

THE FEDERAL COURTS BEGIN TO ADDRESS HIPAA PREEMPTION ISSUES

I. U.S. ex rel. Mary Jane Stewart, et al. v. The Louisiana Clinic, et al., 2002 WL 31819130 (E.D. La.)

Though the compliance date for the HIPAA Privacy Rules is not until April 14, 2003, courts are already relying on them as a basis for decision. In the first case interpreting HIPAA's preemption scheme, a Federal District Court in Louisiana held that a Louisiana statute governing the disclosure of third party medical records is preempted by HIPAA.

In U.S. ex rel. Mary Jane Stewart, et al. v. The Louisiana Clinic, et al., 2002 WL 31819130 (E.D. La.), the Court addressed a HIPAA defense raised by a medical clinic and various physician defendants. The case is a *qui tam* action in which individuals sought to recover damages on behalf of themselves and the United States under the False Claims Act for defendants allegedly having presented false reimbursement claims to Medicare and Medicaid.

The issue before the Court was a protective order sought by the defendants who argued that if they were compelled to produce the medical records of individuals who were not a party to the lawsuit without redacting individually identifying information, they could be liable under Louisiana law for unauthorized disclosure of confidential medical information. Defendants relied on HIPAA and its implementing regulations to argue that Louisiana's health care provider/patient privilege is not preempted by HIPAA, and the Court, therefore, had to follow Louisiana privilege law in determining how the documents should be produced.

In federal question cases such as this one, privilege questions are decided under federal common law, but there is no physician/patient privilege recognized under federal law. Defendants argued that this required the Court to follow the federal HIPAA law whose preemption provisions required the Court to apply Louisiana privilege law because the Louisiana statute regarding disclosure of third party medical records is "more stringent" than are the HIPAA regulations (the "Privacy Rules").

Compliance with the HIPAA Privacy Rules is not, however, required until April 14, 2003. The Court decided to apply them in any event because (a) they demonstrate a strong federal policy of protection for patient medical records (citing the one other federal court to address the HIPAA Privacy Rules, *see U.S. v. Sutherland*, 143 F.Supp.2d 609 (W.D. Va. 2001)), and (b) the instant case will likely be still ongoing by the April date when compliance will be required.

In undertaking its analysis, the Court first reviewed the HIPAA regulations permitting disclosure of protected health information without written authorization in the context of judicial or administrative proceedings. *See* 45 CFR §164.512(e). Such disclosure is permitted: (a) pursuant to a court or administrative order, (b) if the covered entity has received "satisfactory assurances" from the party seeking the information that reasonable efforts have been made to ensure that the individual whose information is being disclosed has been notified or (c) if reasonable efforts have been made to seek a protective order.

Defendants argued that because Louisiana law required either the express consent of the individual or a court order after a hearing and a finding by the court that the release of the information was proper in order to disclose the medical records, it was “more stringent” than the HIPAA Privacy Rule, and so must be followed.

The Court read HIPAA as preempting all “contrary” provisions of state law unless the state law (a) “related to the privacy of individually identifiable information” and (b) was “more stringent.” The HIPAA Privacy Rules went on to define “more stringent” as a law that meets one or more criteria, one of which is:

“With respect to the form, substance, or the need for express legal permission from an individual, . . . provides requirements that narrow the scope of individually identifiable information, increase the privacy protections afforded (such as by expanding the criteria for), or reduce the coercive effect of the circumstances surrounding the express legal permission, as applicable” 45 CFR §160.202.

Applying this standard, the Court rejected Defendants’ argument, holding that the Louisiana law does not address the “form, substance, or the need for express legal permission from an individual.” Instead, the Court read the Louisiana statute as requiring the individual’s express consent to the disclosure, but absent such consent, the statute created a method to permit disclosure by convincing a court that the disclosure was proper. By providing a way around the individual consent requirement, the Federal District Court read the Louisiana law as less protective of individual privacy rights, and held, therefore, that it is preempted by HIPAA.

What this case and the Smith decision it cited clearly indicate, however, is that, when addressing how confidential medical information may be properly disclosed, courts will be paying great attention to the HIPAA Privacy Rules and will show considerable deference to them. That two Federal District Courts have relied on the HIPAA Privacy Rules before the required compliance date is itself noteworthy. This decision is further indication that the HIPAA Privacy Rules will likely become the standard of care for protecting medical records and confidential medical information, at least in federal courts.

The Court’s decision also provides some indication that the federal courts may interpret what appear to be strict state law privacy protections in a more limited way so as not to interfere with the application of HIPAA’s privacy protections. It is arguable, after all, that the adequate assurances required by 45 CFR §164.512(e) are not as stringent as the full court hearing and order required under Louisiana law since by their terms they describe the circumstances when covered entities may disclose protected health information in the absence of a court order. Yet the Court here held that HIPAA prevailed over state law. Any inference that courts generally will find HIPAA preempts state law, however, should not be taken too broadly.

The Court’s unwillingness to rely on the Louisiana privilege statute here may have been influenced more by the fact that HIPAA preemption was being raised by defendants in a federal fraud action to limit the information they would be obligated to disclose. Rather than a shield protecting the confidential information of their patients, the HIPAA protections were here being

used by the defendants as a sword against accusations of Medicare fraud. In a different context, one where a plaintiff was raising the same Louisiana statute to protect an otherwise embarrassing or detrimental disclosure, a different court might well have been willing to reach a different result as to whether HIPAA or the Louisiana law was “more stringent.”

While this is the first decided case addressing HIPAA preemption, it is likely to be the forerunner of many more to come, and it is likely that HIPAA preemption will give the courts as much difficulty as has ERISA preemption.

II. In re PPA Litigation, 2003 WL 22203734 (N.J. Super.L. 2003)

Two recent cases have addressed HIPAA preemption, and in both instances, the courts found that the state law at issue was not preempted. The issue that prompted both judicial inquiries was the same – the permissibility of *ex parte* discussions with a claimant’s treating physician – though the contexts in which the issue arose were quite different.

In In re PPA Litigation, 2003 WL 22203734 (N.J. Super.L. 2003), the issue arose in the context of mass tort litigation against the manufacturers of the drug phenolpropanolamine (“PPA”). In seeking to manage approximately 300 cases, each involving four to ten medical personnel, defendants’ counsel had relied on a New Jersey Supreme Court case, Stempler v. Speidell, 100 N.J. 368 (1985), that permitted defendant’s to informally interview, *ex parte*, plaintiffs’ health care providers so long as certain authorization requirements had been met.

Here plaintiffs’ counsel objected to the continuation of the informal *ex parte* procedures permitted by Stempler in light of HIPAA’s privacy protections. They argued that HIPAA preempts these informal interview procedures because they do not afford the adequate safeguards required under the new privacy regulations. To avoid HIPAA concerns, plaintiffs sought a ruling that would require defendants to formally depose any medical personnel. Defendants argued that HIPAA posed no conflict, since, under New Jersey law, a plaintiff who puts his or her health condition at issue is deemed to have waived the physician-patient privilege.

The Court noted that the informal *ex parte* discovery procedures challenged here are not statutory, but a creation of the New Jersey courts. The Court also noted that HIPAA does not address any specific state court rules, statutes or case laws. The Court construed Congress’ intent as one of not wanting to intrude on the states’ general authority to oversee and control its own judicial and administrative proceedings. Thus, the presumption is that HIPAA was not intended to displace this area of state regulation. Therefore, “the courts should be governed by state law or as in the case of New Jersey as set forth by our Supreme Court. Therefore, *ex parte* interviews as a form of informal discovery may proceed as permitted under Stempler Because the disclosure is limited in scope, the Stempler interviews do not conflict with the general principles of HIPAA.” Among the requirements for a Stempler interview, however, is patient authorization, and with the advent of HIPAA, the Court ruled that any required authorization would have to be HIPAA-compliant.

Though defendants won the HIPAA preemption battle here, they lost the war. The Stempler decision, which had crafted the informal *ex parte* discovery process at issue in this

case, also noted than in “extreme cases” it might be necessary to have plaintiff’s counsel present when defense counsel was interviewing medical witnesses, and, left this option to the discretion of the court. The Court here exercised its discretion by holding that these mass tort PPA cases represented an “extreme case” situation that required abandonment of the informal *ex parte* proceedings. Thus, though not preempted by HIPAA, New Jersey’s informal discovery procedures were not available in this particular case.

III. Lemieux v. Tandem Health Care of Florida d/b/a Arbors At Winter Haven and Winter Haven Care, LLC, 2003 WL 22438605 (Fla. App. 2 Dist.)

The other HIPAA preemption opinion is from a state court in Florida, Lemieux v. Tandem Health Care of Florida d/b/a Arbors At Winter Haven and Winter Haven Care, LLC, 2003 WL 22438605 (Fla. App. 2 Dist.), and deals with a very similar discovery issue under Florida law. The issue in Lemieux was whether defense counsel could interview a patient’s treating physician who was not directly or indirectly involved in the lawsuit. The law at issue in Florida, however, was a statutory provision that allowed for disclosure of medical information in four discrete circumstances, two of which were “to other health care providers involved in the care and treatment of the patient” and another was “to attorneys, experts, and other individuals necessary to defend the physician in a medical negligence action in which the physician is or expects to be a defendant.”

The Court found that the first exception was intended to allow only health care providers currently involved in the care of a patient to share medical information about the patient’s condition, and did not allow disclosure to any and all physicians who might ever treat the patient. It also held that nothing in the second exception permitted the disclosure of medical information by one health care provider to the attorney of another health care provider, without express patient authorization. Here the defendants were seeking to have *ex parte* discussions, not with doctors it had employed, but with doctors who had later treated the litigant, one of whom had no relation at all to the defendant and one who only had privileges there.

In considering the impact of HIPAA on this dispute, the Court determined that HIPAA’s procedural requirements were likely more stringent than Florida’s since Florida allowed disclosure in any of the four statutorily described situations without notice or opportunity for the patient to object, while the HIPAA privacy regulations required both. The Court found, however, that the substantive provisions of the Florida law were more stringent because the Florida law allowed disclosure only in the four limited statutory circumstances, while HIPAA allowed disclosure in any situation where the covered entity has received “satisfactory assurances” of confidentiality. In the Court’s view, substance trumped procedure: “Because Florida’s substantive law on this is more stringent than HIPAA, Florida law controls and the HIPAA provisions would not later the outcome.”

Both of these were state court decisions. It is interesting to note that the one federal decision addressing discovery issues under HIPAA, U.S. ex. rel. Stewart v. Louisiana Clinic, 2002 WL 31819130 (E.D. La.), found that HIPAA preempted the Louisiana law at issue. This is not to say that these are all “homer” decisions by any means. Indeed, the New Jersey case reflects an extended analytic effort to deal with the two quite difficult, inter-related problems that

were before it -- the impact of HIPAA preemption and the HIPAA privacy regulations on state law discovery procedures in the context of mass tort litigation.

It is also worth noting that the HIPAA decisions to date addressed discovery issues in the context of medical malpractice, product liability litigation and Medicare fraud. The fundamental questions of patient privacy rights in the treatment context, out side of litigation, have not yet been the focus of judicial scrutiny. This does not diminish these findings in any way, but only means that HIPAA's impact on substantive privacy issues remains undefined, to be fleshed out by cases that have not yet had time to reach the stage of full adjudication. Whether we look forward to the day those decisions are handed down, or not, it is sure to come.