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Briefing Complete, Eleventh Circuit Poised To Assess HIPAA Conflict With Florida Law

An appellate ruling on whether a Florida malpractice law is preempted by the Health Insurance Portability and Accountability Act will have important implications for patients, practitioners and attorneys who represent them, according to briefs filed in the case and attorneys who spoke to Bloomberg BNA (*Dulay v. Murphy*, 11th Cir., No. 13-14637, *briefing completed* 2/27/14).

Attorneys noted that the U.S. Court of Appeals for the Eleventh Circuit will be the first federal appeals court to decide whether a law that requires patients, as a condition of suing their providers, to sign an authorization allowing the doctor and others to conduct ex parte interviews provides less protection than HIPAA's regulatory scheme.

The outcome will affect malpractice plaintiffs' access to Florida courts and their obligations to permit disclosure of protected health information (PHI) as a condition of suing, and could affect decisions by other states to adopt similar laws, they added. Ex parte interviews are conducted outside the presence of a plaintiff's attorney and without the plaintiff's consent.

The state, and the physician sued in the underlying case, claimed in their briefs that the law isn't preempted by HIPAA and that the state may, consistent with federal law, condition a malpractice plaintiff's right to sue on a waiver of certain procedural rights under HIPAA.

The plaintiff countered that a federal trial court properly determined that the state law was preempted because ''the ex parte interviews take place presuit, when no court has jurisdiction, the law provides no safeguards to allow a claimant to protect private health information from unwarranted disclosure, contains no effective limits on the scope and breadth of the information that the defendant or its representatives may obtain, and instead allows an adverse attorney, expert, or insurance adjuster unfettered access to the patient's most personal and private medical information.''

Requirements in Tension. Kirk Nahra, a partner with Wiley Rein LLP, in Washington, said the litigation is interesting on multiple levels, raising questions about the conduct of ex parte interviews under HIPAA and, on a broader level, the extent to which state laws could avoid HIPAA restrictions by mandating disclosures in other areas. ''The Florida statute appears at the very least to be aimed at facilitating goals that are inconsistent with the HIPAA Privacy Rule by requiring individuals to give up certain HIPAA protections,'' he said.

''The case exposes an interesting interplay between preemption principles—that HIPAA preempts state laws that are less protective of personal health information—and 'required-by-law' disclosures,'' Nahra said. He also noted that the law, which appears to require malpractice plaintiffs to give up rights in order to sue, was passed in the face of an established HIPAA regulatory regime.

''The Florida law also appears to be inconsistent with a theme in the Privacy Rule that authorizations must be voluntary and are not required.''

—W. Reece Hirsch,
Morgan, Lewis & Bockius LLP, San Francisco

''HIPAA regulations clearly contemplate, in 45 C.F.R. § 164.512(e), that disclosures required as part of judicial and administrative proceedings be obtained through court orders or subpoenas, with specific safeguards,'' Nahra noted. ''The state law requirement that a HIPAA-compliant authorization be provided as a condition of filing a malpractice lawsuit appears to be in tension with, and potentially undermines, protections afforded by Section 512.''

W. Reece Hirsch, a partner with Morgan, Lewis & Bockius LLP, San Francisco, said the case raises ''significant'' issues that appear to be addressed in commentary to the HIPAA Privacy Rule. ''When a party puts their medical condition at issue as a plaintiff, disclosure of medical information is required as a practical matter for the case to proceed, but you have to do so in compliance with HIPAA rules,'' he said.

''HIPAA does not provide for the waiver of HIPAA patient rights, but under the Florida statute, the protections mandated by the HIPAA rules don't seem to be available,'' Hirsch said.

''Requiring a prospective plaintiff to sign a HIPAA-compliant authorization related to potential proceedings appears to lessen protections that are fairly well established under the Privacy Rule,'' he added. ''The Florida law also appears to be inconsistent with a theme in the Privacy Rule that authorizations must be voluntary and are not required.''

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Hirsch also said the Eleventh Circuit's ruling on this issue of first impression could affect other states' decision on whether to adopt similar measures. ''It will be very interesting to see what the court decides because if the Florida law is not preempted, it may open the door to further state legislative activity seeking to supplement HIPAA,'' Hirsch said.

Law Preempted. The appeal by the state, Dr. Adolfo C. Dulay and his practice, challenges a September 2013 federal trial court ruling that found the patient, Glen Murphy, was entitled to an injunction precluding Dulay's attorneys, from conducting any ex parte interviews without Murphy's consent.

The U.S. District Court for the Northern District of Florida ruled that an injunction was warranted because the state law, Fla. Stat. § 766.1065 conflicts with HIPAA rules. HIPAA stipulates that disclosure of PHI by a covered entity—such as a patient's treating physician—is permitted only under a court order or with the valid consent of the patient (22 HLR 1490, 10/3/13).

The court found the mandated authorization didn't qualify as valid for purposes of HIPAA because the state law allows a defendant's attorney, insurer or adjuster to conduct ex parte interviews of a patient's other healthcare providers, whether or not the patient consents, whenever a patient asserts a claim alleging medical negligence.

''A state statute that authorizes such ex parte interviews in connection with a medical-negligence claim, without the patient's consent and without the safeguards included in 45 C.F.R. § 164.512(e), is squarely at odds with federal law,'' the trial court ruled.

Reversal Urged. An appellate brief filed by the state, and a separate filing by Dr. Dulay, argued that the trial court erred in finding HIPAA preempts § 766.1065 in permitting ex parte interviews of health care providers pursuant to a HIPAA-compliant authorization form that prospective plaintiff must submit before bringing a Florida medical negligence action.

They argued that the Eleventh Circuit should adopt the reasoning of the Texas and Tennessee supreme courts that rejected challenges to two state laws with provisions similar to those of the Florida statute. They also claimed the requirement that a prospective plaintiff must authorize a release of PHI, or forgo the right to file suit, is no different from other contexts in which patients must authorize release of PHI.

''This is fully consistent with HIPAA's Privacy Rule, which expressly recognizes that HIPAA authorizations are sometimes compelled as a condition of receiving other benefits,'' the state said in its brief. ''The authorization contemplated by Florida law is a 'valid authorization' for purposes of HIPAA'' and § 766.1065 ''is not otherwise preempted by HIPAA because it does not contain any contrary provision and it does not undermine HIPAA's purposes.''

The state focused its arguments on the fact that HIPAA requires ''valid authorizations,'' that the authorizations under the state law comply with HIPAA's requirements, and that the authorization that meets these requirements is no less valid because it is compelled as a precondition of receiving a benefit—here access to a judicial forum in which to press malpractice claims.

More Restrictive. A brief filed on behalf of Murphy stressed the fact that HIPAA allows state schemes that provide greater PHI protections than are mandated under HIPAA, but that HIPAA preempts state schemes that are less protective of individuals' PHI. It also observed that the ''benefit'' referred to by the state is actually a constitutionally guaranteed right to court access and that an authorization covering ex parte interviews is neither valid nor voluntary under applicable HIPAA regulations if it is obtained without court involvement and oversight.

The state law permits a defendant's attorney and others to meet, ex parte, with a patient's treating healthcare providers, ''including those who treated the patient two years before the alleged malpractice took place,'' the brief noted. ''It also requires the patient to disclose other treatment dates and identify treating physicians that have no relevance to the alleged malpractice, a violation of HIPAA in and of itself.''

The appellants' briefs ignored the first ground found by the district court for finding preemption: that the new law fails to conform to 45 C.F.R. § 164.512(e), which governs disclosure of private health information in connection with litigation, the brief claimed. ''Neither Appellant makes any attempt to claim that the Florida law at issue complies with these requirements.''

''Indisputably, it does not because the law does not require a defendant denied voluntary consent for the interviews to seek a qualified protective order from a court, as the regulations demand,'' it said.

''HIPAA itself sets the prerequisites that must be followed in order to obtain private health information in connection with judicial proceedings. By failing to follow the procedures established in connection with litigation, which require an opportunity to object to disclosures or a court order, the new Florida law is less protective of patient privacy and thus preempted,'' the brief said.

''Florida has attempted to bypass HIPAA's mandatory protections by asserting that waiver of HIPAA rights is a condition precedent to bringing a lawsuit. The preemptive scope of HIPAA, overriding less privacy-protective laws, does not permit that ploy,'' it concluded.

A date for oral arguments hasn't been set.

Murphy is represented by Robert S. Peck, Center for Constitutional Litigation PC, Washington; Brett Elliott von Borke and David Marc Buckner, with Grossman Roth PA, Coral Gables, Fla.; and Ralph Vinson Barrett Jr., with Eubanks Barrett Fasig & Brooks, Tallahassee, Fla. Dulay and his practice are represented by Erik Pelletier Bartenhagen, Mark Hicks and Michael S. Hull, with Hicks Porter Ebenfeld, Miami. The state is represented by Diane Gail DeWolf, Albert Bowden and Allen C. Winsor, all with the Attorney General's Office, Tallahassee.

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*The physician's appellate brief is at http://www.bloomberglaw.com/public/document/Glen_Murphy_v_Aldolfo_Dulay_et_al_Docket_No_1314637_11th_Cir_Oct_. The state's appellate brief is at http://www.bloomberglaw.com/public/document/Glen_*

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