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Practice Update

Talk Amongst Yourselves: HIPAA Does Not Preempt Florida Med Mal Presuit Authorization Law

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The United States Court of Appeals for the Eleventh Circuit recently concluded that the Health Insurance Portability and Accountability Act of 1996 (HIPAA) does not prevent the application of a Florida law requiring plaintiffs to execute an authorization for release of protected health information (PHI) as a presuit condition to bringing a medical malpractice action. The ruling in *Murphy v. Dulay* will allow defendants in medical malpractice lawsuits, or their lawyers, to interview plaintiffs' treating health care providers outside the presence of plaintiffs or their attorneys.

As a result of 2013 amendments to Florida's medical malpractice laws, an aggrieved patient is required to execute an authorization for the release of certain of the patient's PHI, including PHI in the custody of: (1) health care providers who treated the patient in connection with injuries arising from the alleged malpractice; and (2) health care providers who treated the patient in the two years before the alleged malpractice incident. This presuit authorization, which must be included with the presuit notice of intent to initiate medical negligence litigation, must also expressly allow certain categories of persons (a doctor defendant or his insurer, expert, or attorney) to conduct interviews with the listed providers

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without the presence of the patient or the patient's attorney. The authorization does not apply to providers the patient certifies do not possess information relevant to the injury that is the basis of the presuit notice. The providers identified by the patient as possessing relevant PHI are not required to submit to a request for an *ex parte* interview.

In one of several challenges to the 2013 amendments, a patient sued a physician in federal court, claiming that the amendment to section 766.1065, Florida Statutes, violated HIPAA by effectively forcing him to waive his privacy rights or give up his right to file a medical malpractice claim. Ruling in the patient's favor, the federal trial court held that HIPAA preempted Florida's presuit authorization requirement. The trial court also enjoined the doctor from obtaining any of the patient's PHI through *ex parte* interviews unless the doctor complied with HIPAA or the patient voluntarily consented outside of Florida's statutory scheme. The doctor and the State of Florida, which intervened to defend the constitutionality of the Florida statute, appealed the decision to the Eleventh Circuit Court of Appeals.

In a unanimous opinion, a three-judge panel of the Eleventh Circuit reversed the trial court's decision because it concluded Florida's presuit authorization requirement is not preempted by HIPAA. Under the U.S. Constitution's supremacy clause, all state laws that conflict with federal laws are preempted. In relevant part, the HIPAA regulations provide a state law is contrary to HIPAA if: (1) a covered entity would find it impossible to comply with both state and federal law; or (2) the state law is an obstacle to the accomplishment and execution of the full purposes and objectives of HIPAA. In analyzing whether section 766.1065 is contrary to HIPAA, the appellate court made several conclusions, including:

- Florida's presuit authorization expressly provides it shall be construed in accordance with the relevant HIPAA standards and contains the

elements required for HIPAA authorizations, such as:
    - It is revocable at any time;
    - It serves a legitimate purpose;
    - It is specific as to the information to be disclosed and the purpose of the disclosure; and
    - Treatment cannot be conditioned on executing the authorization.
- The mandatory nature of the presuit authorization does not conflict with HIPAA because
    - There is no explicit voluntariness requirement for HIPAA authorizations;
    - A person retains the choice whether to file a suit in Florida state court, and therefore retains the choice whether to sign the presuit authorization; and
    - Although HIPAA requires a knowing and informed decision when making authorizations, HIPAA does contemplate some degree of permissible coercion because it expressly permits Medicaid benefits, financial incentives, and employment to be conditioned on HIPAA authorizations.

Because there was no clear intent in the HIPAA regulations to prohibit Florida's presuit authorization requirement, the appellate court concluded it "must observe the strong presumption against preemption in areas traditionally regulated by the states" (such as personal injury lawsuits). Accordingly, the court determined HIPAA did not preempt section 766.1065 for two main reasons:

1. A medical provider could comply with both HIPAA and section 766.1065 because once a plaintiff executes the valid HIPAA authorization in accordance with the Florida law, the medical provider can, consistent with HIPAA, convey the plaintiff's relevant PHI to the defendant.

2. Section 766.1065 is not an obstacle to accomplishing the full purposes of HIPAA because one of HIPAA's objectives is to reduce administrative costs of providing and paying for health care. Likewise, the Florida law allows the possibility of pre-litigation settlement of malpractice claims, which would reduce the overall costs that malpractice litigation contributes to Florida's health care system.

The Eleventh Circuit reversed the trial court's decision and ordered the trial court to enter judgment for the doctor and the State of Florida on the plaintiff's preemption claim.

Barring modification on rehearing or further review at the U.S. Supreme Court, either of which is unlikely, presuit notices from potential plaintiffs in Florida medical malpractice actions must include the authorization required under section 766.1065, Florida Statutes. If not, the plaintiffs will forego their rights to maintain a medical malpractice action in Florida state court. Also, health care providers who are defendants in medical malpractice actions, and their lawyers, will now have the same access to treating physicians as plaintiffs. Whether treating physicians will agree to interviews with defense lawyers remains to be seen.
