

ASEA/AFSCME HEALTH BENEFITS TRUST V.
EILEEN OLSON
Case No. 3AN-03-13456
Anchorage, Alaska

Wherein Ms. Olson
was accused of violating
“HIPPA” (sic).

HEALTH TRUST BACKGROUND

- Trust beneficiaries are 7,500 State of Alaska employees and dependents
- Total ~16,000 “covered lives”
- \$79,000,000 annual revenue
- Union-sponsored plan created in 2000
- Unilateral governing board consists of six full-time State employees as trustees
- Privacy Policy adopted April 14, 2003
- Eileen Olson appointed as a trustee in January 2003
- Olson sued and removed from the board in November 2003

■ Health Trust Practice while Eileen Olson was a Trustee

- Trustees would get appeals files sent by express mail. Often received appeal files one week in advance of hearing.
- The appeals files contained PHI. The files did not de-identify the person receiving treatment.
- One trustee kept the files on a chair in his study at home.
- One trustee kept the files in his car.
- One trustee would take them home and put them in a drawer.
- Eileen Olson took them home and locked the files in a safe.
- Emailed PHI over the State's email system, which is not secure.

■ Privacy Policy.

- No procedures for sending PHI by email
- No procedures for handling PHI in electronic format.
- No procedure for the use and storage of PHI outside of the Trust Office
- No written procedure on what to do with appeals files once the appeal was over

Unauthorized Acquisition and Removal of Trust Files from the Administrative Office in Violation of Trust Policy and HIPAA

Without the authority of the Trustees and in violation of the acknowledgment (Exhibit 1) and Trust policy (Exhibits 2 and 5), on August 27, 2003, Trustee Olson coerced the Trust staff to provide her with access to a Trust Office computer, from which she proceeded to download to CDs Trust files containing "protected health information" and staff correspondences, which she removed from the Trust office. See email from Trust Administrative Assistant Tammy Wilts, attached as Exhibit 10. As stated in the background information above, the Trustees have been instructed on the mandates of HIPAA and have enacted Policies and Notices of Privacy Practices which delineate the approved disclosures and releases of protected health information in any format under HIPAA. The Security provisions of HIPAA further provide strict controls and safeguards for electronic data. Trustee Olson had no authority to access the confidential and privacy-protected electronic data maintained at the Trust Office, nor does she have adequate safeguards in place to ensure that the security of the information will be maintained after she removed it from the Trust Office. HIPAA Privacy Regulations specifically require that, even when a disclosure is permitted, the disclosure is subject to the "minimum necessary" requirement for the specific allowed purpose under that federal law. There is no reason under HIPAA that would allow Trustee Olson access to electronic data from the Trust Office, nor did she take any precaution in obtaining the information that it was the "minimum necessary" for such purpose. A violation of HIPAA's Privacy Regulations carries civil penalties of \$100 per disclosure or unlawful release of an individual's protected health information, and criminal penalties of up to \$250,000 and 10 years in jail. The civil penalties attach to the Plan. Therefore, Trustee Olson breached her responsibility to the participants by: (1) violating the clear mandates of HIPAA and (2) potentially subjecting the Trust to penalties under HIPAA, which would reduce the assets available for benefits. She further breached her duty of loyalty to the Trust and to her co-fiduciaries by violating the clear mandate and intent of the Trust's policies and her written acknowledgment of her understanding of her responsibilities as a Trustee.

Conclusion

The Trustees have taken all steps necessary to ensure Trustee Olson due process in addressing her repeated breaches of Trust policy and unauthorized publication of unsubstantiated, subjective conjecture, presented as fact, to parties outside the Trust, as well as discoverable statements against the interests of the Trust fiduciaries. She has been warned repeatedly to not compromise the integrity of non-public Trust information and protected health information, and has actively ignored such warnings. Her actions (1) constitute a breach of loyalty and fiduciary duty, (2) have caused the Trust to incur unnecessary expenses, (3) have subjected the Trust to litigation risk, (4) potentially have invalidated two Trustee elections, (4) mislead the participants to their disadvantage, (5)

“Independent” Attorney Michael Patterson’s letter to the Trust

If you are going to provide an
expert opinion get the
acronym right

Law Offices
LEE SMART COOK MARTIN & PATTERSON
P.S., Inc.

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Tammy L. Williams
Kenneth E. Hepworth
Charles P. E. Leitch
Michelle A. Corsi
Craig L. McIvor

Retired:
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Fred T. Smart

John Patrick Cook
1934-2001

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William L. Cameron
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Pamela J. DeVet
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Marianna Valasek-Clark
Laura A. Walters
John J. Watson
Keturia Berry Wick

November 7, 2003

VIA EMAIL: Fred_Brown@labor.state.ak.us

Mr. Fred Brown
AFSEA/AFSCME Local 52 Health Benefits Trust
P.O. Box 5434
Spokane, WA 99205-8434

Re: AFSEA/AFSCME Local 52 Health Benefits Trust

Dear Mr. Brown:

The following is my response to your October 30, 2003, letter seeking an opinion on several issues relating to Trustee Eileen Olson. You provided me with the following documents:

1. Your letter dated October 30, 2003 with associated exhibits 1-7;
2. A summary of events and associated exhibits prepared by Brady & Company submitted to Chubb Insurance prior to its decision to provide coverage to Trustee Olson;
3. Mary Stoll's September 5, 2003 opinion letter with exhibits addressed to attorney Chuck Dunnagan; and
4. Trustee Olson's September 12, 2003 letter in response to the Mary Stoll letter with associated attachments.

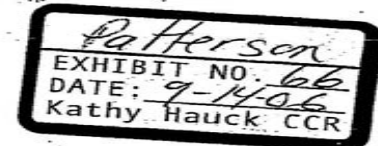
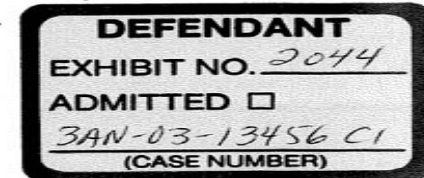
You asked me to provide answers and opinions to the following questions:

1. Please provide a brief background of your experience in advising Health Benefits Trusts, and in advising insurers on whether to provide trusts with fiduciary liability coverage;
2. As to the facts presented in this case, do you believe Trustee Olson has breached her fiduciary duty? If so, what corrective measures should be undertaken by the other trustees?

[901122.DOC]

MAP 26

1800 ONE CONVENTION PLACE • 701 PIKE STREET • SEATTLE, WA 98101-3929
TELEPHONE (206) 624-7990 • TOLL-FREE (877) 624-7990 • FACSIMILE (206) 624-5944



Law Offices
LEE SMART COOK
MARTIN & PATTERSON
P.S., Inc.

Mr. Fred Brown
Re: AFSEA/AFSCME Local 52 Health Benefits Trust
November 7, 2003
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Trustee Olson has also acquired participant health information that would be considered protected health information under HIPPA in violation of Trust policy and the HIPPA regulations.

The documents provided go into much greater detail regarding the violations of Trust policy and breach of fiduciary duty by Trustee Olson. I believe that the documentation supplied adequately supports the position that Trustee Olson breached her fiduciary duty, and that she should be removed from the Board of Trustees.

3. What is the likelihood that Chubb will renew the ASEA/AFSCME Local 52 Health Benefits Trust's fiduciary liability policy (a) if Trustee Olson remains on the Trust as a trustee, and (b) if Trustee Olson is removed from the Trust?

(a) If Trustee Olson remains on the Trust as a trustee, there is a substantial risk that Chubb will not renew the current Health Benefits Trust's fiduciary liability policy.

You should be aware of Chubb Insurance Company's overall evaluation of their insureds together with their underwriting considerations. Chubb's overall considerations include looking at the Trust's claim record, the Trust's current events, to include whether or not there are potentials for future claims given the current activities of the Trust and its Board members, and the overall impression that the policymaker makes. Specifically, are the Trust's activities now so fraught with potentials for future claims, whether they would be covered under the insurance policy or not, which would render substantial risks to legal proceedings and financial exposure.

Chubb Insurance Company's underwriting considerations are the following: (1) Are all Trustees fulfilling their duties as outlined by the Trust documents to the Trust? (2) Are the Trustees working for the benefit of the Trust and the Plan Participants as a whole? and (3) Are the Trustees generally fulfilling their fiduciary obligations to the Trust and its participants as a whole?


Given the above overall considerations and underwriting considerations and given the information contained in the documents we reviewed, there is a substantial risk that Chubb will not renew the current Health Benefits Trust fiduciary liability policy if Trustee Olson remains on the Board of Trustees.

(b) If Trustee Olson is removed from the Trust as a trustee, the insurance would remain in effect.


This opinion is based upon the elimination of all of the issues that have been created by Olson while serving as a Trustee.


When HIPAA is used as a weapon:
Purported “HIPPA” violations used
as the basis for suing, removing a
dissenting trustee.


- Sent to 7,500 Union Members via the State of Alaska’s email system and published on the Health Trust’s web site for 30 days

 Whats New?


 Newsletter


 Summary of Benefits
Appeals Procedures

 What is
HCRA?


 Trustees


**2003-2004 Open
Enrollment Information**

 Frequently
Asked Questions

 On-Line
Enrollment


 Annual Audit


 Misc. Health
Benefit Info.


 Group Health Plan
Benefits Book

 Trust
Agreement

 Participant Request
for
Trust Documentation

 Forms
to Download

 Meeting
Schedules

 Quick Reference
Contact Information

 Archived
Information

ASEA/AFSCME LOCAL 52 HEALTH BENEFITS TRUST



Last updated: November 25, 2003

New Employee and Family Information forms (see Forms page)
The Fall Newsletter is available under the Newsletter button
Financial Statements PY 2003-2004 & 2002-2003 are updated
(see What's New).

Article III of the ASEA/AFSCME Local 52 Health Benefits Trust Agreement states: "The Board of Trustees shall have the authority to terminate a Trustee from the Board of Trustees on Motion and by majority vote of the Board of Trustees."

For the reasons outlined in the following legal opinion memo by the Seattle law firm of LEE, SMART, COOK, MARTIN & PATTERSON, P.S., INC., the Board of Trustees has terminated Trustee Eileen Olson, effective immediately. Her position will be filled in accord with the terms of Article III.

We were asked to provide an opinion regarding the following questions:

1. **Did Trustee Olson breach her fiduciary duty? If so, what corrective measures should be undertaken by the other trustees?**

It is our opinion that Trustee Olson has breached her fiduciary duties to include disregarding several Trust policies and Board of Trustee directives; disclosing non-public Trust documentation or information without consensus of the full board to participants in the Plan in violation of Trust policy and in direct contravention of documents Trustee Olson signed when she was seated on the Board of Trustees; emailing Trust business to non-trustee members; and acquiring participant health information that would be considered protected under HIPPA in violation of Trust policy and the HIPPA regulations.

With respect to corrective measures, the Board of Trustees should vote to remove Trustee Olson.

2.

What is the likelihood that Chubb will renew the ASEA/AFSCME Local 52 Health Benefits Trust's fiduciary liability policy, effective January 25, 2003, (a) if Trustee Olson remains on the Trust as a trustee, and (b) if Trustee Olson is removed from the Trust?

LITIGATION BEGINS

- Depositions and Expert Reports
- Three petitions for review to the Alaska Supreme Court
- Alaska Supreme Court abrogates attorney client privilege between Health Trust and its attorney, overrules the trial judge's decision to deny Eileen Olson a jury trial and overrules the trial judge's decision to prevent Steven Lazarus from providing an expert opinion.
- Thank goodness for email

II. Supplemental Opinions

I was asked to review and respond to additional topics in this case. My opinions on those topics follow.

1. Are the Trustees of the Health Trust authorized to terminate or remove a Trustee?

Response: Yes.

Basis: (1) Health Trust documents. Article III, Section 6, Termination of Trustee, states, "The Board of Trustees shall have the authority to terminate a Trustee from the Board of Trustees on Motion and by majority vote of the Board of Trustees."

(2) AS13.36.107 grants to the Trustee the powers conferred by the terms of the trust. AS 13.36.198 states that if a Trustee violates a provision of AS 13.36.105 – 13.36.220, the Trustee may be removed as Trustee.

(3) Although ERISA does not apply to this Health Trust, courts do look to ERISA for guidance. For instance, courts, including Alaska courts, do look to ERISA law in making determinations as to what, for example, would be a breach of fiduciary duty.

2. Did Eileen Olson violate HIPAA? If so, in what regard.

Response: Yes.

Basis: The Health Insurance Portability and Accountability Act of 1996 (42 U.S.C. 1320) (HIPAA); NOTICE OF PRIVACY PRACTICES provided by Trust, Effective April 14, 2003, regarding access to individually identifiable health information or Plan participants on behalf of the Plan itself, or for administrative functions of the Plan, in order to carry out HIPAA.

Ms. Olson kept appeal files at her home after the appeal files had already been decided. There was no requirement, as per HIPAA, that she maintain those files. There were no safeguards in place, she was not the designated custodian, and it was not "minimally necessary" for her to have those files as a Trustee because there was nothing pending on them.

Pursuant to HIPAA regulations, any medical records must be kept in the ordinary course of business and then all copies sent out or kept must be destroyed with documents showing the date and method used for destruction. After the appeals were decided, there was no business reason to retain the records by Ms. Olson.

3. If a Trustee of the ASEA/ASFCME Health Benefits Trust perceives that there is a breach of fiduciary duty by another Trustee or Trustees, what are the appropriate steps the Trustee should take with regard to that perceived breach? In particular, is notifying the Executive Board of the Union an appropriate action?

Call in the Cavalry



January 9, 2007

David Clark
101 E. Ninth Avenue
Anchorage, AK 99501-3651

RE: Expert Opinion Letter to David Clark regarding HIPAA relating to No. 3AN-03-13456 CI, ASEA/AFSCME Local S2 Health Benefits Trust vs. Eileen Olson

(Contains confidential information)

Dear Mr. Clark:

Per your request, I have reviewed several documents relating to the above referenced case which are listed in Attachment A. My opinion expressed here is based on these documents and my expertise in HIPAA Administrative Simplification, which is described below.

1. Qualifications of Steven S. Lazarus, PhD, CPEHR, CPHIT, FHIMSS

I received a Bachelor of Science Degree from Cornell University in 1966, with a major in Industrial Engineering and Operations Research. The Industrial Engineering curriculum included several courses in computer programming and the use of computers in business and scientific applications, as well as approaches to achieve business process improvement through their use. I received a Master of Science degree in Industrial Engineering and Operations Research from the Polytechnic University in 1967. Further studies in these and related areas contributed to my being awarded a PhD in Business Administration by the University of Rochester in 1974. It is during this time that I began working in the health care industry. My doctoral dissertation was on hospital planning.

During the period 1971 to present, I have held various teaching, consulting, research, and administrative positions utilizing my knowledge and expertise in the use of computer information systems in the health care industry.

Expert Opinion Letter of Steven S. Lazarus

is silent on uses. The distinction is that uses include internal use by staff and trustees for payment and health care operations.

Section 164.506 of the Privacy Regulation describes uses and disclosures to carry out treatment, payment, or health care operations. Subparts of this section include:

(c) Implementation specifications: treatment, payment, or health care operations (1) A covered entity may use or disclose protected health information for its own treatment, payment, or health care operations.

Section 165.501 Definitions includes "Payment" means: The activities undertaken by the health plan, include, but are not limited to determinations of eligibility or coverage, and review of health care services with respect to medical necessary, coverage under health plan, appropriateness of care, or justification of charges.

It is appropriate under the provisions of payment and health care operations for health plans to utilize claims data and appeals data to develop policies and maintain consistency in its decisions. The December 28, 2000 Privacy Rule publication in the Federal Register, on Page 82614 (in the "Preamble") notes that "commentators noted that the proposed rule was not clear as to whether protected health information could be used to resolve disputes over coverage, including appeals or complaints regarding quality of care." The response indicates that HHS modified the definition of "the resolution of payment and coverage disputes. . .". The other examples provided by commentators, such as arranging, conducting, or assistance with primary and appellate level review of enrollee coverage appeals, also fall within the scope of adjudication of health benefits claims. Uses and disclosures of protected health information to resolve disputes over quality of care may be made under the definition of "health care operations".

Clearly, the information that Ms. Olson copied onto the CD was a permitted use for the purposes that she stated, consistent with the Privacy regulation. This is in contrast to the statement on the Trust's website, last updated November 25, 2003 (Exhibit A of the Answer and Counterclaim of December 24, 2003), which states that, "Acquiring participant health information that would be considered protected under HIPAA in violation of Trust policy and the HIPAA regulations."

With regard to Ms. Olson having the right to acquire the information on the CD (appeals records), there is nothing in the HIPAA Privacy Rule that precludes her from accessing these records. Section 160.103 definitions includes "Use means, with respect to individually identifiable health information, the sharing, employment, application, utilization, examination, or analysis of such information within an entity that maintains such information." The same section defines "workforce means employees, volunteers, trainees, and other persons whose conduct, in the performance of work for a covered entity, is under the direct control of such entity, whether or not they are paid by the covered entity."

(5) Is there clear and convincing evidence (is it highly probable) that at the time the Health Trust made the statement, the Health Trust either knew the statement was false or had serious doubts about the truth of the statement; that is, that the Health Trust acted with reckless disregard as to whether the statement was true or false?

Answer "yes" or "no."

Answer: yes

If you answer Question No. 5 "no," do not answer any further questions. Your foreperson should date and sign this verdict. However, if you answer "yes" to Question No. 5, then answer Question No. 6.

(6) What amount of money will fairly compensate Eileen Olson for the harm to Eileen Olson which was more likely than not legally caused by the statement?

1.	Injury to Reputation:	\$ <u>0</u>
2.	Humiliation:	\$ <u>25,000</u>
3.	Emotional Distress:	\$ <u>25,000</u>
	Total:	\$ <u>50,000</u>

If you have not awarded Eileen Olson money in response to Question No. 6, your foreperson should date and sign the verdict. If you have awarded Eileen Olson money in response to Question No. 6, answer Question No. 7.

(7) Should punitive damages be awarded in this case?

Answer "yes" or "no."

THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ASEA/AFSCME LOCAL 52 HEALTH
BENEFITS TRUST

Plaintiff,

vs.

EILEEN OLSON,

Defendant,

Case No. 3AN-03-13456 CI

EILEEN OLSON,

Counterclaim Plaintiff

vs.


ASEA/AFSCME LOCAL 52 HEALTH
BENEFITS TRUST,

Counterclaim Defendants.

SPECIAL VERDICT

1. What amount do you award to Eileen Olson as punitive damages?

\$ 225000.



Jury Foreperson

3.21.03

Date