

# Electronic Medical Records



## OVERVIEW OF LIABILITY RISKS

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# Unique Risks



- Litigation
- Regulatory
- Operational / Contract

# Litigation Risks



## 1. Malpractice Litigation

- Standard of Care: Johnson v. Hillcrest Health Center, Inc. <sup>1</sup>
- Quality of Care: Template Driven

## 2. Liability for Privacy Breaches

- HIPAA Privacy Standards: Sorensen v. Barbuto <sup>2</sup>  
Acosta v. Byrum <sup>3</sup>
- Provider Risk Awareness
- Employee Pattern of Conduct

# Litigation Risks con't



## 3. Liability for Security Breaches

- HIPAA Security Rule
- Medical Identity Theft <sup>4</sup>

## 4. E-Discovery Issues

- Litigation Hold <sup>5</sup>
- Failure to Comply <sup>6</sup>
  - Reproduce the Missing Data
  - Monetary Fines
  - Adverse Inference in Litigation
  - Judgment Against Defendant

# Regulatory Risks



1. Health Information Technology and Economics and Clinical Health Act (“HITECH Act”) <sup>7</sup>
  - Mandatory Breach Notification Obligation
    - Office for Civil Rights Enforcement <sup>8</sup>
  - Increased Penalties for Violations
    - Criminal Penalties
    - Civil Penalties
    - Eliminated Certain Defenses
  
2. State Law –Data Breach Notification
  - Security Breach Notification Act <sup>9</sup>

# Regulatory Risks con't



## 3. Stark Law <sup>10</sup> and Anti-Kickback <sup>11</sup> Liability

- EMR Exception <sup>12</sup> and Safe Harbor <sup>13</sup>
  - Interoperability
  - Unrestricted Use
  - Required Cost-sharing
- Stark Law Violations
  - Civil Monetary Penalties up to \$100,000
  - Exclusion from Medicare / Medicaid
  - Implicates False Claim Act
- Anti-Kickback Law Violations
  - Civil Monetary Penalties up to \$100,000 or 3 times remuneration
  - Criminal Penalties – up to \$25,000, up to 5 years prison
  - Implicates False Claim Act <sup>14</sup>

# Regulatory Risks con't



- 4. Federal Trade Commission Red Flags Rule
  - Comprehensive Identity Theft Program
    - Obtain Healthcare Services
    - Falsify Claims for Medical Services
  - Compliance Data – December 31, 2010 <sup>15</sup>

# Operational / Contract Risks



## 1. Transition Issues and Timeliness

- American Recovery and Reinvestment Act (“ARRA”)
  - HITECH Allocates \$19B
  - “Meaningful Use”
- Required Time Period
  - Carrot – Demonstrate in 2011 eligible for incentives
  - Stick – Penalized starting 2015 1% Medicare fee reduction increasing to 3% in 2017

## 2. Disputes with EMR Service Providers

- Healthcare Provider Vendor Relationships
  - Product Liability
  - Indemnification Claims

# Appendix 1



- <sup>1</sup> Johnson v. Hillcrest Health Center, Inc., 70P. 3d 811 (2003 OK 16).
- <sup>2</sup> Sorensen v. Barbuto, 143 P. 3d 295 (Utah Ct. App. 2006), *cert., granted*, 150 P. 3d 544 (2006).
- <sup>3</sup> Acosta v. Byrum, 638 S.E. 2d 246 (N. C. Ct. App. 2006).
- <sup>4</sup> See, <http://www.pendleton-gazette.com/medicalidentitytheft.html>.
- <sup>5</sup> Federal Rule of Civil Procedure, Rule 34 and 12 O.S. §3234.
- <sup>6</sup> See, <http://www.gibsondunn.com/Publications/Pages/2009YearEndElectronicDiscoveryUpdate>.
- <sup>7</sup> The HITECH Act was included as part of The American Recovery and Reinvestment Act of 2009, enacted on February 17, 2009.

# Appendix 1 con't



<sup>8</sup> Kendra Casey Plank, *HHS Office for Civil Rights “Vigorously” Enforcing Security Rule, Agency Official Says*, BNA’s Health Care Daily Report, May 14, 2010.

<sup>9</sup> 24 O.S. §161-168. (HB 2245, eff. November 1, 2008).

<sup>10</sup> 42 U.S.C. §1395nn.

<sup>11</sup> 42 U.S.C. §1320a-7b(b).

<sup>12</sup> 42 C.F.R. §411.357(v) and 42 C.F.R. §411.357(w).

<sup>13</sup> 42 C.F.R. §1001.952(x) and 42 C.F.R. §1001.952(y).

<sup>14</sup> 31 U.S.C. §3729

<sup>15</sup> “Protecting Patient Data – New Rules, New Headaches,” Steven J. Fox, Peter D. Hardy, Vadim M. Schik, Post & Schell, PC, AHLA Executive Summary, HIT and Business Law and Governance Practice Group (April 2010).