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HEALTH CARE REFORM UPDATE

Update #328

June 2, 2003

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Jeanne Scott includes quotes, jokes, stories and other bits of entertaining information through-out her newsletter. To make it easier to find or skip this additional material, we have highlighted it in blue.



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Quotes of the Week (It's been an over-abundant week!)

"Every senior should have access to comprehensive prescription drug coverage, regardless of which Medicare option they choose."

—Independent-thinking Maine Republican Senator Olympia Snowe, suggesting that not only did she oppose President Bush on his latest tax cuts, but that she may oppose him on his plan for Medicare reform. [See, Report #2, below]

"We all understand that the old Medicare system is a very inefficient way to provide care. It's lower quality, and it costs more."

—Pennsylvania GOP Senator Rick Santorum, supporting President Bush's plan that hopes to "incentify" seniors to move away from the loveable old fee-for-service Medicare program. [Report #2, below]

"It is my intention to vote on final passage of such legislation before we adjourn for the July 4th recess."

—Senate Majority Leader Bill Frist, on his schedule for passing President Bush's Medicare reform plan. [Report #2, below]

"I ask my colleagues to just look at this practically. There are millions of people who don't have health care who could get it if we enact this legislation. You've got to have something better to offer before you oppose a bill that could do that much."

—Senator Jim Talent (R-Mo.), in support of "Association Health Plan" legislation now making its way through Congress. [See, report #3, below]

"Across the board, doctors are looking at ways to improve their bottom line. The groups I work with don't want to do these things, but they want to be able to pay their bills."

—Regina Regembal, a medical practice consultant, on the

increased number of physicians and other providers now charging for services they formerly did for free. [See, Report #5, below]

“These charges are bad news for patients, but the real problem is the reimbursement scenario under which doctors are operating. Of course, how sorry we should feel for them is another story.”

—Arthur Levin, director of the New York-based advocacy group Center for Medical Consumers, on the new surcharges by physicians. [Report #5, below]

“This is a year where we had seen considerable opportunity at the state level, and the major reason is the health care issue has been driving the agenda.”

—Sherman Joyce, president of the American Tort Reform Association, a malpractice limitation advocacy group, on the growing number of states adopting new state laws. [See, Report #6, below]

“Malpractice awards are not the major factor driving up insurance costs. The stock market is low and interest rates are low, and insurance companies have to make their profits by increasing malpractice coverage premiums.”

—Mark Phenicie, legislative counsel for the Pennsylvania Trial Lawyers Association, responding to the malpractice limitation advocates. [Report #6, below]

“Health care in the richest country on the face of this planet is not a privilege, it’s a right. We need to guarantee [health care] is available to all Americans in a cost-effective, efficient and openly accessible, affordable way.”

—Democratic presidential Candidate and Senatecritter John Kerry, expounding on his plans for health care reform. [See, report #7, below]

“We have generally opposed introducing any kind of means testing in Medicare and this sounds a lot like means testing.”

—David Certner, director of federal affairs for AARP, commenting on Republican proposals to set an income test for future Medicare prescription drug benefits. [See, Report #8, below]

“Doctors need to prescribe drugs, not television ads...These ads are crazy. This is complicated stuff. We shouldn’t be doing it over television. People are obviously affected by this advertising. TV is an enormous psychological tool.”

—Democratic presidential candidate Dick Gephardt, suggesting that “direct-to-consumer” television prescription drug ads need to be outlawed. [See, Report #11, below]

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1. \$10 BILLION FOR ‘IMMEDIATE’ MEDICAID RELIEF TO THE STATES —RURAL HEALTH CARE LEFT OUT!

President Bush on May 28 signed into law a \$350 billion compromise tax cut bill (HR 2) that includes additional funds for state Medicaid programs. Under the law, states will receive \$20 billion in federal funds, \$10 billion of which will be used to increase federal matching rates for Medicaid by 2.95 percentage points until October 1, 2004. The other \$10 billion will be evenly divided over two years for states to use on health care, social services, public safety, education, job training, transportation and infrastructure, law enforcement or other “essential government” services. The compromise bill did not include additional funds for Medicare providers in rural areas, as sought by Senate Finance Committee Chaircritter Charles Grassley (R). The House and Senate approved the compromise measure on May 23.

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An Editorial

Just Between You and Me: You'll have to pardon me if I seem a little heady this week. A couple of issues back I had the temerity to suggest that there may be some in the Bush administration who actually want to create a "fiscal train wreck" as part of their Machiavellian plan to ultimately dismantle America's social safety net. This week, the same theme was expressed in the august Financial Times of London:

"Proposing to slash federal spending, particularly on social programs, is a tricky electoral proposition, but a fiscal crisis offers the tantalizing prospect of forcing such cuts through the back door."

Wow! And then the New York Times columnist Paul Krugman echoed the same thought:

"It's no secret that right-wing ideologues want to abolish programs Americans take for granted. But not long ago, to suggest that the Bush administration's policies might actually be driven by those ideologues—that the administration was deliberately setting the country up for a fiscal crisis in which popular social programs could be sharply cut—was to be accused of spouting conspiracy theories."

Okay, I won't go that far. But we do have to start to wonder who's in charge of this rapidly sinking boat. Medicaid is bankrupting the states. Our aging population will only demand more and more services. Medicare is facing a tidal wave of baby-boomers poised to join the program they have been paying into all of their working lives. Health care costs seem to be spinning aimlessly out-of-control. And now federal budget deficits threaten fiscal responsibility for decades ahead. Pardon me, if at times I get a little behind myself. We have to begin to address the issues in real terms—either we abandon the safety net of Medicare and Social Security—or we find ways to make them work. Right now the dismantlers seem to have the upper hand. And maybe they are right, but I would prefer that they were more open about their intentions and let Americans decide what they want without all of this subterfuge and misdirection.

Legal Quote of the Week

“If I had but one life to give for my country, it would be my lawyer’s.”

—Anonymous

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2. TROUBLE IN CAPITAL CITY AND IT RHYMES WITH ‘M’—AS IN ‘MEDICARE’—REFORM THAT IS, INCLUDING DRUGS

The Medicare reform framework that President Bush proposed earlier this year faces trouble on Capitol Hill, where most Democrats and a growing number of Republicans oppose the proposal. The Bush reform proposal, dividing Medicare in to three parts, two of which would be privately run, would —starting in 2006 (more about this date later, see below) —allow Medicare beneficiaries to (1) opt to stay in the “traditional” Medicare program (the one we have all come to know and love) and have a limited Rx benefit relying heavily on “prescription drug discount cards;” or (2) beneficiaries could join an “Enhanced Medicare” program, which would offer a choice of private plans that include prescription drug coverage; or (3) enroll in “Medicare Advantage,” basically a re-vamped version of the failed Medicare+Choice program, which offers a selection of private health plans with and without prescription drug coverage. Low-income beneficiaries would receive additional premium and cost-sharing assistance. According to conversations with congressional aides, the Bush administration has said that Mr. Bush will only support a Medicare prescription drug benefit bill with a drug benefit that provides incentives for beneficiaries to enroll in managed care plans. A goal of 50% of Medicare seniors leaving traditional Medicare has been set. According to one congressional aide, the Bush Administration has made it clear that “they really must have an unequal drug benefit.” However, several Republican lawmakers now do support a universal prescription drug benefit. Some Republican lawmakers, led by Senate Finance Committee Chaircritter Charles Grassley (R-Iowa), maintain that Bush’s Medicare reform framework would “penalize” beneficiaries in rural areas where private health plans have historically been unavailable or inaccessible.

Just Between You and Me: Get real! They've already missed their timelines. House of Representatives Speakercritter Dennis Hastert had earlier said that he wanted to have a House vote on the President's Medicare plan by Memorial Day. Missed! The Senate Finance Committee under Mr. Grassley, say it plans to begin markup of Medicare reform legislation next week after the Memorial Day recess. Senate Majority Leadercritter Bill Frist said on May 20 that the Senate plans to "focus on" Medicare, whatever that means, in the last two weeks of June. But if they can't hold their few moderates in the game (Snowe, Chaffee, Voinovich, et al.), even Vice President Cheney's tie-breaking vote may prove to be unavailing.

Already behind schedule, the House hopes now to vote on the issue before the 4th of July (can Labor Day be far behind). GOPers want desperately to pass a "reform" bill including Rx benefits —and reform bill, any benefit —before fall. That's why the 2006 "effective date" is so critical —they can run for election in 2004 claiming that they, not the Dems, have "saved" Medicare and given seniors Rx. It won't matter in 2004 whether what they pass would work or not —the illusion would prevail over reality. Once returned to power with greater majorities in both the House and the Senate, they can consolidate their power and change Medicare —and Social Security —along the privatization lines long lusted after in conservative GOP circles. Privatization may be the only answer to saving the otherwise "Ponzi-schemed Medicare plan for our children and grandchildren, I just wish they would be a little bit more honest —and trusting —of the American electorate and tell them what they really want to do.

And lets face facts; fall of 2003 is the drop-dead deadline. Already Campaign 2004 is underway —nothing, absolutely nothing this controversial will pass in 2004. It is now —or wait until at least 2005!

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Actual Trial Lawyer Quote:

Lawyer: What happened then?

Witness: He told me, he says, "I'll have to kill you because you can identify me."

Lawyer: Did he kill you?

FACTOID: TRIPLE YOUR LTC PLEASURE

To meet the needs of the aging baby boom generation, the United States will need to more than triple its number of long-term care workers by 2050, according to a new DHHS and Department of Labor report. The number of people using nursing facilities, alternative residential care or home care services is expected to increase from 15 million in 2000 to 27 million by 2050, the report said. As a result, the number of long-term care nurses, nurse aides, home health and personal care workers will need to increase from about 1.9 million in 2000 to between 5.7 million and 6.5 million by 2050. The report, requested by Congress, said that low job satisfaction and salaries, poor benefits and a lack of training and education opportunities contribute to the long-term care staffing shortage. The departments are working jointly to increase the number of long-term care workers by such means as job training and apprenticeship programs and a national nursing panel.

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3. BARELY BONING UP ON ASSOCIATION HEALTH PLANS: WHAT YOU PROBABLY REALLY, REALLY DIDN'T WANT TO KNOW

The National Federation of Independent Business' and other trade groups' are supporting something called "association health plans" (AHPs), which they say would reduce the number of uninsured by allowing small businesses to offer health insurance that they previously could not afford. The NFIB, the Chamber of Commerce and the National Restaurant Association are supporting a bill that would allow small businesses to join together across state lines and buy insurance policies for workers through a "well-established" association. The bill would exempt such policies from some state regulations regarding coverage minimums, premiums and coverage minimums and premiums. Instead, the AHPs would be regulated by the less stringent rules of the federal Labor Department. Critics say that the bill could lead to the creation of "cheaper, bare-bones" insurance that would draw a disproportionate number of healthier and younger workers, increasing the costs for broader state-regulated plans by leaving them with an older and sicker pool of covered workers. However, aides to President Bush said the legislation contains precautions against "cherry-picking" healthy workers. In addition, the plan could bring the NFIB over \$100 million of annual revenue by selling policies —(shades of AARP selling MediGap and this killing the 1988 Medicare drug legislation). The Blue Cross Blue Shield Association, consumer and labor groups and state regulators also oppose the bill.

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Jeanne's Lawyer Joke of the Week

"Wife," announced the puritanical New England minister, "I am going to find out what our son wants to be when he grows up. Watch." The minister put a twenty-dollar bill on a table —that stood for the banking business. Next to it, he laid a Bible, representing the ministry. Finally, he placed a bottle of whiskey, to symbolize a life of dissolution and immorality. Both parents then hid behind the drapes. Their 12-year old son entered the room, picked up the bill, held it in the light, and replaced it. He fingered the pages of the Bible. Then he uncorked the bottle of booze and sniffed the contents. Suddenly the boy stuffed the twenty-dollar bill in his pocket, tucked the Bible under his arm, grabbed the whiskey and ran out of the room.

"Heaven help us!" exclaimed the minister, "he's going to be a Lawyer!"

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4. AETNA? THEY MAY BE GLAD THEY MET YA: \$170 MILLION SETTLEMENT

Aetna officials on May 22 plan to announce that the company will pay \$170 million to settle a class-action lawsuit in which about 700,000 physicians nationwide allege that the health insurer improperly denied and reduced reimbursements. Aetna has agreed to pay \$100 million to the physicians, \$20 million to establish a foundation to improve the quality of health care and \$50 million to cover the cost of the legal fees of the plaintiffs. The settlement also will provide an estimated additional \$300 million to the physicians through improved automated systems that will eliminate some reimbursement reductions and expedite payments. Under the settlement, Aetna also will adopt a "more physician-friendly" definition of "medical necessity" and will establish an independent "Billing Dispute External Review Board" to resolve disputes with physicians. Aetna will not admit wrongdoing in the settlement, which will involve about 18 medical societies and associations nationwide. The settlement is part a larger class-

action lawsuit filed by physicians in U.S. District Court in Miami against several large health insurers. The lawsuit alleges that Aetna, United Healthcare, Cigna, Coventry Health Care, WellPoint Health Networks, Humana Health Plan, PacifiCare Health Systems and Anthem Blue Cross Blue Shield delayed or denied reimbursements for health services and rejected claims for medically necessary treatments as part of a racketeering conspiracy. The Miami court must approve the settlement with Aetna —and given how much of the \$170 million must first go to those dangnabbit trial lawyers in fees, it may not be as generous as first thought.

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Actual Trial Lawyer Quote:

Lawyer: Now doctor, isn't it true that when a person dies in his sleep, in most cases he just passes quietly away and doesn't know anything about it until the next morning?

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5. NICKLES AND DIMES: THEY ALL ADD UP

A small but increasing number of medical practices are starting to charge patients for services that other providers give free of charge. Such services could include telephone or e-mail consultations with patients; providing or transferring copies of patient records; calling pharmacies to refill prescriptions; and completing miscellaneous medical forms. Some doctors now also charge patients for appointments they miss or cancel without 24 hours notice. According to the American College of Physicians, the cost of running a medical practice has increased 60% over the last 10 years, while reimbursements from public health programs and private health plans generally have remained the same. Providers most likely to use the new surcharges include those in internal medicine, pediatrics and family practice —the trio of primary care specialties that are the least lucrative and most patient-intensive. Some patients are “so offended” by the new fees that they find new

doctors, the Post reports. Many health plans are declining to cover the fees and beginning to prohibit physicians from passing such costs on to patients.

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Actual Trial Lawyer Quote:

Lawyer: What is the meaning of sperm being present?

Physician Witness: It indicates intercourse had taken place.

Lawyer: Male sperm? Witness: That's the only kind I know!

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6. MALPRACTICE LIABILITY/REFORM: THE LOBBYING INTENSIFIES

Lobbying efforts at state and national levels by both advocates and opponents of limits on medical malpractice lawsuit awards are expanding exponentially. Insurance companies and other businesses seeking to limit awards in medical malpractice lawsuits believe the current political climate is "friendly to their cause." For instance, the House in March passed a bill (HR 5) that would limit noneconomic jury awards in medical malpractice lawsuits at \$250,000, and President Bush supports such reforms. Twenty state legislatures are considering medical malpractice legislation, and 11 states have already passed such bills this year. The bills, while different, include common elements such as caps on jury awards and elimination of joint and several liability, in which a defendant partially responsible for injury must pay the full award. At the state level, lobbying for limits on personal injury awards has become intense. Many doctors have rallied in favor of limits on jury awards, while some hospitals have closed their obstetrics departments because of the high risk of lawsuits and price of malpractice insurance. In many states, trial lawyers, who generally oppose limits on jury awards, have begun fierce counterattacks

against coalitions of insurance companies, doctors and other businesses, such as advertising campaigns.

Just Between You and Me: The winners in all of this? Advertising firms, television and print ad salesmen, four-color printers. You name it, an enormous amount of money has already been spent and lots more will be. During the 2002 election cycle, the American Medical Association (not counting what each of its state affiliates and individual physicians may have spent) contributed \$2.7 million through its political action committee (PAC), 60 percent of it to Republicans. The American Trial Lawyers Association, and its local affiliates, including individuals, spent \$3.7 million, 89% of which went to Democrats. We can expect those numbers to triple or quadruple in 2004. I'm in the wrong business. Anyone want to join me in setting up a print shop?

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Actual Trial Lawyer Quote:

Lawyer: Any suggestions as to what prevented this from being a first-degree murder rather than attempted murder?

Witness: The victim lived.

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CAMPAIGN 2004

7. THIS WEEK: JOHN KERRY

Presidential Candidate, husband to the Heinz catsup fortune heir, and Democratic Senatecritter John Kerry (D-Mass.) has expanded on his health care reform proposals. Under his plan, the federal government would assume state expenditures for children enrolled in Medicaid. In exchange, states would expand their CHIP programs to cover all children and parents with household incomes that do not exceed 300% of the federal poverty level, or

\$55,200 for a family of four. The federal government also would cover 75% of the cost of coverage for individuals with catastrophic health care costs —those that total \$50,000 or more. The Kerry proposal would allow individuals to pay to participate in the Federal Employees Health Benefits Program (the “FEHBP”); those who opt to participate could receive tax credits and other subsidies. In addition, Kerry would end legal provisions that allow pharmaceutical companies to block the entry of generic medications to the market and require pharmacy benefit managers to disclose financial incentives that they receive from pharmaceutical companies. He also has proposed that medical malpractice lawsuits enter mediation and receive a review from state panels before they proceed to court. Kerry would bar punitive damages in malpractice lawsuits that do not involve intentional misconduct, gross negligence or reckless indifference to life. The plan also would provide tax credits and other incentives for hospitals to invest in new technologies to help reduce medical errors and administrative costs. Kerry said that the proposal would cost about \$72 billion annually and provide health coverage to 96% of U.S. residents.

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Actual Trial Lawyer Quote:

Lawyer: Do you recall approximately the time you examined the body of Mr. Dunnington at the mortuary?

Coroner: It was in the evening. The autopsy started about 8:30pm.

Lawyer: And Mr. Dunnington was dead at that time, is this correct?

Coroner: No you dumb %\$#, he was sitting there on the table wondering why I was doing an autopsy!

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PHARMACY CORNER

8. INCOME QUALIFICATIONS FOR MEDICARE Rx: WELFARE OR ENTITLEMENT?

House Republicans are considering a plan that would set a higher threshold for Medicare catastrophic prescription drug coverage for wealthier Medicare beneficiaries than for lower-income beneficiaries. Under the plan, about which House leaders reportedly recently requested polling data, the point at which catastrophic coverage begins also could rise in stages as income increases, GOP officials said. Debate on a Medicare drug benefit is expected this summer. The officials did not offer further details about the proposal, such as its cost, but an annual income threshold of \$60,000 for scaled down catastrophic coverage had been mentioned hypothetically. Several aides said no similar proposal is expected in the Senate Republicans' version of the legislation. Increasing costs for higher-income beneficiaries would allow Republicans to offer more benefits to others.

Just Between You and Me: Thanks to heavy semantic misappropriation, most Americans have come to detest the word "entitlement." Actually there are very few federal entitlements in the USA. Welfare, including Medicaid, for example, is NOT an entitlement. We give and we take it, depending upon political whim and wind. Social Security and Medicare, on the other hand, are entitlements, embodied by now deep in the American social psyche. Everyone meeting minimal qualifications will get them. Bill Gates will get Medicare and Social Security when he is eligible. The bag lady who sleeps over the grating outside Union Station in Washington DC will get them. They do not depend upon our wealth or social status. We are entitled to them because we are Americans. Democrats, in particular, pay heavy homage to this principle. Any effort to change the entitlement —to "welfarize" the program —will be ardently opposed. Stay tuned, this could be the start of something big in 2004.

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Actual Judge Quote:

The court, in its discretion, is permitted to strike irrelevant, redundant and redundant matters.

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9. MAINE ON MY MIND, OR “AS MAINE GOES WILL THE REST OF THE NATION GO AS WELL!”

Although the Supreme Court may only have cut the baby in half, some analysts believe Maine’s in-the-works prescription-drug plan could cost pharmaceutical companies up to \$43 billion in lost 2006 sales—that is, between 10 and 20% of the industry’s total. But those figures apply only if the nation’s other states were to set up similar programs and provide drug coverage to each of their residents.

The Supreme Court has lifted as major barrier to Maine’s effort to rein in prescription-drug costs, a blow to pharmaceutical companies that challenged the state. Maine officials devised a drug-buying pool called Maine Rx. The program would compel drug makers to give other state residents who lack prescription-drug coverage the same 20% discount the state itself receives when buying medications for Medicaid. Any PhRMA company that opted out of the program would face restrictions on its sales to the state’s Medicaid program. But the Supreme Court decision amounted to less than a green light for Maine Rx, which faces further legal challenges before it can begin dispensing cut-rate drugs to residents there.

However, the drug industry fears the landmark case could be the start of nationwide state-pricing controls, and of government control over what drugs may be prescribed. Indeed, that is exactly what appears to be happening. Already a similar program has been initiated by Michigan and Vermont. Other states, facing growing pressures for action, seem poised to jump on the bandwagon. All told, close to 20 states are looking into how they can implement a program like Maine Rx. If these efforts enable states to hardball drug companies into lowering their prices,

private insurers will have more room to maneuver for their own discounts. Price erosion in the broader and more profitable private market is the most significant danger the Maine decision poses to drug makers.

Just Between you and Me: The Supreme Court decision in the Maine case is just the start of what promises to be a long stretch of challenges to and from the pharmaceutical manufacturing industry via litigation, lobbying and public relations. Remember to sign up for the Jeanne Scottletter's semi-annual report on state legislation impacting the Pharmaceutical industry. The mid-year report will be coming out in July.

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Actual Trial Lawyer Quote:

Have you suffered the loss of smell in either ear?

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10. MEDICAID FORMULARIES: DENIALS AND OTHER CHALLENGES

FLORIDA MAY HAVE SET A MODEL FOR THE NATION

To settle a 2002 lawsuit, Florida's Medicaid program has agreed to explain to beneficiaries any denials of coverage for prescription drugs and set up a process to handle beneficiaries' appeals of such denials. In March 2002, five Florida Medicaid beneficiaries and an organ transplant recipients' group filed a federal lawsuit against the state's Medicaid program, alleging that a new formulary program has resulted in illegal denial of prescription drugs. Under the state's program, adopted to help reduce drug spending, doctors can only prescribe medicines to Medicaid beneficiaries from a drug formulary, and patients can only obtain four brand-name drugs at a time. Doctors can request authorization from the state to waive these restrictions. The suit,

filed in federal district court in Miami, did not challenge the restrictions themselves, but claimed that Medicaid beneficiaries should get advance warning of the denial and a chance to appeal before drugs are denied.

Under the settlement —which could now become a model for the nation, Florida will begin an ombudsman’s office to manage drug-denial appeals. The ombudsman will attempt to resolve the issue in three days; should that fail, the beneficiary could then file a formal complaint. The state also will begin to give beneficiaries written explanations of drug denials and will let the beneficiaries continue to take the drug during the appeals process.

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Actual HIPAA Lawyer Quote:

We are refraining from providing you with copies of the medical records, which are enclosed.

Everybody’s telling HIPAA “horror” stories, to the media and elsewhere; there’s even a web site collecting them <http://www.healthprivacy.org>. But on this page we only tell of our HIPAA “fun” moments. Come on folks send them in, I know they’re out there. jeanne.scott@health-politics.com

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11. 'D-T-C TELEVISION BAD!' SAYS DEM-PRESIDENTIAL HOPEFUL GEPHARDT

Democratic presidential candidate and late minority leadercritter in the House, Dick Gephardt has proposed a ban on television advertisements for prescription drugs. Gephardt said that lawmakers may pass legislation to ban television ads for prescription drugs and that the FDA could impose such a ban. However, Jason Brodsky, an FDA spokesperson, said that the agency does not have the authority to ban the ads.

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