ADMINISTRATIVE OFFICE OF THE
NINETEENTH JUDICIAL CIRCUIT

Lake County, Illinois

JORGE L. ORTIZ
Circuit Judge

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JAY W. UKENA
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June 3, 2019

Amy Browne
Administrative Office of the Illinois Courts

Ms. Browne:

This letter is in response to the Supreme Court Rules Committee's request for comments with regard to the proposal to amend Rule 218 to require entry of a Uniform HIPAA Order. A Uniform HIPAA Order would certainly follow the Department of Health and Human Services comments encouraging the development of a model protective order to facilitate adherence with the rule. 65 Fed. Reg. 82530 (December 28, 2000). However, the 19th Judicial Circuit recently considered a request by State Farm Insurance Company to adopt the Cook County HIPAA qualified protective order and declined to do so.

HIPAA permits disclosures of PHI for judicial and administrative proceedings. 45 C.F.R. §164.512(e). Disclosures are permitted in response to an order of a court, or in response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court if the parties agree to a protective order and have presented it to the Court, or have asked the Court for a protective order. 45 C.F.R. 164.512(e)(1). HIPAA requires that a protective order prohibit the use or disclosure of the protected health information for any purpose other than the litigation and requires the return or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding. 45 C.F.R. 164.512(e)(1)(v)(A); 164.512(e)(1)(v)(B).

The qualified protective order adopted in Cook County permits insurance companies to receive PHI in litigation and disclose, maintain, use, and dispose of the PHI in conformity with all applicable federal laws and regulations and the Illinois Insurance Code and its accompanying rules and regulations. The Cook County qualified protective order additionally permits insurance companies to disclose, maintain, use and dispose of PHI for the purposes of: 1) Reporting; investigating; evaluating; adjusting, negotiating, arbitrating, litigating, or settling claims; 2) Compliance reporting or filing; 3) Conduct described in 215 ILCS 5/1014; 4) Required inspections and audits; 5) Legally required reporting to private, federal, or state

governmental organizations, including health or medical insurance organizations, and to the Centers for Medicare and Medicaid Services (CMS); 6) Rate setting and regulation; 7) Statistical information gathering; 8) Underwriting, reserve, loss, and actuarial calculation; 9) Drafting policy language; 10) Workers' compensation; and 11) Determining the need for and procuring excess or umbrella coverage or reinsurance.

The reason for such language was Illinois Insurance Code and Administrative Code regulations authorizing the use of PHI and regulating its disposal and destruction. Such regulations indicate that insurers are to maintain a complete record of all books, records and accounts, including claim files and claim data, and make that information available upon request by the Illinois Department of Insurance for examination. 50 Ill. Adm. Code 901.20, amended in, 40 Ill. Reg. 7895, eff. May 23, 2016; 215 ILCS 5/133(2) and 5/132.4; 50 Ill. Adm. Code 919.30. The Cook County Order also contains permissions for insurance companies to disclose, maintain, use and dispose of PHI to perform several insurance functions under Illinois law.

The 19th Judicial Circuit found the Cook County protective order contained provisions for insurance companies in direct contravention to the HIPAA provisions for a qualified protective order. In order to reconcile the contrary provisions, Lake County courts considered whether HIPAA requirements for qualified protective orders preempt Illinois state law requirements for insurance companies.

In drafting HIPAA, Congress included an express preemption provision. 42 U.S.C. § 1320d–7. HIPAA's preemption clause provides that the statute "shall supersede any contrary provision of State law." *Id.* § 1320d–7(a). A state law is "contrary" to HIPAA if:

> (1) A covered entity or business associate would find it impossible to comply with both the State and Federal requirements; or
> (2) The provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of ... section 264 of Public Law 104–191 ....

45 C.F.R. § 160.202. However, HIPAA, does not preempt state laws that provide "more stringent" privacy protections. *See id.* § 160.203(b).

We came to the conclusion that adopting the Cook County language would result in a protective order that no longer contains the two requirements set forth in the HIPAA to allow a covered entity to disclose PHI in response to a subpoena, discovery request, or other lawful process. Without the requirements in 164.512(e)(1)(v)(A) and 164.512(e)(1)(v)(B), a covered entity no longer has a valid HIPAA qualified protective order to allow disclosure of PHI. Further, the Cook County order would eliminate the two requirements set forth by the Department for a qualified protective order and would not provide the confidentiality and protection of PHI envisioned when the Privacy Rule was enacted.

While arguments have been made that HIPAA is not applicable to liability insurers, such reasoning does not exempt liability insurers from obeying a protective order entered by courts with respect to PHI which has been produced *by a covered entity.* Congress did not intend for

attorneys and expert witnesses to be free to use PHI for their own private business purposes at the close of litigation, simply by virtue of the fact that they are non-covered entities under the Act. Accordingly, a liability insurer's status as a non-covered entity has no relevance as to whether a qualified protective order should be fundamentally altered from the requirements of HIPAA.

Recently, Judge Mitchell Hoffman and Judge Diane Winter ruled on objections to a proposed qualified protective order and denied entering the adopted Cook County order based on the foregoing reasons. Attached for your review are their orders. At this time, I respectfully request the Supreme Court reject the proposal to adopt the Cook County qualified protective order for the aforementioned reasons. Thank you for your consideration.

Jorge L. Ortiz
Circuit Judge
19th Judicial Circuit

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT

LAKE COUNTY, ILLINOIS

AGNIESZKA SURLOCK and EDWARD SURLOCK	)	
Plaintiffs,	)	
	)	18 L 39
v.	)	
DRAGOSLAV STARCEVIC	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Plaintiffs', Agnieszka Surlock and Edward Surlock, Motion for Entry of Protective Order and Authorization to Disclose Protected Health Information. Having heard arguments on the motion, considered the statutory authority and case law, and being fully advised in the premises, this Court now FINDS AS FOLLOWS:

Plaintiffs have filed a complaint at law alleging negligence against the Defendant, along with resulting injury. During the course of litigation, Plaintiffs filed a Motion For Entry of Protective Order and Authorization to Disclose Protected Health Information. Plaintiffs attached a Proposed Order ("Order") and requested the court enter said Order.

Plaintiffs state their Order follows the procedure set forth in HIPAA, which permits disclosures of PHI for judicial and administrative proceedings. 45 C.F.R. §164.512(e). Disclosures are permitted in response to an order of a court, or in response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court if the parties agree to a protective order and have presented it to the

Court, or have asked the Court for a protective order. 164.512(e)(1). HIPAA requires that the protective order prohibit the use or disclosure of the protected health information for any purpose other than the litigation and requires the return or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding. 164.512(e)(1)(v)(A); 164.512(e)(1)(v)(B).

State Farm Mutual Automobile Insurance Company ("State Farm"), as Intervenor, filed its Objections to the Order, arguing it would place significant restrictions and obligations on it as Defendant's liability and casualty insurer. Specifically, State Farm objects to paragraphs 9 and 10 of the Order, on the basis that the restrictions set forth in the Order directly conflict with State Farm's Obligations and rights under Illinois Law.

State Farm correctly observes that the Order would require it to return or destroy all PHI received pertaining to the Plaintiffs in this case following the conclusion of this litigation. Also, the Order prevents State Farm from using any medical information put into its claim records for other lawful purposes that are expressly permitted or required by statutes or regulations applicable to State Farm's operations. As a result, State Farm maintains that, if it complies with the Order, it would fall short of its obligations under both the Illinois Insurance Code and Administrative Code to maintain a complete record of its claim files, thereby subjecting it to possible disciplinary action under Illinois law.

Particularly, State Farm cites to the IIC, 215 ILCS 5/1-1516, and the accompanying administrative code, 50 Ill. Admin. Code 101-9500, which regulate the business of insurance in Illinois. Illinois regulates the insurers' use of records, and also

regulates their disposal and destruction. Regardless of the type of record or line of insurance, an insurer is authorized to:

> Dispose of or destroy records in its custody that are not needed;
> a) In the transaction of current business;
> b) For the final settlement or disposition of any claim arising out of a policy of insurance issued by the company; or
> c) To determine the financial condition of the company for the period since the date of the last examination report of the company officially filed with the Department of Insurance, except that these records must be maintained for at least 7 years.

50 Ill. Adm. Code 901.20, amended in, 40 Ill. Reg. 7895, eff. May 23, 2016.

Both the Illinois Insurance Code and the Administrative Code indicate that insurers are to maintain a complete record of all books, records and accounts, including claim files and claim data, and to make that information available upon request by the Illinois Department of Insurance for examination. 215 ILCS 5/133(2) and 5/132.4; 50 Ill. Adm. Code 919.30.

State Farm requests this court deny Plaintiffs' Motion for Entry of the Proposed Medical Protective Order and adopt the form routinely used in the Circuit Court of Cook County under GAO 18-1. The Cook County order does not have the language contained in paragraphs 9 and 10 of Plaintiffs' Proposed Order and inserts language that:

> Permit[s] insurance companies to receive PHI or what would otherwise be considered PHI from covered entities, business associates, and parties in litigation and to disclose, maintain, use, and dispose of PHI or what would otherwise be considered PHI in conformity with all applicable federal laws and regulations and the Illinois Insurance Code and its accompanying rules and regulations; and

The Cook County order contains additional language permitting disclosures:

To insurance companies to disclose, maintain, use, and dispose of PHI or what would otherwise be considered PHI to comply and conform with current and future applicable federal and state statute, rules, and regulations for these purposes:

1. Reporting; investigating; evaluating; adjusting, negotiating, arbitrating, litigating, or settling claims;
2. Compliance reporting or filing;
3. Conduct described in 215 ILCS 5/1014;
4. Required inspections and audits;
5. Legally required reporting to private, federal, or state governmental organizations, including health or medical insurance organizations, and to the Centers for Medicare and Medicaid Services (CMS);
6. Rate setting and regulation;
7. Statistical information gathering;
8. Underwriting, reserve, loss, and actuarial calculation;
9. Drafting policy language;
10. Workers' compensation; and
11. Determining the need for and procuring excess or umbrella coverage or reinsurance.

Plaintiffs dispute State Farm's interpretation that these sections of Illinois law require them to keep medical records and PHI produced to State Farm that is reviewed and considered in connection with State Farm's payment and handling of insurance claims such as those pursued by Plaintiffs. They argue that neither the Illinois Insurance Code nor the Illinois Administrative Code require the retention of PHI and suggests there has never been a disciplinary action taken against State Farm for failing to maintain PHI, despite tens of thousands of cases having HIPAA protective orders entered every year requiring the return or destruction of the records. Further, Plaintiffs maintain that State Farm has failed to provide any guidelines or regulations requiring it to keep PHI for "business operations" and "certain insurance functions."

Preemption of State Law by HIPAA

However, if State Farm's argument is correct, that HIPAA requirements for a qualified protective order in 164.512(e)(1)(v)(A) and 164.512(e)(1)(v)(B) conflict with obligations and rights under Illinois law, then this court must determine whether the HIPAA requirements preempt Illinois state law requirements for State Farm.

This Court begins its analysis with the bedrock principle that the Constitution designates the laws of the United States as the supreme law of the land, requiring that "all conflicting state provisions be without effect." *Maryland v. Louisiana,* 451 U.S. 725, 746, 101 S.Ct. 2114, 2128–29 (1981); *see also* U.S. Const. art. VI, cl. 2. Accordingly, where state and federal law directly conflict, "state law must give way." *PLIVA, Inc. v. Mensing,* 131 S.Ct. 2567, 2577 (2011). In addition, "[t]here is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision." *Arizona v. United States,* 132 S.Ct. 2492, 2500–01 (2012). As the Supreme Court has explained, "[w]hen a federal law contains an express preemption clause, we focus on the plain wording of the clause," as the plain language of the text is "the best evidence of Congress' preemptive intent." *Chamber of Commerce of U.S. v. Whiting,* 131 S.Ct. 1968, 1977 (2011) (internal quotation omitted).

In drafting HIPAA, Congress included an express preemption provision. 42 U.S.C. § 1320d–7. HIPAA's preemption clause provides that the statute "shall supersede any contrary provision of State law," and lists certain exceptions that are not at issue here. *Id.* § 1320d–7(a). A state law is "contrary" to HIPAA if:

> (1) A covered entity or business associate would find it impossible to comply with both the State and Federal requirements; or

> (2) The provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of ... section 264 of Public Law 104–191 ....

45 C.F.R. § 160.202. However, HIPAA, does not preempt state laws that provide "more stringent" privacy protections. *See id.* § 160.203(b).

As to the first element, whether a covered entity would "find it impossible to comply with both the State and Federal requirements, State Farm has argued that it cannot comply with both the HIPAA requirements for a qualified protective order and Illinois law. Likewise, covered entities cannot comply with HIPAA if Illinois legal requirements for record retention and use of PHI are inserted into the qualified protective order. State Farm's suggested order allows insurance companies to disclose, maintain, use and dispose of PHI outside of the litigation and does not require them to destroy or return the PHI at the end of litigation. This directly contrasts with the requirements of HIPAA. *See* 164.512(e)(1)(v)(A) and 164.512(e)(1)(v)(B).

Adopting the Cook County language would result in a protective order that no longer contains the two requirements set forth in the HIPAA to allow a covered entity to disclose PHI in response to a subpoena, discovery request, or other lawful process. Without the requirements in 164.512(e)(1)(v)(A) and 164.512(e)(1)(v)(B), a covered entity no longer has a valid HIPAA qualified protective order to allow disclosure of PHI.

As to the second element, whether Illinois law is an "obstacle to the accomplishment and execution of the full purposes and objectives of [HIPAA section 264]," the court must consider Congress' intent. One of the congressional objectives in enacting HIPAA was to address concerns about the confidentiality of patients' individually identifiable health information. See Health Insurance Portability and

Accountability Act of 1996, Pub.L. No. 104–191, § 264, 110 Stat. 1936; see also *S.C. Med. Ass'n v. Thompson*, 327 F.3d 346, 348, 354 (4th Cir.2003) ("Recognizing the importance of protecting the privacy of health information in the midst of the rapid evolution of health information systems, Congress passed HIPAA in August 1996."). To that end, Congress provided for the Secretary of Health and Human Services to promulgate privacy regulations addressing individuals' rights to individually identifiable health information, procedures for exercising such rights, and the uses and disclosures of such information. Pub.L. No. 104–191, § 264(b) & (c)(1); *S.C. Med. Ass'n*, 327 F.3d at 349. In compliance with the statute, the Department of Health and Human Services issued final regulations known as the "Privacy Rule." S.C. Med. Ass'n, 327 F.3d at 349; see also *Citizens for Health v. Leavitt*, 428 F.3d 167, 172–74 (3d Cir.2005) (detailing the history of the Privacy Rule's promulgation and explaining its requirements). As the Department explained when announcing the Privacy Rule: "It is important to understand this regulation as a new federal floor of privacy protections that does not disturb more protective rules or practices.... The protections are a mandatory floor, which other governments and any covered entity may exceed." (65 Fed. Reg. 82471 (Dec. 28, 2000).)

In particular, Congress sought to protect patients' PHI during a judicial or administrative proceeding by allowing disclosure by subpoena, discovery request, or other lawful process only if satisfactory assurances that a qualified protective order has been sought are made. 45 C.F.R. §164.512(e). The Department stated such a qualified protective order would "guard the confidentiality of the information." 65 Fed. Reg. 82530 (December 28, 2000). In addition, the Department encouraged "the

development of 'model' protective orders that [would] facilitate adherence with this subpart." *Id.*

State Farm's proposed Cook County order would eliminate the two requirements set forth by the Department for a qualified protective order and would not provide the confidentiality and protection of PHI envisioned when the Privacy Rule was enacted. Further, the Department anticipated the use of model orders and it set forth exactly what the model orders must include in 164.512(e)(1)(v)(A) and 164.512(e)(1)(v)(B). Instead of exceeding the protective rules of HIPAA, the state law requiring State Farm to maintain the PHI and allow disclosure outside of litigation impermissibly lowers the protective floor that Congress sought to provide in enacting HIPAA and certainly acts as an obstacle to the accomplishment and execution of the full purposes and objectives of HIPAA.

Applying the plain language of HIPAA's express preemption clause, the Illinois laws cited by State Farm are preempted because they are contrary to HIPAA. A covered entity would find it impossible to comply with both the State and Federal requirements and the Illinois laws are an obstacle to the accomplishment and execution of the full purposes and objectives of HIPAA section 264.[1]

Applicability of HIPAA to Liability Insurers

Additionally, State Farm states the Plaintiffs' proposed order seeks to bind State Farm to the requirements of HIPAA when it is expressly exempt from the application of

[1] The Court asked the parties to address the possible application of the McCarran-Ferguson Act, which prohibits federal preemption of state laws that regulate insurance, "unless the federal statute expressly announce[s] Congress' specific intention to inject itself into the area of state insurance law." *U.S. v. Rhode Island Insurers' Insolvency Fund*, 80 F.3d 616, 520 (1996). Neither party argued that the Act applied in this case. Therefore, this Court will not address the issue.

HIPAA. State Farm argues that it is not subject to the HIPAA regulations and must follow existing state insurance law and regulations governing insurers. While the court agrees that property and casualty liability insurers are not covered entities under HIPAA, such reasoning does not exempt State Farm from obeying a protective order entered by this court with respect to PHI which has been produced *by a covered entity.* Covered entities cannot disclose PHI in certain circumstances without a qualified protective order containing the provisions in 164.512(e)(1)(v)(A) and 164.512(e)(1)(v)(B).

All parties receiving the PHI are bound to follow the qualified protective order of the court regardless of whether they are a covered entity under HIPAA in the first instance. State Farm's logic amounts to stating they need not follow any order of the court with HIPAA provisions, since they are not a covered entity. The qualified protective order loses its effectiveness in protecting a patient's PHI if non-covered entities may ignore the restrictions required by HIPAA. Non-covered entities would broadly include attorneys, expert witnesses, casualty insurers, etc. It is obvious that Congress did not intend for attorneys and expert witnesses to be free to use PHI for their own private business purposes at the close of litigation, simply by virtue of the fact that they are non-covered entities under the Act. Accordingly, State Farm's status as a non-covered entity has no relevance as to whether the qualified protective order should be altered.

Alternatives to a Qualified Protective Order

Finally, State Farm argues that there are alternatives to issuing a qualified protective order under HIPAA. It deems the Plaintiffs' proposed order a "court order"

under 164.512(e)(1)(i), instead of a qualified protective order accompanying a subpoena, discovery request, or other lawful process under 164.512(e)(1)(ii). However, there is no indication that Plaintiff's Motion was for a court order under 164.512(e)(1)(i). In fact, in both State Farm's Objection and Plaintiffs' Reply, the arguments centered around a qualified protective order pursuant to 164.512(e)(1)(ii). While the HIPAA regulations do provide several different ways in which a covered entity is permitted to disclose PHI, Plaintiffs have chosen to secure a qualified protective order under 164.512(e)(1)(ii). State Farm provided a good justification for this choice in its brief, "personal injury litigation often implicates HIPAA because parties seek to obtain medical information through discovery requests sent to claimants' health-care providers." Whether a different method could be used to permit disclosure is irrelevant as to whether the qualified protective order at issue should be changed to avoid conflict with State Farm's alleged obligations and rights under Illinois Law.

CONCLUSION

State Farm's justification for the proposed alteration of Plaintiffs' requested qualified protective order is a conflict between HIPAA requirements and Illinois insurance law regarding the use and retention of Plaintiff's PHI. However, HIPAA has an express preemption clause that, when applied to this matter, acts to preempt the Illinois laws which would otherwise obligate or permit State Farm to keep and maintain the PHI well after the litigation has ended. State Farm's other argument regarding its status as a non-covered entity under HIPAA fails to address the fact that, in the case at bar, State Farm would be receiving the PHI *from* a covered entity, and that all parties receiving PHI from a covered entity are subject to the requirements of a HIPPA

protective order. Further, the Plaintiffs have chosen to seek a qualified protective order, and State Farm's argument that a different method could be used to seek authorization has no bearing on the question currently before the court. Accordingly, this court denies State Farm's request to enter the Cook County order and grants Plaintiffs' Motion for Entry of Protective Order and Authorization to Disclose Protected Health Information.

So Ordered.

DATE: May 15, 2019

ENTER: _____

Diane E. Winter,
Circuit Judge

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

ROSEMARIE HAAGE	)	
	)	
	)	
Plaintiff,	)	
	)	17 L 897
v.	)	
	)	
ALFONSO MONTIEL ZAVALA, PATRICIA	)	
SANTIAGO, JOSE PACHECO-VILLANUEVO,	)	
OKAN ESMEZ, and ROSALINA ESMEZ.	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Plaintiff's, Rosemarie Haage, Motion for Entry of Protective Order and Authorization to Disclose Protected Health Information. Having heard arguments on the motion, considered the statutory authority and case law, and being fully advised in the premises, this Court now FINDS AS FOLLOWS:

Plaintiff has filed a complaint at law alleging negligence against the Defendants, along with resulting injury. During the course of litigation, Plaintiff filed a Motion For Entry of Protective Order and Authorization to Disclose Protected Health Information. Plaintiff attached a Proposed Order ("Order") and requested the court enter said Order.

Plaintiff states her Order follows the procedure set forth in HIPAA, which permits disclosures of PHI for judicial and administrative proceedings. 45 C.F.R. §164.512(e). Disclosures are permitted in response to an order of a court, or in response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court if the

parties agree to a protective order and have presented it to the Court, or have asked the Court for a protective order. 164.512(e)(1). HIPAA requires that the protective order prohibit the use or disclosure of the protected health information for any purpose other than the litigation and requires the return or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding. 164.512(e)(1)(v)(A); 164.512(e)(1)(v)(B).

State Farm Mutual Automobile Insurance Company ("State Farm"), as Intervenor, filed its Objections to the Order, arguing it would place significant restrictions and obligations on it as Defendant's liability and casualty insurer. Specifically, State Farm objects to paragraphs 9 and 10 of the Order, on the basis that the restrictions set forth in the Order directly conflict with State Farm's Obligations and rights under Illinois Law.

State Farm alleges the Order would require it to return or destroy all PHI received pertaining to the Plaintiff in this case following the conclusion of this litigation. Consequently, the obligations under both the Illinois Insurance Code and Administrative Code to maintain a complete record of its claim files could subject State Farm to possible disciplinary action under Illinois law, making compliance with the Order impossible. Also, the Order prevents State Farm from using any medical information put into its claim records for other lawful purposes that are expressly permitted or required by statutes or regulations applicable to State Farm's operations.

Particularly, State Farm cites to the IIC, 215 ILCS 5/1-1516, and the accompanying administrative code, 50 Ill. Admin. Code 101-9500, which regulate the business of insurance in Illinois. Illinois regulates the insurers' use of records, and also regulates their disposal and destruction. Regardless of the type of record or line of insurance, an insurer is authorized to:

> Dispose of or destroy records in its custody that are not needed;
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c) To determine the financial condition of the company for the period since the date of the last examination report of the company officially filed with the Department of Insurance, except that these records must be maintained for at least 7 years.

50 Ill. Adm. Code 901.20, amended in, 40 Ill. Reg. 7895, eff. May 23, 2016.

Both the Illinois Insurance Code and the Administrative Code indicate that insurers are to maintain a complete record of all books, records and accounts, including claim files and claim data, and to make that information available upon request by the Illinois Department of Insurance for examination. 215 ILCS 5/133(2) and 5/132.4; 50 Ill. Adm. Code 919.30.

State Farm requests this court deny Plaintiff's Motion for Entry of the Proposed Medical Protective Order and adopt the form routinely used in the Circuit Court of Cook County under GAO 18-1. The Cook County order does not have the language contained in paragraphs 9 and 10 of Plaintiff's Proposed Order and inserts language that:

> Permit[s] insurance companies to receive PHI or what would otherwise be considered PHI from covered entities, business associates, and parties in litigation and to disclose, maintain, use, and dispose of PHI or what would otherwise be considered PHI in conformity with all applicable federal laws and regulations and the Illinois Insurance Code and its accompanying rules and regulations; and

The Cook County order contains additional language permitting disclosures:

> To insurance companies to disclose, maintain, use, and dispose of PHI or what would otherwise be considered PHI to comply and conform with current and future applicable federal and state statute, rules, and regulations for these purposes:
>
> 1. Reporting; investigating; evaluating; adjusting, negotiating, arbitrating, litigating, or settling claims;
> 2. Compliance reporting or filing;
> 3. Conduct described in 215 ILCS 5/1014;
> 4. Required inspections and audits;
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6. Rate setting and regulation;
7. Statistical information gathering;
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9. Drafting policy language;
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11. Determining the need for and procuring excess or umbrella coverage or reinsurance.

Plaintiff disputes State Farm's interpretation that these sections of Illinois law require them to keep medical records and PHI produced to State Farm that is reviewed and considered in connection with State Farm's payment and handling of insurance claims such as those pursued by Plaintiff. She argues that neither the Illinois Insurance Code nor the Illinois Administrative Code require the retention of PHI and suggests there has never been a disciplinary action taken against State Farm for failing to maintain PHI, despite tens of thousands of cases having HIPAA protective orders entered every year requiring the return or destruction of the records. Further, Plaintiff maintains that State Farm has failed to provide any guidelines or regulations requiring it to keep PHI for "business operations" and "certain insurance functions."

Preemption of State Law by HIPAA

However, if State Farm's argument is correct, that HIPAA requirements for a qualified protective order in 164.512(e)(1)(v)(A) and 164.512(e)(1)(v)(B) conflict with obligations and rights under Illinois law, then this court must determine whether the HIPAA requirements preempt Illinois state law requirements for State Farm.

We begin our analysis with the bedrock principle that the Constitution designates the laws of the United States as the supreme law of the land, requiring that "all conflicting state provisions be without effect." *Maryland v. Louisiana,* 451 U.S. 725, 746, 101 S.Ct. 2114, 2128–29 (1981); *see also* U.S. Const. art. VI, cl. 2. Accordingly, where state and federal law directly conflict, "state law must give way." *PLIVA, Inc. v. Mensing,* 131 S.Ct. 2567, 2577 (2011). In

addition, "[t]here is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision." *Arizona v. United States,* 132 S.Ct. 2492, 2500–01 (2012). As the Supreme Court has explained, "[w]hen a federal law contains an express preemption clause, we focus on the plain wording of the clause," as the plain language of the text is "the best evidence of Congress' preemptive intent." *Chamber of Commerce of U.S. v. Whiting,* 131 S.Ct. 1968, 1977 (2011) (internal quotation omitted).

In drafting HIPAA, Congress included an express preemption provision. 42 U.S.C. § 1320d–7. HIPAA's preemption clause provides that the statute "shall supersede any contrary provision of State law," and lists certain exceptions that are not at issue here. *Id.* § 1320d–7(a). A state law is "contrary" to HIPAA if:

> (1) A covered entity or business associate would find it impossible to comply with both the State and Federal requirements; or
> (2) The provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of ... section 264 of Public Law 104–191 ....

45 C.F.R. § 160.202. However, HIPAA, does not preempt state laws that provide "more stringent" privacy protections. *See id.* § 160.203(b).

As to the first exception, whether a covered entity would "find it impossible to comply with both the State and Federal requirements, State Farm has argued that it cannot comply with both the HIPAA requirements for a qualified protective order and Illinois law. Likewise, covered entities cannot comply with HIPAA if Illinois law requirements for record retention and use of PHI are inserted into the qualified protective order. State Farm's suggested order allows insurance companies to disclose, maintain, use and dispose of PHI outside of the litigation and does not require them to destroy or return the PHI at the end of litigation. This directly contrasts with the requirements of HIPAA. *See* 164.512(e)(1)(v)(A) and 164.512(e)(1)(v)(B).

Adopting the Cook County order creates a protective order that no longer contains the two requirements set forth in the HIPAA to allow a covered entity to disclose PHI in response to a subpoena, discovery request, or other lawful process. Without the requirements in 164.512(e)(1)(v)(A) and 164.512(e)(1)(v)(B), a covered entity no longer has a valid HIPAA qualified protective order to allow disclosure of PHI.

As to the second exception, whether Illinois law is an "obstacle to the accomplishment and execution of the full purposes and objectives of [HIPAA section 264]," the court must consider Congress' intent. One of the congressional objectives in enacting HIPAA was to address concerns about the confidentiality of patients' individually identifiable health information. *See* Health Insurance Portability and Accountability Act of 1996, Pub.L. No. 104–191, § 264, 110 Stat. 1936; *see also S.C. Med. Ass'n v. Thompson,* 327 F.3d 346, 348, 354 (4th Cir.2003) ("Recognizing the importance of protecting the privacy of health information in the midst of the rapid evolution of health information systems, Congress passed HIPAA in August 1996."). To that end, Congress provided for the Secretary of Health and Human Services to promulgate privacy regulations addressing individuals' rights to individually identifiable health information, procedures for exercising such rights, and the uses and disclosures of such information. Pub.L. No. 104–191, § 264(b) & (c)(1); *S.C. Med. Ass'n,* 327 F.3d at 349. In compliance with the statute, the Department of Health and Human Services issued final regulations known as the "Privacy Rule." *S.C. Med. Ass'n,* 327 F.3d at 349; *see also Citizens for Health v. Leavitt,* 428 F.3d 167, 172–74 (3d Cir.2005) (detailing the history of the Privacy Rule's promulgation and explaining its requirements). As the Department explained when announcing the Privacy Rule: "It is important to understand this regulation as a new federal floor of privacy protections that does not disturb more protective rules or practices.... The protections are a

mandatory floor, which other governments and any covered entity may exceed." (65 Fed.Reg. 82471 (Dec. 28, 2000).)

In particular, Congress sought to protect patients' PHI during a judicial or administrative proceeding by allowing disclosure by subpoena, discovery request, or other lawful process only if satisfactory assurances that a qualified protective order has been sought. 45 C.F.R. §164.512(e). The Department stated such a qualified protective order would "guard the confidentiality of the information." 65 Fed. Reg. 82530 (December 28, 2000). In addition, the Department encouraged "the development of 'model' protective orders that [would] facilitate adherence with this subpart." *Id.*

State Farm's proposed Cook County order would eliminate the two requirements set forth by the Department for a qualified protective order and would not provide the confidentiality and protection of PHI envisioned when the Privacy Rule was enacted. Further, the Department anticipated the use of model orders and it set forth exactly what the model orders must include in 164.512(e)(1)(v)(A) and 164.512(e)(1)(v)(B). Instead of exceeding the protective rules of HIPAA, the state law requiring State Farm to maintain the PHI and allow disclosure outside of litigation impermissibly lowers the protective floor that Congress sought to provide in enacting HIPAA and certainly acts as an obstacle to the accomplishment and execution of the full purposes and objectives of HIPAA.

Applying the plain language of HIPAA's express preemption clause, the Illinois laws cited by State Farm are preempted because they are contrary to HIPAA. A covered entity would find it impossible to comply with both the State and Federal requirements and the Illinois laws

are an obstacle to the accomplishment and execution of the full purposes and objectives of HIPAA section 264.[1]

Applicability of HIPAA to Liability Insurers

Additionally, State Farm states the Plaintiff's proposed order seeks to bind State Farm to the requirements of HIPAA when it is expressly exempt from the application of HIPAA. State Farm argues that they are not subject to the HIPAA regulations and must follow existing state insurance law and regulations governing insurers. While the court agrees that property and casualty liability insurers are not covered entities under HIPAA, such reasoning does not exempt State Farm from obeying a protective order entered by this court with respect to PHI which has been produced *by a covered entity.* Covered entities cannot disclose PHI in certain circumstances without a qualified protective order containing the provisions in 164.512(e)(1)(v)(A) and 164.512(e)(1)(v)(B).

All parties receiving the PHI are bound to follow the qualified protective order of the court regardless of whether they are a covered entity under HIPAA in the first instance. State Farm's logic amounts to stating they need not follow any order of the court with HIPAA provisions, since they are not a covered entity. The qualified protective prder loses its effectiveness in protecting a patient's PHI if all non-covered entities may ignore the restrictions required by HIPAA. Non-covered entities would broadly include attorneys, expert witnesses, casualty insurers, etc. It is obvious that Congress did not intend for attorneys and expert witnesses to be free to use PHI for their own private business purposes at the close of litigation,

[1] The Court asked the parties to address the possible application of the McCarran-Ferguson Act, which prohibits federal preemption of state laws that regulate insurance, "unless the federal statute expressly announce[s] Congress' specific intention to inject itself into the area of state insurance law." *U.S. v. Rhode Island Insurers' Insolvency Fund*, 80 F.3d 616, 520 (1996). Neither party argued that the Act applied in this case. Therefore, this Court will not address the issue.

simply by virtue of the fact that they are non-covered entities under the Act. Accordingly, State Farm's status as a non-covered entity has no relevance as to whether the qualified protective order should be altered.

Alternatives to a Qualified Protective Order

Finally, State Farm argues that there are alternatives to issuing a qualified protective order under HIPAA. It deems the Plaintiff's proposed order a "court order" under 164.512(e)(1)(i), instead of a qualified protective order accompanying a subpoena, discovery request, or other lawful process under 164.512(e)(1)(ii). However, there is no indication that Plaintiff's Motion was for a court order under 164.512(e)(1)(i). In fact, in both State Farm's Objection and Plaintiff's Reply, the arguments centered around a qualified protective order pursuant to 164.512(e)(1)(ii). While the HIPAA regulations do provide several different ways in which a covered entity is permitted to disclose PHI, Plaintiff has chosen to secure a qualified protective order under 164.512(e)(1)(ii). State Farm provided a good justification for this choice in its brief, "personal injury litigation often implicates HIPAA because parties seek to obtain medical information through discovery requests sent to claimants' health-care providers." Whether a different method could be used to permit disclosure is irrelevant as to whether the qualified protective order at issue should be changed to avoid conflict with State Farm's alleged obligations and rights under Illinois Law.

CONCLUSION

State Farm's justification for the proposed alteration of Plaintiff's requested qualified protective order is a conflict between HIPAA requirements and Illinois insurance law regarding the use and retention of Plaintiff's PHI. However, HIPAA has an express preemption clause that, when applied to this matter, acts to preempt the Illinois laws permitting State Farm to use

Plaintiff's PHI outside of this litigation and obligating State Farm to keep and maintain the PHI well after the litigation has ended. State Farm's other argument regarding its status as a non-covered entity under HIPAA fails to address the fact that, in the case at bar, State Farm would be receiving the PHI *from* a covered entity, and that all parties receiving such PHI are subject to the requirements of a HIPPA protective order. Further, the Plaintiff has chosen to seek a qualified protective order, and State Farm's argument that a different method could be used to seek authorization has no bearing on the question currently before the court. Accordingly, this court denies State Farm's request to enter the Cook County order and grants Plaintiff's Motion for Entry of Protective Order and Authorization to Disclose Protected Health Information. So Ordered.

DATE: May ____, 2019

ENTER: _____
Mitchell L. Hoffman,
Circuit Judge