

Health Information Compliance Alert

Litigation: LAWSUIT QUESTIONS HHS' AUTHORITY TO PROMULGATE HIPAA PRIVACY STANDARDS

A lawsuit filed against the **Department of Health and Human Services** last year is picking up steam, and the plaintiffs' impending oral arguments intend to derail the HHS' authority to promulgate privacy regulations.

A group of plaintiffs including the **South Carolina Medical Association**, the **Physicians Care Network**, the **Louisiana State Medical Society** and other individual physicians filed a constitutional challenge against the HHS July 2001. Oral arguments are expected in August in the district court in Columbia, SC. The plaintiffs challenge the Health Insurance Portability and Accountability Act on three grounds in their complaint for declaratory relief, alleging:

1. HIPAA is an "unconstitutional delegation of legislative powers" in violation of Article I, 1 of the Constitution. The plaintiffs contend HIPAA violates the separation of powers envisioned by the Constitution since the statute allows HHS to act as federal legislators in drafting and enacting the act's privacy regulations. "As enacted by Congress, [HIPAA] contains no intelligible principle to guide or limit HHS in the drafting of the regulations," the plaintiffs argue in the lawsuit;
2. the preemption clause of HIPAA in Section 264(c)(2), a provision that says a regulation shall not supercede a contrary provision of state law if the provision of state law imposes "more stringent" standards than those of the regulation, is "so impermissively vague that it violates the Due Process guarantee of the Fifth Amendment;" and
3. even if the court upholds the constitutionality of Section 264, "the regulations promulgated thereby are unconstitutional because they violate the clear intent of Congress that limited application of any HHS regulations to electronic communications." Additionally, the HHS privacy rule as enacted is "not a permissible construction of the statute," the suit contends.

The plaintiffs are quick to note that they wouldn't challenge congressional privacy legislation that considered HHS' recommendations, but they find that the combination of Congress' failure to limit HHS' authority as well as its refusal to enact any legislation itself has left HHS regulations "constitutionally infirm." Essentially, they argue when Congress enacted HIPAA, it charged HHS with responsibility to provide recommendations on standards to safeguard the privacy of individually identifiable health information. HHS is not permitted both to promulgate law and execute that law.

While plaintiffs' attorney **Terry Richardson** of Barnwell, SC-based **Richardson, Patrick, Westbrook & Brickman** mid-month predicted the case would ultimately and in the **U.S. 4th Circuit Court of Appeals**, other plaintiffs hope the need for future court dates won't be necessary.

A hearing is scheduled Aug. 5 in federal court in which the HHS will ask the judge to dismiss the suit. As president of the **South Carolina Medical Association** and one of the plaintiffs in the case, Dr. **Duren Johnson, Jr.** says the case rests in large part on what he views as unnecessary "mountains of paperwork" the HHS has created with HIPAA compliance which the department never had the right to enact. Johnson says he's spoken with countless numbers of physicians who felt the same way, but says someone "needed to stick his neck out" to initiate a complaint against the HHS' right to write regulations when delegated by Congress.

Johnson tells **Eli** he and the plaintiffs have received some financial support from the Advocacy Resource Center, the legal arm of the **American Medical Association**, as well as other financial support for his case from about a dozen state medical associations. And as for criticism of the complaint, Johnson says he's privately had to defend the perception

some have of the plaintiffs as quixotic crusaders who don't stand a chance against the HHS. "[Some] feel that this is a case of David versus Goliath," while he notes others say "even if we're right we're probably not going to win." Johnson says he's aware this is an uphill battle: "It's a tough lawsuit," but he stresses that the plaintiffs and their lawyers are prepared to go the distance.