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Wisconsin Supreme Court Concludes Silence Speaks Volumes When it Comes to Fees for Copies of Electronic Medical Records

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Continuing a trend that began in 2017 with Moya v. Aurora Healthcare, Inc., the Wisconsin Supreme Court's decision in Banuelos v. Univ. of Wisconsin Hospitals & Clinics Authority imposed further limitations on the fees that a Wisconsin health care provider may charge for copies of patient health care records. Specifically, the Court held that Wis. Stat. § 146.83(3f) does not permit health care providers to charge fees for electronic copies of patient health care records when a "person," e.g., a plaintiff's personal injury attorney, requests a patient's health care records and provides the "informed consent" of the patient.[1]

In *Banuelos*, the plaintiff submitted a "patient-directed request,"[2] or a written request from a patient to transmit records to a third party (here, the patient's personal injury attorneys), to UW Hospital for copies of her patient health care records in an electronic format. Acting through its medical records vendor, the hospital transmitted the copies to the plaintiff's attorneys along with an invoice for $109.96, which was calculated based on the per page fees in § 146.83(3f).

UW Hospital's vendor appears to have assessed the fee for three reasons. First, § 146.83(3f) of the Wisconsin statutes that limits the permissible fees for copies of medical records is silent on the issue of electronic copies. Second, a 2020 decision[3] struck down a U.S. Department of Health and Human Services rule that limited providers to a "cost-based fee" (which was generally understood to be $6.50) on patient-directed requests for electronic copies of their health care records, meaning federal law did not impose a limit on such fees. Finally, the fee helped to offset the costs associated with providing electronic copies of patient health care records, which as the nonparty Association of Health Information Outsourcing Services ("AHIOS") explained to the Court, is a complex and labor-intensive process.

The Wisconsin Supreme Court disagreed with UW Hospital. Recognizing that federal law did not impose a limit on the fees for patient-directed requests, the Court focused its analysis on Wisconsin law. By the Court's reading of § 146.83(3f), the statute occupied the field of permissible fees for patient health care records by identifying all of the fees health care providers were permitted to charge. Thus, the statute's silence as to fees for electronic copies of patient health care records

prohibits such fees. With regard to the risk that health care providers may now need to pass these costs on to patients through increased healthcare costs—rather than to personal injury attorneys and the other commercial entities that receive and use the records—the Court suggested that cost-apportionment policy decisions are up to the legislature.

FOOTNOTES

[1] A health care provider may charge a fee for access to or copies of a patient's electronic health care records when a contract or another statute provides that specific right.
[2] *See* Health Information Economic and Clinical Health (HITECH) Act, § 17935(e) (1) and 45 C.F.R. § 164.524(c).
[3] *Ciox Health, LLC v. Azar*, 435 F. Supp. 3d 30 (D.D.C. Jan. 2020).

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