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STATE OF WISCONSIN
SUPREME COURT

BEATRIZ BANUELOS,

Case No. 2020AP001582

Plaintiff-Appellant,

vs.

UNIVERSITY OF WISCONSIN HOSPITAL AND
CLINICS AUTHORITY,

Defendant-Respondent-Petitioner.

APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY
Honorable Juan B. Colas
Dane County Case No. 2020CV000903

**NONPARTY BRIEF OF ASSOCIATION OF HEALTH
INFORMATION OUTSOURCING SERVICES**

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INTRODUCTION

The members of the Association of Health Information Outsourcing Services (“AHIOS”) are release of information companies (“ROI Vendors”). Healthcare providers hire ROI Vendors to assist with or manage health information management, including responding to medical record requests.

Wisconsin residents pay more for healthcare, per capita, than residents of almost every other state.¹ Reflecting a nationwide trend, these costs continue to rise.² With current inflation, healthcare costs will become even more burdensome to

¹ Within a national ranking of states based on the cost of healthcare, with number one being the state with the cheapest healthcare, Wisconsin ranks forty-third. See Adam McCann, *Best & Worst States for Health Care*, WalletHub (Aug. 2, 2021), <https://wallethub.com/edu/states-with-best-healthcare/23457>.

² See Nisha Kurani et al., *How has U.S. spending on healthcare changed over time?*, Peterson-KFF Health System Tracker (Feb. 25, 2022), <https://www.healthsystemtracker.org/chart-collection/u-s-spending-healthcare-changed-time/> (national); Bayard Godsave, *Wisconsinites should not have to live in fear of health care costs*, Wisconsin Examiner (May 17, 2021), <https://wisconsinexaminer.com/2021/05/17/wisconsinites-should-not-have-to-live-in-fear-of-health-care-costs/> (Wisconsin).

residents.³ At the same time, Wisconsin healthcare providers have been financially squeezed by COVID-19 and a deluge of class action lawsuits over medical record fees.⁴ By reading a prohibition on charging for electronic medical records into Wis. Stat. § 146.83(3f), the court of appeals has caused a further increase in healthcare costs in this state.

AHIOS seeks to provide the Court with an understanding of the complex, multi-step, and expensive process required to release electronic health records. It is not a “few mouse clicks at little or no cost to the provider.” (Response Br. at 11). The usage-based fees that commercial third-party requesters like law firms and insurance companies pay for medical records help cover the expenses incurred responding to patient-focused requests. For example, ROI Vendors are only allowed to charge small fees for responding to patient requests, and usually send records to other

³ Healthcare costs have outpaced general costs over the last few decades. *See US Health Care Inflation Rate*, Y Charts, https://ycharts.com/indicators/us_health_care_inflation_rate (last visited May 24, 2022).

⁴ In the past five-years, there have been over 40 class action lawsuits filed against healthcare providers alleging unlawful charges.

healthcare providers for free. The practical effect of the court of appeals' decision will be increased costs for healthcare providers and patients, a result that is contrary to the text of Wis. Stat. § 146.83(3f) and canons of construction.

ARGUMENT

I. The Costs of Releasing Electronic Health Records.

A. Releasing electronic records is not free.

Putting aside the ROI Vendor's and the healthcare provider's pre-established investments in staff and infrastructure, there are significant operational and labor costs associated with releasing medical records in any form. By and large, the same steps apply for requests to produce paper copies as to produce electronic copies. Although AHIOS's members strive to make the release of information process simpler and more cost-effective, the practical realities of the process make releasing electronic health records "with just a few clicks" impossible.

When an ROI Vendor receives a request for it to release protected health information on behalf of a healthcare provider, a series of time-consuming steps apply: (1) Logging and verifying the request for HIPAA compliance, (2) retrieving only the requested records, (3) protecting patient privacy, (4) releasing authorized information, and (5) completing and invoicing the request.⁵ Each step will be addressed below.⁶

1. *Logging and verifying the request for HIPAA Compliance.*

Upon receiving a medical records request, the ROI Vendor must first log the request. Logging the request ensures that the ROI Vendor can efficiently manage, track, and respond to status inquiries concerning a particular request. Additionally, the HIPAA Accounting of Disclosure rule, 45 CFR § 164.528, requires

⁵ See generally Ass'n of Health Info. Outsourcing Servs., Comment Letter on Proposed Modifications to the HIPAA Privacy Rule to Support, and Remove Barriers to, Coordinated Care and Individual Engagement (May 3, 2021), Fed. Reg. # 2020-27157, available at <https://www.regulations.gov/comment/HHS-OCR-2021-0006-1036> (AHIOS Appendix ("A-App. __") at 7).

⁶ For a diagram illustrating this process, see A-App. 25 (AHIOS Chart) and A-App. 40 (GAO Chart).

the ROI Vendor to record and maintain detailed information about certain requests.

Next, the ROI Vendor must verify the request, which entails making sure the healthcare provider has the authority to release the requested information under HIPAA⁷ and any similar state laws. This step protects the patient's privacy, and – according to AHIOS member data – requires following-up with the requester for approximately 10% of all requests.⁸

For third-party requests, HIPAA requires the patient or patient's personal representative to sign a HIPAA Authorization. The Authorization sets forth the allowable information to be released, including whether or not sensitive information can be released. The ROI Vendor must confirm that the Authorization contains the core HIPAA requirements:

- A meaningful description of the information to be disclosed;

⁷ Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104-191; *see also* 45 CFR § 164.508.

⁸ In these instances, the Authorization or request letter is deficient in some way (*i.e.*, missing or mismatching signatures, improper authorization, or a request by an entity without the right to access the records).

- The name of the individual or the name of the person authorized to make the requested disclosure;
- The name or other identification of the recipient of the information;
- A description of each purpose of the disclosure;
- An expiration date or an expiration event that relates to the individual; and,
- A signature of the individual or their personal representative (someone authorized to make health care decisions on behalf of the individual) and the date.⁹

Once satisfied that the Authorization is valid, the ROI Vendor compares the Authorization to the medical record request letter. The letter sets forth the specific information to be released, and the ROI Vendor must ensure the information is within the scope of the Authorization. ROI Vendors must provide significant and sophisticated training, including over two weeks of one-on-one training, to their employees so that they can accurately and efficiently recognize the numerous reasons to reject a request.

⁹*Disclosures for Emergency Preparedness - A Decision Tool: Authorization*, U.S. Dep't of Health & Hum. Servs., <https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/authorization/index.html> (last visited May 24, 2022); 45 C.F.R. § 164.508.

2. *Retrieving only the requested records.*

To locate the correct patient's records, the ROI Vendor queries the master patient index with at least two identifiers and then validates the Authorization's patient signature against the chart to verify authenticity. Staff then retrieve and record the unique identifying patient number.

After locating the patient, the ROI Vendor then identifies where relevant records may be located—on the provider's electronic health record ("EHR") systems, off- or on-site paper files, or microfilm.¹⁰ Staff then collect and compile the requested hard-copy records and then convert paper or microfilm records to a digital format. For already-electronic records, staff interact with the EHR software to select the appropriate scope of information, which often involves manually selecting the requested documents and exporting to a digital format. Locating the requested records in the provider's EHR may take some

¹⁰ Searching for paper records will be required in many instances because only 3.4% of hospitals nationwide are completely paperless. A-App. 25 at Step 6; *see also* A-App. 49-50 (explaining that extracting medical records from electronic health records ("EHR") is "not a simple 'push of a button'" because records may be stored on multiple EHR systems or in hard-copy files.

time—hospitals have, on average, sixteen different EHR systems, and this figure may not include other systems used for billing or diagnostic purposes.¹¹ Once the records are located, staff upload the records to the ROI Vendor's software for compilation and dissemination.¹² Depending on the volume of records selected, EHR software can take up to several hours to create the compiled file.

3. *Protecting patient privacy.*

The ROI Vendor must then safeguard legally-protected or sensitive information (e.g., HIV, drug and alcohol use, and mental health). Because EHR software is unable to reliably flag sensitive information within the records, the ROI Vendor's staff must review the responsive records page-by-page to make sure that each page relates to that patient and does not contain unauthorized sensitive information. If the records contain

¹¹ Tom Sullivan, *Why EHR data interoperability is such a mess in 3 charts*, Healthcare IT News (May 16, 2018, 10:07 AM), <https://www.healthcareitnews.com/news/why-ehr-data-interoperability-such-mess-3-charts>.

¹² ROI Vendors employ highly customized software to compile, review, store, and deliver the records software; typical electronic health record systems do not have these features. A-App. 8.

sensitive information, the ROI Vendor must ensure that the Authorization permits release or remove the information from the response.

4. *Releasing authorized information.*

The ROI Vendor's staff then engage in an additional quality control check on the collected set of records. Staff check that each page relates to the proper patient, falls within the date range requested, contains only the document types requested (e.g., labs, progress notes, etc.), and is properly-authorized. They also combine the records and convert them to a transferrable format that the requester can access (e.g., PDF). ROI Vendors often perform these functions separately from the release process through a quality assurance process. This process reduces the chance of inadvertent disclosure, which, aside from harm to the patient, may subject the ROI Vendor or provider to significant penalties.

5. *Completing and invoicing the request.*

To complete the release process, the ROI Vendor prepares an invoice and charges the requester the amount allowed by state or federal law. The protected health information is then transmitted to the requester in the medium requested—*i.e.*, paper, CD, or secure transfer. Typically, ROI Vendors deliver the records through a secure file transfer site (EHR software is unable to do this for non-patient requests).

B. ROI Vendors provide a cost-effective solution for releasing electronic health records.

Without a doubt, the medical records release process is time- and staff-intensive. ROI Vendors leverage their size and expertise to make this process more cost-efficient; economies of scale save money. Indeed, it is now the norm for healthcare providers to hire ROI Vendors (approximately 80% of hospitals do so).¹³ The alternative to hiring an ROI Vendor is for the healthcare provider, large or small, to divert resources from

¹³ A-App. 5.

patient care to spend on training and employing staff to properly handle patient privacy in records releases.

C. The fees charged under state law to commercial requesters offset the cost of releasing records to patients and other providers.

Healthcare providers receive an enormous number of medical record requests each year—for example, ROI Vendors and healthcare providers responded to 98 million requests in 2018.¹⁴

Under HIPAA, HITECH, and various state laws, healthcare providers are limited in their ability to charge fees that financially support the multi-step release process. The limits apply by requester type:

- (1) Providing records to patients is subject to cost-based limits, which limit fees to below the cost of providing the records¹⁵ (10.9% of all requests);

¹⁴ A-App. 17 (Figure 5).

¹⁵ Under HITECH and the HHS Privacy Rule, there are three ways to calculate the rate applicable to a patient's request: actual cost, average cost, or a "safe-harbor" rate. *See generally* 45 CFR § 164.524(c)(4). The only permissible "costs" under this rule, however, are labor for copying, supplies, postage, or preparing a summary of the material. *Id.* The fee may not include costs associated with verification, documentation, searching for and retrieving the responsive records, paying for data storage, maintaining systems, or anything else. *Id.*

(2) Transmitting records between healthcare providers for patient care is done for free or at low rates (54.2% of all requests); and,

(3) Responding to commercial-focused requests, generally by law firms or insurance companies, is not subject to limits under federal law (35% of all requests).¹⁶

Because stricter fee limits apply to 65% of the requests a healthcare provider will receive, it is a business necessity that an ROI Vendor or provider be allowed to charge the higher fees authorized by state law to the commercial requesters. For these requests, ROI Vendors employ a usage-based business model—the user of the records, be it an insurance company, law firm, or some other entity, pays a fee that covers the costs and labor created by the request. Commercial requests, such as Ms. Banuelos’s attorney’s request, help to fund the unreimbursed cost of releasing records to patients directly or to other health care providers for patient care purposes.¹⁷ Thus, even though commercial requests are not a majority of all requests, fees for

¹⁶ A-App. 14 (Figure 2); *see also* A-App. 5 (“Even when the law authorizes a fee, many providers and their ROI companies choose to give patients or their providers access to PHI for free because it enables the delivery and coordination of patient care.”).

¹⁷ A-App. 5.

commercial requests are the largest source of an ROI Vendor's revenue (48.3%, on average).¹⁸ This is not profiteering, but rather a sensible business solution to the problem of the inherent costs of the medical records release process.

II. Barring Healthcare Providers from Charging Fees for Electronic Health Records Will Increase Patient Pass-Through Costs.

As explained in Section I.C, all of the same costs (except paper and printing) are present when the requester wants records in an electronic format. The majority of commercial requests ask for the records in an electronic format.¹⁹ Thus, because of the court of appeals' decision, ROI Vendors or healthcare providers are not only unable to offset the lower-fee requests with commercial request fees, they also will be unable to charge *anything* for most commercial requests. The non-commercial request fees that formerly were insufficient to cover the costs of the release of records and required subsidization, are now the *sole source of compensation* for the medical record

¹⁸ A-App. 20 (Figure 7).

¹⁹ A-App. 15 (Figure 3).

release process.²⁰ Instead of the business model where the entities that *use* the services pay for it, the court of appeal's decision requires *providers and patients* to bear the cost of all requests for records. The court decision has not only turned the *status quo* on its head, it has eviscerated the fee-for-service model that has allowed ROI Vendors to provide critical services to patients and healthcare providers.

If ROI Vendors are no longer allowed in Wisconsin to charge fees to commercial parties to recover the costs of the medical records release process, the only alternative is for them to charge the state's healthcare providers. Likewise, providers that already handle the process in-house, or choose to move it in-house rather than pay increased service fees to ROI Vendors, will have no choice but to increase funding for their records release

²⁰ This will, of course, force ROI Vendors to operate at a significant loss: "The average operating margin (earnings before interest and taxes) for those ROI Companies is 14.1% of sales, while the average net income is 1.8% of sales. If ROI Companies were to lose anywhere close to 48.3% of their revenue, their margins would quickly run negative and they could no longer pay for their expenses to respond to requests, let alone make a profit, under their current business model." A-App. 19.

departments.²¹ Regardless of the mechanism, healthcare providers will face greater costs associated with the statutory requirement to respond to medical record requests, which is money they cannot spend on providing patient care. Releasing patient health care records will be another drain on an already-tapped system. It is probable that such a change would disproportionately affect smaller and/or rural providers less able to take the financial hit.

Patients likely will be worse off as well. First, AHIOS's data suggests that there would be externalities other than increased costs associated with taking the release process in-house, including lower quality control, longer turnaround times, and increased provider staff turnover.²² Second, to cover the gap created by the revenue lost from commercial requests for records in electronic format, healthcare providers will likely increase their fees for services related to patient care. Ultimately, patients will bear the expense of commercial requests, even when the

²¹ *Id.*

²² A-App. 22.

interests of the requester are adverse to the patient's interest (*i.e.*, if a defense firm is requesting the records to defeat a legal claim by the patient, or a life insurer needs the records to calculate premiums).

III. The Court of Appeals' Decision Contravenes Accepted Interpretive Canons.

AHIOS agrees with the statutory argument that UW Health submits to this Court. Wisconsin Stat. § 146.83(3f)'s fee limits facially do not apply to requests to receive records in an electronic format. In addition, AHIOS notes that the practical effect of the court of appeals' decision is contrary to established canons of construction.

First, courts should avoid statutory interpretations that defy common sense or lead to absurd results. *Teschendorf v. State Farm Ins. Cos.*, 2006 WI 89, ¶¶30-43, 293 Wis. 2d 123, 717 N.W.2d 258 (lead opinion) (rejecting a literal interpretation that both “produce[d] absurd results and defie[d] common sense”). Forcing healthcare providers to *offset the cost of commercial requests with more expensive patient care* runs afoul of these

principles, particularly where this Court has indicated that a purpose of Wis. Stat. § 146.83 is to prevent patients from overpaying for medical records. *E.g., Moya v. Aurora Healthcare, Inc.*, 2017 WI 45, ¶ 34, 375 Wis. 2d 38, 894 N.W.2d 405.

Similarly, the Wisconsin legislature is presumed to have knowledge of existing law when it enacts or modifies law. *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶ 103, 327 Wis. 2d 572, 786 N.W.2d 177. The court of appeals' ruling, however, effectively creates an end-run around federal laws that are meant to prevent *patients* from overpaying for their medical records—as well as associated costs—because the ruling results in increased healthcare costs. Considering that it may be presumed the legislature knew about these federal laws when it eliminated the electronic record mandate and corresponding fee provision in 2011 (*see* UW Health Br. at 23-26), this Court should not adopt an interpretation that would show a disregard for federal law by the Wisconsin legislature.

CONCLUSION

For the reasons above and in the briefs filed by UW Health,
this Court should reverse.

Dated this 13th day of June, 2022.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief produced with a monospaced, proportional serif font. The length of this brief is 2,984 words.

Dated this 13th day of June, 2022.

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FORM AND LENGTH CERTIFICATION

I hereby certify that:

I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12)(f).

The electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on both parties.

Dated this 13th day of June, 2022.

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