HEALTH LAW

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I. INTRODUCTION

In January of 2009, the 111th Congress assembled on the Capitol steps to hear Barack Obama take the oath of office as President and deliver his inaugural address. In that address, the new President called for health care reform. For the first time since 1993, one of the most important items on a new administration's agenda was health care and how best to:

- finance it
- make coverage more available to the American people
- lower its cost
- more sensibly compensate those who provide it
- increase the accuracy and security of all protected health information (PHI) by making it electronic, and at the same time
- make the same electronic PHI available and accessible electronically to physicians and other providers when the individual who is the subject of the PHI needs treatment in an emergency or other acute circumstance in a location not served by the patient's usual physician and other providers. Such access is not available today[1]

In early 2009, the Congress passed and on February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act (ARRA),[2] a major statute that includes stimulus provisions and other incentives designed to encourage the development, use and security of electronic medical records. These provisions are generally located in the HITECH Act[3] portions of the ARRA.[4] Included

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1. The need to improve the interoperability of computer systems in the United States has been addressed in countless articles, research papers and at professional meetings in recent years. See, for example, "Increasing Interoperability in Health Care Information Systems for Medicaid, Mental Health, and Substance Abuse Treatment," a compilation of papers presented at a conference sponsored by the Centers for Medicare and Medicaid Services Substance Abuse Mental Health Services Administration in 2007.

2. Pub. L. No. 111-5, 123 Stat. 115 (2009).

3. "HITECH" is "short" for "Health Information Technology for Economic and Clinical Health."

are Medicare and Medicaid financial incentives for hospitals and physicians to obtain and make "meaningful use" of electronic medical records.[5] The HITECH Act also requires Business Associates under the Health Insurance Portability and Accountability Act (HIPAA) to abide by HIPAA's privacy and security provisions.[6] Previously, only HIPAA Covered Entities were so obliged. Business Associates had only to comply with the obligations imposed by Business Associate Agreements.

Experts inside and outside the federal government have weighed in on the subject of what more needs to be done technically to achieve interoperability, reliability, accessibility and security for electronic medical records.[5] By the date this Article was submitted for publication, however, only a few regulations relating to this new and other amended federal laws—some interim and some proposed final regulations—have been published. Most final regulations were visible only on the far horizon.

A plenary "health care reform" bill was not enacted into law until early 2010, more than seven months after May 31, 2009, the end of the *Survey* period. Accordingly, with very few exceptions, each of which is identified, no post May 31, 2009 matters are addressed.[7] The enactment of the AARA is covered below, but its discussion is quite limited. It is a massive piece of legislation whose provisions and impact cannot yet be fully assessed.

This overview begins, accordingly, by reviewing the major health law related decisions of the Michigan Supreme Court and Michigan Court of Appeals and concludes with a Sixth Circuit case on the Emergency Medical Treatment and Active Labor Act (EMTALA)[8] that increases the risks of violating EMTALA for both Michigan Hospitals and physicians. This Article ends with a discussion of the problems created by an amendment to the Michigan Medical Records Access Act that was enacted in early 2009.

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4. Pub. L. No. 111-5, div. A, tit. XIII, §§ 13001-13421 and div. B, tit. IV, §§ 4001-4302; 123 Stat. 226-279 and 123 Stat. 467-496.

5. Pub. L. No. 111-5, div. B, tit. IV §§ 4101-4102; 123 Stat. 467-486.

6. Pub. L. No. 111-5, div. A, tit. XIII §13408.

7. Below only a very few actions that occurred after May 31, 2009 are discussed. Each is specifically identified. See, for example, the discussion in Section II of *Bush v. Shabahang*, 484 Mich. 156, 772 N.W.2d 272 (2009), *infra* text accompanying notes 74-90. In this case, the Michigan Supreme Court partially overruled two of its own statute of limitations decisions on cases involving the statute of limitations.

8. 42 U.S.C.A. §1395dd (West 2010).

II. MICHIGAN COURT DECISIONS

As noted above, in other years, the *Survey* period covered in this annual review of health law developments has covered from June 1 of the preceding year through May 31 of the year when the annual review is published. For 2009, because of a significant Michigan Supreme Court decision partially overruling two of its own prior decisions that was decided on July 29, 2009, the review period for health law cases appealed on statute of limitations grounds has been extended through July 2009. Below, we discuss that case, *Bush v. Shabahang*,[9] and the statute of limitations precedent it partially overruled, as well as the results of appeals in other areas of the law that were decided by the Michigan Supreme Court or Michigan Court of Appeals from June 1, 2008, through May 31, 2009. Cases are discussed by topic and in chronological order.

A. Which Statute of Limitations Applies?: Kuznar v. Raksha Corp.[10]

The plaintiff's husband went to Crown Pharmacy, a "d/b/a" of Raksha Corporation, to refill her prescription for Mirapex, a drug to treat restless leg syndrome.[11] No licensed pharmacist was on duty.[12] Defendant Valerie Randall is not a licensed pharmacist.[13] Even so, she refilled and then dispensed the prescription.[14] The dosage of Mirapex dispensed was eight times the dosage Judith Kuznar's physician prescribed.[15] After taking one pill in the afternoon and two more in the early evening, Mrs. Kuznar became ill.[16] Later that night she lost consciousness and required treatment in a hospital emergency department.[17] Physicians diagnosed her symptoms as the result of an excessive dosage of Mirapex.[18]

The prescription refilled was dispensed on November 13, 2000.[19] The Kuznars did not file suit until October 7, 2003.[20] They sued both the

9. 484 Mich. 156, 772 N.W.2d 272 (2009).
10. 481 Mich. 169, 750 N.W.2d 121 (2008).
11. *Id.* at 172-73, 750 N.W.2d at 124.
12. *Id.* at 173, 750 N.W.2d at 124.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Kuznar*, 481 Mich. at 173, 750 N.W.2d at 124.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*

Crown Pharmacy Corporation and Randall for ordinary negligence.[21] The statute of limitations for ordinary negligence is three years.[22] Against Crown, the Kuznars argued that the pharmacy failed to refill the prescription in the appropriate medication dosage, failed to recognize the error made before dispensing the medication, allowed a person who was not a licensed pharmacist to refill the prescription, and failed to have a licensed pharmacist on site to oversee, supervise and control the actions of unlicensed personnel who refilled prescriptions.[23]

Against Randall the plaintiffs made a similar argument: she had a duty not to refill or dispense prescription medications because she is not a licensed pharmacist.[24] She violated her duty when she dispensed a medication for Plaintiff Judith Kuznar to her husband.[25] The dosage dispensed was eight times too strong and Randall failed to recognize and correct her error, harming Judith Kuznar as a result.[26]

Plaintiffs' case on the merits was, obviously, a strong one. In defense, the Defendants argued that Randall was employed by a "licensed health facility or agency," so that the Kuznars' complaint was actually one that "sounded in medical malpractice rather than in ordinary negligence."[27] The statute of limitations for medical malpractice is part of M.C.L.A. section 600.5805.[28] It provides:

> 1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.[29]

The statute further provides: "(6) Except as otherwise provided in this chapter, *the period of limitations is 2 years for an action charging malpractice.*"[30] No exception applied to the facts of the case because of two flaws in the defense's argument—each one independently fatal.[31] The first flaw was this: while pharmacists are licensed health-care

21. *Id.*
22. *Kuznar*, 481 Mich. at 171-72, 750 N.W.2d at 123.
23. *Id.* at 173-74, 750 N.W.2d at 124.
24. *Id.*
25. *Id.*
26. *Id.* at 174, 740 N.W.2d at 124.
27. *Id.*
28. MICH. COMP. LAWS ANN. § 600.5805 (West 2009).
29. MICH. COMP. LAWS ANN. § 600.5805(1).
30. MICH. COMP. LAWS ANN. § 600.5805(6) (emphasis added).
31. *Kuznar*, 481 Mich. at 173-74, 750 N.W.2d at 124.

professionals subject to medical malpractice claims under M.C.L.A. section 600.5838a(1)(b), Defendant Randall was not a licensed pharmacist and never had been.[32] Thus, she lacked the credentials to be sued for medical malpractice.[33] The second fatal flaw pointed out by the Michigan Court of Appeals in its opinion below was this: a pharmacy is not a "licensed health facility or agency" as defined in Article 17 of the Michigan Public Health Code.[34] Only Article 17 licensed facilities or agencies are subject to a two-year statute of limitations for medical malpractice.[35] Pharmacies are licensed under Article 15 of the Public Health Code.[36] In other words, the three year statute of limitation for ordinary negligence applies.[37] The complaint was, accordingly, timely filed.[38]

On June 11, 2008, in an opinion by Justice Marilyn J. Kelly, the Michigan Supreme Court affirmed the court of appeals conclusion and its holding that a pharmacy is not a licensed health facility or agency within the meaning of M.C.L.A. section 600.5805 and not a licensed health-care professional either.[39] Accordingly, a pharmacy cannot be directly liable for medical malpractice, only for ordinary negligence.[40] The Michigan Supreme Court affirmed the court of appeals' finding that the three-year statute of limitation for ordinary negligence applied.[41] The Kuznars timely filed their complaint.[42]

B. What Happens When the Initial Personal Representative of an Estate Files a Notice of Intent to Sue Just a Few Days Before the Statute of Limitations Will Expire and then a Successor Personal Representative is Appointed who Files Her Own Complaint Six Months Later Still?: Estate of Dale v. Robinson[43]

The issue presented here was this: in a wrongful death case, when does the statute of limitations run if the initial personal representative did not serve a notice of intent until four days before the two-year

32. *Id.* at 175-76, 750 N.W.2d at 125.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Kuznar*, 481 Mich. at 175-76, 750 N.W. 2d at 125.
38. *Id.*
39. *Id.* at 177-82, 750 N.W.2d at 126-28.
40. *Id.* at 182, 750 N.W.2d at 129.
41. *Id.*
42. *Id.*
43. 279 Mich App. 676, 760 N.W.2d 557 (2008).

malpractice statute of limitations was to run, and some time thereafter, a successor personal representative filed her own notice of intent.[44]

The defendants in this wrongful death and medical malpractice case—two physician groups and Battle Creek Health System and Cancer Care Center (BCHS)—all moved for summary disposition on statute of limitations grounds.[45] The trial court denied all three motions and all three defendants appealed.[46]

The facts of the case were as follows: the defendant physicians and faculty treated C. Joyce Dale for cancer.[47] She died on December 15, 2000.[48] A personal representative of Dale's estate was appointed on February 23, 2001.[49] He did not, however, serve defendants with a notice of intent to file a medical malpractice claim until February 19, 2003.[50] On August 15, 2003, a woman was appointed successor personal representative of the estate.[51] On August 22, 2003, she filed a medical malpractice complaint against all defendants.[52] All defendants argued that the complaint was filed months after the applicable two-year statute of limitations period had run and even months after the statute giving personal representatives additional time to file a claim on behalf of the decedent's estate had run.[53] That statute, M.C.L.A. section 600.5852, provides:

> If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, *an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run.* But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run.[54]

A wrongful death is "an action which survives by law" within the meaning of this statute.[55] Relying on *Eggleston v. Bio-Medical*

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44. *Id.* at 682-84, 760 N.W.2d at 560-61.
45. *Id.* at 677, 760 N.W.2d at 558-59.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Estate of Dale*, 279 Mich. App. at 677, 760 N.W.2d at 558-59.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. MICH. COMP. LAWS ANN. § 600.5852 (West 2009) (emphasis added).
55. MICH. COMP. LAWS ANN. § 600.2922.

Applications of Detroit, Inc.,[56] the Michigan Court of Appeals followed the Michigan Supreme Court's holding in *Waltz v. Wyse*[57] and found that a notice of intent does not toll the savings period of M.C.L.A. section 600.5852, because that statute is "an *exception* to the limitation period" and not "a period of limitations itself."[58]

The Supreme Court in *Eggleston* reversed the grant of summary disposition, holding that according to the plain language of the first sentence of M.C.L.A. section 5852,[59] the section's application was not restricted to letters of authority appointing an initial personal representative.[60] The statute simply provides that the personal representative may commence an action "at any time within 2 years after letters of authority are issued although the period of limitations has run."[61] The court went on to say that the language the legislature adopted clearly allows an action to be brought within two years after letters of authority are issued to the personal representative.[62] The statute does not provide that the two-year period is measured from the date letters of authority are issued to the *initial* personal representative."[63]

C. What Are (a) the Requirements for an Adequate Notice of Intent and (b) the Consequences of filing a Defective Notice of Intent on Tolling the Statute of Limitations?: Boodt v. Borgess Medical Center[64]

This is the last in a series of Michigan Court of Appeals and Michigan Supreme Court opinions in which the courts routinely dismissed plaintiff appeals based on statute of limitations grounds if the Plaintiff's notice of intent (NOI) did not fully describe how the particular actions or inactions of a defendant led to the injuries suffered by the patient.[65] Here, the patient's estate brought a wrongful death medical malpractice action against the surgeon and both medical centers following the patient's death during percutaneous transluminal coronary angioplasty procedure.[66] The only issue on appeal was whether the

56. 468 Mich. 29, 658 N.W.2d 139 (2003).
57. 469 Mich. 642, 577 N.W.2d 813 (2004).
58. *Estate of Dale*, 279 Mich. App. at 683-84, 760 N.W.2d at 561-62 (emphasis added).
59. *Eggleston*, 468 Mich. at 33, 658 N.W.2d at 142.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. 481 Mich 558, 751 N.W.2d 44 (2008).
65. *See id.* at 562-64, 481 N.W.2d at 46-47.
66. *Id.* at 560, 751 N.W.2d at 46-47.

plaintiff's NOI was sufficient with respect to the defendant physician.[67] The trial court granted all defendants' motions for summary disposition on the grounds that the NOI was insufficient.[68] The court of appeals reversed with respect to the 2006 grant of summary disposition in favor of Dr. Lauer.[69]

In a four-to-three decision, the Michigan Supreme Court held that the NOI was insufficient because it did not describe "the manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice," as required by M.C.L.A. section 600.2912(b)(4)(e).[70] Instead, the court stated that the notice "merely indicates that Lauer caused a perforation and that he then failed to do several things that he presumably should have done, such as perform a periodardiocentesis in a timely manner."[71]

Boodt is one of the two cases that the Michigan Supreme Court overruled in part in *Bush v. Shabahang*.[72] The other decision it overruled in part is *Roberts v. Mecosta County General Hospital*.[73] In a per curiam opinion in that case, the court ruled that M.C.L.A. section 600.2912b (4)(e) requires a notice of intent to contain a "statement" describing the "manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice."[74]

D. What Test Must a Notice of Intent Meet in order to be Sufficient and Toll the Statute Of Limitations?: Bush v. Shabahang[75]

In an opinion drafted in early 2009 by then recently elected Justice Diane Hathaway, the Michigan Supreme Court first focused on amendments to the medical malpractice statute of limitations passed in 2004.[76] Before the 2004 amendments, the applicable statute called for tolling the statute of limitations only if the "notice is given in compliance

67. *Id.*
68. *Id.*
69. *Id.*
70. *Boodt*, 481 Mich. at 560, 751 N.W.2d at 45.
71. *Id.* "Peridardiocentesis" is defined as "[a] procedure performed with a needle to remove fluid for diagnostic or therapeutic purposes from the tissue covering the heart (pericardial sac)." Healthline.com in an article titled Pericardiocentesis Health. Article available on line.
72. 484 Mich. 156, 772 N.W.2d 272 (2009).
73. 470 Mich. 679, 684 N.W.2d 711 (2004).
74. *Bush*, 484 Mich. at 191, 772 N.W.2d at 291.
75. *Id.* at 156, 772 N.W.2d at 272.
76. *Id.* at 160, 772 N.W.2d at 275.

with section 2912b."[77] Justice Hathaway described the issue before the court as follows:

> The question arises whether the amendment mandates compliance with the entirety of Section 2912b, such that a defective NOI does not get the benefit of tolling or whether the new language focuses on compliance with only the applicable notice period in Section 2912b, such that a defective NOI tolls the statute of limitations as long as it is compliant with the notice period.[78]

Justice Hathaway also referred to *Boodt*, noting that "Boodt, while decided in 2008, made no reference to the 2004 amendment . . . Boodt relied on language of a statute that is no longer in existence," making "examining the correct interpretation of Section 5856(c) and its interrelationship with Section 2912b an issue of first impression."[79] She concluded:

> [T]he focus of the new Section 5856(c) is unquestionably limited to compliance with the applicable notice period . . . thus, pursuant to the clear language of Section 2912h and the new Section 5856(c), if a plaintiff complies with the applicable notice period before commencing a medical malpractice action, the statute of limitations is tolled.[80]

Citing M.C.L.A. section 600.2301, she wrote that "[section] 2301 mandates that Courts disregard errors or defects when those errors or defects do not affect the substantial rights of the parties."[81]

A second significant statutory construction involved M.C.L.A. section 600.29112b (7) and defective responses to a NOI and their impact, if any, on when the plaintiff can file a medical malpractice complaint.[82] M.C.L.A. section 600.2912b (1) begins as follows:

> (1) Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given

77. *Id.* at 165, 772 N.W.2d at 278.
78. *Id.*
79. *Id.* at 166, 772 N.W.2d at 278.
80. *Bush*, 484 Mich. at 169, 772 N.W.2d at 280.
81. *Id.* at 178, 772 N.W.2d at 285.
82. *See id.* at 181, 772 N.W.2d at 286-87.

> the health professional or health facility written notice under this section not less than 182 days before the action is commenced.[83]

M.C.L.A. section 600.2912b(7) requires a defendant to provide the plaintiff with a written response to an NOI within 154 days of receipt of the NOI.[84] This provision is mandatory and the contents of the required NOI response are specified.[85] The court of appeals found Shabahang's response to the NOI to be defective and not compliant with the statute.[86] When a plaintiff does not timely receive an adequate response from the defendant covering all statutory requirements, the plaintiff does not have to wait 182 days to file suit. Instead, the plaintiff can file as soon as the 154-day period expires.[87] The court ruled accordingly.[88]

As a result of the *Bush* decision, in cases with similar facts a timely filed NOI morphed into a time saver, allowing the plaintiff to file his/her complaint 154 days after the NOI filing date unless the defendant timely files an "adequate response." Requirements for an "adequate response"[89] are not spelled out in the decision of the court in *Bush*.[90]

E. What Are a Nursing Home's Reporting Obligations When a Resident is Injured?: People v. Edenstrom[91]

What reached the Michigan Court of Appeals as a criminal case began when a certified nursing assistant tried to help a resident who is oxygen-dependent smoke a cigarette in the nursing home's designated smoking area.[92] As she had been taught to do, she turned off the oxygen flow and lit the resident's cigarette.[93] According to the court, "[r]esidual oxygen in the tubing ignited, causing [the resident] to suffer burns on his hands and face as well as smoke inhalation."[94] The nursing assistant testified that she did not know that "nasal cannula tubing could contain

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83. MICH. COMP. LAWS ANN. § 600.2912b(1) (West 2009).
84. *Bush*, 484 Mich. at 181, 772 N.W2d at 287.
85. *Id.*
86. *Id.* at 181-82, 772 N.W.2d at 287.
87. *Id.* at 185-86, 772 N.W.2d at 288-89.
88. *Id.*
89. *See id.* at 156, 772 N.W.2d at 272.
90. After the Bush case had been decided—and after the time period covered in this *Survey*—the Michigan Supreme Court issued an order amending Michigan Court Rules 2.112 and 2.118 as they relate to a notice of intent, an affidavit of merit or an affidavit of meritorious defense. Not all justices agreed with the order.
91. 280 Mich. App. 75, 760 N.W.2d 603 (2003).
92. *Id.* at 77, 760 N.W.2d at 604.
93. *Id.*
94. *Id.*

oxygen after the oxygen tank was turned off."[95] The court noted that "[r]emoving a resident's cannula before lighting a cigarette point was not covered in her training."[96] Accordingly, the court concluded that "she did what she knew to do. She did not fail 'to act in the presence of the knowledge of what should be done and the capability to provide the require service.' The evidence clearly showed that the nursing assistant did not harmfully neglect [the resident]."[97]

M.C.L.A. section 333.21771 provides:

> (1) A licensee, nursing home administrator, or employee of a nursing home shall not physically, mentally, or emotionally abuse, mistreat or harmfully neglect a patient.
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> (2) A nursing home employee who becomes aware of an act prohibited by this section immediately shall report the matter to the nursing home administrator or director. A nursing home administrator or nursing director who becomes aware of an act prohibited by this section immediately shall report the matter by telephone to the department of public health,[98] which in turn shall notify the department of social services.[99]

The statute does not define the terms "[h]armfully neglect" or "harmful neglect."[100] Examples of them are, however, contained in a manual for nursing homes titled the "Complaint and Facility Reported Incident Manual" published by the Bureau of Health Systems of the Michigan Department of Community Health.[101] Since a number of terms like "abuse, mistreat, and neglect" are used but not defined by the applicable statutes, section 3300 of the manual "sets forth definitions that meet the intent of these multiple legal bases."[102]

Here, the nursing home administrator investigated the incident and concluded that no "harmful neglect" or act to "harmfully neglect" occurred.[103] Accordingly, no report to the Michigan Department of Community Health was made.[104] A member of the resident's family did

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95. *Id.*
96. *Id.* at 83, 760 N.W.2d at 607.
97. *Edenstrom*, 280 Mich. App. at 83, 760 N.W.2d at 607.
98. Now the Michigan Department of Community Health (MDCH).
99. MICH. COMP. LAWS ANN. § 333.21771 (1)-(2) (West 2009).
100. MICH. COMP. LAWS ANN. § 333.21771-2199e.
101. COMPLAINT AND FACILITY REPORTED INCIDENT MANUAL § 3300 (2005).
102. *Edenstrom*, 280 Mich. App. at 81, 760 N.W.2d at 606.
103. *Id.* at 83-85, 760 N.W.2d at 607-08.
104. *Id.*

report the incident, however, and after an investigation, the nursing home administrator was charged with a misdemeanor for failing to report as M.C.L.A. section 333.2177(2) requires.[105] As noted above, the court agreed with her assessment of the incident and the administrator prevailed in her appeal.[106] The court of appeals did not, however, agree with or accept the lower court's holding that the reporting statute does not cover and require reporting "accidents."[107]

F. Is the Michigan Property and Casualty Guaranty Association a Worker's Compensation Insurer Under Michigan law?: Smith v. Parkland Inn/Casualty Reciprocal Exchange[108]

This worker's compensation case involved an employee with two jobs who was injured while working at the Parkland Inn but was also employed by a restaurant.[109] Parkland Inn's workers' compensation insurer, Casualty Reciprocal Exchange (CRE), paid plaintiff her full rate of benefits.[110] When an injured employee has two jobs and certain compensation percentages are met,[111] the "full rate of benefits" is based upon the earnings of the employee at both jobs.[112] CRE was reimbursed on a quarterly basis by the Second Injury Fund, Dual Employment Provision (SIF), for the benefits paid based upon the plaintiff's employment at the restaurant.[113] Then CRE became insolvent.[114] This triggered the Michigan Property and Casualty Guaranty Association (MPCGA) Act, M.C.L.A. section 500.7001 through section 500.7090, pursuant to which MPCGA began paying plaintiff's full benefits in place of CRE.[115] MPCGA requested quarterly reimbursement from the SIF, just as CRE had done.[116] SIF denied the request, not because the facts showed that MPCGA Act's did not meet the act's dual employment

105. *Id.*
106. *Id.*
107. *Id.* at 88, 760 N.W.2d at 610.
108. 279 Mich. App. 642, 760 N.W.2d 554 (2008).
109. *Id.* at 643-44, 760 N.W.2d at 555-56.
110. *Id.*
111. MICH. COMP. LAWS ANN. section 418.371(1) (West 2010) states: "The principal employer must pay 80 percent or less of the employee's average weekly wage at the time of the personal injury or death" If this test is satisfied, as it was in this case, the insurer is liable for that portion of the employee's weekly benefits that is not paid by the primary employer.
112. *Smith*, 279 Mich. App. at 643-44, 760 N.W.2d at 555-56.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*

requirements, but because SIF disputed that MPCGA was an "insurer" under M.C.L.A. section 418.601(a).[117]

The court of appeals ruled that MPCGA is, indeed, an "insurer" under M.C.L.A. section 418.372(1)(b), because the Worker's Disability Compensation Act defines "insurer" as "an organization that transacts the business of worker's compensation insurance within this State."[118] Both the magistrate who heard the case below and the Workers' Compensation Appellate Commission had ruled the same way.[119] All insurers authorized to do business in Michigan except life and disability carriers are members of the MPCGA.[120] Belonging to the association is a condition of doing business in the state.[121] Further, the MPCGA is subject to the laws "'of this state to the extent that it would be subject to those laws if it were an insurer organized and operating under M.C.L.A. section 500.5000 *et seq.*'"[122] Finally, the purpose of "[t]he MPCGA is to fulfill the obligations of an insolvent insurer in regard to covered claims."[123] The claim here was one of the "covered claims" as defined in the MPCGA Act.[124]

G. When Conducting an Investigation to Determine Whether a Licensed Health Care Provider has Committed Billing Fraud, can the Michigan Attorney General Obtain a Subpoena that Compels a Licensed Psychologist to Produce All Billing Records, Medical Records, Emergency Room Records, Treatment Records, and Pathology and Laboratory Reports?: In re Petition of Attorney General for Investigative Subpoenas[125]

In the midst of conducting an investigation into billing fraud by different kinds of licensed health care providers for the Michigan Department of Community Health (MDCH), the Michigan attorney general went to circuit court to petition for subpoenas to compel a psychologist to produce records, including but not limited to "ALL billing records, medical records, emergency room records, documentation, treatment records, pathology and laboratory reports . . .

117. *Id.* at 643-47, 760 N.W.2d at 555-57.
118. *Smith*, 279 Mich. App. at 643-47, 760 N.W.2d at 555-57.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 645, 760 N.W.2d at 556 (quoting MICH. COMP. LAWS ANN. § 500.7911(3) (West 2010)).
123. *Id.*
124. *Smith*, 279 Mich. App. at. 647, 760 N.W.2d at 557.
125. 282 Mich. App. 585, 766 N.W.2d 675 (2009).

and radiology reports pertaining to so on of ten [of his] patients."[126] The circuit court issued an order to that effect.[127] Shortly thereafter, the respondent moved to quash on the grounds that the information sought was "privileged information under the psychologist patient privilege, MCL 333.18237."[128] In its response, the attorney general's office argued, first, that M.C.L.A. section 333.16235(1) expressly mandates "compliance with an investigative subpoena" and, second, that the situation was a "no harm no foul" one, because M.C.L.A. section 333.16238(1) makes patient records reviewed in a public health investigation confidential under M.C.L.A. section 333.16238(1) and M.C.L.A. section 15.243, the latter being a provision of the Freedom of Information Act.[129] The pertinent part of the Act reads as follows: "Sec. 13. (1) A public body may exempt from disclosure as a public record under this act: (a) Information of a personal nature where the public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy."[130]

The trump card here was the wording of the privilege statute itself, M.C.L.A. section 333.18237, which provides in pertinent part:

> A psychologist licensed or allowed to use that title under this part or an individual under his or her supervision *cannot be compelled to disclose confidential information acquired from an individual consulting the psychologist in his or her professional capacity if the information is necessary to enable the psychologist to render services.*[131]

None of the exceptions that would allow disclosure applied and the attorney general, as petitioner, did not contest that the information sought in this case is "necessary to enable the psychologist to render services."[132] No confidential information acquired by the psychologist was required to be disclosed.[133]

126. *Id.* at 586-87, 766 N.W.2d at 676.
127. *Id.*
128. *Id.* at 587-89, 766 N.W.2d at 676-77.
129. *Id.*
130. MICH. COMP. LAWS ANN. § 15.243(13)(1)(a) (West 2009).
131. MICH. COMP. LAWS ANN. § 333.18237 (West 2009) (emphasis added).
132. *Investigative Subpoenas*, 282 Mich. App. at 592, 766 N.W.2d at 679.
133. *Id.* at 597-98, 766 N.W.2d at 682.

III. SIXTH CIRCUIT CASE: DOES EMTALA APPLY TO INPATIENTS? YES: *MOSES V. PROVIDENCE HOSPITAL & MEDICAL CENTERS, INC.*[134]

The Emergency Medical Treatment and Active Labor Act (EMTALA) requires Medicare/Medicaid participating hospitals to provide a medical screening examination and stabilizing treatment to individuals who come to hospital emergency departments with emergency medical conditions.[135] On April 6, 2009, in *Moses v. Providence Hospital & Medical Centers, Inc.*, the Sixth Circuit became the first circuit court of appeals to issue a decision that greatly expands a facility's obligations under EMTALA to inpatients.[136] The holding is also contrary to federal regulations issued by the Center for Medicare and Medicaid Services (CMS).[137]

The facts of the case were as follows: Marie Moses-Iron took her husband, Howard, to the defendant hospital because he had physical symptoms of medical problems and had also threatened her safety.[138] Howard was admitted.[139] A psychiatrist consulted on the case and recommended that the husband be moved to the psychiatric ward because he was emotionally or mentally unstable.[140] For reasons not entirely clear from the evidence presented at trial, he was not transferred.[141] Instead, an intern discharged him six days later.[142] Discharge occurred even though Marie Moses-Iron still feared her husband, Howard, because he declined the psychiatric ward placement and a physician concluded he was "medically stable."[143] Ten days after his discharge, Howard murdered Marie.[144] The personal representative of Marie's estate sued the hospital and the psychiatrist who had worked with Howard for violating EMTALA.[145]

The hospital contested the Plaintiff's standing to sue under EMTALA because the personal representative of the estate was not the

134. 561 F.3d 573 (6th Cir. 2009).

135. *See* 42 U.S.C.A. § 1395dd(a) (West 2010).

136. *Moses*, 561 F.3d at 583-87.

137. See *infra* text accompanying notes 161-62 relating to an interim order by the U.S. Supreme Court in late 2009 to the solicitor general to brief the question of whether EMTALA applies to inpatients and to take into account the 2008 CMS decision *not* to amend the applicable regulation to make EMTALA apply to inpatients.

138. *Moses*, 561 F.3d at 576-77.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Moses*, 561 F.3d at 576-77.

145. *Id.*

patient involved and because EMTALA's applicability ends once the patient is admitted.[146] The district court granted summary judgment to the hospital.[147] This decision was consistent with the rulings of every United States circuit court of appeals that had then ruled upon an EMTALA case when the patient involved became an inpatient.[148] Even the Sixth Circuit's opinion in *Moses* acknowledges that EMTALA "was not designed or intended to establish guidelines for patient care or to provide a suit for medical negligence or malpractice."[149] Having acknowledged this, the court then ignored its own statement.[150] Indeed, later in the opinion, the court proceeded to describe what the hospital should have done, but failed to do in treating Howard once he was an inpatient.[151]

The Sixth Circuit took an uncharted course on other issues as well. For example, after the court held that non-patients have standing to sue under EMTALA,[152] it also determined that standing for alleging EMTALA violations is very broad, despite legislative history to the contrary, since the statute itself authorizes suit by "any individual who suffers personal harm as a direct result" of an EMTALA violation.[153] As of the date this Article was completed, no other court, trial or appellate, has taken this language in the statute literally. The Sixth Circuit, however, rejected plaintiff's claim against the defendant psychiatrist, since EMTALA authorizes suits only "against the participating hospitals."[154] It creates no private right of action against individuals.[155]

Next, the *Moses* court reversed the district court and held that EMTALA's plain language requires a hospital to give patients such treatment beyond admittance as an inpatient, "as may be required to stabilize the medical conditions of the patient."[156] According to the court, "EMTALA requires more than admission and further testing, . . . it requires that actual care, or treatment, be provided as well."[157] Again, the court explicitly rejected the applicable CMS regulation to the contrary.[158]

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146. *Id.*
147. *Id.* at 577-78.
148. There were no reported U.S. Circuit Court of Appeals rulings to the contrary.
149. *Moses*, 561 F.3d at 578.
150. *Id.* at 577-78.
151. *Id.* at 582-83.
152. *Id.* at 581.
153. *Id.* at 580 (citing § 1395dd(d)(2)(A)).
154. *Id.* at 587.
155. *Moses*, 561 F.3d at 582 (citing § 1395dd(b)).
156. *Id.*
157. *Id.*
158. *Id.*

That regulation ended a hospital's EMTALA obligations to a patient upon the patient's admittance as an inpatient.[159]

For the time being at least, *Moses* means that Michigan hospitals can no longer safely rely upon the CMS regulation ending EMTALA's application at inpatient admission. Hospitals would be well advised to consider educating their admitting and/or attending physicians to document whether a patient admitted through the emergency department has or no longer has an "emergency medical condition" and whether the patient is "stable" or "not yet stable." If the patient has an emergency medical condition and a physician providing services or consulting on the case recommends transferring the patient to another unit, and that recommendation is not followed, the medical record should explain why. The absence of documentation such as that suggested above clearly made it harder for the hospital and physician to argue they had met their respective EMTALA's obligations. This situation may change, however, because *Moses* is now pending before the United States Supreme Court.[160]

The February 1, 2010 edition of the King and Spalding publication *Health Headlines* contained an entry dealing with the Moses decision issued by the Sixth Circuit. The entry focused on "an interim order by the United States Supreme Court inviting the United States Solicitor General to file a brief in the case of *Providence Hospital v. Moses*" (which is on appeal to the court).[161] The entry included the following remarks:

> CMS [the Center for Medicare and Medicaid Services] considered revising the regulation in 2008 to expand application of the law to inpatients. However, CMS opted to retain the more limited application of the rule due to concerns that a broader application could "further burden emergency services system" and "negatively impact patient care."[162]

IV. CHANGES IN MICHIGAN STATUTES: THE MICHIGAN MEDICAL RECORDS ACCESS ACT

The Michigan Medical Records Access Act was amended in 2008 to allow "heirs at law" access to a deceased patient's medical records or

159. *Id.* at 583 (citing 42 C.F.R. § 489.24(d)(2)(i)).

160. Providence Hosp. v. Moses, 130 S. Ct. 1318 (2010).

161. Nancy LeGros & Christina Gonzalez, Health Headlines, *Supreme Court Seeks Solicitor General's View On EMTALA's Application to Inpatients*, KING & SPALDING, Feb. 1, 2010, http://www.kslaw.com/portal/server.pt?space=KSPublicRedirect&control=KSPublicRedirect&PublicationId=2124.

162. *Id.*

autopsy reports in all circumstances.[163] The Act does not, however, define "heirs at law."[164] Michigan's Estates and Protected Individuals Code (EPIC) defines "heir" as "those who would be entitled to the decedent's property under the law of intestacy, MCL 700.1104(n), except as otherwise provided in MCL 700.2720."[165]

As you will see immediately below, M.C.L.A. section 700.2720 does not do much to reduce the number of potential heirs (not the arguments to be expected).[166] It provides:

> If an applicable statute or a governing instrument calls for a present or future distribution to or creates a present or future interest in a designated individual's "heirs," "heirs at law," "next of kin," "relatives," or "family" or language of similar import, the property passes to those persons, including the state, in the shares that would succeed to the designated individual's intestate estate under the intestate succession law of the designated individual's domicile if the designated individual died when the disposition is to take effect in possession or enjoyment. If the designated individual's surviving spouse is living, but is remarried at the time the disposition is to take effect in possession or enjoyment, the surviving spouse is not an heir of the designated individual.[167]

In plain English, the statute leaves it up to the decedent's health care provider—probably a hospital or the patient's physician—to figure out who is his/her heir, depending on the family situation.[168] Numerous questions may arise. For example: Is there a surviving spouse? If so, are there surviving children of the decedent and that spouse? Of the decedent and another spouse? If the decedent had a child now deceased, are there any grandchildren of that child surviving?

How is the provider supposed to figure this out? Very carefully, following EPIC. Providers may also need to seek the advice of counsel asking that they consult the applicable Michigan Court Rules. Unless an order determining heirs has been issued by the probate court, any licensed health care provider in possession of the decedent's medical record should protect itself, the decedent and the decedent's personal

163. *See* MICH. COMP. LAWS ANN §§ 333.26261-.26271 (West 2010).
164. *See id.*
165. MICH. COMP. LAWS ANN. § 700.1104(n) (West 2009).
166. *See* MICH. COMP. LAWS ANN. § 700.2720 (West 2009).
167. *Id.*
168. *See id.*

representative by treating any person claiming to be an heir at law who requests a copy of a decedent's medical record as follows: require the claimant to provide official documentation satisfactory to provider's counsel that verifies his/her status as an heir such as a birth certificate, adoption order, certificate of marriage, or other pertinent court order before the copy is provided. Unless and such documentation is provided, no copy should be provided.