary’s new findings to support the validity of the Amended Rule. But in doing so, the District Court ignored that the original findings - which were more contemporaneous with the enactment of HIPPA itself - are to be given greater deference. (*Madison v. Resources for Human Development, Inc.*, 233 F.3d 175, 187 (3rd Cir. 2000).) Thus, the

Secretary's later findings that, for example, the consent requirement hindered some aspects of health care delivery, should not override the earlier findings that privacy protections are essential and necessary.

Second, in upholding the validity of the Amended Rule, the District Court ruled that "the rescission of the consent requirement is not so inconsistent with earlier findings as to render the change so implausible that it could not be ascribed to a difference in viewpoint or the product of agency expertise." (*Citizens for Health v. Thompson*, 2004 WL 765356, *13 (2004).) But that conclusion is, indeed, irreconcilable with the Secretary's findings in promulgating the Original Rule. In his analysis on the Original Rule, the Secretary recognized that, absent the privacy protections afforded in the Original Rule, patients were likely to take "some sort of evasive action to avoid the inappropriate use of their information by providing inaccurate information to a health care provider, changing physicians, or avoiding care altogether." (65 Fed. Reg. 82,462, at 82,468.) By deleting the consent requirement, that is, by stripping away the patient's power to limit disclosures, the Amended Rule is, in fact, wholly inconsistent with the Secretary's original findings - findings which must be given deference. (*Madison, supra.*)

Third, and most important, there were targeted fixes that the Secretary could have implemented that would have maintained privacy protections while still

enhancing procedural efficiencies - as the Secretary himself acknowledged. (67 Fed. Reg. 53,182, at 53,210.) But the Secretary rejected this solution on the grounds that it would have made the rule itself more complex. But complexity is patently no justification for abrogation of personal privacy rights. If complexity can solve the problem, i.e., it can protect privacy while yet giving medical care providers with the flexibility they need for processing medical claims, it should not be shunned, but embraced.

Thus, the Secretary's decision to effectively rescind the Original Rule and promulgate the Amended Rule constituted an abuse of discretion on the Secretary's part and upholding it constituted an error on the District Court's part.

CONCLUSION

The right of medical privacy is of paramount importance to consumers. (65 Fed. Reg. 82,462, at 82,465.) They, in fact, believe privacy is more important than the actual receipt of medical care itself, as evidenced by the fact that they would rather withdraw from the medical care system than risk privacy violations. (*Id.*, at 82, 468.) This, then, requires that the efficiencies in the delivery of health care be

predicated on a sound foundation for protection of patient privacy rights. The Amended Rule fails to accomplish this goal and, in doing so, undermines congressional intent in enacting and implementing HIPPA. That being the case, the Amended Rule must be disapproved and the District Court's decision reversed.

Dated: August 31, 2004

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