

## Health Information Compliance Alert

### Litigation: PALMETTO STATE DOCS WILL WAGE HIPAA WAR IN APPEALS COURT

Physicians in South Carolina and across the nation who had hoped to obliterate the **Department of Health and Human Services'** power to promulgate Health Insurance Portability and Accountability Act regulations lost a big battle last month in district court but they're hoping a more agreeable theater will help them win the war.

Spearheading the plaintiffs' case is the **South Carolina Medical Association**, the **Physicians Care Network**, and other individual physicians. District court judge **Terry Wooten** on Aug. 14 struck down the plaintiffs' argument that HHS does not have the authority to issue medical privacy regulations.

The SCMA argued their case on three counts: 1) Congress failed to articulate an "intelligible principle" relating to standards or policies governing HHS' power to draft privacy regulations; 2) the HHS exceeded its HIPAA authority by regulating paper records; and 3) HIPAA's preemption provision is so "impermissively vague" that a person of ordinary intelligence won't be able to determine whether or not the privacy regulations apply to his or her communications.

Judge Wooten dismissed the case on all counts. Wooten ruled that Congress directed HHS to implement regulations containing standards relating to individually identifiable health information, that HIPAA can be "reasonably interpreted" to show that Congress intended to include paper records as part of privacy protection, and that HIPAA's preemption provision and its correlating regulations are "sufficiently clear" as applied to providers.

Though the plaintiffs suffered a considerable setback by judge Wooten's decision, they plan to forge ahead with an appeal in the **4th U.S. Circuit Court of Appeals**, according to **Dr. Duren Johnson, Jr.**, president of the SCMA.

Johnson says the argument he and the plaintiffs made initially has not been amended. He notes that while he respects judge Wooten's decision, he's appealing the decision based primarily on the plaintiffs' conviction that Congress was overly broad in delegating power to HHS. "We think that Congress had a more specific constitutional obligation to specify what it was they wanted [with HIPAA privacy regulations]."

Johnson claims Congress used the wrong approach in delegating authority to HHS. "In effect," he states, "Congress took the pornography approach, which is, 'we're not sure what privacy is, but we'll know it when we see it. Go to it, guys.'"

And Johnson is hopeful that the forum for the plaintiffs' appeal will yield a more favorable result this time, since they will argue their case before a panel of judges instead of before a single judge. "We're hoping that because we're appealing before a circuit court, that we'll be able to appeal to multiple judges rather than a single judge. We think our cause might fare better in a full court than with a single judge."

A court hearing is scheduled for the second week in December, Johnson tells **Eli**.