

In the
Supreme Court of Ohio

MEDICAL MUTUAL OF OHIO,	:	Case No. 2008-0598
	:	
Plaintiff-Appellant,	:	
	:	On Appeal from the
v.	:	Cuyahoga County
	:	Court of Appeals,
WILLIAM SCHLOTTERER, D.O.,	:	Eighth Appellate District
	:	
Defendant-Appellee.	:	Court of Appeals Case
	:	No. CA-07-089388
	:	

**MERIT BRIEF OF *AMICUS CURIAE* STATE OF OHIO
IN SUPPORT OF APPELLANT
MEDICAL MUTUAL OF OHIO**

STEPHEN F. GLADSTONE* (0012128)

**Counsel of Record*

BRIAN E. ROOF (0071451)

FRANTZ WARD LLP

2500 Key Tower

127 Public Square

Cleveland, Ohio 44114-1230

216-515-1660

216-515-1650 fax

sgradstone@frantzward.com

Counsel for Plaintiff-Appellant

Medical Mutual of Ohio

D. JEFFERY RENGEL* (0029069)

**Counsel of Record*

THOMAS R. LUCAS (0071916)

RENGEL LAW OFFICE

421 Jackson Street

Sandusky, Ohio 44870-2736

419-627-0400

Counsel for Defendant-Appellee

William Schlotterer, D.O.

NANCY H. ROGERS (0002375)

Attorney General of Ohio

BENJAMIN C. MIZER* (0083089)

Solicitor General

**Counsel of Record*

STEPHEN P. CARNEY (0063460)

Deputy Solicitor

SCOTT MYERS (0040686)

Assistant Attorney General

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

bmizer@ag.state.oh.us

Counsel for *Amicus Curiae*

State of Ohio

FILED

SEP 22 2008

CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

	Page	
TABLE OF CONTENTS.....	i	
TABLE OF AUTHORITIES	ii	
INTRODUCTION	1	
STATEMENT OF AMICUS INTEREST	2	
STATEMENT OF FACTS	3	
ARGUMENT.....	4	
 <u>Amicus Curiae State of Ohio’s Proposition of Law:</u>		
<i>The qualified doctor-patient privilege is outweighed by the public interest in “special situations” that justify disclosure, and an insurance fraud lawsuit against a doctor is such a situation. The public interest in detecting and combating insurance fraud is high, the affected patients’ interests support disclosure, and patients’ privacy interests are adequately protected by protective orders as well as by laws requiring confidentiality.</i>		4
A. The Court has long held that the doctor-patient privilege is qualified, not absolute, and the need for disclosure outweighs claims of privilege when the public interest supports disclosure.....	4	
B. Insurance fraud is the type of special situation that outweighs the privilege under <i>Biddle</i> , and private insurers need access to medical records so that they may fulfill their duty to partner with State regulators to combat fraud.	5	
C. Patients’ interests in privacy may be fully protected by protective orders and other restrictions, and patients’ ultimate interests are on the side of disclosure, because fraudulent doctors are abusing the doctor-patient relationship.....	8	
CONCLUSION.....	10	
CERTIFICATE OF SERVICE	unnumbered	

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Biddle v. Warren General Hospital</i> (1999), 86 Ohio St. 3d 395	4, 5, 8
<i>Med. Mut. of Ohio v. Schlotterer</i> (8th App. Dist.), 2008-Ohio-49; 2008 Ohio App. Lexis	7, 8
<i>Ohio State Medical Bd. v. Miller</i> (1989), 44 Ohio St. 3d 136	4, 5, 8
<i>State ex rel. Fed. Union Ins. Co. v. Warner</i> (1934), 128 Ohio St. 261	5
<i>State ex rel. Wallace v. State Med. Bd.</i> (2000), 89 Ohio St. 3d 431	6, 7
 Constitutional Provisions, Statutes, and Rules	Page(s)
Health Information Portability and Accountability Act of 1996	8
R.C. Chapter 39.....	5
R.C. 3901.011	2, 5, 6
R.C. 3901.44	6
R.C. 3999.31	5
R.C. 3999.41(A).....	2, 6
R.C. 3999.42(A).....	2, 6
 Other Authorities	Page(s)
Audit of Medicaid Reimbursements Made to William L. Schlotterer, D.O., by Auditor of State Betty D. Montgomery, issued March 2005 (“Auditor Report”), <i>available at</i> www.auditor.state.oh.us/AuditSearch/Reports/2005/William_Schlotterer_Erie_Final Report.pdf (last visited Sept. 19, 2008)	3
Step II Consent Agreement between William L. Schlotterer, D.O. and the State Medical Board of Ohio, Sept. 12, 2007 (defining terms of reinstatement), and Step I Consent Agreement, March 14, 2007 (imposing suspension), <i>available at</i> http://med.ohio.gov/formala/34003224.pdf (last visited Sept. 19, 2008).....	3, 4

INTRODUCTION

This case asks whether a doctor facing a credible charge of insurance fraud may use the doctor-patient privilege as a shield to prevent an insurance company from proving the doctor's possible wrongdoing. The Court should say no and reject Defendant-Appellee Dr. William Schlotterer's attempt to keep his records hidden from Plaintiff-Appellant Medical Mutual of Ohio. The Court has long held that the doctor-patient privilege is not absolute; instead, the privilege must yield when important interests weigh in favor of disclosure. Here, several related interests support disclosure, and the State and its agencies share those interests.

The Ohio Department of Insurance ("ODI") has a duty to investigate insurance fraud, and it relies on private insurance companies—who have a statutory duty to report fraud to ODI—to work as partners in rooting out fraud. If the insurers cannot do their job, then ODI cannot do its job as effectively. If that happens, fraud continues undiscovered, to the detriment of all Ohio citizens. In addition, the Auditor of State searches for health care fraud committed against Medicaid, and her investigations may overlap with those of ODI and private insurers. After all, doctors who defraud private insurance may defraud government payors as well—and indeed, the Auditor found that that Dr. Schlotterer overbilled Medicaid.

Moreover, the Medical Board, which supports a strong doctor-patient privilege as a means of strengthening the doctor-patient relationship, agrees that the privilege should yield in fraud cases. The privilege helps to ensure proper treatment, but that purpose is not met if a doctor uses a patient as a pawn in a fraud scheme. Indeed, the patients' interests here are on the side of disclosure, as fraudulent doctors might not stop at false billing, but might perform unneeded tests or procedures. Finally, fraud may coincide with other problems, such as substance abuse—as happened here—and the Medical Board of course seeks to discover and stop such problems.

For these reasons, the State favors disclosure.

STATEMENT OF AMICUS INTEREST

As summarized above, the State and its agencies have overlapping interests in rooting out insurance fraud. The General Assembly has, by statute, given ODI and its head, the Superintendent of Insurance, the duty to ensure an honest and efficient market for insurance, and that duty extends to investigating insurance fraud committed by health care providers or others. See R.C. 3901.011. The Assembly has also provided for a public-private partnership between ODI and private insurers to combat fraud. “[E]very insurer . . . shall adopt an antifraud program,” R.C. 3999.41(A), and an “insurer shall notify” ODI if the insurer “has a reasonable belief that a person is perpetrating or facilitating an insurance fraud,” R.C. 3999.42(A). ODI’s fraud unit investigates over 180 suspected cases of insurance fraud per year, and about 80-85% of those investigations are triggered by insurers’ reports to ODI.

ODI’s antifraud mission is, in turn, part of its broader mission to protect consumers through strong, fair, and vigilant regulation, while promoting a stable and competitive environment for insurers. Insurance fraud threatens that broader mission because it adds costs to providing insurance to consumers, and higher costs threaten access to insurance. Thus, ODI has a strong interest in this case and in the general cause of combating insurance fraud.

In addition, the Auditor of State audits Medicaid payments to doctors to ensure that taxpayer dollars are not misspent, and that interest is also at issue here. While this case formally involves alleged fraud against a private insurer rather than against Medicaid, the two often coincide. Indeed, that circumstance happened here: The Auditor conducted a special audit of Dr. Schlotterer and concluded that he had overbilled Medicaid.

The Medical Board has an interest, too, as it is statutorily charged with overseeing the practice of medicine in Ohio, and it disciplines doctors who violate professional standards. The Board believes that using patients in a fraud scheme undermines, rather than strengthens, the

doctor-patient relationship, and worse yet, insurance fraud may involve improper or unneeded treatment. Further, fraud or financial wrongdoing may coincide with other problems, such as substance abuse, that affect patient treatment—as was the case here.

STATEMENT OF FACTS

The State relies on Medical Mutual's Statement of Facts for the details of Medical Mutual's investigation of Dr. Schlotterer and the resulting litigation. See Merit Brief of Appellant Medical Mutual of Ohio ("MMO Br.") at 1-7. The State stresses that, in 2005, Medical Mutual reported its suspicions about Dr. Schlotterer to ODI. *Id.* at 13-14.

The State also notes that both the Auditor and the Medical Board have investigated Dr. Schlotterer. Although these facts are not formally part of the dispute between Medical Mutual and Dr. Schlotterer, these facts are public record and are in reports available online.

First, the Auditor conducted a special audit of Dr. Schlotterer's Medicaid billings. See Audit of Medicaid Reimbursements Made to William L. Schlotterer, D.O., by Auditor of State Betty D. Montgomery, issued March 2005 ("Auditor Report"), *available at* www.auditor.state.oh.us/AuditSearch/Reports/2005/William_Schlotterer_Erie_FinalReport.pdf (last visited Sept. 19, 2008). The Auditor concluded that Dr. Schlotterer overbilled in several ways, including using billing codes not justified by documentation, billing for services not covered by Medicaid, and more. See Auditor Report at 3-6. As the report noted, Dr. Schlotterer declined to provide a "corrective action plan," and he instead decided to end his Medicaid participation. *Id.* at 6.

Second, the Medical Board took formal action against Dr. Schlotterer. It suspended his license to practice medicine and required him to undergo treatment for alcohol abuse, and it reinstated him on probationary terms, including closer monitoring. See Step II Consent Agreement between William L. Schlotterer, D.O. and the State Medical Board of Ohio, Sept. 12,

2007 (defining terms of reinstatement), and Step I Consent Agreement, March 14, 2007 (imposing suspension), *available at* <http://med.ohio.gov/formala/34003224.pdf> (last visited Sept. 19, 2008).

ARGUMENT

Amicus Curiae State of Ohio's Proposition of Law:

The qualified doctor-patient privilege is outweighed by the public interest in "special situations" that justify disclosure, and an insurance fraud lawsuit against a doctor is such a situation. The public interest in detecting and combating insurance fraud is high, the affected patients' interests support disclosure, and patients' privacy interests are adequately protected by protective orders as well as by laws requiring confidentiality.

A. The Court has long held that the doctor-patient privilege is qualified, not absolute, and the need for disclosure outweighs claims of privilege when the public interest supports disclosure.

The test to apply here is undisputed, as the Court has long held that the doctor-patient privilege is not absolute, and the Court has explained the type of "special situations" in which the public interest supports overcoming the privilege and allowing disclosure. *Biddle v. Warren General Hospital* (1999), 86 Ohio St. 3d 395, 402; *Ohio State Medical Bd. v. Miller* (1989), 44 Ohio St. 3d 136, 139-42. In *Biddle*, the Court held that a doctor "is privileged to disclose otherwise confidential medical information in those special situations where disclosure is made in accordance with a statutory mandate or common-law duty, or where disclosure is necessary to protect or further a countervailing interest which outweighs the patient's interest in confidentiality." *Biddle*, 86 Ohio St. 3d at 395. In *Miller*, the Court rejected a doctor's attempt to use privilege as a shield against producing records to the State Medical Board as part of a Board investigation of him. *Miller*, 44 Ohio St. 3d at 139-42. The Court explained that "the interest of the public at large, served here through the board's investigation of possible wrongdoing by a licensed physician, outweighs the interests to be served by invocation of the physician-patient privilege." *Id.* at 141-42. The Court also noted that the purpose served by the privilege, namely,

patient confidentiality, was equally served by disclosure within the Board’s investigative process, as the Board was required by statute to keep materials confidential. *Id.* at 142.

Thus, the issues here are whether this case involves the type of special situation that the Court discussed in *Biddle* and *Miller*, and whether patient confidentiality can be adequately protected if privileged materials are produced to Medical Mutual. As explained below, this is such a special situation, so disclosure is warranted. Patient privacy can be fully protected, and indeed, the affected patients’ interests are best served by disclosure.

B. Insurance fraud is the type of special situation that outweighs the privilege under *Biddle*, and private insurers need access to medical records so that they may fulfill their duty to partner with State regulators to combat fraud.

Insurance fraud is precisely the type of situation that qualifies as a “special situation” under *Biddle* and *Miller*—that is, it is a scenario in which the public interest in disclosure outweighs the value of maintaining the doctor-patient privilege. Insurance fraud is a scourge on the insurance market and on the health care system, and ODI cannot effectively fight fraud without the help of private insurers’ efforts.

The General Assembly has charged ODI and its Superintendent with broad powers and duties, under Revised Code Chapter 39 and specifically R.C. 3901.011, to regulate the business of insurance in Ohio. As the Court explained over 70 years ago, “that the business of insurance is impressed with the public use,” so the “statutes designed to regulate such business should be liberally construed to affect the purpose to be served and to prevent and correct evils growing out of the conduct of such business.” *State ex rel. Fed. Union Ins. Co. v. Warner* (1934), 128 Ohio St. 261, 264.

One of the “evils growing out of” insurance is fraud, so ODI is empowered to investigate fraud and to refer cases for criminal prosecution. Specifically, R.C. 3999.31 defines a “fraudulent insurance act,” and the statute encourages investigations by immunizing from

liability those who provide information about such acts to ODI. ODI may refer a case for prosecution under R.C. 3901.011: “If the superintendent decides that there is sufficient evidence . . . he shall furnish the proper prosecuting attorney with all the information obtained by such superintendent, the names of witnesses, and a copy of all material testimony taken in the case.” In addition, R.C. 3901.44 addresses the confidential status of records that ODI obtains in the course of an insurance fraud investigation. In sum, the General Assembly has set forth a comprehensive scheme by which ODI is not only empowered to investigate insurance fraud, but is expected to do so.

The General Assembly did not expect ODI to act alone in combating fraud; to the contrary, it provided for a public-private partnership between ODI and private insurers to detect and expose fraud. In particular, R.C. 3999.41(A) and R.C. 3999.42(A) require all insurance companies to develop antifraud programs and to report instances of suspected fraud to ODI. And as noted above, R.C. 3901.44 immunizes those who provide information to ODI. That same statute also contemplates that patients and others—presumably including insurers—would likely provide privileged information to ODI; the statute provides a method for such informants to maintain the confidentiality of the information supplied.

The Court has also recognized the need for such cooperative investigations, and it has specifically noted that insurance companies work with ODI to investigate fraud. See *State ex rel. Wallace v. State Med. Bd.* (2000), 89 Ohio St. 3d 431, 438. In *Wallace*, the Court weighed a public-records request for files held by both ODI and the Medical Board, and in that context, the Court explained how State regulators worked with insurance companies: “Investigations into insurance fraud are not conducted in a vacuum. Investigators working for private insurance companies may have occasion to interact with investigators from the Insurance Department.” *Id.*

The Court cited R.C. 3999.42's requirement that insurers having a "reasonable belief that a person is perpetrating or facilitating an insurance fraud . . . shall notify" ODI. *Id.* Indeed, ODI reports that about 80-85% of its investigations begin with referrals from insurers.

In addition, other state regulators also work with insurers. The Auditor meets regularly with insurers to compare notes, as part of her duty to protect against Medicaid fraud. In fact, although Medicaid is public, not private, it is, essentially a large insurer itself. And the Medical Board sometimes interacts with insurers and ODI together, as *Wallace* demonstrates.

Thus, both the statutory scheme and the Court's precedent recognize that ODI must work with private insurers to fight fraud, so the appeals court's contrary view was mistaken. The appeals court below said that Medical Mutual's antifraud interests did not warrant disclosure because, in the court's view, the "legislature . . . has indicated a preference for such matters to be handled by the state, rather than by a private party." *Med. Mut. of Ohio v. Schlotterer* (8th App. Dist.), 2008-Ohio-49, ¶ 13; 2008 Ohio App. Lexis. This purported "preference" for purely public action is nowhere in the statute; instead, the statute calls for a partnership. The appeals court acknowledged the statutory requirement for insurers to report to ODI, but it mistakenly said that Medical Mutual did not report here, *id.*, when in fact, Medical Mutual did. And the appeals court did not mention the other statutes cited above, such as the requirement to have an antifraud program, the immunity offered to those who inform to ODI, and so on. Thus, since the court erred in understating the public interest in cooperative investigations, it is perhaps not surprising that it consequently erred in failing to find that the public interest warranted disclosure.

In sum, public policy, as expressed in statutes, favors disclosure of the information that Medical Mutual seeks from Dr. Schlotterer, so that Medical Mutual can seek to prove its fraud

case against him. The appeals court's contrary view, if adopted here, would eviscerate ODI's ability to fight fraud and protect the public.

C. Patients' interests in privacy may be fully protected by protective orders and other restrictions, and patients' ultimate interests are on the side of disclosure, because fraudulent doctors are abusing the doctor-patient relationship.

In some cases involving privilege issues and balancing tests, courts must weigh a party's need to acquire information against another person's desire to keep information confidential. The appeals court viewed this case as one of those cases, as it placed the interests of Dr. Schlotterer's patients firmly on the side of the scale against disclosure. See *id.* at ¶¶ 29, 35. Indeed, the court expressly rejected Medical Mutual's argument that this was a case like *Miller*, the Medical Board disciplinary case, in which patients have been wronged by a doctor's improper practices. *Id.* at 29. The appeals court was wrong, and Medical Mutual was right, as this is a case in which the patients' interests weigh in favor of disclosure. First, at a minimum, Dr. Schlotterer's patients would not be harmed by disclosure of further information to Medical Mutual. Second, the patients are actually helped by such disclosure.

First, disclosure of the requested information to Medical Mutual will not harm Dr. Schlotterer's patients, for several reasons. All of them are insured by Medical Mutual, so they have already agreed that significant information could be provided to Medical Mutual as part of the process of obtaining insurance payments for their treatment. All that Medical Mutual wants is further documentation regarding the diagnoses and treatments it already knows about.

Equally important, Medical Mutual cannot turn around and disclose the information to others, as such disclosure would be barred not only by an appropriate protective order, but also by both federal and state law. The federal Health Information Portability and Accountability Act of 1996, or HIPAA, forbids insurers from releasing health information to unauthorized recipients. The tort recognized in *Biddle* creates civil liability for improper release of

information. And not only is Medical Mutual restricted as a legal matter, but as a practical and institutional matter, it routinely handles, and preserves the confidentiality of, personal health information. Indeed, outside doctors and hospitals themselves, it is hard to imagine who is more experienced at protecting such information than insurance companies are. Thus, patient information can safely be given to them without fear of leakage.

Second, and equally important, the patients' interests are helped, not harmed, by disclosure here, because patients have an interest in ensuring that their doctor-patient relationship is not abused and that they receive only appropriate treatment. The purpose of the doctor-patient privilege is to encourage frank discussions between the doctor and patient, with the ultimate goal of providing the patient with the best possible treatment. At a minimum, a doctor's fraudulent submission of insurance claims does not enhance patient care, so allowing the privilege to shield such fraud would be an abuse of the privilege and of the doctor-patient relationship. What is more, fraud schemes may involve more than just proper care followed by improper billing; fraudulent doctors may perform unneeded tests and procedures to pad the bills. Obviously, patients have a strong interest in avoiding being used in that way.

Moreover, although financial fraud and deficient treatment of patients are independent wrongs, in some instances, such as here, the different problems coincide. That is, on occasion, a doctor who commits insurance fraud might also be violating other professional standards; for example, his practice may suffer because he has a substance abuse problem. Here, the Medical Board, in an independent process, suspended Dr. Schlotterer and ordered him to undergo treatment before he could be reinstated. While that process was independent of the fraud investigation here, it is possible for financial investigations to trigger the discovery of other

problems. In other words, the efforts of other State regulators and of private insurers can uncover the type of problems that the Medical Board seeks to stop or prevent.

For all these reasons, the patients' interests here are best served by allowing all involved, whether private or public, to help monitor and discover all types of problems with doctors, so that the problems may be stopped and the situation fixed. And that is especially so when the disclosure will not only help the patients, but can also be controlled in such a way that further disclosure will be prevented.

CONCLUSION

For the above reasons, the Court should reverse the judgment below and reinstate the trial court's order in favor of disclosure of the disputed materials, subject to an appropriate protective order.

Respectfully submitted,

NANCY H. ROGERS (0002375)
Attorney General of Ohio



BENJAMIN C. MIZER* (0083089)
Solicitor General

**Counsel of Record*

STEPHEN P. CARNEY (0063460)
Deputy Solicitor

SCOTT MYERS (0040686)
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

614-466-8980
614-466-5087 fax
bmizer@ag.state.oh.us

Counsel for *Amicus Curiae*
State of Ohio

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* State of Ohio in Support of Appellant Medical Mutual of Ohio was served by U.S. mail this 22nd day of September, 2008, upon the following counsel:

Stephen F. Gladstone
Brian E. Roof
Frantz Ward LLP
2500 Key Tower
127 Public Square
Cleveland, Ohio 44114-1230

Counsel for Plaintiff-Appellant
Medical Mutual of Ohio

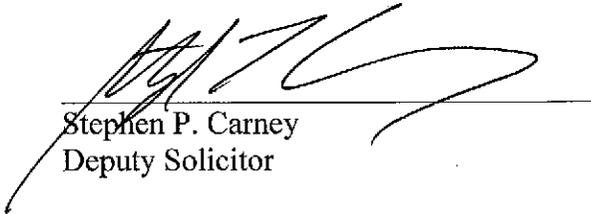
D. Jeffery Rengel
Thomas R. Lucas
Rengel Law Office
421 Jackson Street
Sandusky, Ohio 44870-2736

Counsel for Defendant-Appellee
William Schlotterer, D.O.

A courtesy copy was also sent to the following counsel for amicus:

Lisa Norris
Howard Anglin
Allen Kuehnle Stovall & Neuman LLC
21 West Broad Street, Suite 400
Columbus, Ohio 43215-3422

Counsel for *Amicus Curiae*
America's Health Insurance Plans, Coalition
Against Insurance Fraud, National Health
Care Anti-Fraud Association, National
Insurance Crime Bureau



Stephen P. Carney
Deputy Solicitor