

# SURVEY OF ILLINOIS LAW: HEALTH CARE LAW

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## I. INTRODUCTION TO HEALTH CARE LAW

Health Care remains among the most active and diverse fields in law. This year's Survey reviews significant issues in state and federal health care laws. Section II of this survey will examine the changes with the scope of health care professional practice. Section III discusses the impact of physician restrictive covenants after the Illinois Supreme Court decision in *Reliable Fire Equip. Co. v. Arredondo*, 2011 IL 111871. Next, Section IV will analyze the changes to the mental health and developmental disabilities as well as provide a framework on health information exchanges and opting out of disclosures that are protected. Section V investigates Illinois' law on licensed health care worker sex offenders. Lastly, Section VI highlights the current split among the Illinois districts when determining whether the Illinois Good Samaritan Act provides immunity to a licensed physician who furnishes to a patient emergency care without fee.

Senior Illinois health care attorneys, most of whom are current or former members of the Illinois State Bar Association's Health Care Section Council, researched and drafted the various sections to inform Illinois lawyers of significant developments in this dynamic practice area.

## II. SCOPE OF HEALTH CARE PROFESSIONAL PRACTICE CHANGES

Illinois licenses dozens of different types of healthcare professionals under its police powers as a sovereign state. The purpose for licensure is for the protection of the public health, safety and welfare of the citizens of Illinois by regulating and establishing minimum qualifications for practice of various professions in the state.<sup>1</sup> Licensed healthcare professionals

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include physicians,<sup>2</sup> dentists,<sup>3</sup> podiatrists,<sup>4</sup> optometrists,<sup>5</sup> advanced practice nurses,<sup>6</sup> physician assistants,<sup>7</sup> pharmacists,<sup>8</sup> and others.<sup>9</sup> In recent years, numerous changes or modifications have been made in the licensure statutes or regulations for healthcare professionals. For a comprehensive summary of changes to these licensure laws, the Illinois Association of Healthcare Attorneys publishes an Annual Survey of Health Law each fall.<sup>10</sup> Under the Regulatory Sunset Act,<sup>11</sup> the Illinois General Assembly regularly reviews licensure and other Acts. This is done by establishing an

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medical professional liability. Ms. DeVito received her Juris Doctorate from Loyola University Chicago School of Law, where she also received a Certificate in Health Law and served on the staff of the Annals of Health Law as an editor. Prior to attending law school, Ms. DeVito received her Bachelor of Arts degree in Spanish and International Studies from the University of Wisconsin-Madison and worked for the Governor of Wisconsin.

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1. 20 ILL. COMP. STAT. 2105/2105-10 (2013).

2. 225 ILL. COMP. STAT. 60 (2013).

3. 225 ILL. COMP. STAT. 25 (2013).

4. 225 ILL. COMP. STAT. 100 (2013).

5. 225 ILL. COMP. STAT. 80 (2013).

6. 225 ILL. COMP. STAT. 65 (2013).

7. 225 ILL. COMP. STAT. 95 (2013).

8. 225 ILL. COMP. STAT. 85 (2013).

9. Nurses, 225 ILL. COMP. STAT. 65 (2013); clinical psychologists, 225 ILL. COMP. STAT. 15 (2013); social workers, 225 ILL. COMP. STAT. 20 (2013); physical therapists, 225 ILL. COMP. STAT. 90 (2013); occupational therapists, 225 ILL. COMP. STAT. 75 (2013); paramedics and emergency medical technicians, 210 ILL. COMP. STAT. 50 (2013); athletic trainers, 225 ILL. COMP. STAT. 5 (2013); dieticians, 225 ILL. COMP. STAT. 30 (2013); naprapaths, 225 ILL. COMP. STAT. 63 (2013); nursing home administrators, 225 ILL. COMP. STAT. 70 (2013); orthotists, pedorthist and prosthetists, 225 ILL. COMP. STAT. 84 (2013); respiratory care practitioners, 225 ILL. COMP. STAT. 106 (2013); professional or clinical professional counselors, 225 ILL. COMP. STAT. 107 (2013); audiologists or speech language pathologists, 225 ILL. COMP. STAT. 110 (2013); perfusionists, 225 ILL. COMP. STAT. 125 (2013); surgical assistants or surgical technologists, 225 ILL. COMP. STAT. 130 (2013); genetic counselors, 225 ILL. COMP. STAT. 135 (2013); marriage and family therapists, 225 ILL. COMP. STAT. 55 (2013); hearing instrument dispensers, 225 ILL. COMP. STAT. 50 (2013); home medical equipment and services providers, 225 ILL. COMP. STAT. 51 (2013).

10. See <http://iahanet.org>.

11. 5 ILL. COMP. STAT. 80.

automatic repeal of the Act by a specified date, usually every ten years.<sup>12</sup> This section will highlight a number of changes concerning physicians, dentists, podiatrists, optometrists, physician assistants, advanced practice nurses and pharmacists.

#### A. Physicians

Physicians are licensed under the Medical Practice Act of 1987 (Act).<sup>13</sup> A number of changes have been made in physician licensure in the past few years. In 2010, the prohibit on fee splitting was amended to permit fee splitting among full-time faculty members of a non-profit medical school offering an medical degree and graduate medical education.<sup>14</sup>

In 2011, three changes were made. First, the Act was amended to broaden the authority of a physician to delegate prescriptive authority to advanced practice nurses and physician assistants for Schedule II Controlled Substances.<sup>15</sup> Second, the Act was amended to add a definition of “chiropractic physician.” This definition applies to physicians licensed to treat human ailments without the use of drugs or operative surgery.<sup>16</sup> Third, the Act was amended to require the Department of Financial and Professional Regulation to disclose the status of the Disciplinary Board’s review of a complaint upon request of the original complainant.<sup>17</sup> In 2012, a number of significant changes were made in a comprehensive rewrite of the Medical Practice Act of 1987. Noteworthy changes include the expanded requirements for applicants to undergo criminal background checks, revised grounds for discipline, and all the changes from Public Act 94-677 that were overturned by the Illinois Supreme Court in *Lebron v. Gottlieb* were reenacted.<sup>18</sup> Further, unlike the standard ten-year sunset deadline, the Act has been extended under the Regulatory Sunset Act for no more than one year in 2010, 2011, and 2012. Additionally, the Patients’ Right to Know Act was moved from Section 24.1 of the Act to a separate Act,<sup>19</sup> and the rules were reinstated.<sup>20</sup>

In 2013, the Act was amended to expand and clarify the limits of a physician’s authority to delegate under a collaborative or supervision

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12. 5 ILL. COMP. STAT. 80/12.

13. 225 ILL. COMP. STAT. 60; 68 ILL. ADMIN. CODE 1285.

14. Pub. Act 96-1126, effective July 20, 2010.

15. Pub. Act 97-358, effective August 12, 2011.

16. Pub. Act 97-462, effective August 19, 2011.

17. Pub. Act 97-449, effective January 1, 2012.

18. *Lebron v. Gottlieb Mem'l Hosp.*, 237 Ill. 2d 217, 930 N.E.2d 895 (2010); Pub. Act 97-622, effective November 23, 2011.

19. Pub. Act 97-280, effective August 9, 2011; 225 ILL. COMP. STAT. 61.

20. 68 ILL. ADMIN. CODE 1285, 35 Ill. Reg. 14564, August 12, 2011.

agreement.<sup>21</sup> Further, the Patients' Right to Know Act<sup>22</sup> was revised to expand the timeframe for criminal convictions, regulatory disciplines and malpractice judgments or awards, and publication maintained on the physician profiles from five years to ten years.<sup>23</sup> Additionally, physician licensure fees were increased from \$300 to \$700 for a three-year license during two licensure periods beginning in 2014. After the two periods, the licensure fee becomes \$500 for a three-year license.<sup>24</sup> Other statutory fees were also increased. Under the Regulatory Sunset Act, the Act will be repealed on December 31, 2013.<sup>25</sup>

## B. Dentists

Illinois dentists are licensed under the Dental Practice Act (DPA).<sup>26</sup> Dentistry is generally the care and treatment of the "human oral cavity and adjacent tissues and structures".<sup>27</sup> In 2011, the DPA was amended to allow the Department of Financial and Professional Regulation to refuse to renew or to suspend licenses to dentists or dental hygienists for violating the terms of probation upon the individual's license.<sup>28</sup> In 2012, significant changes were made to the DPA including, but not limited to, expanding the grounds for discipline, clarify the standards for government required prenatal and physical exams of licensees or applicants, and revising the standards for restoration of a license after discipline.<sup>29</sup> Further, the DPA was amended to specify that a dentist "shall not supervise more than four dental assistants at any one time for placing, carving, and finishing of amalgam restorations" or "for the monitoring of nitrous oxide."<sup>30</sup> In 2013, the DPA was amended to further clarify how anesthesia should be handled by dentists, to clarify that dentists are limited to supervising a total of four dental assistants or dental hygienists in specified circumstances and amend the Basic Life Support certification requirement under the DPA.<sup>31</sup> The Regulatory Sunset Act will repeal the DPA on January 1, 2016.<sup>32</sup>

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21. Pub. Act 98-192, effective January 1, 2014.

22. 225 ILL. COMP. STAT. 61 (2013).

23. Pub. Act 98-210, effective January 1, 2014.

24. Pub. Act 98-3, effective March 8, 2013.

25. 5 ILL. COMP. STAT. 80/4.23(b).

26. 225 ILL. COMP. STAT. 25; 68 ILL. ADMIN. CODE 1220.

27. 225 ILL. COMP. STAT. 25/4(k).

28. Pub. Act 97-102, effective July 14, 2011.

29. Pub. Act 97-1013, effective August 17, 2012.

30. Pub. Act 97-886, effective August 2, 2012.

31. Pub. Act 98-147, effective January 1, 2012.

32. 5 ILL. COMP. STAT. 80/4.26 (2013).

### C. Optometrists

Illinois optometrists are licensed under the Illinois Optometric Practice Act of 1987 (OPA).<sup>33</sup> Optometry is generally, the care and “treatment of human visual system, the human eye, and its appendages without the use of surgery.”<sup>34</sup>

In 2011, the Act was amended to clarify and expand the list of “ocular pharmaceutical agents” and the process for approval for use by optometrists.<sup>35</sup> Further, the OPA was revised to delete the authority for limited liability companies to practice optometry through another entity authorized to conduct business.<sup>36</sup> Then in 2012, the OPA was amended to specify that patient and prescription records may be kept offsite in a secure storage facility.<sup>37</sup> The following year, the OPA was amended to limit dispensing of contact lenses to licensed optometrists, licensed pharmacists, and licensed physicians.<sup>38</sup> Further, optometrist supervision of others to dispense contact lenses was clarified.<sup>39</sup> The Regulatory Sunset Act will repeal the OPA on January 1, 2017.<sup>40</sup>

### D. Physician Assistants

Illinois physician assistants (PAs) are licensed under the Physician Assistant Practice Act of 1987 (PAPA).<sup>41</sup> Physician assistants generally provide patient care services within the specialty of and under the supervision of a physician licensed to practice medicine in all its branches.<sup>42</sup> In 2011, PAPA was amended to broaden the Schedule II prescriptive authority that a physician can delegate to a physician assistant.<sup>43</sup> In 2012, the limitations on how many physician assistants a physician may supervise at one time were changed from two to a maximum of five full-time equivalents. However, this limitation of five is reduced by the number of collaborative agreements the supervising physician has with advanced practice nurses (APNs) so that the total of both PAs and APNs can be no more than five.<sup>44</sup> In 2013, physician assistants were authorized to order home health services if such authority is delegated by the supervising

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33. 225 ILL. COMP. STAT. 80; 68 ILL. ADMIN. CODE 1320.

34. 225 ILL. COMP. STAT. 80/3(a).

35. Pub. Act 97-170, effective July 22, 2011.

36. Pub. Act 97-563, effective August 25, 2011.

37. Pub. Act 97-1028, effective January 1, 2013.

38. Pub. Act 98-186, effective August 5, 2013.

39. *Id.*

40. 5 ILL. COMP. STAT. 80/4.27.

41. 225 ILL. COMP. STAT. 95 (2013); 68 ILL. ADMIN. CODE 1350.

42. 225 ILL. COMP. STAT. 95/4(3).

43. Pub. Act 97-358, effective August 12, 2011.

44. Pub. Act 97-1071, effective August 24, 2012.

physician.<sup>45</sup> The Regulatory Sunset Act will repeal PAPA on January 1, 2018.<sup>46</sup>

#### E. Advanced Practice Nurses

Illinois advanced practice nurses (APNs) are licensed under the Nurse Practice Act (NPA).<sup>47</sup> Advanced practice nurses (APNs) generally provide patient care services within the practice field of their collaborating physician or podiatrist or department in a hospital, hospital affiliate or ambulatory surgical treatment center.<sup>48</sup> In 2011, NPA was amended to expand the Schedule II Controlled Substances subject to delegation to an advanced practice nurse by a physician.<sup>49</sup> APNs were granted authority to “complete discharge prescriptions provided the prescription is in the name of the advanced practice nurse and the attending or discharging physician.”<sup>50</sup> In order to obtain a mid-level practitioner controlled substances license to implement delegated prescriptive authority for Schedule II Controlled Substances the advanced practice nurse must show evidence of completion of at least forty-five graduate contact hours in pharmacology. Further, APNs are required to complete five hours of continuing education in pharmacology annually.<sup>51</sup>

In 2013, the NPA was amended to provide that, absent an employment relationship, a written collaboration may not: (1) restrict the categories of patients of an advanced practice nurse; (2) limit the third party payors or government health programs with which an advanced practice nurse may contract; or (3) limit the geographic area or practice location of the advanced practice nurse. The definition of “generally provides” was expanded and clarified to specifically authorize primary health care services within the APN’s training and experience.<sup>52</sup> The Regulatory Sunset Act will repeal the NPA on January 1, 2018.<sup>53</sup>

#### F. Pharmacists

Illinois pharmacists and pharmacies are licensed under the Pharmacy Practice Act (PPA).<sup>54</sup> In 2010, the PPA was amended to authorize

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45. Pub. Act 98-261, effective August 9, 2013.

46. 5 ILL. COMP. STAT. 80/4.28.

47. 225 ILL. COMP. STAT. 65 (2013); 68 ILL. ADMIN. CODE 1300.

48. 225 ILL. COMP. STAT. 65/50-10, 65-30, 65-35(b), 65-45.

49. Pub. Act 97-358, effective August 12, 2011.

50. *Id.*

51. *Id.*

52. Pub. Act 98-192, effective January 1, 2014.

53. 5 ILL. COMP. STAT. 80/4.28.

54. 225 ILL. COMP. STAT. 85 (2013); 68 ILL. ADMIN. CODE 1330.

prescriptions to contain the illness, disease, or condition for which a drug or device is being prescribed.<sup>55</sup> Further, the rules were comprehensively rewritten to implement Public Act 95-689.<sup>56</sup> Then in 2011, the PPA was amended to require a pharmacist who substitutes a generic anti-epileptic drug for brand-named anti-epileptic drugs to provide the patient with written notice at the time the prescription is dispensed.<sup>57</sup> In 2012, pharmacists were granted authority to provide vaccines to patients between the ages ten and thirteen for Influenza or Tdap. A licensed physician, under a standing order by a licensed physician, or under a hospital pharmacy and therapeutics committee policy must administer the vaccines pursuant to a valid prescription. The pharmacist must have completed the appropriate training and notify the patient's physician following the administration of the vaccine.<sup>58</sup> The Regulatory Sunset Act will repeal the PPA on January 1, 2018.<sup>59</sup>

#### G. Professional Conduct

Broad changes affecting all of the professions addressed in this section concern controlled substances and licensure prohibitions. The Illinois Controlled Substances Act<sup>60</sup> was comprehensively rewritten effecting all aspects of the regulation of controlled substances and affecting pharmacists, physicians, dentists, optometrists, advanced practice nurses and physician assistants.<sup>61</sup> Rules implementing this rewrite are expected to be proposed within the next year.

In 2010, the Truth in Health Care Professional Services Act was adopted to require all licensed healthcare professionals to meet specific standards in advertising services, such as, the use of statutory licensure acronyms or designations. In addition, the licensed health care professional must wear a nametag meeting the standards of the law.<sup>62</sup> In 2011, the Act was amended to exclude licensed dentists from the requirements of the Act.<sup>63</sup>

In 2011, the Department of Professional Regulation Law of the Civil Administrative Code<sup>64</sup> was amended to require the license of a health care worker be revoked without a hearing upon conviction of (1) a criminal act

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55. Pub. Act 96-1353, effective July 28, 2010.

56. 68 ILL. ADMIN. CODE 1330; 34 Ill. Reg. 6690, April 29, 2010.

57. Pub. Act 97-456, effective January 1, 2012.

58. Pub. Act 97-1043, effective August 21, 2013.

59. 5 ILL. COMP. STAT. 80/4.28 (2013).

60. 720 ILL. COMP. STAT. 570 (2013).

61. Pub. Act 97-339, effective January 1, 2012.

62. Pub. Act 96-1340, effective July 27, 2010.

63. Pub. Act 97-181, effective July 22, 2011.

64. 20 ILL. COMP. STAT. 2105/2105-165 (2013).

that requires the health care worker to register under the Sex Offender Registration Act; (2) criminal battery against any patient in the course of patient care or treatment, including any offense based on sexual conduct or sexual penetration; (3) a forcible felony;<sup>65</sup> or (4) a crime which includes a sentence to register under the Sex Offender Registration Act.<sup>66</sup> After filing charges, the State's Attorney must notify the Department of Financial and Professional Regulation of the health care worker's name, address, practice address and license number, as well as the patient's name and a copy of the criminal charges filed. The health care worker can only practice with a chaperone pending the outcome of the criminal procedures.<sup>67</sup> Further, patients must be provided with and sign a written notice of the order to use a chaperone. If the charges are dropped or the health care worker is acquitted, then the Department's administrative record must be expunged.<sup>68</sup>

In 2012, this provision was changed to require the prosecuting attorney rather than the State's Attorney notify the Department. Further, the provision was clarified that the notification must identify that changes have been filed.<sup>69</sup> See Section V, Illinois Licensed Health Care Worker Sex Offenders, for a more detail treatment these legislative changes.

In conclusion, recent statutory changes have expanded or clarified the authority of health care professionals to practice in the State of Illinois. Attorneys representing health care facilities or health care professionals should be mindful of the statutory limitations or restrictions on individuals licensed to practice in Illinois. Further, many of these changes will be interpreted and implemented through changes in the administrative rules so the *Illinois Register*<sup>70</sup> should be monitored for any changes.

### III. PHYSICIAN RESTRICTIVE COVENANTS AFTER *RELIABLE FIRE EQUIPMENT COMPANY V. ARREDONDO*

#### A. Introduction

There has been a long-standing presumption in the Illinois common law that medical practices (and, indeed, most businesses providing professional services) have a protectable business interest in the practice's patient base, which may be protected by enforcement of reasonable restrictive practice covenants in physician employment agreements. This presumption was explained by Justice Zenoff in the lead appellate court

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65. 68 ILL. ADMIN. CODE § 1130.120.

66. Pub. Act 97-156, effective August 20, 2011; Pub. Act 97-484, effective September 21, 2011.

67. 68 ILL. ADMIN. CODE § 1130.130 and § 1130.130 APPENDIX A.

68. Pub. Act 97-156, effective August 20, 2011 and Pub. Act 97-484, effective September 21, 2011.

69. Pub. Act 97-873, effective July 31, 2012.

70. See <http://www.cyberdriveillinois.com/departments/index/register> (last visited, Oct. 27, 2013).



opinion in *Reliable Fire Equipment Company v. Arredondo*.<sup>71</sup> Drawing upon the comments of Justice Freeman in *Mohanty v. St. John Heart Clinic*,<sup>72</sup> Justice Zenoff stated:

[A] legitimate business interest is presumed in a doctor's relationship with his patients. . . . Those engaged in professional services, by the nature of those services, can justifiably anticipate a permanent or near-permanent relationship with their clientele. . . . Consequently, the focus in determining whether a restrictive covenant in a professional services case should be upheld is on the time-and-territory restrictions.<sup>73</sup>

Justice Zenoff's colleague, Justice Hudson, in a specially concurring opinion rejected "categorical pronouncements"<sup>74</sup> in determining the existence of a legitimate business interest and, instead, preferred a broader approach as follows: "I would plainly hold that the existence of a legitimate business interest should be determined with regard to the totality of the facts and circumstances of a given case."<sup>75</sup> In its consideration of the case, the Illinois Supreme Court resolved the above analytical model conflict in favor of the totality of the circumstances analysis and that analytical model has now been applied in at least two professional services cases.

#### B. *Reliable Fire Equip. Co. v. Arredondo*

In *Reliable Fire Equip. Co. v. Arredondo*,<sup>76</sup> the Illinois Supreme Court overruled Justice Steigmann's opinion in *Sunbelt Rentals, Inc. v. Ehlers*,<sup>77</sup> and reaffirmed the use of a three-part reasonableness test to determine the enforceability of a covenant not to compete. Reliable Fire Equipment Company, a seller, installer, and servicer of portable fire extinguishers, hired Rene Garcia in April 1992, as a systems technician and offered him a sales position one year later, which he accepted.<sup>78</sup> Garcia signed a noncompetition agreement in November 1997. In November 1998, Reliable hired Arnold Arredondo as a salesperson, and Arredondo signed a noncompetition agreement approximately one week later.<sup>79</sup> Both Garcia and Arredondo agreed not to compete with Reliable during their

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71. 405 Ill. App. 3d 708, 940 N.E.2d 153 (2010) *rev'd*, 2011 IL 111871, 965 N.E.2d 393.

72. 225 Ill. 2d 52, 866 N.E.2d 85 (2006).

73. *Reliable Fire Equip. Co.*, 405 Ill. App. 3d 708, 940 N.E.2d at 174.

74. *Id.* at 187.

75. *Id.* at 187 (citation omitted).

76. 2011 IL 111871, *reh'g denied* (Mar. 26, 2012).

77. 394 Ill. App. 3d 421, 915 N.E.2d 862 (4th Dist. 2009).

78. *Reliable Fire Equip. Co.*, 2011 IL at ¶¶ 3-4.

79. *Id.*

employment and for one year after their termination from employment in Illinois, Indiana, or Wisconsin.<sup>80</sup> They further promised not to solicit sales or referrals from Reliable customers or referral sources, or to solicit Reliable employees to leave their employment with Reliable.<sup>81</sup> Arredondo resigned from Reliable effective September 15, 2004, and Reliable fired Garcia on suspicion of competition on October 1, 2004.<sup>82</sup> High Rise, a company with a stated purpose of supplying engineered fire alarm and related auxiliary systems, was formed as a limited liability corporation in April 2004.<sup>83</sup> High Rise's managers included Arredondo and Garcia.<sup>84</sup>

Reliable filed a complaint claiming breach of the restrictive covenants by Arredondo and Garcia for engaging in sales activities, providing services to Reliable customers, and soliciting referrals from Reliable's referral sources.<sup>85</sup> The circuit court ruled that the restrictive covenants were unenforceable because Reliable failed to prove the existence of a legitimate business interest that justified enforcement of the covenants.<sup>86</sup> The appellate court affirmed the decision.<sup>87</sup> In reaching its decision, the Illinois Supreme Court first affirmed that a restrictive covenant, assuming it is ancillary to a valid employment relationship, is reasonable only if the covenant: (1) is no greater than is required for the protection of a legitimate business interest of the employer-promisee; (2) does not impose undue hardship on the employee-promisor, and (3) is not injurious to the public.<sup>88</sup>

The court overruled *Sunbelt Rentals, Inc. v. Ehlers*<sup>89</sup> and *Steam Sales Corp. v. Summers*,<sup>90</sup> which rejected the legitimate business interest prong of the test, and reinstated the legitimate business interest of the promisee as a long-established component in the three-prong reasonableness test.<sup>91</sup>

However, the Supreme Court concluded that the appellate court erred in its application of the legitimate business interest test and remanded the case for further proceedings.<sup>92</sup> According to the Supreme Court, the appellate court developed a formula for assessing the legitimate business interest of the promisee and "some of the factors considered in this formula

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80. *Id.*

81. *Id.*

82. *Id.* at ¶ 6.

83. *Id.* at ¶ 5.

84. *Id.*

85. *Id.* at ¶ 7.

86. *Id.* at ¶ 8.

87. *Id.* at ¶ 9.

88. *Id.* at ¶ 17 (citing *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 388, 712 N.E.2d 1220, 1223 (1999)).

89. 394 Ill. App. 3d 421, 915 N.E.2d 862 (4th Dist. 2009).

90. 405 Ill. App. 3d 442, 937 N.E.2d 715 (2d Dist. 2010).

91. *Reliable Fire Equip. Co.*, 2011 IL 111871 at ¶ 30.

92. *Id.* at ¶ 45.

were highly weighted, if not conclusive.”<sup>93</sup> The specially concurring justice in the appellate court decision concurred with the result of the appellate court but based on the totality of the circumstances presented, not on the test used in the lead opinion.<sup>94</sup> The Supreme Court agreed with the specially concurring justice that the appellate court should have considered the covenants based on the totality of the circumstances when determining if an employer has a protectable interest, as opposed to utilizing a rigid legitimate business interest test.<sup>95</sup> The Supreme Court reasoned that “if it were possible to make a complete list today, human ingenuity would render the list obsolete tomorrow.”<sup>96</sup> The Supreme Court adopted the position:

[W]hether a legitimate business interest exists is based on the totality of the facts and circumstances of the individual case. Factors to be considered in this analysis include, but are not limited to, the near-permanence of customer relationships, the employee’s acquisition of confidential information through his employment, and time and place restrictions. No factor carries any more weight than any other does, but rather its importance will depend on the specific facts and circumstances of the individual case.<sup>97</sup>

### C. *Gastroenterology Consultants of N. Shore, S.C. v. Meiselman*

In wake of *Reliable Fire Equip. Co. v. Arredondo*,<sup>98</sup> the plaintiff in *Gastroenterology Consultants of N. Shore, S.C. v. Meiselman*<sup>99</sup> argued that the trial court failed to apply the *Reliable Fire Equip. Co.* standard when analyzing the legitimacy of a plaintiff’s business interest to determine the enforceability a restrictive covenant.<sup>100</sup> *Gastroenterology Consultants* involved a restrictive covenant signed by Mick S. Meiselman, M.D., when he and three other physicians formed plaintiff corporation, Gastroenterology Consultants of the North Shore, South Carolina.<sup>101</sup> The restrictive covenant prohibited all of the doctors associated with Gastroenterology Consultants from soliciting patients of the corporation or from treating any of its patients directly or in connection with any entity engaged in a competitive business within a fifteen-mile radius of the plaintiff’s offices for a period of thirty-six-months following the

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93. *Id.* at ¶ 36.

94. *Id.* at ¶ 39.

95. *Id.*

96. *Id.* at ¶ 40 (quoting *Arthur Murray Dance Studios of Cleveland v. Witter*, 105 N.E.2d 685, 695 (Ohio Com. Pl. 1952)).

97. *Id.* at ¶ 43.

98. 2011 IL 111871, reh’g denied (Mar. 26, 2012).

99. 2013 IL App (1st) 123692.

100. *Id.*

101. *Id.* at ¶ 2.

termination of their employment.<sup>102</sup> Meiselman terminated his employment with plaintiff effective April 14, 2011, to accept a position with NorthShore University HealthSystem Medical Group, Inc. and started work with NorthShore on April 20, 2011.<sup>103</sup>

Gastroenterology Consultants filed a complaint, seeking both preliminary and permanent injunctive relief against Meiselman for breach of the restrictive covenant.<sup>104</sup> Meiselman admitted he began treating any patient who sought out his services, including patients he had treated while in the employ of Gastroenterology Consultants.<sup>105</sup> However, the trial court denied injunctive relief, finding that, among other things, the plaintiff failed to prove that it had any legitimate protectable interest in the patients being treated by Meiselman and failed to prove that the restrictive covenant in Meiselman's employment agreement was reasonable in geographic scope.<sup>106</sup>

On appeal, Gastroenterology Consultants contended that the trial court applied an incorrect standard in determining the existence of a legitimate business interest in need of protection.<sup>107</sup> Specifically, the plaintiff argued that the circuit court applied the "Near-Permanent Customer Relationship Test" rather than the *Reliable Fire Equipment Co.* totality of the circumstances test.<sup>108</sup> However, the appellate court disagreed, ruling that the circuit court did in fact apply the totality of the circumstances test.<sup>109</sup> The court reasoned:

It is true that the circuit court considered whether the plaintiff had a near-permanent relationship with the patients being treated by Meiselman. It is also true, however, that the circuit court considered whether Meiselman misappropriated any confidential information that he acquired while employed by the plaintiff and, subsequent to the termination of his employment, used that information for his own benefit; and the geographic restrictions contained in the employment agreement. Additionally, the circuit court examined issues, such as: the level of the plaintiff's investment of time, effort or money in the development of Meiselman's relationship with his patients, Meiselman's patient-referral sources, whether the plaintiff assisted Meiselman in the development of his professional practice through advertising or marketing, Meiselman's maintenance of a separate office where he treated his patients, the fact that Meiselman, not the plaintiff, billed for his services, and whether

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102. *Id.*

103. *Id.* at ¶ 3.

104. *Id.* at ¶ 5.

105. *Id.* at ¶ 4.

106. *Id.* at ¶ 7.

107. *Id.*

108. *Id.* at ¶ 10. (*citing* *Reliable Fire Equip. Co.*, 2011 IL 111871).

109. *Id.* at ¶ 11.

Meiselman would not have developed his relationship with his patients and referral sources “but for” his affiliation with the plaintiff. To us, it is clear from the circuit court's memorandum opinion that it made the determination of whether the plaintiff established a legitimate business interest in need of protection based upon the totality of the circumstances in this case.<sup>110</sup>

Alternatively, Gastroenterology Consultants argued that the trial court's finding that Gastroenterology Consultants failed to establish that it possessed a legitimate business interest in need of protection was against the manifest weight of the evidence.<sup>111</sup> The appellate court also rejected this argument.<sup>112</sup> The testimony at the evidentiary hearing established:

[P]rior to the formation of the plaintiff corporation, Meiselman practiced gastroenterology for approximately 10 years in the area later serviced by the plaintiff, treating thousands of patients. Meiselman, along with Drs. James Rosenberg, Tom Neumann and Tat Tsang, formed the plaintiff corporation in 1996. Meiselman testified that, from the very beginning of his association with the plaintiff, he continued treating patients, and accepting referrals from physicians, with whom he had developed relationships prior to affiliating with the plaintiff. After the formation of the plaintiff corporation, Meiselman preserved his independent relationship with his patients. According to Meiselman, the plaintiff did not introduce him to either his patients or his physician-referral sources. Rosenberg, the plaintiff's president, admitted that physicians would refer patients to Meiselman individually, not to the plaintiff. The plaintiff did not advertise, promote or market Meiselman's practice, and, with the exception of administrative support, the plaintiff was not materially involved with his practice. Meiselman billed for his services, not the plaintiff; and his compensation was based upon the revenue generated by his independent practice. Meiselman maintained his own office and had his own telephone number. Based upon the testimony at the hearing, the circuit court correctly concluded that there was no evidence that the plaintiff ever established a near-permanent relationship with the patients treated by Meiselman.<sup>113</sup>

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110. *Id.*

111. *Id.* at ¶ 12.

112. *Id.*

113. *Id.* at ¶ 14.

D. *Nw. Podiatry Ctr., Ltd. v. Ochwat*

Once the appellate court established the appropriate interpretation of a privileges restriction in a physician's contract in *Nw. Podiatry Ctr., Ltd. v. Ochwat*,<sup>114</sup> it easily concluded that the restriction failed the *Reliable Fire Equip. Co. v. Arredondo*<sup>115</sup> three-prong reasonableness standard for enforceability. Dr. Ochwat worked for Northwest Podiatry Center (NPC) for over twenty years and was a vice-president, member of the board of directors, and owned about thirty-seven percent of the company's issued and outstanding shares.<sup>116</sup> Dr. Ochwat never signed any restrictive covenants.<sup>117</sup> Dr. Halihan began employment with NPC in September 2006 and signed an employment agreement, which included a noncompetition clause, a privileges restriction, and a solicitation restriction.<sup>118</sup> The privileges restriction read:

PHYSICIAN further covenants and agrees that should he leave the employ of CORPORATION that he will surrender his clinical privileges at any hospital or ambulatory surgical treatment center at which an employ of CORPORATION then holds clinical privileges.<sup>119</sup>

In March 2010, Dr. Ochwat told NPC that he would be retiring and moving to California.<sup>120</sup> Dr. Halihan submitted his letter of resignation effective June 30, 2010.<sup>121</sup> Instead, Dr. Ochwat founded Advanced Foot and Ankle Specialists (AFA) in 2010 with offices in Illinois, and Dr. Halihan began work at AFA.<sup>122</sup> Two other NPC employees left employment with NPC to work for AFA.<sup>123</sup>

NPC sought injunctive relief, claiming Dr. Ochwat and Dr. Halihan breached their fiduciary duties to NPC by engaging in secret dealings, setting up AFA, soliciting other employees to terminate their employment with NPC, misappropriating NPC patient records, and inducing Northwest Independent Practitioner's Association (IPA) to terminate its agreement with NPC.<sup>124</sup> NPC also claimed that Dr. Halihan violated his restrictive covenants.<sup>125</sup> The trial court granted NPC's request for preliminary

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114. 2013 IL App (1st) 120458.

115. 2011 IL 111871, *reh'g denied* (Mar. 26, 2012).

116. 2013 IL App (1st) 120458 ¶ 6.

117. *Id.*

118. *Id.* at ¶ 7.

119. *Id.*

120. *Id.* at ¶ 8.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at ¶ 10.

125. *Id.*

injunction determining that: (1) Dr. Ochwat owed a fiduciary duty to the principals of NPC to deal fairly, honestly, and openly, (2) Dr. Ochwat and Dr. Halihan violated their fiduciary duties to NPC when they conspired against NPC in January and February 2010, (3) Dr. Ochwat interfered with the contract NPC had with IPA, (4) the restrictive covenants in Dr. Halihan's employment agreement were enforceable, and (5) a thirty-six-month temporal limitation in the noncompetition clause also applied to the privileges restriction clause, making the privileges restriction clause enforceable.<sup>126</sup>

The appellate court quickly dismissed the breach of fiduciary duty ruling, stating, "the trial court improperly imposed a restriction on both defendants to which they never agreed."<sup>127</sup> Therefore, Dr. Ochwat could not be enjoined from treating former or current patients of NPC without any oral or written restriction.<sup>128</sup> Dr. Halihan's employment agreement, which the court ruled had been extended by mutual consent after it expired,<sup>129</sup> contained a solicitation restriction, which read:

PHYSICIAN further agrees that he will not, directly or indirectly for himself or on behalf of any other person, partnership, corporation, or any other entity solicit, divert or take away business or patronage of the CORPORATION during the term of PHYSICIAN's employment and for thirty-six (36) months thereafter. . . .<sup>130</sup>

The appellate court found that the trial court abused its discretion by using this solicitation restriction to construct an even more restrictive covenant—the complete prohibition of treating all former and current NPC patients without any temporal limitation.<sup>131</sup> The employment agreement said nothing about whether or not Dr. Halihan could treat former or current patients once employment terminated.<sup>132</sup>

Regarding the privileges restriction, the trial court allowed parole evidence to apply the thirty-six-month temporal restriction to the privileges restriction, even though the privileges restriction itself did not contain a temporal restriction.<sup>133</sup> The appellate court overruled this contention, stating that the language of the privilege restriction was unambiguous and did not contain any temporal limitation.<sup>134</sup> Applying the three-prong

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126. *Id.* at ¶¶ 14-22.

127. *Id.* at ¶ 3.

128. *Id.* at ¶ 54.

129. *Id.* at ¶ 35.

130. *Id.* at ¶ 7.

131. *Id.* at ¶ 55.

132. *Id.*

133. *Id.* at ¶ 42.

134. *Id.* at ¶ 45.

reasonableness test as stated in *Reliable Fire Equip. Co.*,<sup>135</sup> the court ruled that, as it reads by its plain language, the privileges restriction was greater than necessary to protect the legitimate business interest of NPC and imposed an undue hardship on Dr. Halihan by requiring him to permanently resign all clinical privileges at the restricted facilities.<sup>136</sup>

#### E. Conclusion

It is unclear whether a presumption as to the existence of a protectable business interest would have affected the outcome in either the Gastroenterology Consultants or the Northwest Podiatry professional services cases. As an evidentiary matter, presumptions can be overcome by the presentation of contrary facts and those cases were replete with contrary facts suggesting the absence of a legitimate business interest. What is clearer is that reviewing courts will now utilize the totality of the circumstances analysis in assessing the viability of particular restrictive covenants on a case-by-case basis. Those wishing to test the reasonability of restrictive covenants in professional services cases will now be able to do so by presenting evidence with respect to the totality of the circumstances addressing all three prongs of the Illinois Supreme Court's *Reliable Fire Equip. Co.* restrictive covenant reasonability analysis. Accordingly, the burden on medical practices and other professional services employers in enforcing restrictive covenants against employed and formerly employed professionals has become greater and more complex as a result of the *Reliable Fire Equip. Co.* decision.<sup>137</sup>

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135. 2011 IL 111871.

136. 2013 IL App (1st) 120458, ¶ 47.

137. Due to a recent decision, employers may also face another hurdle in enforcing restrictive covenants. The First District Appellate Court of Illinois added a surprising twist to the enforceability of restrictive covenants in *Fifield v. Premier Dealer Servs., Inc.*, 2013 IL App (1st) 120327, when it ruled that the restrictive covenant was unenforceable due to lack of adequate consideration. The court did not reach the three-prong, *Reliable Fire Equip. Co. v. Arredondo*, reasonableness test because it stated that, prior to consideration whether a restrictive covenant is reasonable, the court must determine: (1) whether the restrictive covenant is ancillary to a valid contract; and (2) whether the restrictive covenant is supported by adequate consideration. The court held that, in order to constitute adequate consideration, employment must be continued for two years or more.



IV. CHANGES TO THE MENTAL HEALTH AND DEVELOPMENTAL  
DISABILITIES CONFIDENTIALITY ACT IN PUBLIC ACT 98-0378:  
HEALTH INFORMATION EXCHANGES AND OPTING OUT OF  
DISCLOSURES PROTECTED BY THE ACT.

Illinois law has long recognized and protected the confidentiality of individual health information.<sup>138</sup> In addition to the protection afforded health information generally, Illinois has recognized special, heightened protections for health information relating specifically to the diagnosis and treatment of mental health conditions and developmental disabilities.<sup>139</sup> As the health care landscape has grown in both technological and institutional complexity, the need for health information to be shared between related entities involved in health care, insurance, or research activities—without compromising the confidentiality patients have come to expect—led to the passage of the federal law known as the Health Insurance Portability and Accountability Act of 1996 (HIPAA). HIPAA, among other things, provides rules governing how, when, and with whom health information can be shared at the federal level without violating patient confidentiality.<sup>140</sup>

While HIPAA creates rules that allow sharing of health information, it does little in the way of creating an infrastructure through which shared, but protected, health information can be put to use. In 2010, Illinois passed the Health Information Exchange and Technology Act (HIE Act), which established the Illinois Health Information Exchange: an electronic infrastructure for exchanging electronic medical records and rules for organizing other health information exchanges (HIEs).<sup>141</sup> The purpose of the HIE Act is to promote the use of electronic medical records and to more fully realize the cost, quality, and efficiency benefits of digital health information and the ability to share information under HIPAA.<sup>142</sup> One of the key limitations to the HIE Act, however, was that it did not account for the additional protections afforded to information protected under Illinois law by the Mental Health and Developmental Disabilities Confidentiality Act (MHDDCA).

Effective August 16, 2013, Illinois adopted Public Act 98-0378, comprising amendments to MHDDCA that: (1) authorize patients to opt-out of Health Information Exchanges in regards to information covered by

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138. Mental Health and Developmental Disabilities Confidentiality Act 740 ILL. COMP. STAT. § 110/1 (2013) (adopted 1979).

139. Illinois Health Information Exchange and Technology Act 20 ILL. COMP. STAT. § 3860/1 (2013) (adopted 2010).

140. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191.

141. 20 ILL. COMP. STAT. § 3860/1.

142. 20 ILL. COMP. STAT. § 3860/5.

MHDDCA; (2) authorize certain disclosures of information covered by MHDDCA related to, but not part of HIEs; (3) expanded certain disclosures of mental health and developmental disability information outside of HIEs; (4) more fully integrated mental health confidentiality with disclosures permissible under HIPAA.<sup>143</sup>

#### A. Disclosure of Protected Information to Health Information Exchanges

With the new amendments, MHDDCA now recognizes several different types of HIEs: (1) HIEs established pursuant the HIE Act; (2) entities with a data sharing arrangement with the Illinois Health Information Exchange; and (3) HIEs that are designated by the Illinois Health Information Exchange Authority (the “HIE Authority”) as a member of or represented on the Authority Board’s Regional Health Information Exchange Workgroup.<sup>144</sup>

Generally, HIEs act as a database where providers and other users authorized under the HIE Act can both submit and obtain patient medical records without having to go through the often cumbersome, non-standard procedures of obtaining medical records from a variety of individual providers. These amendments formally permit entities covered under MHDDCA to submit such information to an HIE without patient consent and for HIEs and their business associates to use, disclose, or re-disclose protected information for purposes consistent with the HIE Act.<sup>145</sup> Purposes of such uses or disclosures of protected information include care, treatment, care coordination, and the operation of an integrated health system or interdisciplinary team.<sup>146</sup>

Notwithstanding the fact MHDDCA now contemplates the disclosure of protected information to HIEs, information protected under MHDDCA retains its character as subject to special protections through the new informed consent and opt-out procedures.

#### B. Opt-Out Procedures for Information Covered by the Mental Health and Developmental Disabilities Confidentiality Act

The amendments to MHDDCA reconcile the use and disclosure of protected information in relation to HIEs with the traditional heightened confidentiality standards mental health and developmental disability related records by providing a procedure whereby a recipient of such services may

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143. Pub. Act 98-0378 (adopted August 16, 2013).

144. Pub. Act 98-0378 (codified at 740 ILL. COMP. STAT. § 110/2).

145. *Id.* (codified at 740 ILL. COMP. STAT. § 110/9.5).

146. *Id.* (codified at 740 ILL. COMP. STAT. § 110/2, “HIE Purposes” (*referencing* 45 C.F.R. § 160.103)).

elect to have protected information excluded from disclosures to an HIE or expunged from the HIE once it has been disclosed to an HIE.<sup>147</sup>

In effect, the new policy allows HIEs to shield information protected by MHDDCA from use or disclosure consistent with the wishes of the recipient on an individual basis. Even if recipients exercise their rights under the opt-out procedure, however, protected information may still be used or disclosed under other provisions of MHDDCA.<sup>148</sup>

MHDDCA now requires the Illinois Health Information Exchange Authority to adopt rules requiring each recipient of mental health or developmental disability services be afforded a reasonable opportunity to expressly decline the further disclosure of that patient's protected information.<sup>149</sup> The HIE Authority's rules must permit a patient to either revoke a prior decision to opt-out or revoke a prior decision not to opt-out.<sup>150</sup> The HIE Authority's rules must also provide for written notice of a patient's right to opt-out, specifically directing such patients to a website explaining the purpose of HIEs along with audio-visual and written instructions on how to opt-out.<sup>151</sup> The HIE authority must review these rules annually to account for new technical options.<sup>152</sup> The HIE Authority must also specifically regulate the form and content of written disclosures. A patient's decision on whether to opt-out must be obtained without any form of inducement, condition, duress, fraud, or any form of constraint or coercion.<sup>153</sup> A provider may not condition the provision of health services on the patient's decision to opt-out or not to opt-out.<sup>154</sup>

The rules to be promulgated by the HIE Authority must enable and give annual consideration to a patient's ability to expressly decline further HIE-related disclosures of protected information of selected portions of the patient's mental health and developmental disability records.<sup>155</sup> The

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147. *Id.* (codified at 740 ILL. COMP. STAT. § 110/9.6).

148. *Id.*; 740 ILL. COMP. STAT. § 110/11 (Authorized disclosures of protected information under MHDDCA outside of Health Information Exchanges are numerous and include things like use for: (1) civil commitment or involuntary treatment; (2) emergency medical care; (3) collecting money for mental health services; (4) civil or criminal proceedings; (5) compliance with the federal census; (6) protecting individuals from a threat of violence; (7) compliance with other statutes such as the Abused and Neglected Child Reporting Act, the Children and Family Services Act, the Child Care Act, the Sex Offender Registration Act, the Rights of Crime Victims and Witnesses Act, the Abused and Neglected Long Term Care Facility Residents Reporting Act, the Abuse of Adults with Disabilities Intervention Act.).

149. Pub. Act 98-0378 (codified at 740 ILL. COMP. STAT. § 110/9.6).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* The Health Information Exchange Authority's assessment specifically includes evaluating the extent to which health information technologies actually enable such segmentation in the disclosure of records and seeking clinical guidance about the practical application of such

regulations to be promulgated by the HIE authority under MHDDCA may be more restrictive than the existing statutory rules in MHDDCA or HIPAA.<sup>156</sup>

### C. Expansion of Disclosures of Protected Information Without Consent

In addition to authorizing, subject to limitations and regulations discussed above, disclosure of protected information under MHDDCA to HIEs, these amendments provide additional expanded disclosures without patient consent. Protected information, including the patient's identity, provider, and a description of the nature, quantity, and costs of services, necessary for a patient to apply for or receive benefits may now be done consistent with the provisions of MHDDCA without the patient's consent.<sup>157</sup> Protected information may also be disclosed without consent, subject to the provisions of MHDDCA, for the purposes of licensure, statistical compilation, research, evaluation, or similar purpose related to the provider of services.<sup>158</sup>

MHDDCA now recognizes an entity known as a "record locator service."<sup>159</sup> These services are intended to support and enable the establishment of HIEs by allowing for the compilation of a master patient index or service that can locate, identify, and gather health information for accumulation in an HIE. Protected information may be disclosed to a record locator service.<sup>160</sup>

MHDDCA now recognizes the concept of a "business associate," familiar from its use in HIPAA. Business associates are essentially contractors, agents, or organizations affiliated with providers under HIPAA or MHDDCA. Generally, business associates perform ancillary functions such as billing, practice management, benefit management, legal services, or other such functions.<sup>161</sup> HIEs and other entities covered by MHDDCA are now authorized to disclose protected information to their business associates subject to the requirements and limitations of MHDDCA.<sup>162</sup> Similarly, MHDDCA now recognizes "integrated health systems," defined as: "an organization with a system of care which incorporates physical and

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technologies. The HIE Authority is also directed to consider information by persons and organizations affected by the Act regarding the feasibility, availability, cost, reliability, and interoperability of related technologies or processes. *Id.*

156. *Id.*

157. Pub. Act 98-0378 (codified at 740 ILL. COMP. STAT. § 110/6).

158. Pub. Act 98-0378 (codified at 740 ILL. COMP. STAT. § 110/7).

159. Pub. Act 98-0378 (codified at 740 ILL. COMP. STAT. § 110/9.9).

160. *Id.*

161. 45 C.F.R. § 160.03.

162. Pub. Act 98-0378 (codified at 740 ILL. COMP. STAT. § 110/9.8).

behavioral healthcare and includes care delivered in an inpatient and outpatient setting;”<sup>163</sup> and “interdisciplinary teams,” defined as:

a group of persons representing different clinical disciplines, such as medicine, nursing, social work, and psychology, providing and coordinating the care and treatment for a recipient of mental health or developmental disability services. The group may be composed of individuals employed by one provider or multiple providers.<sup>164</sup>

MHDDCA now allows for disclosure of protected information to integrated health systems and interdisciplinary teams for the provision, coordination, or management of health care services without special consent by the patient.<sup>165</sup>

The amendments to MHDDCA contemplate certain expanded disclosures between and among various government agencies such as the Department of Human Services, law enforcement agencies, and correctional facilities.<sup>166</sup> Although such uses and disclosures were already a part of MHDDCA, they now include uses and disclosures between and among integrated health systems, interdisciplinary teams, federally qualified health centers, as well as physicians, therapists, or other healthcare providers licensed by or receiving payment from the Department of Human Services.<sup>167</sup> The purposes of such disclosures, which had previously included admission, provision of care, planning or discharge, now include coordination of care, and governmentally mandated health reporting.<sup>168</sup>

MHDDCA now expressly excludes so-called “de-identified records” from its confidentiality provisions.<sup>169</sup> Regulations promulgated under HIPAA provide for the disclosure of protected health information that does not contain the identity of an individual and for which there is no reasonable basis to believe an individual could be identified.<sup>170</sup> MHDDCA now incorporates that concept, and expressly excludes such information from the definition of “record” referenced for the confidentiality provisions included in the Act, thereby allowing disclosure of such information without running afoul of MHDDCA’s confidentiality provisions.<sup>171</sup>

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163. Pub. Act 98-0378 (codified at 740 ILL. COMP. STAT. § 110/2).

164. *Id.*

165. Pub. Act 98-0378 (codified at 740 ILL. COMP. STAT. § 110/9).

166. Pub. Act 98-0378 (codified at 740 ILL. COMP. STAT. § 110/9.2).

167. *Id.*

168. *Id.*

169. Pub. Act 98-0378 (codified at 740 ILL. COMP. STAT. § 110/9.11).

170. 45 C.F.R. § 164.514(a).

171. Pub. Act 98-0378 (codified at 740 ILL. COMP. STAT. § 110/9.11).

#### D. Conclusion

As part of Illinois' continuing efforts to reap the benefits of efficiency, cost, and quality from the expanded use and integration of electronic medical records, the amendments to MHDDCA included in Public Act 98-0378 allow physicians and patients in Illinois the ability to have information protected under MHDDCA included in HIEs while retaining the right to continue to protect and limit the use and disclosure of this sensitive information. In doing so, the amendment strikes a balance between confidentiality and a more integrated information system for the provision of health care services in Illinois.

Although these amendments provide broad guidelines to allow the incorporation of protected information into HIEs and to give patients the flexibility to exempt such information, in whole or in part, from use in HIEs, the Illinois Health Information Exchange Authority still must establish the implementation details about the form and content of informed consent disclosures in the opt-out program as well as to push forward with the technological and organizational challenges in segmenting protected information under MHDDCA for disclosure or exemption based on patients' individual preferences.

### V. ILLINOIS LICENSED HEALTH CARE WORKER SEX OFFENDERS

#### A. Introduction

In June of 2010, the Chicago Tribune published an article on physician sex offenders in the State of Illinois.<sup>172</sup> According to the article, Illinois doctors who were convicted of sex crimes were often allowed to continue to practice, and discipline rarely involved suspension—not revocation—of a doctor's license for a short period of time.<sup>173</sup> The Tribune asserted that 16 sex offenders have been licensed to practice medicine in Illinois within the last fifteen-years, and none of those sixteen had their license permanently revoked.<sup>174</sup> The Illinois Department of Financial and Professional Regulation (IDFPR)—the licensing body for medical professionals in Illinois—allegedly suspended the licenses of a few physicians after learning of their criminal convictions for sexual abuse, but

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172. Megan Twohey, *Doctor? Sexual Abuser? Or Both*, Chi. Trib., June 20, 2010, [http://articles.chicagotribune.com/2010-06-20/news/ct-met-doctors-sex-convictions-20100619\\_1\\_sexual-abuser-sexual-misconduct-discipline-doctors](http://articles.chicagotribune.com/2010-06-20/news/ct-met-doctors-sex-convictions-20100619_1_sexual-abuser-sexual-misconduct-discipline-doctors).

173. *Id.*

174. *Id.*

later reinstated those licenses or allowed the physicians to reapply.<sup>175</sup> In the Tribune article, the IDFPR claimed their disciplinary measures were limited by the Illinois Medical Practice Act, which restricted the IDFPR from permanently revoking a physician's license unless he or she has been convicted twice of felonies involving public aid or controlled substances offenses.<sup>176</sup> Additionally, the IDFPR alleged the police failed to notify them about the criminal complaints against physicians that the IDFPR would then investigate.<sup>177</sup> The Tribune went on to publish a series on the topic, and devoted a website to the issue.<sup>178</sup>

## B. Legislation

Shortly after the Chicago Tribune series was published, HB 220 was introduced to amend the Medical Practice Act of 1987 (Act), by providing that the IDFPR shall revoke the license of a physician who has been convicted of sexual assault or other battery against a patient.<sup>179</sup> The bill was later changed to instead amend the Department of Professional Regulation Law of the Civil Administrative Code of Illinois.<sup>180</sup>

Ultimately, the final language states that license shall be permanently revoked without a hearing if: (1) a licensed health care worker has been convicted of a criminal act that requires registration under the Sex Offender Registration Act; (2) has been convicted of a criminal battery against a patient during patient care, including offenses based on sexual conduct or penetration; (3) has been convicted of a forcible felony;<sup>181</sup> (4) or is required as part of a criminal sentence to register under the Sex Offender Registration Act.<sup>182</sup> The Act also prevents persons who must register as sex offenders from becoming licensed in Illinois as a health care worker.<sup>183</sup> This law affects not only physicians, but all "health care workers," which include dentists, dental hygienists, nurses, advanced practice nurses, occupational therapists, optometrists, pharmacists, physical therapists, physician assistants, podiatrists, clinical psychologists, clinical social

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175. *Id.*

176. 225 ILL. COMP. STAT. 60/22(B) (2013).

177. Megan Twohey, *Dr. Richard Arze and sex abuse cases shows disconnect between law enforcement, state regulators of doctors*, CHI. TRIB., July 29, 2010, <http://www.chicagotribune.com/health/ct-met-doctor-sex-charges-20100729,0,5520049.story?page=1>.

178. Doctors Operate Unchecked, <http://chicagotribune.com/doctors> (last visited Aug. 30, 2013).

179. H.B. 220, 97th Gen. Assem., Reg. Sess. (Ill. 2011).

180. H.B. 220 House Amendment 1, 97th Gen. Assem., Reg. Sess. (Ill. 2011).

181. "Forcible felony" includes thirty-six different offenses. ILL. ADMIN. CODE 68, § 1130.120 (2013).

182. 20 ILL. COMP. STAT. 2105/2105-165(a) (2013).

183. 20 ILL. COMP. STAT. 2105/2105-165(b).

workers, speech-language pathologists, audiologists, and hearing instrument dispensers.<sup>184</sup>

The new law also fixes a previous problem whereby the IDFPR did not know about criminal charges filed and convictions entered against licensed health care workers. Under the new law, after a state's attorney files criminal charges alleging a licensed health care worker committed one of the acts listed above, then the state's attorney must give notice to the IDFPR of the health care worker's name, address, practice address, license number, and the patient's name and copy of the criminal charges.<sup>185</sup> The Secretary of the IDFPR then has five business days after receiving that notice to issue an administrative order that the health care worker may only practice with a chaperone, who is also a licensed health care worker, while the criminal proceedings are pending.<sup>186</sup> The chaperone is required to give written notice to all of the health care worker's patients that the IDFPR has ordered their presence, include the statement "[t]he health care worker is presumed innocent until proven guilty of the charges," and the patient must sign an acknowledgment of receiving the notice.<sup>187</sup>

The health care worker must then provide a written compliance plan to the IDFPR within five-days after receiving the administrative order.<sup>188</sup> If the health care worker fails to file or follow the plan, his or her license will be temporarily suspended until the criminal proceedings end.<sup>189</sup> Should the charges upon which the revocation or administrative order is based are dropped or if the health care worker is not convicted of the charges, or if a conviction on the charges is vacated, overturned, or reversed, the revocation or administrative order will be vacated and completely removed from the licensee's records.<sup>190</sup> The rules also allow the licensee to contest, in a written response, the IDFPR'S action within twenty-days after the Notice of Intent to Issue Permanent Revocation Order is mailed.<sup>191</sup> However, there is only consideration for a challenge if it alleges either, the licensee has been incorrectly identified, the conviction was vacated, overturned, reversed, or a pardon was granted, or the conviction is not a qualifying one.<sup>192</sup> It should be noted that the Act is not limiting and IDFPR may still initiate a disciplinary action against a health care worker independent from criminal charges, conviction, or sex offender registration.<sup>193</sup>

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184. 20 ILL. COMP. STAT. 2105/2105-165; 225 ILL. COMP. STAT. 47/15(d) (2013).

185. 20 ILL. COMP. STAT. 2105/2105-165(c).

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. 20 ILL. COMP. STAT. 2105/2105-165(e).

191. ILL. ADMIN. CODE tit. 68, § 1130.100(b) (2013).

192. *Id.*

193. 20 ILL. COMP. STAT. 2105/2105-165(f).



The Act was signed into law on August 22, 2011.<sup>194</sup> The following month, the IDFPR released its monthly disciplinary report. Whereas in July 2011, no health care worker licenses were subject to discipline, in August 2011, over twenty licenses were subject to discipline, including thirteen physicians who had their licenses permanently revoked due to conviction of a criminal act requiring registration under the Sex Offender Registration Act.<sup>195</sup>

### C. Constitutional Challenge

Recently, four licensed health care workers who had their licenses revoked pursuant to the new law filed a consolidated appeal against the IDFPR, Secretary of the IDFPR, Brent Adams, and Director of the Division of Professional Regulation of the IDFPR, Jay Stewart.<sup>196</sup> The plaintiffs, Angelo Consiglio, M.D., Nercy Jafari, M.D., Mohammed Khaleeluddin, M.D., and Bradley Hiroshi Hayashi, D.C., were three physicians and one chiropractor, respectively that filed separate actions in the Cook County Circuit Court after their licenses were revoked.<sup>197</sup> They challenged the constitutionality of the new section and sought a declaration that new law could not be applied prospectively and injunctive relief stopping the IDFPR from revoking their licenses.<sup>198</sup> The IDFPR and Director Stewart filed motions to dismiss, which the court granted, and the plaintiffs timely appealed.<sup>199</sup>

In their appeal, the plaintiffs raised nine arguments in support of their appeals.<sup>200</sup> First, plaintiffs asserted that the Act violated their constitutional guarantee of substantive due process because the Act is retroactive.<sup>201</sup> The Appellate Court looked at the plain language of the statute and determined the phrase “has been convicted” constitutes a present perfect verb tense, and refers “to a past event that has present consequences.”<sup>202</sup> The Court opined that despite the fact that the convictions predate the Act, the statutory language applied to the plaintiffs’ convictions.<sup>203</sup> The Court also determined the Act was not retroactive, and therefore, did not violate the

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194. 20 ILL. COMP. STAT. 2105/2105-165.

195. DEP’T OF FIN. & PROF’L REGULATION, IDFPR AUGUST DISCIPLINE REPORT (2011), [http://www.idfpr.com/Forms/DISCIPLN/1108\\_dis.pdf](http://www.idfpr.com/Forms/DISCIPLN/1108_dis.pdf).

196. *Consiglio v. Dep’t of Fin. & Prof’l Regulation*, 2013 IL App (1st) 121142, ¶ 1.

197. *Id.* at ¶ 2.

198. *Id.* at ¶ 7.

199. *Id.*

200. *Id.* at ¶ 10.

201. *Id.*

202. *Id.* at ¶ 13.

203. *Id.*

plaintiffs' substantive due process because it affected the plaintiffs' rights to practice subsequent to its enactment.<sup>204</sup>

Next, the plaintiffs argued the Act violated their right to procedural due process because it revoked their licenses without a hearing.<sup>205</sup> The Court stated that procedural due process does not necessarily require a hearing, and considered: (1) the private interests affected; (2) the risk of erroneous deprivation of such interests; (3) the government's interest.<sup>206</sup> It determined that while a professional license is a property interest, the risk of erroneous revocation is low since conviction is required, and the government has an interest in protecting the public from criminals working in a healthcare setting.<sup>207</sup> Furthermore, it stated a hearing requirement would "impose additional burdens without any corresponding benefit."<sup>208</sup> The Court also noted that plaintiffs may challenge the revocation within twenty-days of its mailing.<sup>209</sup>

The plaintiffs also claimed the revocation of their licenses violated their constitutional protection against double jeopardy.<sup>210</sup> However, the doctrine of double jeopardy bars multiple criminal punishments for one offense.<sup>211</sup> In general, a civil penalty does not qualify as a punishment that invokes double jeopardy unless it is so punitive that it is the equivalent of a criminal punishment.<sup>212</sup> On balance, the Court determined that the civil penalty developed by the Act does not have a punitive effect as it does not impose a serious penalty such as imprisonment, the revocation of a license is not normally regarded as punishment, does not promote traditional criminal punishment goals, has non-punitive purposes, and is not excessive.<sup>213</sup>

In their fourth argument, plaintiffs contend the Act violated proscriptions against *ex post facto* laws, specifically that it "changes the punishment for a crime and inflicts a greater punishment than the law annexed to the crime when committed."<sup>214</sup> The Court considered the same factors as under the double jeopardy analysis and determined that the mandate to revoke a health care worker's license is a civil sanction, does not constitute criminal punishment, and is non-punitive.<sup>215</sup> Therefore, as it

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204. *Id.* at ¶ 16.

205. *Id.* at ¶ 17.

206. *Id.* at ¶ 18.

207. *Id.* at ¶ 19.

208. *Id.*

209. *Id.* at ¶ 20.

210. *Id.* at ¶ 22.

211. *Id.* at ¶ 23.

212. *Id.*

213. *Id.* at ¶¶ 26-30.

214. *Id.* at ¶¶ 31-32.

215. *Id.* at ¶ 33.

was not intended as an additional punishment, it does not violate the *ex post facto* laws proscription.<sup>216</sup>

The plaintiffs next argued the Act violated the separation of powers provision in the Illinois Constitution.<sup>217</sup> To support this argument, they stated that because the Act provided for no hearing, it took away the courts' ability to review the IDFPR's decisions.<sup>218</sup> The Court rejected this argument by stating a hearing is not required for due process purposes.<sup>219</sup> The plaintiffs contended the Act was passed because the legislature wanted to overturn the IDFPR's prior decisions to allow the plaintiffs to keep their licenses.<sup>220</sup> The Court also rebuffed that argument, averring that the legislature prospectively revoked the licenses, and did not overturn prior decisions of the IDFPR.<sup>221</sup>

In their sixth argument, the plaintiffs stated the Act violated the contracts clause of the Illinois Constitution because it impaired the consent orders they entered into with the IDFPR.<sup>222</sup> The Court found that while a contractual obligation existed and the Act substantially impaired that obligation, the impairment was reasonable and necessary to serve the important purpose of protecting the public and preserving the state's high standards for health care worker licensure.<sup>223</sup>

Next, plaintiffs argued the Act imposed an excessive penalty in violation of the proportionate penalties clause of the Illinois Constitution.<sup>224</sup> To support their argument, plaintiffs averred that the permanent nature of the punishment is disproportionate to the offense and does not aid in their rehabilitation.<sup>225</sup> In response, the Court pointed to its analyses on the double jeopardy and *ex post facto* arguments and found that again that the Act is non-punitive and therefore cannot constitute a disproportionate penalty in violation of the clause.<sup>226</sup>

For their eighth argument, plaintiffs asserted the doctrine of *res judicata* barred revocation of their licenses.<sup>227</sup> The Court opined that while *res judicata* serves to prevent a subsequent action on a decided matter, "a change in law occurring between two successive causes of action on the same subject matter renders *res judicata* inapplicable."<sup>228</sup> In this instance,

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216. *Id.*

217. *Id.* at ¶ 34.

218. *Id.* at ¶ 35.

219. *Id.*

220. *Id.* at ¶ 36.

221. *Id.*

222. *Id.* at ¶ 37.

223. *Id.* at ¶¶ 37, 40.

224. *Id.* at ¶ 41.

225. *Id.*

226. *Id.* at ¶ 42.

227. *Id.* at ¶ 43.

228. *Id.* at ¶¶ 43-44.

Illinois law changed between the time the IDFPR entered its original orders and the recent orders revoking the licenses pursuant to the Act.<sup>229</sup> Therefore, as the orders responded to different issues and statutes, *res judicata* does not serve as a bar.<sup>230</sup>

Finally, plaintiffs claimed the Act deprives them of the statute of limitations and repose defenses available under the Medical Practice Act and the Code of Civil Procedure.<sup>231</sup> The Court noted that while the Act provides that violations of the Medical Practice Act are subject to a time limitation, such a limitation does not apply to the Act in question.<sup>232</sup> The plaintiffs further argued that because the Act does not contain a temporal limitation, the limitation in section 13-205 of the Code of Civil Procedure should be read into it.<sup>233</sup> The Court disagreed, and instead stated that the legislative policy focused on protecting the general public and as such should not include a time limitation.<sup>234</sup> Finding that the plaintiffs failed to state claims upon which relief could be granted, the Court affirmed the ruling of the Circuit Court.<sup>235</sup> Rehearing was denied on the second and third of May 2013.<sup>236</sup> However, on September 25, 2013, the Illinois Supreme Court granted petitions for leave to appeal by the petitioners Drs. Jafari, Hayashi, and Khalleeluddin.<sup>237</sup>

Shortly after *Consiglio* was decided, the Illinois Appellate Court again addressed the constitutionality of the new section in *Rodrigues v. Quinn*, 2013 Ill. App. 3d (1st) 121196. Rochelle Rodrigues was licensed as a practical nurse in Illinois when she was convicted of aggravated criminal sexual assault, which required her to register as a sex offender, and sentenced to five years in prison in 2002.<sup>238</sup> Thereafter, the IDFPR suspended her license indefinitely and at least for five years.<sup>239</sup> Following her release from prison, in 2008 Rodrigues petitioned the IDFPR to restore her license, which it did after an investigation and hearing in 2009.<sup>240</sup> In July of 2011, Rodrigues began practicing again as a nurse.<sup>241</sup> The next month, the IDFPR notified Rodrigues that her license was being revoked pursuant to the new section, and later that month she filed a complaint against the IDFPR, its Secretary and Director, the Illinois Board of Nursing

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229. *Id.* at ¶ 45.

230. *Id.*

231. *Id.* at ¶ 47.

232. *Id.* at ¶ 48.

233. *Id.* at ¶ 49.

234. *Id.* at ¶ 50.

235. *Id.* at ¶ 52.

236. *Consiglio v. Dep't of Fin. & Prof'l Regulation*, 2013 IL App (1st) 121142.

237. *Consiglio v. Dep't of Fin. & Prof'l Regulation*, 2013 IL App (1st) 121142, *pet. for leave to appeal granted*, No. 116023 (Sept. 25, 2013).

238. *Rodrigues v. Quinn*, 2013 Ill. App. 3d (1st) 121196, ¶ 2.

239. *Id.*

240. *Id.*

241. *Id.*

and its chairperson, the Governor, and the Attorney General.<sup>242</sup> In her complaint, Rodrigues sought a declaration that the section can only be prospectively applied and injunctive relief preventing the IDFPR from revoking her license.<sup>243</sup> Rodrigues filed an emergency petition on September 7, 2011, for a temporary restraining order and preliminary injunction, and the circuit court of Cook County granted the temporary restraining order the next day.<sup>244</sup> On April 13, 2012, the circuit court denied the preliminary injunction petition, and Rodrigues timely appealed.<sup>245</sup>

Rodrigues argued that the Act was not supposed to apply retroactively, and contended such application was unconstitutional because it violated the prohibition on *ex post facto* laws, violated protection from double jeopardy, infringed on her right to due process, violated her right to substantive due process because the section was not rationally related to the government's interest, and violated her right to equal protection.<sup>246</sup> The Court declined to address the appellant's first three arguments, since it rejected similar claims in the recently-decided *Consiglio* case.<sup>247</sup>

In her substantive due process claim, Rodrigues asserted that the section was not rationally related to the protection of the public because the IDFPR already determined she did not constitute a threat when they reissued her license to practice nursing.<sup>248</sup> The Court disagreed, and opined that property rights can be affected by state legislatures, and individuals can be prevented from a profession if they have failed to comply with the requirements imposed by the legislature.<sup>249</sup> It further noted that the legislature intended to prevent registered sex offenders from receiving a health care worker license, and that interest is rationally related to protecting the public from dangerous practitioners and maintaining the "integrity of the health care professions."<sup>250</sup>

The Court also rejected the appellant's equal protection claim using the same rational basis test it applied to her substantive due process claim: because the Act is "rationally related to a legitimate state purpose of protecting the public from health care workers with certain convictions and maintaining the integrity of the health care professions," it therefore does not violate the equal protection clause.<sup>251</sup> Thus, the Appellate Court

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242. *Id.* at ¶ 3.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* at ¶ 5.

247. *Id.*

248. *Id.* at ¶ 6.

249. *Id.* at ¶ 7.

250. *Id.* at ¶ 8.

251. *Id.* at ¶ 10.

affirmed the judgment of the circuit court and remanded for further proceedings.<sup>252</sup>

#### D. Conclusion

Since the legislation went into effect in 2011 and despite a constitutional challenge, over sixty health care workers in Illinois have had their licenses permanently revoked pursuant to the Act.<sup>253</sup> The process is still slow. For instance, Ricardo Arze, M.D., was the subject of a Chicago Tribune article on physician sexual abusers on July 29, 2010.<sup>254</sup> Despite allegations of him sexually assaulting patients beginning in 2005, criminal charges were not filed until 2007.<sup>255</sup> In addition, from September 25, 2007 until December 10, 2010, Dr. Arze was placed on summary suspension by the IDFPR.<sup>256</sup> The suspension was then extended from December 10, 2010 until May 23, 2013, when the IDFPR finally revoked his license because he was convicted of an offense requiring registration under the Sex Offender Registration Act.<sup>257</sup> Dr. Arze was eventually convicted in May 2012, of criminal sexual assault of a patient.<sup>258</sup> Revocation did not occur for a year.<sup>259</sup>

### V. CONFLICT EMERGES OVER GOOD SAMARITAN ACT

The Illinois Good Samaritan Act (Act) provides that,

Any person licensed under the Medical Practice Act of 1987 [225 ILL. COMP. STAT. 60/1] or any person licensed to practice the treatment of human ailments in any other state or territory of the United States who, in good faith, provides emergency care without fee to a person, shall not, as a result of his or her acts or omissions, except willful or wanton misconduct

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252. *Id.* at ¶ 11.

253. See Dep't of Fin. & Prof'l Regulation News Releases, <http://www.idfpr.com/News/NewsMain2013.asp> (last visited Aug. 30, 2013).

254. Megan Twohey, *Dr. Ricardo Arze and Sex Abuse Cases Shows Disconnect Between State Law Enforcement, State Regulators of Doctors*, CHI. TRIB., July 29, 2010, <http://www.chicagotribune.com/health/ct-met-doctor-sex-charges-20100729,0,5520049.story>.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Ex-Doctor Convicted of Sexually Assaulting Patient*, Chi. Sun-Times, May 8, 2012, <http://www.suntimes.com/news/metro/12390676-418/ex-doctor-convicted-of-sexually-assaulting-patient.html>.

259. *Id.*

on the part<sup>260</sup> of the person, in providing the care, be liable for civil damages.

Under this provision, a licensed physician who “in good faith” furnishes to a patient “emergency care without fee” is immune from liability for any resulting injuries, unless due to “willful or wanton misconduct.” Over the last several years, a conflict has gradually developed among the Illinois Appellate Court Districts as to the application of the Act’s immunity provisions in a particular type of situation. The conflict focuses on the term “without fee” in the Act. It involves whether the Act’s immunity applies in a case where, while the patient has not been billed or charged for the care, the physician has nonetheless been paid for providing the care, as for example by receiving a salary in return for the services. The most recent decision to address this issue is from the First District Appellate Court, *Home Star Bank and Financial Services v. Emergency Care and Health Org., Ltd.*<sup>261</sup> Since the Illinois Supreme Court has granted a petition for leave to appeal in the *Home Star* case, this split will likely soon be resolved.<sup>262</sup>

The split among the appellate districts traces its recent history to a 2008 decision from the Second Appellate District, *Muno v. Condell Medical Center.*<sup>263</sup> In *Muno*, the appellate court upheld a \$6.3 million jury verdict against the defendants, an anesthesiologist and his practice group, in an action brought by the parents of a child who died during a surgical procedure.<sup>264</sup> The defendants argued on appeal that the trial court should have granted a judgment notwithstanding the verdict based on the Good Samaritan Act.<sup>265</sup> The defendants asserted that emergency care had been provided and that they had not billed the plaintiffs.<sup>266</sup> The appeals court, looking to the evidence presented at trial concluded that the jury could have determined that the defendants’ decision not to charge a fee was not made in “good faith,” but rather in an effort to avoid legal liability.<sup>267</sup> Thus, the appeals court upheld the trial judge’s decision to not grant the defendants’ motion.<sup>268</sup>

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260. The Good Samaritan Act, 745 ILL. COMP. STAT. 49/25 (2010). For an excellent article examining the Illinois Good Samaritan Act, its history, and development as well as urging the courts to restrict its reach in situations as discussed here, see Ben Bridges, *Curb Your Immunity: The Improper Expansion Of Good Samaritan Protection in Illinois*, 34 S. ILL. U. L.J. 373 (2010).

261. *Home Star Bank & Fin. Servs. v. Emergency Care & Health Org., Ltd.*, 2012 IL App (1st) 112321, 983 N.E.2d 45 *appeal allowed*, 985 N.E.2d 306 (Ill. 2013).

262. *Id.*

263. *Muno v. Condell Medical Center*, 383 Ill. App. 3d 688, 688, 891 N.E.2d 495, 496 (2d Dist. 2008).

264. *Id.* at 688, 891 N.E.2d at 496.

265. *Id.*

266. *Id.*

267. *Id.* at 692, 891 N.E.2d at 499

268. *Id.*

The *Muno* court, as it considered the case, “uncovered some authority challenging . . . previous interpretations of the Act and instead interpreting it in a way that would render it inapplicable here, even if [the defendants’] decision not to bill was in good faith.”<sup>269</sup> The court asked the parties to brief this issue.<sup>270</sup> The issue identified by the *Muno* court involved whether the Act should apply at all where the physician, while not billing the person for the care, is nonetheless compensated for the care through some other means, such as a salary.<sup>271</sup>

The court noted that in *Estate of Heanue v. Edgecome*<sup>272</sup> it had previously determined that a physician can derive indirect economic benefits or compensation for the emergency care provided without relinquishing immunity under the Act.<sup>273</sup> Further, the *Muno* court noted that, in *Heanue*, it followed previous case law and held that a physician does not need to prove the absence of a pre-existing duty to provide care in order to rely on the protections of the Act.<sup>274</sup> In *Heanue*, the defendant-physician, who provided emergency care to a hospitalized patient in response to a call for assistance from a nurse, claimed immunity under the Act.<sup>275</sup> The physician was a member of the same medical group as the patient’s treating physician and was paid by the group.<sup>276</sup> The surgical group billed the patient for the care provided.<sup>277</sup> However, the physician did not specifically bill the patient for his services.<sup>278</sup> Given these facts, the court concluded the physician provided services without fee.<sup>279</sup> This was so, the court said, even though the medical group paid the physician.<sup>280</sup>

Having referenced *Heanue*, the *Muno* court however, noted other decisions critical of this analysis.<sup>281</sup> In *Henslee v. Provena Hospitals*,<sup>282</sup> the federal court had observed that the Illinois courts in cases like *Heanue* had assumed the language of the Act was unambiguous, when in fact “without fee” actually allows for other interpretations.<sup>283</sup> Given the purpose of the Act, to encourage physicians to “volunteer their time and talents,”<sup>284</sup> this could indicate that a physician paid to provide emergency

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269. *Id.* at 689, 891 N.E.2d at 497

270. *Id.*

271. *Id.*

272. *Estate of Heanue v. Edgcomb*, 335 Ill. App. 3d 645, 823 N.E.2d 1123 (2d Dist. 2005).

273. *Muno*, 383 Ill.App.3d at 689, 891 N.E.2d at 497.

274. *Id.*

275. *Heanue*, 335 Ill. App. 3d at 646, 823 N.E.2d at 1126.

276. *Id.*

277. *Id.* at 648-49, 823 N.E.2d at 1128.

278. *Id.* at 647, 823 N.E.2d at 1126.

279. *Id.*

280. *Id.*

281. *Muno*, 383 Ill.App.3d at 689-90, 891 N.E.2d at 497.

282. *Henslee ex rel. Estate of Johnson v. Provena Hospitals*, 373 F. Supp.2d 802, 809 (N.D. Ill. 2005).

283. *Id.* at 812.

284. *Id.* at 813.



services and under an existing duty to do so is excluded from protection.<sup>285</sup> The court in *Henslee* concluded that a reasonable interpretation of the word “fee” in the Act would include either billing the patient or payment to the physician for the care provided.<sup>286</sup> Interpreted in this fashion, the Act would not apply in a case where the physician had been paid by an employer or other party to provide the services in question.<sup>287</sup>

Having identified this conflict, the *Muno* court concluded no decision was necessary on this issue based on the jury’s finding that the defendants did not act in good faith and thus were not entitled to the Act’s protections.<sup>288</sup> The jury verdict was upheld.<sup>289</sup> But, the stage was now set for the conflict to emerge among the appellate districts.

After *Muno*, in 2009, another judge from the Federal District Court for the Northern District of Illinois encountered the problem of interpreting the Act’s term “without fee” in *Rodas v. Swedish American Health Sys. Corp.*<sup>290</sup> *Rodas* involved a negligence action in connection with the death of the plaintiff’s infant daughter following delivery at the defendant-hospital.<sup>291</sup> The plaintiff-mother was under the care of a medical clinic during her pregnancy.<sup>292</sup> When she went into labor, she presented to the defendant-hospital as she had been instructed to do.<sup>293</sup> The clinic had an on-call family physician for its patients at the hospital.<sup>294</sup> Further, by contract with the clinic, a medical school provided back-up physicians (obstetricians and gynecologists) at the hospital for clinic patients.<sup>295</sup> Under the contract, the clinic paid a flat monthly fee for these services and retained the right to bill patients for the services after it received documentation from the hospital regarding any services provided by the back-up physicians.<sup>296</sup>

When plaintiff experienced significant problems during delivery, one of the back-up physicians, the defendant-obstetrician, was called.<sup>297</sup> Initially, this physician attempted an instrument-assisted delivery.<sup>298</sup> When this was unsuccessful, an emergency cesarean section was performed.<sup>299</sup>

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285. *Id.* at 813-14.

286. *Id.* at 814.

287. *Id.*

288. *Muno v. Condell Medical Center*, 383 Ill. App. 3d 688, 692, 891 N.E.2d 495, 499 (2d Dist. 2008).

289. *Id.*

290. *Rodas v. Swedish American Health Sys. Corp.*, 594 F. Supp. 2d 1033 (N.D. Ill. 2009).

291. *Id.* at 1037.

292. *Id.* at 1035.

293. *Id.*

294. *Id.* at 1035-36.

295. *Id.*

296. *Id.* at 1036.

297. *Id.*

298. *Id.* at 1037.

299. *Id.*

However, the infant died a few days after delivery.<sup>300</sup> The plaintiff then filed suit.<sup>301</sup> Additionally, following the delivery, the obstetrician completed billing forms for the procedure, which were then submitted to the clinic's billing office.<sup>302</sup> Thereafter, the clinic billed Medicaid for the delivery.<sup>303</sup>

In the suit, the back-up physicians, including the obstetrician, moved for summary judgment asserting immunity under the Good Samaritan Act.<sup>304</sup> In examining this issue, the court's analysis focused on the "without fee" portion of the statute.<sup>305</sup> Initially the court noted that an array of Illinois appellate court opinions have held that the "without fee" language of the Act is clear and is implicated only when the physician directly charges for the services in question, and not where the physician only receives an indirect benefit of some kind.<sup>306</sup> In this regard, the court cited the *Heanue* case.<sup>307</sup> However, the court also noted the federal court's decision in *Henslee*, where that court found the term "without fee" ambiguous and concluded that it should be interpreted to encompass not only a direct charge by the physician for the specific services, but any compensation paid to the physician for services rendered within the scope of employment, such as a salary.<sup>308</sup>

Faced with these conflicting authorities, the *Rodas* court decided that it should "follow the approach that has been consistently taken by the Illinois appellate courts. . . ."<sup>309</sup> Thus, it ruled that "without fee" should be limited to direct charges by the physician for the services furnished.<sup>310</sup> As a result, the immunity provided under the Good Samaritan Act applied, and the defendant-physicians were entitled to summary judgment.<sup>311</sup>

With this as the backdrop, the First District Appellate Court considered the *Home Star* case in 2012.<sup>312</sup> In *Home Star*, a patient, while hospitalized, suffered permanent brain damage after the defendant-physician responded to the patient's "code blue" and attempted to intubate and otherwise treat the patient.<sup>313</sup> The defendant-physician had not

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300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.* at 1038.

305. *Id.* at 1039.

306. *Id.*

307. *Id.*

308. *Id.* at 1040.

309. *Id.* at 1041.

310. *Id.* at 1042.

311. *Id.* at 1043.

312. *Home Star Bank & Fin. Servs. v. Emergency Care & Health Org., Ltd.*, 2012 IL App (1st) 112321, 983 N.E.2d 45 *appeal allowed*, 985 N.E.2d 306 (Ill. 2013).

313. *Id.* at 46.

previously treated the patient and was, in fact, on another hospital floor at the time of the “code blue.”<sup>314</sup> The physician was an employee of an emergency services provider group under contract to staff the hospital’s emergency department.<sup>315</sup>

At the trial court, the physician moved for summary judgment asserting immunity under the Act.<sup>316</sup> The physician argued that he had provided emergency care and that neither he nor anyone else had billed the patient for that care.<sup>317</sup> Additionally, the physician asserted that the care he provided met the appropriate professional standards.<sup>318</sup> The plaintiff responded that the defendant-physician was not entitled to immunity under the Act because he was not a “volunteer” furnishing care “without fee,” but rather was paid to provide emergency services in the hospital.<sup>319</sup> Further, the plaintiff argued there was a material factual issue as to whether the failure to bill was in “good faith.”<sup>320</sup> The trial court found no evidence the patient or his insurer had been billed for the physician’s services “or that the decision not to bill was in bad faith.”<sup>321</sup> The trial court held that, given these circumstances, the physician was immune under the Good Samaritan Act and granted summary judgment.<sup>322</sup> The plaintiff appealed.

On appeal, the plaintiff again argued that summary judgment was not appropriate because a genuine issue of material fact existed regarding whether the physician’s failing to bill for his emergency care was in good faith and, because the Act does not apply to physicians such as the defendant who are hired and paid to work in hospitals for the purpose of providing emergency care.<sup>323</sup>

The appellate court noted that the Act requires both that the “emergency care” and the “without fee” be done in good faith.<sup>324</sup> Here, there was no question that the emergency care was furnished in good faith.<sup>325</sup> The court then looked at the position taken in *Heanue*<sup>326</sup> in terms of determining if the care was provided without a fee.<sup>327</sup> The *Home Star* court observed that, if it followed *Heanue*, the physician here would be

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314. *Id.*

315. *Id.* at 47.

316. *Id.* at 46-47.

317. *Id.* at 47.

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.* at 50.

322. *Id.*

323. *Id.* at 51.

324. *Id.*

325. *Id.* at 53.

326. *Heanue*, 335 Ill. App. 3d 645, 823 N.E.2d 1123.

327. *Home Star Bank*, 2012 IL App (1st) 112321, 983 N.E.2d at 53.

immune from liability.<sup>328</sup> Since no bill was sent for his emergency care services to the patient, he performed those services “without fee” under the Act according to the *Heanue* court’s analysis.<sup>329</sup> However, the court declined to follow *Heanue*.<sup>330</sup>

Looking instead to the federal district court’s decision in *Henslee*, the court found that the undefined “without fee” language in the Act was ambiguous.<sup>331</sup> As the court observed, the term “fee” in the Act “is capable of being understood in two different ways, the client being billed or the physician being paid. . . .”<sup>332</sup>

From this perspective, the court said its task was to determine the General Assembly’s intent.<sup>333</sup> The legislative history of the Act reflected, the court stated, an intent to protect physicians who are volunteers providing care in emergency situations without the availability of the usual equipment and services and without some contractual duty or expectation of pay.<sup>334</sup> “The Act should not apply” the court said, “to physicians who provide emergency services in a hospital where they have been hired and paid to work. . . . These doctors are not providing their services ‘without fee.’”<sup>335</sup> Here, the court held, the defendant-physician was compensated and required to respond to the patient’s “code blue.”<sup>336</sup> Thus, he did not provide emergency care “without fee” and was not immune from liability under the Act.<sup>337</sup> The appellate court therefore reversed summary judgment and remanded the case to the lower court.<sup>338</sup>

With the *Home Star* decision, a conflict as to the proper interpretation of the “without fee” provision in the Illinois Good Samaritan Act has clearly surfaced. Under decisions such as that of the Second District in *Heanue*, proper application of the Act’s “without fee” language requires only that the court consider whether the patient was billed for or otherwise charged a fee by the physician seeking the protection of the Act’s immunity. If not, and assuming the other stipulations in the Act are satisfied, the physician is immune from liability save for willful or wanton misconduct. In contrast, under the analysis adopted by the First Appellate District panel in *Home Star*, the “without fee” inquiry is broader, requiring not only consideration of whether the physician charged the patient for the

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328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.* at 53-54.

332. *Id.* at 54.

333. *Id.* at 54.

334. *Id.* at 56.

335. *Id.* at 56-57.

336. *Id.* at 57.

337. *Id.*

338. *Id.*

care provided, but also whether the physician nonetheless was compensated for the services for example by a salary paid for to care for the patient.

How the Illinois Supreme Court resolves this conflict remains to be seen. On the one hand, as the federal court observed in *Rodas*, the more restrictive approach taken in *Heanue* represents a position consistently taken in an array of appellate court opinions over the years. From this perspective, the Illinois General Assembly has not seen fit to amend the Act to reject this reading.<sup>339</sup> On the other, looking to the Act's general purpose and to its legislative history, good arguments can be made that the Act ought not apply where a physician is under contract to furnish services to the patient and is paid to do so, even if the patient is never billed or charged.<sup>340</sup>

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339. "One tool courts use to interpret statutory language is the acquiescence rule. If a legislature is aware of a court or agency's interpretation of a statute and does nothing to clarify or change that interpretation through subsequent legislation or amendment, courts sometimes presume that the legislature agrees with the interpretation, and will therefore be reluctant to change that reading in the future." Blair C. Warner, *The Hypocrisy of the Acquiescence Canon* (2010), available at [http://works.bepress.com/blair\\_warner/2](http://works.bepress.com/blair_warner/2). See *Ready v. United/Goedecke Services, Inc.*, 905 N.E.2d 725, 731-32 (Ill. 2008). This analysis arguably applies here where the General Assembly has amended and recodified the statute in issue, aware of judicial interpretations, without rejecting those interpretations.

340. See Bridges, *supra* note 246, at 386-87. As noted here, Section 2 of the Good Samaritan Act states that, "The General Assembly has established numerous protections for the generous and compassionate acts of its citizens who *volunteer* their time and talents to help others. . . . [T]his Act shall be liberally construed to encourage persons to *volunteer* their time and talents." 745 ILL. COMP. STAT. 49/2 (2010) (emphasis added).

