Glen E. Amundsen
[redacted]

June 5, 2019

Via Email and Hand Delivery
Illinois Supreme Court Rules Committee
Attn: Amy Bowne, Committee Secretary
222 N. LaSalle Street, 13th Floor
Chicago, IL 60601
[redacted]

Re: Comments re: Proposal 18-01 Amends Supreme Court Rule 218

Members of the Illinois Supreme Court Rules Committee:

Proposal 18-01 amending Supreme Court Rule 218 providing for the entry of a routine protective order related to the discovery of protected health information (PHI) in personal injury cases is an important and necessary advancement in the administration of the civil justice system in Illinois. For the reasons explained below, it deserves the support and endorsement of the Illinois Supreme Court Rules Committee for adoption by the Court and implementation statewide. The proposed amendment to Rule 218 (proposal 18-01) and the suggested form protective order offered by Circuit Judge John Ehrlich is the product of scholarly evaluation of the varying interests of plaintiffs, defendants, and property casualty insurers ("P&C insurers") and the confluence of multiple areas of law implicated when injured persons elect to put the nature, extent or duration of their claimed injuries into dispute in court.

The origin of Proposal 18-01 stems from a litigated challenge to Cook County Law Division General Administrative Order 12-01 that ultimately resulted (after almost 18 months of briefing and argument) in a decision of the Chief Judge of the Law Division of the Circuit Court of Cook County to adopt Proposal 18-01 as the routine practice for the discovery of medical records in the busiest docket in the Illinois Court system. The presiding judge in that litigated matter was the Hon. John H. Ehrlich, the proposer of 18-01. The change in the prevailing Cook County procedure for securing medical records was based on a memorandum opinion and order authored by Judge Ehrlich (entered December 15, 2017) addressing the deficiencies in the current practices. A copy of that memorandum opinion and order is attached to this letter for the Committee's ease of reference.

The deficiencies requiring the change in procedure in Cook County personal injury suits were essentially two-fold. First, Judge Ehrlich concluded that the prevailing protective order was unconstitutional in that it did not adequately and fully inform personal injury plaintiffs of their right of privacy and the uses to which private information could be put in personal injury litigation. Second, the prevailing routine protective order impermissibly imposed limitations on the use, retention and dissemination of medical information by P&C insurers that directly conflicted with other Illinois laws and regulations applicable to these insurers doing business in Illinois.

Over the years, Illinois courts have utilized a variety of means to address the question of the privacy of the medical information of litigants. The nature of privacy protections for litigants in a civil justice system that is, subject to limited exceptions, open to public scrutiny has been evolving. Some venues in our State, like Cook County, have had some form of routine process for the protection of private health information for many years. In Cook County there has been a formally adopted procedure for production of medical records since at least 2012. Other venues have had little or no formal process. The question of whether to enter a medical protective order, and, if so, the terms of the order are in many Illinois venues subject to the discretion of counsel for the litigants and the presiding judge on a case by case basis.

Questions around the scope of privacy protections afforded to personal injury plaintiffs, defendant's rights and restrictions with regard to relevant medical information obtained in litigation, and any judicially imposed conditions on P&C insurers should be addressed uniformly across all venues in Illinois. There is need for consistency so that all Illinois litigants are subject to the same protections and limitations no matter where the suit is pending. Proposal 18-01 will advance these goals. Additionally, Proposal 18-01 will help avoid the likelihood of different outcomes in circuit courts across Illinois and the certainty of multiple appellate proceedings. If left to case by case determination, settling this question via the common law could take years at great expense to the detriment of all stakeholders. Therefore, it is appropriate to address this subject by rule.

Accordingly, the State Farm Companies support an affirmative recommendation of this Committee for the adoption of Proposal 18-01. Additionally, below we address the most common misconceptions about Proposal 18-01 and demonstrate why the proposed amendment to Rule 218 is an appropriate and equitable balancing of the interests of all stakeholders and will advance the fair disposition of personal injury litigation in Illinois.

Scope of Discovery

Many comments have asserted that the proposed protective order submitted in Proposal 18-01 impermissibly broadens the scope of the medical records that can be obtained by a defendant. Such assertions misapprehend the protective order submitted with the Proposal. The proposed protective order does not outline the scope of what records may be obtained.[1] That is for good reason. Rule 201(b)(1) governs the scope of permitted discovery by the bounds of relevancy to the issues in controversy in the case. Further, Rule 201 (c) (1) & (2) allows litigants to seek court intervention to supervise or limit discovery if the scope of discovery sought is beyond the bounds of relevancy.

[1] It provides expressly that no protected health information (PHI) may be disclosed for any reason without the consent of the party and an order of court (See paragraph 1 proposed form protective order). Neither a defendant nor an insurer gains unfettered access to any of the plaintiff's medical records simply because a protective order has been entered.

Consistent with Rule 201, relevancy has likewise been the touchstone of the scope of discovery of medical records permitted under the common law of Illinois for decades. In *Kunkel v Walton*, 179 Ill. 2d 519 (1997), a case involving the question of a litigant's privacy rights in the context of the discovery of medical records, the Illinois Supreme Court observed that it "is reasonable to require full disclosure of medical information that is relevant to the issues in the lawsuit." *Id*. at 538. The Court noted in that case that only an "unreasonable" invasion of privacy is prohibited under the Illinois Constitution's right of privacy. The Court specifically commented that "In the context of civil discovery, reasonableness is a function of relevance." *Id*.

In short, nothing in the proposed protective order alters, modifies, or vacates Rule 201 or any Illinois Supreme Court Rules, Illinois statute, Illinois common law, or any other laws that address the boundaries of the PHI that may properly be sought by a defendant.

Means of Discovery

Some objectors also protest that the proposed protective order permits defendants to engage in practices that are not presently allowed. By way of example, some argue the proposed protective order would permit defense counsel to issue subpoenas without notice to opposing counsel; circumvent the protections required under the Mental Health and Developmental Disabilities Confidentiality Act or other specific statutes dealing with sensitive records; or authorize counsel or insurers to have direct communications with a party's treating physicians. These concerns are also unfounded. None of those possible abuses is sanctioned by the proposed order. In fact, the explicit terms of order are to the contrary.

Paragraph six (6) of the proposed protective order expressly provides that no party or their attorney, or their representative ***"are permitted to request, obtain or disclose PHI or any other type of medical bills, records or information other than through the formal discovery procedures authorized by the Code of Civil Procedure, Illinois Supreme Court rules, and orders of this court"*** **(emphasis added).** Paragraph three (3) of the Findings contained in the order provides specifically that nothing in the attached order relieves any covered party or their attorneys from complying with Illinois statutes relating to mental health and disability records, AIDs, alcoholism and drug abuse, genetic information and/or any and all other applicable State and federal laws regulating the disclosure, maintenance, use and disposal of PHI.

In *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill. App. 3d 581 (1st Dist. 1986), the Illinois Appellate Court determined that the public policy of the State of Illinois prohibits *ex parte* communications between opposing counsel and a treating physician. *Petrillo*, 148 Ill. App. 3d at 587-88. Proposal 18-01 does not authorize *ex parte* communications with plaintiff's treating physicians. In fact, the order is consistent with that doctrine because it expressly prohibits efforts to obtain medical information other than by the means authorized under the Code of Civil Procedure, Illinois Supreme Court Rules, or applicable law. Contrary to the fears of some opposed to the amendment, Proposal 18-01 does not afford a means for defendants or their representatives to make an end-run around the *Petrillo* doctrine.

Waiver of the Right of Privacy

Some objectors also take issue with the proposed order's admonition that by filing a suit for personal injury a litigant waives his/her right of privacy associated with the disclosure of PHI relevant to the issues in dispute. The order further requires the plaintiff initiating the suit to consent to the disclosure of that information under the terms and limitations outlined in the

order. As noted above, it has long been the common law of Illinois that it is reasonable to require full disclosure of relevant medical information by the plaintiff in a personal injury suit. See *Kunkel v Walton*, supra. Therefore nothing is or should be offensive, unlawful, or improper about providing notification of that fact to each party who elects to put his or her medical condition in issue and requiring the plaintiff's knowing and voluntary consent **before** the PHI is actually secured by counsel for the opposing party or parties.

Proposal 18-01 is In Harmony with HIPAA and Insurance Laws & Regulations Applicable to P&C Insurers Doing Business in Illinois

In the litigation resulting in the adoption of Proposal 18-01 by the Law Division of the Cook County Circuit Court, the Court paid careful attention to the question of the interface between: (i) federal law related to the disclosure of PHI under the Health Insurance Portability and Accountability Act (HIPAA); (ii) privacy rights guaranteed under Article I, Section 6 of the Illinois Constitution; (iii) Illinois laws and regulations applicable to P&C insurers which address their access to, use, and retention of private information including PHI; (iv) Illinois civil discovery rules/procedures; and (v) courts' inherent power to regulate/supervise discovery to prevent abuse and protect the rights of the litigants.

Judge Ehrlich's December 15, 2017 memorandum opinion and order, which the Presiding Judge of the Law Division adopted for implementation in all personal injury cases, provides a cogent analysis of the confluence of these various areas of law and regulations applicable to the circumstances where PHI is subject to disclosure to P&C insurers in legal proceedings.

Importantly, Judge Ehrlich made a number of conclusions of law in the litigation spawning Proposal 18-01, which neither party to the litigation challenged through appeal, including:

> P&C insurers (those that write non–health insurance lines of business) are not "covered entities" subject to the regulation of HIPAA (See - Shull v Ellis, Case No 15 L 9759 and consolidated cases, Memorandum Opinion & Order at pp. 8-9);
>
> Although Congress determined that P&C insurers would not be "covered entities" under HIPAA, PHI that is in the possession of P&C insurers is subject to state regulation under Article XL of the Illinois Insurance Code. See 215 ILCS 5/1001-1024 and accompanying regulations issued by Illinois insurance regulators (See Shull v Ellis, Case No 15 L 9759 and consolidated cases Memorandum Opinion & Order at pp. 11-14);
>
> The Illinois Insurance Code and associated regulations mandate or permit access to, use, and retention of PHI by P&C insurers in a variety of important ways outside of the specific litigation in which PHI is disclosed, to permit P&C insurers to perform beneficial insurance functions (See Shull v Ellis Case No 15 L 9759 and consolidated cases, Memorandum Opinion & Order at p. 19); and
>
> The prior medical protective orders utilized in Cook County before the adoption on January 1, 2018 of the order submitted with Proposal 18-01 inappropriately subjected P&C insurers to HIPAA limitations applicable to covered entities by requiring the destruction of PHI records at the conclusion of litigation and limiting their use solely to

the litigation, a result that was "unsupportable in light of federal law." (Shull v Ellis Case No 15 L 9759 and consolidated cases, Memorandum Opinion & Order at p. 9

Judge Ehrlich's order thus properly recognizes that P&C insurers are not covered entities under HIPAA and their handling of PHI is governed by a different regulatory scheme, 215 Ill. Comp. Stat. 5, et seq. Judge Ehrlich's order accommodates insurer use of PHI under Illinois regulations, allowing P&C insurers to use and disclosure PHI for authorized insurance functions, and does so consistently with both HIPAA and the Illinois Constitution's recognition of a right of privacy.

As a practical matter, an insurer is entitled to receive PHI in the context of personal injury claims and lawsuits because such disclosure is necessary to analyze and process the plaintiff's claims and to satisfy the insurer's obligations to its policyholder. But the importance of PHI to the insurance function does not extend solely to its use in connection with litigation of a claim. As Judge Ehrlich's order acknowledges:

> "It is plain that what would otherwise be considered PHI under HIPAA constitute fundamental information needed by the state to support its regulatory responsibility of auditing insurance companies to ensure the fair and efficient business of insurance for consumers. The same records constitute fundamental information needed by insurers to evaluate and pay claims. The records are also necessary for internal audits and regulatory disclosures required, for example, by Medicare and Medicaid. These records further ensure a carrier's solvency by providing a basis for sufficient reserves to avoid the liquidation of assets to pay claims or to avoid artificially high premiums to cover projected claims. The records also form the basis for insurance accreditation, ratings, and reviews by independent and trade organizations. Finally, the records may prove to be key evidence used to defend the carrier against bad-faith claims…"

Shull v Ellis Case No 15 L 9759 and consolidated cases, Memorandum Opinion & Order at pp. 13-14.

The order also recognizes that, in litigation where health records held by HIPAA-covered entities is necessary and relevant, the HIPAA covered entity (such as the health care provider) may disclose PHI only in a manner consistent with HIPAA. Fortunately, HIPAA provides several alternative routes for covered entities to permissibly produce PHI in litigation: by subpoena, if adequate notice is given to the individual whose PHI is to be produced; by records authorization signed by the party whose records are at issue; and by non-QPO court order.[2] 45 C.F.R. § 164.512(e)(1)(i)-(iii).[3] Judge Ehrlich relied upon these HIPAA-approved procedures to ensure compliance with HIPAA without unduly burdening P&C insurers, and without restricting their necessary access to, use, and retention of PHI. The resulting Cook County order, which has now been utilized successfully for nearly 18 months in the venue with by far the largest docket of personal injury litigation in the Illinois, is an illustration of the kind of court order governing disclosure of PHI that is explicitly permitted by HIPAA.

[2] The United States Department of Health and Human Services ("HHS") provided its interpretation of this section when publishing the HIPAA privacy regulations. Specifically, HHS stated, when a request is made pursuant to an order from a court, the covered entity may disclose protected health information without any additional process. 65 Fed. Reg. 82461, 82529 (December 28, 2000).

[3] As noted above, by filing a suit for personal injury, a plaintiff has implicitly (if not expressly) agreed to full disclosure of the relevant PHI related to the nature, extent, or duration of the injuries claimed. It should not be surprising, then, that HIPAA allows for disclosure of protected health information for, inter alia, judicial and administrative proceedings. 45 C.F.R. § 164.512(e).

Conclusion

Proposal 18-01 is a positive initiative that is the product of extensive analysis and study of the law, strikes a deliberate and appropriate balance between litigants' rights of privacy and the ability of P&C insurers to discharge their core functions, and, if adopted, will result in much-needed clarity in this area of the law for all interested parties.

The State Farm Companies fully support Proposal 18-01 as a rule advancing the administration of the civil justice system in Illinois. Proposal 18-1 appropriately harmonizes HIPAA, the Illinois Constitutional right of privacy, Illinois common law, and Illinois insurance law and regulations. Additionally, Proposal 18-01 deserves the endorsement and support of this Committee because the proposed order would achieve substantial efficiencies and preserve judicial resources through uniform application of consistent rules governing disclosure of PHI across the State.

Respectfully submitted,

Glen E. Amundsen

Attorney for the State Farm Insurance Companies

Encl:
Memorandum Opinion & Order entered 12-15-17 (Case No Shull v Ellis, Case No 15 L 9759 and consolidated cases)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

GENERAL ADMINISTRATIVE ORDER 17-4
STANDARD HIPAA PROTECTIVE ORDER

Effective January 2, 2018, all protective orders entered in the Law Division pursuant to the Health Insurance Portability and Accountability Act ("HIPAA") shall conform to the attached standard and approved format. This order incorporates by reference the December 15, 2017 memorandum order and opinion issued by Circuit Court Judge John H. Ehrlich in *Shull v. Ellis*, 15 L 9759, and the transcripts of proceedings in that matter dated August 8, October 11, November 13, and November 28, 2017.

Pursuant to Law Division General Administrative Order 03-4, all motions for HIPAA protective orders shall be presented on all motion calendars as "Routine Motions," with proper notice, and must be specifically labeled and contain a specific reference to the HIPAA statute.

Objections to the entry of HIPAA protective orders shall be submitted in accordance with the routine motion rules and standing orders of motion judges.

Law Division General Administrative Orders 12-1 and 17-3 are hereby vacated and replaced with this Law Division General Administrative Order 17-4.

IT IS HEREBY ORDERED THAT this order is effective as of the date indicated below and will be spread on the records of this court.

Hon. James P. Flannery
Presiding Judge
Law Division

JUDGE JAMES P. FLANNERY
DEC 15 2017
Circuit Court-1505

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

_____	)	
Plaintiff,	)	
	)	
v.	)	No. _____
	)	
_____	)	
Defendant.	)	

HIPAA PROTECTIVE ORDER

This court explicitly finds that this court order is necessary to:

1. Protect a party's right to privacy as guaranteed by article I, section 6 of the Illinois constitution for each party in this lawsuit;
2. Ensure the parties' compliance with the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and its accompanying rules and regulations governing the disclosure, maintenance, use, and disposal of protected health information (PHI), *see generally* 45 C.F.R. 160.103 & 160.501,
3. Require covered entities, *see* 45 C.F.R. 160.103, to disclose a party's PHI for use in this litigation without a separate disclosure authorization;
4. Permit 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 compliance and conformity with all applicable federal laws and regulations and the Illinois Insurance Code and its accompanying rules and regulations; and
5. Further the interest of the State of Illinois in regulating the business of insurance.

A party disclosing PHI explicitly stipulates that she or he:

1. Read this court order before signing their name to be bound by it;
2. Discussed the contents of this court order with their attorney of record in this litigation and had the opportunity to ask questions;
3. Was informed of and fully understands the consequences of the entry of this court order;
4. Freely and without reservation stipulates to the entire contents of this court order; and
5. Understands that by refusing to consent to the contents of this order, the court may impose sanctions up to and including dismissal of the complaint.

Based on these findings and stipulations, this court orders the following:

1. The PHI of any party in this lawsuit may not be disclosed for any reason without that party's prior written consent and an order of this court.

2. A party that has disclosed PHI and agreed (as indicated by signature) to the entry of this court order explicitly waives the right to privacy over the disclosed materials but only to the extent provided in this court order. The only disclosures explicitly waived and expressly permitted are those:

A. 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 statutes, rules, and regulations for purposes including:

1. Reporting; investigating; evaluating, adjusting, negotiating, arbitrating, litigating, or settling claims;
2. Compliance reporting or filing;
3. Identifying and reporting criminal or unlawful conduct;
4. Required inspections and audits;
5. Legally required reporting to private, federal, or state governmental health or medical insurance organizations, including, but not limited, 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;

B. Ordered by this or another court or arbitral body or by subpoena for purposes of subrogation, reimbursement, or payment of liens arising out of or related to this lawsuit; and

C. Necessary to comply with any other federal or state laws, rules, or regulations, but only with the party's express consent and entry of an appropriate court order.

3. Any covered entity over which this court has jurisdiction that fails or refuses to disclose PHI in accordance with this court order is subject to all sanctions authorized by the Code of Civil Procedure and the Illinois Supreme Court rules.

4. A party to this lawsuit may provide PHI to an undisclosed consulting expert or controlled expert witness as defined in Illinois Supreme Court Rule 213(f)(3), but only after receiving acknowledgement that each such expert or witness agrees to be bound by the terms of this order.

5. Immediately after the conclusion of this lawsuit, as indicated by a court-entered order of dismissal, all parties and other persons or entities subject to this court order possessing PHI shall by agreement either return it to the party or non-party about whom it concerns or their attorney of record in this lawsuit or destroy it by shredding, pulverizing, melting, incinerating, or degaussing. This provision does not apply to insurers who possess what would otherwise be considered PHI under HIPAA, but only to the extent as limited in paragraph 2.

6. No parties or their attorneys, agents, or representatives are permitted to request, obtain, or disclose PHI or any other type of medical bills, records, or related information other than through the formal discovery procedures authorized by the Code of Civil Procedure, Illinois Supreme Court rules, and orders of this court.

7. The parties are prohibited from including or attaching PHI to any document filed with the Clerk of the Circuit Court. PHI necessary for the court's consideration of any matter must be provided separately.

8. This court retains jurisdiction to enforce the terms of this order after the conclusion of this litigation.

_____
Printed Name

Dated: _____ _____
Signed by Plaintiff / Legally Designated Representative / Other (circle one)

Dated: _____ _____
Counsel for Plaintiff

_____
Circuit Court Judge

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Marc Shull,	)	
	)	
Plaintiff,	)	
	)	No. 15 L 9759
v.	)	and all consolidated
	)	cases
Eric Ellis,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

This court has been tasked with reconciling a circuit court order with a state statute. The court order at issue is the Health Insurance Portability and Accountability Act (HIPAA) qualified protective order (QPO) currently entered routinely by judges in the Circuit Court of Cook County. That order authorizes the disclosure of a litigant's protected health information (PHI) to, among others, the defendants' insurers exclusively for use in the captioned litigation and requires all entities to return or destroy a litigant's PHI at the lawsuit's conclusion. The statute in question is the Illinois Insurance Code (IIC). That statute, along with its extensive regulations, requires property and casualty insurers to retain for seven years nearly every type of document in their possession for various state and industry purposes.

In attempting to reconcile the order and the statute, this court recognizes that it must also consider HIPAA's privacy and security rules as well as the Illinois constitution. The latter document explicitly guarantees a right to personal privacy that the Illinois Supreme Court has held extends to personal medical information. This court has concluded that the Circuit Court's

current HIPAA QPO conflicts with both federal and state law and the Illinois constitution by authorizing:

(1) the disclosure of a plaintiff's PHI to property and casualty insurers despite their exemption from HIPAA;
(2) the disclosure of a plaintiff's PHI to property and casualty insurers without the plaintiff's explicit and knowing waiver of her or his constitutional right to privacy; and
(3) property and casualty insurers to retain PHI only until the end of litigation although the IIC requires them to retain PHI for at least seven years.

This court further concludes that these conflicts arise from the same focal problem – the current HIPAA QPO fails to inform a plaintiff who is disclosing PHI of the competing constitutional, statutory, and administrative interests in her or his PHI. To remedy this problem, this court has drafted a new HIPAA QPO and attached it as an exhibit. This court believes that the proposed QPO is a narrowly tailored solution to this multi-faceted problem because it informs a plaintiff how her or his PHI may be received, retained, used, and disposed of. With this information, a plaintiff may make an explicit and knowing waiver of her or his constitutional rights.

Facts

On September 12, 2012, Judge William D. Maddux, then presiding judge of the Circuit Court's Law Division, entered an order authorizing the use of a standardized QPO compliant with HIPAA and its regulations. *See* Circuit Ct. Cook Cty. Gen'l Admin. Order 12-1, attached as Ex. A.[1] The court's purpose in approving the QPO was to avoid the voluminous and repetitive motion practice that would otherwise be required in individual lawsuits to authorize the limited use of a litigant's PHI. Since the

[1] Illinois Supreme Court Rule 201(c)(1) authorizes the entry of protective orders.

entry of General Administrative Order 12-1, Circuit Court judges in the Law Division have entered the HIPAA QPO in tens of thousands of lawsuits on a routine basis. The same HIPAA QPO is also used in other circuit court divisions.

The QPO explicitly provides for the disclosure, receipt, retention, and disposal of PHI by "current parties (and their attorneys) and any future parties (and their attorneys). . . ." Ex. A, ¶ 1. To that end, litigants and their attorneys are expressly permitted to use PHI:

> *in any manner reasonably connected with the . . . litigation.* This includes . . . disclosure to the parties, the attorneys' firm (*i.e.*, attorneys, support staff, agents and consultants), *the parties' insurers*, experts, consultants, court personnel, court reporters, copy services, trial consultants, jurors, venire members and other entities *involved in the litigation process*. . . .

Id. (emphasis added), ¶ 4. The QPO also requires that at the end of all litigation, including any appeals:

> any person or entity in possession of "PHI" . . . shall destroy any and all copies of "PHI" pertaining to _____, except:
> (a) the defendant that is no longer in the litigation may retain "PHI" generated by him/her/it; and
> (b) the remaining defendants in the litigation, and persons or entities receiving "PHI" from those defendants . . . may retain "PHI" in their possession
> . . . .

Id. (emphasis in original), ¶ 5. Finally, the QPO provides that parties must comply with state statutes governing mental health and AIDS records as well as state and federal laws governing drug and alcohol records. *Id.* at ¶ 8.

On April 19, 2016, State Farm Mutual Automobile Insurance Company (State Farm) filed in a now-related proceeding,[2] a motion to compel the plaintiff to execute HIPAA authorizations for the release of her PHI or for a court order requiring their release. Soon thereafter, State Farm and other property and casualty insurers began filing similar motions in other cases.[3] These motions came to the attention of the current Law Division Presiding Judge, James P. Flannery. On July 13, 2016, Judge Flannery, on the court's own motion, entered an order based on the following finding:

> Motion Section Judges are being presented with a large number of motions challenging the language of the standard Law Division HIPAA order, on the basis that [its] terms, which require the return or destruction of . . . protected health information ("PHI"), conflict with an insurer's federal and state statutory obligation to "maintain a complete record of all books, records and accounts." 215 Ill. Comp. Stat. Ann. 5/133.

Ex. B. Judge Flannery concluded that, in the interest of judicial economy, the identified issue should be consolidated before this court for adjudication.[4]

In subsequent case management conferences, this court extended an invitation to members of both the plaintiffs' and defendants' bars to participate in the resolution of the issue identified by Judge Flannery. Several law firms have been involved in subsequent discussions, and this court wishes to acknowledge especially the work of Daniel S. Kirschner of Corboy & Demetrio, counsel for Shull, and Glen E. Amundsen of SmithAmundsen, LLC, counsel for State Farm. Kirschner and

---

[2] *Spielberger v. Herman*, 15 L 9935.

[3] State Farm was originally a non-party to these lawsuits, but filed motions to intervene as required by the Code of Civil Procedure. *See* 735 ILCS 5/2-408.

[4] Judge Flannery issued his order in *Franklin v. Pace Sub. Bus Div., Reg'l Transp. Auth.*, 14 M1 302527. That case settled, and on March 27, 2017, Judge Flannery entered an order transferring the issue to this case. Ex. C.

Amundsen have indicated in correspondence with this court that, despite their concerted and cordial efforts to agree on a draft replacement HIPPA QPO, they have been unable to do so. To that end, State Farm submitted to this court a proposed replacement HIPAA QPO while Shull submitted a proposed subparagraph to be added to the existing HIPAA QPO.[5]

State Farm's proposed QPO retains much of the existing HIPAA QPO but would order that PHI be maintained "in a confidential manner" and "shall be destroyed at the conclusion of this litigation" with three exceptions. First, absent a court order, "[c]onfidential medical records retained by defense counsel shall be destroyed in accordance with defense counsel's regular business practices. . . ." Second, "'PHI' provided to the Defendant(s) [*sic*] property and casualty insurer(s) shall be destroyed at the earliest date that permits the insurer to comply with its retention obligations under applicable insurance regulations. . . ." Third, "[w]hile Plaintiff(s) [*sic*] confidential medical records/'PHI' are in the custody or possession of defense counsel or Defendant(s) [*sic*] property and casualty insurer(s) . . . such records shall not be disclosed to any third person. . . ."

For his part, Shull suggested the following language be added to paragraph five of the existing HIPAA QPO:

> Nothing in this section is intended to limited [*sic*] or expand the duties or obligations of the parties' insurers to retain, protect or destroy PHI pursuant to any federal code, state law, administrative regulation, or other court order. A parties' [*sic*] insurer may retain PHI upon the conclusion of this litigation, but such retention shall be subject to the privacy and use requirements set forth in existing federal code, state law, administrative regulation, or other court order

[5] Given the significance of the issues presented, this court thought it prudent to receive from the parties their input on how best to resolve the identified problems as well as to create as complete a record as possible.

regarding the retention, protection or destruction of those records.

Shull further rejects State Farm's reasons to exclude property and casualty insurers from the record destruction requirements of the current HIPAA QPO.

Analysis

The issue before this court lies at the intersection of three distinct bodies of substantive law. Before addressing the confluence of that intersection, it is necessary first to understand the purpose and effect of each.

I. Applicable Law

A. Health Insurance Portability and Accountability Act

The United States Congress passed HIPAA in August 1996 in response to the rapid evolution of health information systems and the electronic transfer of such information. *See South Carolina Med. Ass'n v. Thompson*, 327 F.3d 346, 348 (4th Cir. 2003). One of HIPAA's central goals is to protect individually identifiable health information, defined as information relating to the physical or mental health or condition of an individual, or the provision of health care to an individual, that identifies that person. *See* 42 U.S.C. § 1320d-6; 45 C.F.R. § 160.103. Individually identifiable health information is more commonly called "protected health information," or "PHI." *See* 45 C.F.R. § 160.103.

HIPAA directs the Secretary of Health and Human Services to promulgate regulations to protect PHI from improper disclosure, a goal achieved, in part, through what is known as the privacy rule. *See* 45 C.F.R. parts 160 & 164, subparts A & E. To that end, HIPAA establishes a "mandatory floor" of privacy protections, 65 Fed. Reg. 82,465-71 (Dec. 28, 2000), that "shall not supersede a contrary provision of State law, if . . . [it] imposes requirements, standards or implementation specifications that are

more stringent than . . . [those] imposed under the regulation." 45 C.F.R. § 160.203(b). A state standard is more stringent if it "provides greater privacy protection for the individual who is the subject of the individually identifiable health information." 45 C.F.R. § 160.202(6); *see also Northwestern Mem. Hosp. v. Ashcroft*, 362 F.3d 923, 924 (7th Cir. 2004).

HIPAA regulations apply generally to "covered entities" and "business associates." A covered entity is defined as a: (1) "health plan," an individual or group plan that provides or pays the cost of medical care; (2) "healthcare clearinghouse," such as a billing service or health system management company; or (3) "healthcare provider," considered to be a person or entity that furnishes, bills, or is paid for health care in the normal course of business. *See* 45 C.F.R. § 160.103. A business associate is defined as a person or entity that performs certain functions or activities involving the use or disclosure of PHI on behalf of, or provides services to, a covered entity. *See id.* Business associate functions and activities include, for example, claims processing or administration, data analysis, quality assurance, and billing. *See id.*

Covered entities and business associates are not permitted to use or disclose a person's PHI, *see* 45 C.F.R. § 164.502(a)(1)(i-ii), subject to 12 exceptions, including one for judicial and administrative proceedings, *see* 45 C.F.R. § 164.512(e). The judicial exception authorizes covered entities and business associates to disclose PHI in various ways, three of which are the most common. First, PHI may be disclosed pursuant to a court-entered QPO, *see* 45 C.F.R. § 164.512(e)(1)(ii), (iv), (v), provided that the covered entity or business associate discloses "only the [PHI] expressly authorized by such order. . . ." 45 C.F.R. § 164.512(e)(1)(i) & (f)(1)(ii). The type of order envisioned by HIPAA is a QPO that, at a minimum:

> (A) prohibits the parties from using or disclosing the [PHI] for any purpose *other than the litigation or proceeding for which it was requested*; and

> (B) requires the return of the [PHI] to the covered entity or the destruction of the information *at the end of the litigation or proceeding.*

45 C.F.R. § 164.512(e)(1)(v)(A) & (B) (emphasis added). Second, a party seeking disclosure may send the covered entity a valid subpoena. *See* 45 C.F.R. § 164.512(e)(1)(ii). The covered entity may disclose PHI if the subpoena is accompanied by a written statement from the party issuing the subpoena that: (1) the issuer made reasonable good-faith efforts to notify the patient in writing of the subpoena, *see* 45 C.F.R. § 164.512(e)(1)(ii)(A); (2) the issuer made reasonable efforts to secure a QPO, *see* 45 C.F.R. § 164.512(e)(1)(ii)(B); (3) the notice included sufficient detail to permit the patient to object to the subpoena in court, 45 C.F.R. § 164.512(e)(1)(iii)(A) & (B); and (4) the time for the patient to object to the subpoena lapsed absent any objections or the court overruling any objections, *see* 45 C.F.R. § 164.512(e)(1)(iii)(C)(1) & (2). Third, a party seeking disclosure may provide the covered entity with the patient's valid authorization containing the required elements and statements. *See* 45 C.F.R. § 164.508(b)(1)(i) & (ii).

This brief summary of HIPAA and its scope is useful if only to emphasize that HIPAA does *not* apply to insurers that write non-health insurance lines of business. This is evident if only from the statute's name, the *Health Insurance* Portability and Accountability Act, as opposed to, say, property, casualty, workers' compensation, or any other insurance line. The reason insurers that write non-health insurance lines of business are exempt from HIPAA is that they are not: (1) health plans, since they are not individual or group plans providing or paying the cost of medical care, *see* 42 U.S.C. 300gg-91(a)(2); (2) health care clearinghouses, such as billing services or re-pricing companies; or (3) health care providers that provide medical or health services. *See* 42 U.S.C. 1395x(s) & (u). The Department of Health and Human Services subsequently clarified HIPAA's scope when it explained that:

> With regard to life and casualty insurers, we understand that such benefit providers may use and disclose individually identifiable health information. However, Congress did not include life insurers and casualty insurance carriers as "health plans" for the purposes of this rule and therefore they are not covered entities.

Standards for Privacy of Individually Identifiable Health Information. Final Privacy Rule Preamble . . . Covered Entity, Ass't Sec'y for Planning & Eval., U.S. Dep't of Heath & Human Srvcs., Dec. 28, 2000.

Despite the exemption from HIPAA provided to property and casualty insurers, the QPO currently authorized for use by General Order 12-1 makes those insurers subject to HIPAA and its regulations. It is apparent that all prior iterations of the QPO authorized for use in the Circuit Court of Cook County also contained this same defect. Such overreach is plainly unsupportable in light of federal law; consequently, all previously entered HIPAA orders are unenforceable to that extent.

Although HIPAA does not apply to property and casualty insurers, those insurers receive enormous amounts of what would otherwise be considered PHI. In other words, HIPAA creates a legal fiction because the same information, considered PHI while in the possession of a covered entity or business associate, is *not* considered PHI while in the possession of property and casualty insurers. Regardless of the moniker, information that would otherwise be considered PHI under HIPAA is essential for property and casualty insurers to function both in response to and apart from litigation. As one industry representative explained the paradox:

> Property and casualty insurance differs from health and other types of insurance. The policyholder is typically not the party claiming benefits but rather is a party *against whom a third party is asserting legal rights* and to whom the insurer owes a contractual duty to defend and

> indemnify. The information a property and casualty insurer needs in evaluating and settling claims is not information in its possession but is information in the hands of the claimant-third party. It is critical for property and casualty insurers, most critically, workers' compensation insurers, to have unimpeded and timely access to medically related information to meet their obligations to their policyholders and under law. If not carefully crafted, medical privacy rules could give adverse third-party claimants the ability to circumscribe a carrier's need to share information with innumerable parties that are inherently part of claims evaluation and disability management.

Bruce C. Wood, "Statement of the American Ins. Ass'n," Nov. 18, 2011 (emphasis in original); available at: www.ncvhs.hhs.gov/wp-content/uploads/2014/05/111118p7.pdf.

In addition to its privacy rule, HIPAA contains a security rule that, in part, governs the disposal of PHI. *See generally* 45 C.F.R. Parts 160 & 164, subparts A & C; 45 C.F.R. §§ 164.306, 164.308, 164.310 & 164.312. HIPAA requires that covered entities and business associates implement policies and procedures to address the disposal of PHI, *see* 45 C.F.R. §164.530(c), including electronically stored information. *See* 45 CFR § 164.310(d)(2)(i). Yet neither HIPAA nor its regulations identify the means for disposal. Acceptable methods do, however, include shredding, pulverizing, melting, incinerating, and degaussing. *See* https://www.hhs.gov/hipaa/for-professionals/faq/575/what-does-hipaa-require-of-covered-entities-when-they-dispose-information/. As with the privacy rule explained above, insurance companies that sell non-health insurance lines of business are not subject to the security rule since, once again, those carriers are not covered entities or business associates. *See* 45 C.F.R. parts 160 & 164, subparts A & C.

B. Illinois Insurance Code

The IIC, 215 ILCS 5/1 – 1516, and the accompanying administrative code, 50 Ill. Admin. Code 101 – 9500, regulate the business of insurance in Illinois. Although records that would be considered PHI under HIPAA are exempt from HIPAA regulation while in the possession of property and casualty insurers, those same records are still subject to state regulation. Article XL of the IIC is devoted explicitly to insurance information and privacy protection. *See* 215 ILCS 5/1001 – 1024. As provided, the purpose of article XL is to:

> establish standards for the collection, use and disclosure of information gathered in connection with insurance transactions by insurance institutions, agents or insurance-support organizations; to maintain a balance between the need for information by those conducting the business of insurance and the public's need for fairness in insurance information practices, including the need to minimize intrusiveness; to establish a regulatory mechanism to enable natural persons to ascertain what information is being or has been collated about them in connection with insurance transactions and to have access to such information for the purpose of verifying or disputing its accuracy; to limit the disclosure of information collected in connection with insurance transactions; and to enable insurance applicants and policyholders to obtain the reasons for any adverse underwriting decision.

215 ILCS 5/1002.

In the case of property and casualty insurance, the protections provided by article XL extend to persons "who are subject of information collected, received or maintained in connection with insurance transactions involving policies, contracts or certificates of insurance delivered, issued for delivery or renewed in this State. . . ." 215 ILCS 5/1002(B)(2)(a). The IIC

goes on to regulate the need for and contents of notices to policyholders and applicants, including in instances of re-disclosure of information by insurance companies. *See, e.g.*, 215 ILCS 5/2-1005 – 1008 & 1014. To implement the statute's privacy protections effectively, the Department of Insurance has promulgated regulations governing financial as well as personal privacy information. *See* 50 Ill. Admin. Code 4001.10 – 4001.50 & 4002.10 – 4002.240.

Since property and casualty insurers are exempt from HIPAA regulation, they are also exempt from HIPAA's civil and criminal penalties for unauthorized disclosures. At the same time, these insurers have every incentive to comply fully with the privacy provisions of the IIC and the administrative code. Article XL includes a provision outlining a range of penalties for insurers that violate the IIC, starting with hearings and cease-and-desist orders and escalating to monetary fines, suspensions, and license revocations. *See* 215 ILCS 5/1020.

In addition to regulating insurers' use of records, Illinois also regulates their disposal and destruction. Regardless of the type of record or the 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. As the citation indicates, the Department of Insurance recently amended this regulation. The Department justified

increasing the retention period from five to seven years because it: "recognized that the process outlined by this rule was outdated, unnecessary, and not in line with other states' requirements."[6] This statement makes no sense.

Despite this bare bones explanation, the seven-year-retention rule reveals three facts relevant to this court's analysis. First, the IIC does not distinguish between records disclosed before or after the filing of a lawsuit; they are all treated the same. Second, the disposal of documents is predicated on a needs-based trigger, meaning that documents may be retained for more than seven years. In normal business practice, insurers typically begin the running of the retention period after the close of a transaction – a settlement or judgment – and the expiration of any appeals period. In some insurance lines, therefore, such as workers' compensation, carriers might be required to retain records for decades given work-related injuries and subsequent coverage claims. Third, there is no requirement that insurers return documents to the claimant, litigant, or provider instead of disposing of them; rather, insurance companies may dispose of records as they see fit.

This state's particular regulatory scheme serves various and vital purposes. It is plain that what would otherwise be considered PHI under HIPAA constitute fundamental information needed by the state to support its regulatory responsibility of auditing insurers to ensure the fair and efficient business of insurance for consumers. The same records constitute fundamental information needed by insurers to evaluate and pay claims. The records are also necessary for internal audits and regulatory disclosures required, for example, by Medicare and Medicaid. These records further ensure a carrier's solvency by providing a basis for sufficient reserves to avoid the liquidation of assets to pay claims or to avoid artificially high premiums to cover projected claims. The records also form the basis for insurance

---

[6] The department had implemented the five-year requirement in 1968. *See* 7 Ill. Reg. 4213 (Nov. 25, 1968).

accreditation, ratings, and reviews by independent and trade organizations. Finally, the records may prove to be key evidence used to defend the carrier against bad-faith claims brought by a particular plaintiff or a class of consumers. In short, the use of records is vital to the insurance industry and the state's regulation of it.

C. Illinois Constitution

Illinois is one of only ten states governed by a constitution expressly guaranteeing a right to privacy.[7] As provided, in part:

> The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, *invasions of privacy* or interceptions of communications by eavesdropping devices or other means.

Ill. Const., art. I, § 6 (emphasis added). Our Supreme Court has recognized as a general matter that the Illinois constitution, "goes beyond federal constitutional guarantees by expressly recognizing a zone of personal privacy, and that the protection of that privacy is stated broadly and without restrictions." *Kunkel v. Walton*, 179 Ill. 2d 519, 537 (1997), *citing In re Will Cty. Grand Jury*, 152 Ill. 2d 381, 391 (1992). The court further found that "[t]he confidentiality of personal medical information is, without question, at the core of what society regards as a fundamental component of individual privacy." *Kunkel,* 179 Ill. 2d at 537. This public policy is ultimately grounded on the sanctity of the physician-patient relationship. *See Petrillo v. Syntex Labs., Inc.*, 148 Ill. App. 3d 581, 587-88 (1st Dist. 1986). At the same time, "[r]easonableness is the touchstone of the privacy clause" and article I, section 6 "does not accord absolute protection against invasions of privacy. Rather, it is unreasonable invasions of privacy that are forbidden."

---

[7] *See also* Alaska Const. art. I, § 22; Ariz. Const. art. II, § 8; Calif. Const. art. I, § 1; Fla. Const. art. I, § 23; Haw. Const. art. I, §§ 6 & 7; La. Const. art. I, § 5; Mont. Const. art. II, § 10; S.C. Const. art. I, § 10; & Wash. Const. art. I, § 7.

Hope Clinic for Women, Ltd. v. Flores, 2013 IL 112673, ¶¶ 64, 65, *quoting Kunkel*, 179 Ill. 2d at 538.

This state's constitutional privacy protections for health information are reflected in a wide variety of statutes and regulations governing the creation, disclosure, maintenance, and use of that information. *See, e.g.*,

- Abortion Law of 1975, 720 ILCS 510/10
- AIDS Confidentiality Act, 410 ILCS 305/6 & 9
- Alcoholism and Other Drug Abuse and Dependency Act, 20 ILCS 301/30-5(b) & (bb)
- Child Care Act of 1969, 225 ILCS 10/15
- Community Integrated Living Arrangements Code, 59 Ill. Admin. Code 115.250
- Community Living Facilities Code, 77 Ill. Admin. Code 370.1230
- Community Services Act Code, 59 Ill. Admin. Code 132.20
- Dental Care Patient Protection Act, 215 ILCS 109/5(b)(4)
- DNA Indexing Act, 730 ILCS 5/5-4-3(f)
- Early Intervention Services System Act, 325 ILCS 20/12(b) & 89 Ill. Admin. Code 500.155
- Freedom of Information Act, 5 ILCS 140/7
- Genetic Information Privacy Act, 410 ILCS 513/15
- Hospital Licensing Act, 210 ILCS 85/6.17(d) & 77 Ill. Admin. Code 250.1510
- Illinois Public Aid Act, 305 ILCS 5/11-9
- Illinois Veterans' Homes Code, 77 Ill. Admin. Code 340.1800 & 340.1840
- Intermediate Care for the Developmentally Disabled Facilities Code, 77 Ill. Admin. Code 350.1610 & 350.1630
- Long-Term Care for Under Age 22 Facilities Code, 77 Ill. Admin. Code 390.1610, 390.1630 & 390.3320
- Managed Care Reform and Illinois Patient Rights Act, 215 ILCS 134/5(a)(4)
- Medical Patient Rights Act, 410 ILCS 50/3(d)
- Medical Practice Act, 735 ILCS 5/8-802
- Medical Studies Act, 735 ILCS 5/8-2101

- Mental Health and Developmental Disabilities Confidentiality Act, 740 ILCS 110/1 – 17
- Nursing Home Care Act, 210 ILCS 45/2-101, 2-105 & 77 Ill. Admin. Code 300.1810, 300.1820, 300.1840 & 300.3320
- Parental Notice of Abortion Act of 1995, 750 ILCS 70/25 & 70/35
- Respite Program Act Code, 89 Ill. Admin. Code 220.100
- Sheltered Care Facilities Code, 77 Ill. Admin. Code 330.1710 & 330.4320.

The same privacy right has been extended through the common law to include medical information exchanged pursuant to the Workers' Compensation Act. *See* 820 ILCS 305/1 – 30; *see also Hydraulics, Inc. v. Industrial Comm'n*, 329 Ill. App. 3d 166, 171-72 (2d Dist. 2002), *citing Petrillo*, 148 Ill. App. 3d at 591.

As is also evident from the discussion above, the right to privacy is also reflected in the IIC and its regulations. *See* 215 ILCS 5/1 – 1516; 50 Ill. Admin. Code 101 – 9500. Whether any of the permitted uses of what would otherwise be considered PHI possessed by insurers constitute an unreasonable infringement of the constitutional right to privacy is unknown. This court is unaware of any challenge to the constitutionality of this state's statutory and administrative regulation of information received, used, maintained, and disposed of by insurers.

II. HIPAA QPO

The convergence of these three bodies of substantive law brings into relief this court's twin goals. This court must remove property and casualty insurers from the untenable position of complying with a QPO that is inapplicable to their line of business and conflicts with the IIC and its regulations. This court must also ensure that any redrafting of the current HIPAA QPO protects Illinois residents' constitutional rights to privacy over the disclosure of their PHI.

A point of clarification at this juncture would be beneficial. The conundrum this court seeks to resolve concerns only PHI disclosed subject to the HIPAA QPO, in other words, *after* the filing of a lawsuit. This court does not address the scenario in which a person at the pre-suit stage voluntarily discloses the same information to an insurer in hopes of settling a claim. Given a plaintiff's voluntary disclosure, an insurer may receive, use, retain, and dispose of what would otherwise be considered PHI in compliance with the IIC and its regulations. This distinction is important as a legal matter, but likely has little import as a practical matter since insurers do not segregate information based on whether it is received before or during a lawsuit.

The problems identified above have a common source – the current HIPAA QPO. The QPO fails to account for both a plaintiff's right to privacy and an insurer's legal duty to comply with the state's statutory and regulatory insurance framework. The former is a question of constitutional law; the latter is a question of statutory law. These issues are addressed below.

It is evident that the current HIPAA QPO is subject to a facial constitutional challenge. Although most such challenges concern statutes, court orders, too, may be found to be constitutionally flawed. *See, e.g., McDunn v. Williams*, 156 Ill. 2d 288, 394 (1993) (appellate court decision unconstitutional). A facial challenge imposes far more stringent standards than an "as-applied" challenge because a challenged statute or order is facially invalid "only if no set of circumstances exists under which it would be valid." *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 305-06 (2008); *In re M.T.*, 221 Ill. 2d 517, 536 (2006) ("Successfully making a facial challenge to a statute's constitutionality is extremely difficult, requiring a showing that the statute would be invalid under *any* imaginable set of circumstances." (Emphasis in original)). A finding of facial invalidity voids the document for all parties; consequently such a decision is "manifestly, strong medicine that has been employed by the court sparingly and only as a last resort." *Pooh-Bah Enters., Inc. v. Cook County*, 232 Ill. 2d 463, 473 (2009), *quoting National Endowment for the Arts v.*

Finley, 524 U.S. 569, 580 (1998) (internal quotation marks omitted). In this instance, the medicine proposed by this court is far more palatable.

As noted above, HIPAA creates a floor of privacy protections that yields to any state law (or constitution) that imposes "requirements, standards or . . . specifications that are more stringent than . . . [those] imposed under the regulation." 45 C.F.R. § 160.203(b). The right to personal privacy guaranteed by article I, section 6 is unquestionably more stringent than HIPAA because the constitution expresses this state's public policy that "the individual's privacy interest in his *physical person* . . . must be protected." *Will Cty. Grand Jury*, 152 Ill. 2d at 391-92 (emphasis added) (addressing search and seizure violations). Such protection encompasses the disclosure of a person's PHI, which is the focus of HIPAA and *Kunkel*. *See* 179 Ill.2d at 537. The guarantees of article I, section 6 must also extend, however, to informing a plaintiff of the likely uses an insurer may subsequently make of her or his PHI.

That conclusion does not end this court's analysis because Illinois' constitutional right to privacy is not limitless. The Supreme Court has recognized that article I, section 6 prohibits only "unreasonable invasions of privacy." *Hope Clinic*, 2013 IL 112673, ¶¶ 64-65. To determine what is unreasonable, the court has followed a two-step analysis based on "the extent of one's expectation of privacy under the circumstances presented, as well as the degree of intrusiveness of the invasion of privacy." *In re Lakisha M.*, 227 Ill. 2d 259, 279 (2008), *citing People v. Caballes*, 221 Ill. 2d 282, 231 (2006), and *People v. Cornelius*, 213 Ill. 2d 178, 193-94 (2004). Employing that analysis, the court in *Kunkel*, held unconstitutional a Code of Civil Procedure section because there existed both: (1) an expectation of privacy over medical records; and (2) statutory overreach because a trial court could order the disclosure of medical information against the patient's wishes or dismiss the lawsuit for failure to comply. *See* 179 Ill. 2d at 539 (addressing 735 ILCS 5/2-1003(a)). In contrast, the court in *Lakisha M.* found that the constitution generally protected the

disclosure of DNA information, but that the DNA Indexing Act, *see* 730 ILCS 5/5-4-3, was narrowly tailored and, hence, constitutional. *See* 227 Ill. 2d at 280. Similarly, in *Hope Clinic*, the court upheld the Parental Notice of Abortion Act of 1995, 750 ILCS 70/1 – 70/99, because a minor has a right to privacy in choosing an abortion, but the statute's notification options were narrowly tailored based on the perceived need to treat minors differently than adults. *See Hope Clinic*, 2013 IL 112673, ¶ 64.

In this case, the two-step analysis establishes that the HIPAA QPO is unconstitutional. First, *Kunkel* makes it plain that all persons, including litigants, have an expectation of privacy over their personal medical information. *See* 179 Ill. 2d at 537. Second, the degree of intrusiveness imposed by the HIPAA QPO is substantial because it orders a plaintiff to disclose PHI without informing the plaintiff that the information will be used outside the scope of the litigation. Although the QPO explains that PHI may be disclosed to "the parties' insurers," it incorrectly characterizes the disclosure as one "reasonably connected with the . . . litigation. . . ." If that were true, a plaintiff could believe that her or his PHI was going to be used by an insurer to evaluate and settle the claim at issue in the litigation. In fact, the IIC and its regulations mandate insurers use health information in a wide variety of ways outside the litigation. Again, the issue here is not that the uses of what would otherwise be considered PHI outside of litigation fail to satisfy a compelling state interest. Rather, the issue is that the current HIPAA QPO fails to inform a litigant that the disclosure of her or his PHI will not be considered PHI after it has been disclosed to insurers and will be used by them.

This court is unaware of any Illinois decision addressing the constitutional, statutory, and regulatory issues arising from the conflicts created by the current HIPAA QPO. This court has, however, identified one highly pertinent decision from another jurisdiction that has addressed these issues. In *Cohan v. Ayabe*, 132 Haw. 408 (2014), the State of Hawai'i Supreme Court considered Cohan's petition for mandamus against Ayabe, an arbitration judge, who had affirmed an arbitrator's decision

ordering Cohan to sign broad authorizations for the disclosure of his medical records. *Id.* at 410. Cohan had previously objected to the entry of the HIPAA stipulated qualified protective order (SQPO) used in most Hawai'i circuit court litigation (and then available on the Hawai'i Bar Association's website). *Id.* at 411. (A copy of the bar association's HIPAA SQPO addressed in *Cohan* is attached as Exhibit D.)

The Hawai'i constitution's right to privacy is contained in two sections. As provided:

> The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.
>
> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated. . . .

Haw. Const., art. I, §§ 6 & 7. Writing for the court, Justice Richard Pollack considered five provisions of the HIPAA SQPO and found that each violated the Hawai'i constitution's right to personal privacy. The first subparagraph considered by the court permitted the disclosure use of Cohan's health information for the defendant's insurer's internal reviews, claims auditing, loss experience, premium setting, reserve calculations, and procurement of additional coverage. *See* 132 Haw. at 419. The court concluded that even if Cohan could not show any harm from such uses, the disclosure leads to uses that "are outside the underlying litigation. Accordingly, the language of SQPO paragraph 1(b)(2) exceeds the scope allowed by the State Constitution." *Id.*

The court reached the identical conclusion regarding another subparagraph that permitted the use of health information for "external review and/or auditing, such as by reinsurers, the

Insurance Commissioner, or external auditors. . . ." *Id.* at 420 (addressing subparagraph 1(b)(3)). The court recognized that HIPAA explicitly permits the use of health care information for external review and audits conducted by a variety of entities. *See id.* at 420, n. 19, *citing* 45 C.F.R. § 164.501(4). Yet the subparagraph authorized an insurer to share a plaintiff's health information with business associates, including reinsurers, a disclosure that goes beyond the scope of the litigation. *See id.* The court concluded that without comprehensive limitations in the SQPO, the provision violated the right to privacy. *See id.*

The court invalidated a third subparagraph permitting the use of de-identified information "for statistical or analytical purposes. . . ." *Id.* at 420-21 (addressing subparagraph 1(b)(7)). The court reasoned that:

> This provision does not explain what type of analysis will be conducted, who will compile the statistics, and whether the results will be made available to entities outside the litigation. Presumably, there is no need to strip the health information of identifiers if it remains inside the litigation. Because de-identified information is for use outside of the present litigation, the provision is not in accord with the Hawai'i constitutional protection for health information.

Id. at 421.

The court invalidated a fourth subparagraph for two reasons. First, it permitted insurers to maintain health information for "any record keeping requirements or obligations relating to any of the forgoing, and pertaining to the Subject Accident." *Id.* at 421 (addressing subparagraph 1(b)(8)). Since the provision provided "no ostensible limitation to allowing use of Cohan's information outside the subject litigation," it violated the constitution's privacy guarantee. *Id.* Second, the provision permitted the defendant's insurers to request "additional permissible categories of uses, disclosures, or maintenance be added" to the SQPO, and

prohibited Cohan from "unreasonably withhold[ing] consent. . . ." *Id.* For these very reasons the court also found that the subparagraph violated the constitution's privacy protections. *Id.*

Finally, the court addressed a paragraph requiring the defendant, within 90 days of the end of litigation, either to "return to Plaintiff's counsel or destroy the Health Information." *Id.* at 422 (addressing paragraph 5). The court reasoned that a 90-day, post-litigation grace period permitted insurers to use information outside the litigation and that article I, section 6, "by inference, require[d] parties to return records immediately after the litigation concludes." *Id.*

This court finds the Hawai'i Supreme Court's reasoning in *Cohan* highly persuasive for two significant reasons. First, the two constitutions are quite similar as written and applied. The privacy rights guaranteed in article I, section 6 of the Illinois constitution and article I, section 7 of the Hawai'i constitution are nearly word for word identical. In both states, this right extends to personal medical information. *See Kunkel*, 179 Ill. 2d at 537; *Brende v. Hara*, 113 Haw. 424, 426 (2007) (per curiam). Further, the compelling-state-interest provision expressly provided in article I, section 6 of the Hawai'i constitution corresponds with the reasonable-invasion exception recognized in Illinois common law interpreting the constitution. *See Hope Clinic*, 2013 IL 112673, ¶¶ 64-65 (prohibiting only unreasonable invasions of privacy).

Second, this Circuit Court's current HIPAA QPO contains many of the same constitutional deficiencies as did the SQPO at issue in *Cohan*. At a minimum, the HIPAA QPO does not explain that a plaintiff's PHI will no longer be considered PHI once disclosed to an insurer. The current HIPAA QPO permits the disclosure of PHI for subsequent uses that are unexplained. While some or all of those uses may fulfill the compelling state interest of regulating insurance, the document gives no explanation of those uses or the need for them. The order also fails to inform a plaintiff that her or his PHI may be re-disclosed to others outside of litigation, including reinsurers. Finally, the QPO misinforms a

plaintiff that her or his PHI will be returned or destroyed at the end of litigation, although state law requires that such information be retained for a minimum of seven years.

One could argue, as did the defendant in *Cohan*, that a plaintiff would be hard pressed to prove any particular harm arising from the use of what would otherwise be considered PHI outside of litigation. That argument only supports the unsupportable proposition that the violation of a constitutional right exists only if it leads to a monetarily compensable injury. The fact remains that the current HIPAA QPO fails in many ways to inform a plaintiff of the consequences of disclosing her or his PHI. That the current HIPAA QPO applies equally to each plaintiff who executes a release of her or his PHI leads to the inexorable conclusion that the current HIPAA QPO authorized by Circuit Court General Order 12-1 violates the right to personal privacy guaranteed by article I, section 6 of the Illinois constitution.

Since the HIPAA QPO violates the Illinois constitution's personal privacy guarantee, this court must determine if there exists a narrowly tailored solution. That solution must necessarily focus on the previously identified problem – the failure of the HIPAA QPO to inform a plaintiff that the disclosure of her or his PHI will allow a defendant's insurer to use and retain the information after the litigation ends. This court has concluded that a simple but comprehensive remedy comes in the form of a re-drafted HIPAA QPO containing an explicit waiver executed by the person whose PHI will be disclosed.

It is well established that Illinois law recognizes a person's ability to waive any and all rights, including constitutional guarantees. *See, e.g., Birkett v. Dockery*, 235 Ill. 2d 73, 78 (2009) (waiver of jury trial); *Cook Cty. College Teachers Union v. Board of Trustees*, 134 Ill. App. 3d 489, 481 (1st Dist. 1985) (waiver of privacy right over outside employment information); *Suburban Downs, Inc. v. Illinois Racing Bd.*, 316 Ill. App. 3d 404, 414 (1st Dist. 2000) (waiver of due process). To waive a constitutional

right, however, there must be "an intentional relinquishment or abandonment of a known right. . . ." *Smith v. Freeman*, 232 Ill. 2d 218, 228 (2009), *quoting People v. McClanahan*, 191 Ill. 2d 127, 137 (2000). A waiver "must [constitute] 'knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.'" *Id.*, *quoting McClanahan*, 191 Ill. 2d at 137, *citing cases*. In short, a waiver is an absolute necessity lest a plaintiff unknowingly forfeit her or his constitutional right to privacy. *See People v. Blair*, 215 Ill. 2d 443-44 & n.2, *quoting United States v. Olano*, 507 U.S. 725, 733 (1993) ("Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of the right, waiver is the 'intentional relinquishment or abandonment of a known right.'").

This court believes that its proposed HIPAA QPO to replace the current one authorized by General Order 12-1 strikes the necessary balance between guaranteeing a litigant's right to personal privacy and an insurer's needs to retain, use, and dispose of what would otherwise be considered PHI as required by the IIC and its regulations. *See* Ex. E. The proposed HIPAA QPO informs the litigant that by waiving the right to privacy, her or his PHI may be lawfully used by insurers. Further, the proposed HIPAA QPO lists those uses and indicates that they will continue for at least seven years. Finally, the proposed HIPAA QPO includes explicit statements that the litigant understands the contents of the order and the consequences of executing the waiver.[8]

In response to this court's most recent interlocutory memorandum opinion and order and proposed HIPAA QPO, State Farm submitted a brief explaining its objections. State Farm's overarching argument is that there exist "compelling [ ] state

[8] This court would be remiss if it did not warn litigants that would seek to use subpoenas or patient authorizations to circumvent any perceived shortcomings in the proposed HIPAA QPO. Subpoenas or patient authorizations that fail to include an explicit waiver of the right to privacy run the same risk of violating the constitutional guarantees of article I, section 6.

interests" requiring insurance carriers to receive, use, and retain a litigant's health information. State Farm Br. at 4. State Farm even quotes this court's interlocutory opinion and order in support of that proposition. Of greater insight is the affidavit State Farm provided of Robert E. Wagner, who has an extensive career in the insurance industry and the legal profession. Wagner avers in considerable detail the statutorily required uses of what would otherwise be considered PHI by the insurance industry. None of that is in dispute.

State Farm's focus on the insurance industry's statutorily compelled requirements is, ultimately, misdirected. The critical predicate fact is that the current HIPAA QPO permits the disclosure of a plaintiff's PHI without an explicit assurance that the plaintiff understands what the IIC requires and permits and consents to it. State Farm is unquestionably correct that there exists a compelling state interest for insurers to receive, use, and retain a plaintiff's PHI. There exists, however, no compelling state interest for a plaintiff to waive her or his right to privacy by disclosing PHI absent knowledge of its future use. Put another way, but for a plaintiff voluntarily filing a lawsuit and placing her or his medical condition at issue, the state's interest in or ability to obtain a plaintiff's PHI is nearly completely circumscribed. In short, the state's compelling interest arises only *after* a litigant has disclosed her or his PHI to an insurer.

State Farm's argument that the Illinois and Hawai'i constitutions have different constitutional standards for PHI disclosure is unavailing. The argument comes down to switching one set of nouns and adjectives – "compelling state interest" – for another – "reasonable invasion of privacy." State Farm argues there exists a difference between prohibiting an unreasonable invasion of privacy in Illinois, and permitting an invasion of privacy based on a compelling state interest in Hawai'i. Yet a compelling state interest must also be reasonable because the only invasion of personal privacy other than a reasonable one is an unreasonable one. And it is simply illogical and legally unsupportable to suggest that Hawai'i's constitution permits an

unreasonable invasion of privacy that serves a compelling state interest.

The cases on which State Farm relies do not lead to a different result. In *Lakisha M.*, for example, the court addressed the scope of the search-and-seizure clause of article I, section 6, not its privacy clause, when it addressed a challenge to the state's compelled collection of the defendant's saliva. *See* 227 Ill. 2d at 263. One critical distinction is that the saliva was for later use by the state, not a corporation. State Farm concedes as much when it writes that the court in *Lakisha M.* "held that *after* a properly compelled disclosure, the Government's subsequent *retention* and *use* of the DNA, did not give rise to any new or 'additional invasion of the respondent's privacy interest. . . .'" State Farm Br. at 8, n.4 (italics in original). The word State Farm fails to italicize for emphasis is the most important – "Government[ ]." The DNA database is exclusively for use by the state, not private companies. Two other cases on which State Farm relies are also off point because they do not address the constitution's privacy clause. *See People v. Caballes*, 221 Ill. 2d 282 (2006) (search-and-seizure challenge based on canine-sniff searches for illegal drugs); *In re M.A.*, 2014 IL App (1st) 132540 (challenging compelled registration under the Illinois Murderer and Violent Offender Against Youth Registration Act).

Hope Clinic is also substantially different. There, the court addressed, in part, a privacy challenge to the Parental Notice of Abortion Act provision requiring a minor seeking an abortion to notify an adult family member or obtain a judicial waiver of the notice. *See* 2013 IL 112673, ¶ 63. The court upheld the statute because it was narrowly drawn; notification needed to be given to one family member only. *See id. Hope Clinic* is distinct because the statute explicitly informed the minor of the reason for the disclosure. 750 ILCS 70/5 ("The General Assembly finds that notification of a family member . . . is in the best interest of an unemancipated minor" because "[t]he medical, emotional, and psychological consequences of abortion are sometimes serious and long-lasting, and immature minors often lack the ability to make

fully informed choices"). In contrast, the current HIPAA QPO does not give the plaintiff any information to justify the disclosure of her or his PHI to the defendant's insurer.

State Farm's reliance on *Kunkel* is also unhelpful. *Kunkel* held unconstitutional a Code of Civil Procedure provision requiring unlimited disclosure of a plaintiff's health information during discovery. *See* 179 Ill. 2d 519 (1997). State Farm apparently believes that *Kunkel* is persuasive because it concerns the disclosure of health information during discovery, but that is where any similarity to this court's inquiry ends. *Kunkel* has nothing to do with the disclosure of PHI *to insurers* during litigation, their use of that information, and its potential re-disclosure to third persons such as reinsurers. It is also plain that the *Kunkel* court did not have the benefit of HIPAA, its supporting regulations, and the now large body of federal and state case law extending personal privacy statutory rights to the disclosure of PHI.

Burger v. Lutheran General Hospital does not further State Farm's argument.[9] *See* 198 Ill. 2d 21 (2001). *Burger* stands for the proposition that it is reasonable for a patient to expect that healthcare providers would share the patient's health information "within the hospital setting." *Id.* at 53. The patient would, however, have a "justifiable expectation of privacy with respect to the release of medical information to third parties," consequently the Hospital Licensing Act makes such a disclosure a misdemeanor. *Id.*, *citing* 210 ILCS 85/6.17(i). Thus, the lesson from *Burger* is that the reasonably expected use of a plaintiff's PHI *in* litigation is not reasonably expected *outside* of litigation.

---

[9] It should be noted that State Farm initially quotes *Burger* from the section of the opinion addressing constitutional separation of powers, not the subsequent section addressing constitutional privacy concerns. State Farm Br. at 12.

Conclusion

The complex legal issues presented above are reconcilable through a plaintiff's explicit waiver of a right to privacy. Such a waiver will inform a plaintiff of the waiver's consequences. At the same time, the waiver will assure that property and casualty insurers may use what would otherwise be considered PHI as mandated by state law. For the reasons presented above, it is ordered that:

1. This order shall apply to all cases listed on Exhibit F;
2. State Farm is granted leave to intervene in all other cases subject to Judge James Flannery's July 13, 2016 sweep order in which State Farm is a defendant's insurer;
3. In each case in which State Farm is granted leave to intervene, the record will reflect that State Farm raised the same objections that it raised in this lawsuit as if those objections had been filed in each lawsuit;
4. State Farm's motion to compel the plaintiff to execute HIPAA authorizations for the release of her medical information or for a court order requiring its release is denied;
5. This order shall apply to all active cases in which a HIPAA QPO has been entered and shall apply to all future filed cases in which a HIPAA QPO will be entered;
6. This memorandum opinion and order is entered *nunc pro tunc* to July 25, 2017; and

7. A copy of this memorandum opinion and order including all exhibits will be provided as of this date to Presiding Judge James Flannery for consideration as a replacement to the HIPAA protective order authorized in General Order 12-1.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

DEC 15 2017

Circuit Court 2075

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

GENERAL ADMINISTRATIVE ORDER 12-1
STANDARD HIPAA QUALIFIED PROTECTIVE ORDER

Effective immediately, all Qualified Protective Orders, entered pursuant to the provisions of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") shall conform to the attached standard approved format, in Room 2005, as well as on all motion and individual calendar calls.

Pursuant to Law Division General Administrative Order 03-4, all motions and orders for HIPAA Qualified Protective Orders shall be presented in Room 2005 and on all motion and individual calendars as "Routine Motions," with proper notice, and must be specifically labeled and contain a specific reference to the HIPAA statute.

Any objections to the entry of HIPAA Qualified Protective Orders shall be submitted in accordance with the routine motion rules and/or standing orders of motion judges and calendar judges.

IT IS HEREBY ORDERED that this Order is effective September 19, 2012, and will be spread upon the records of this court.

Dated at Chicago, Illinois, this 19th day of September, 2012.

ENTER: William D. Maddux
HON. WILLIAM D. MADDUX
Presiding Judge
Law Division

ENTERED
JUDGE WILLIAM D. MADDUX-1559
SEP 19 2012
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

[redacted]

Exhibit "A"

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Plaintiff(s)	)	
-v-	)	NO:
Defendant(s)	)	

HIPAA QUALIFIED PROTECTIVE ORDER

This cause coming to be heard on the Motion of _____, for entry of a Qualified Protective Order pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA,"), due notice having been given, and the Court being fully advised in the premises:

IT IS HEREBY ORDERED AS FOLLOWS:

(1) The current parties (and their attorneys) and any future parties (and their attorneys) to the above-captioned matter are hereby authorized to receive, subpoena, and transmit "protected health information ("PHI") pertaining to _____, to the extent and subject to the conditions outlined herein;

(2) For purposes of this Qualified Protective Order, "protected health information" or "PHI" shall have the same scope and definition as set forth in 45 CFR 160.103 and 160.501. Without limiting the generality of the foregoing, "PHI" includes, but is not limited to, health information, including demographic information, relating to either:

(a) the past, present or future physical condition of an individual;
(b) the provision of care to an individual; and/or
(c) the payment for care provided to an individual, which identifies the individual or which reasonably could be expected to identify the individual.

(3) All "covered entities" (as defined by 45 CFR 160.13) are hereby authorized to disclose "PHI" pertaining to _____ to all attorneys, now of record, or who may become of record in the future of this litigation;

(4) The parties and their attorneys shall be permitted to use the "PHI" of

_____ in any manner reasonably connected with the above-captioned litigation. This includes, but is not limited to, disclosure to the parties, the attorneys' firm (*i.e.*, attorneys, support staff, agents and consultants), the parties' insurers, experts, consultants, court personnel, court reporters, copy services, trial consultants, jurors, venire members and other entities involved in the litigation process;

(5) At the conclusion of the litigation as to any defendant (defined as the point at which final orders disposing of the entire case as to any defendant have been entered, or the time at which all trial and appellate proceedings have been exhausted as to any defendant), that defendant, and any person or entity in possession of "PHI" received pursuant to Paragraph 4, *supra*, shall destroy any and all copies of "PHI" pertaining to _____, *except*:

(a) the defendant that is no longer in the litigation may retain "PHI" generated by him/her/it; and

(b) the remaining defendants in the litigation, and persons or entities receiving "PHI" from those defendants, pursuant to Paragraph 4, *supra*, may retain "PHI" in their possession;

(6) This order shall not control or limit the use of "PHI" pertaining to _____ that comes into possession of any party, or any party's attorney, from a source *other than* a "covered entity" (as defined in 45 CFR 160.103);

(7) Nothing in this order authorizes defense counsel to obtain medical records or information through means *other than* formal discovery requests, subpoena, depositions, patient authorization, or through attorney-client communications;

(8) Nothing in this order relieves any party from complying with the requirements of:

(a) the Illinois Mental Health & Developmental Disabilities Confidentiality Act (740 ILCS 110/1 *et. seq.*);

(b) the Aids Confidentiality Act (410 ILCS 305/1 *et. seq*); or

(c) state and federal law which protects certain drug and alcohol records (20 ILCS 301/30-5; 42 USC 290dd-3, 290ee-3 and 42 CFR Part 2).

Name/#:
Atty for:
Address:
City/State:
Phone:

ENTER:

_____
JUDGE

NO.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

GREGORY FRANKLIN, Plaintiff, v. PACE SUBURBAN BUS DIVISION OF THE REGIONAL TRANSPORTATION AUTHORITY, a Municipal Corporation, et.al., Defendants.	)	No.: 14 M1 302527 *In re: HIPAA*

ORDER

This matter coming to be heard on the Court's own motion, and the Court having been fully advised in the premises, the Court hereby states:

Motion Section Judges are being presented with a large number of motions challenging the language of the standard Law Division HIPAA order, on the basis that it's terms, which require the return or destruction of the protected health information ("PHI"), conflict with an insurers' federal and state statutory obligation to "maintain a complete record of all books, records and accounts." 215 Ill. Comp. Stat. Ann. 5/133. Therefore, in the interests of justice and judicial economy, one judge, Judge John Ehrlich, is designated to hear these motions on a consolidated basis.

IT IS HEREBY ORDERED:

1. **All pending and subsequently filed motions challenging the terms of the standard Law Division HIPAA order, are hereby consolidated.**

2. **Judge John Ehrlich is designated to hear the consolidated motions, and has set a general status for all pending motions on August 9, 2016, at 10:00 a.m. in Room 2209.**

3. **All cases shall remain before their assigned Judges for all other issues, and all other court dates, including case management dates, trial setting dates, and trial call dates shall stand.**

JUDGE JAMES P. FLANNERY
JUL 13 2016
Circuit Court-1505

Judge James P. Flannery, Jr.
Presiding Judge, Law Division

1505

[redacted]

Exhibit "B"

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

MARC SHULL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No.: 15 L 9759
	)	*In re: HIPAA*
ERIC ELLIS,	)	
	)	
Defendant.	)	

AMENDED ORDER

This matter coming to be heard on the Court's own motion, by agreement of the parties, and the Court having been fully advised in the premises, the Court hereby states:

Motion Section Judges are being presented with a large number of motions challenging the language of the standard Law Division HIPAA order, on the basis that its terms, which require the return or destruction of the protected health information ("PHI"), conflict with an insurers' federal and state statutory obligation to "maintain a complete record of all books, records and accounts." 215 Ill. Comp. Stat. Ann. 5/133. Therefore, in the interests of justice and judicial economy, one judge, Judge John Ehrlich, is designated to hear these motions on a consolidated basis.

The case originally assigned regarding this issue, *Gregory Franklin v. Pace Suburban Bus Division Of The Regional Transportation Authority, a Municipal Corporation, et.al.*, 14 M1 302527, having been dismissed.

IT IS HEREBY ORDERED:

1. **All pending and subsequently filed motions challenging the terms of the standard Law Division HIPAA order, are hereby consolidated.**

2. **Judge John Ehrlich having been designated to hear the consolidated motions, the above captioned case is assigned to Judge Ehrlich, Calendar H, for the limited purpose of addressing this issue.**

3. **All cases shall remain before their assigned Judges for all other issues, and all other court dates, including case management dates, trial setting dates, and trial call dates shall stand.**

JUDGE JAMES P. FLANNERY

MAR 27 2017

Judge James P. Flannery, Jr.
Presiding Judge, Law Division

Circuit Court - 1506

Exhibit "C"

_____ [Header or Reference]

STIPULATED QUALIFIED PROTECTIVE ORDER

Plaintiff _____ ("Plaintiff") and Defendant _____ ("Defendant"), by and through their respective attorneys, hereby stipulate as follows:

PURPOSE AND DEFINITIONS

The purpose of this Stipulated Qualified Protective Order ("Order") is to facilitate the release and/or use of Plaintiff's health and medical information obtained with Plaintiff's HIPAA-compliant authorization and/or pursuant to Rule 26(a) of the Hawaii Rules of Civil Procedure, and/or otherwise voluntarily produced and marked confidential (collectively and interchangeably "Health Information"), for purposes of the above-captioned case, while protecting Plaintiff's privacy right under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") described in 45 C.F.R. § 164.512(e), and under the Right of Privacy under Article I, Section 6 of the Hawaii State Constitution, by limiting the use of that Health Information. Plaintiff's Health Information protected under this Order shall not include any of Plaintiff's health or medical information that is otherwise publicly available.

STIPULATED ORDER

The parties stipulate that Plaintiff's Health Information is protected, and, therefore, the disclosure and use of that Health Information shall be conducted pursuant to the following conditions:

1. **Non-Disclosure Requirement**: Except as provided herein, none of Plaintiff's Health Information obtained from any source shall be disclosed or used by anyone or by any entity for any purpose, without Plaintiff's explicit written consent.

(a) **Specifically Precluded Uses**: It is specifically understood and agreed that

none of Plaintiff's Health Information shall be used/disclosed for or to ISO (f.k.a. Insurance Services Office, Inc.) or any data base, index or similar compilation maintained by any person or entity. It is specifically understood and agreed, however, that the foregoing shall not prohibit Defendant or his/her/its attorney or insurer from summarizing or compiling Plaintiff's Health Information for use in this claim only.

(b) **Specifically Allowable Uses, Disclosures, and Maintenance**: It is specifically understood and agreed that Plaintiff's Health Information may be used, and/or disclosed, and/or maintained, without Plaintiff's consent as may be required to comply with state or federal laws/rules, and court, arbitrator, or administrative orders (including subpoenas duces tecum), and in relation to any claim, litigation, and/or proceeding arising out of the accident/incident of _____ ("Subject Accident"), including the following:

(1) for the subject case, including for evaluation, investigation, negotiations, mediation, arbitration, litigation and/or claims handling;

(2) for Defendant's and/or his/her/their/its insurer's internal review and/or auditing, including the handling and disposition of any claim or matter related to the Subject Accident, communication between Defendant and his/her/its insurer/underwriter/agent relating to the review and/or audit of claims for the purpose of setting premiums, calculating reserves, calculating loss experience, and/or procuring additional coverage, it being understood and agreed that information will not be used for any record compilation or database of Plaintiff's claim history;

(3) for external review and/or auditing, such as by reinsurers, the Insurance Commissioner, or external auditors;

(4) for subrogation and reimbursement matters concerning the Subject Accident, such as subrogation or reimbursement claims for workers' compensation liens, medical liens, or other insurers' claims for subrogation, reimbursement, or contribution relating to the Subject Accident;

(5) for fraud prevention, investigation, reporting, or action relating to the Subject Accident;

(6) for any legally required reporting to governmental health or medical insurance organizations or their private contractors for Plaintiff's health care and expenses related to the Subject Accident;

(7) for statistical or analytical purposes, provided that Plaintiff's personal identification information (e.g., name, specific street address, specific birth date, Social Security number, driver's license number) is not included in such review or use of Health Information; and

(8) for any record keeping requirements or obligations relating to any of the forgoing, and pertaining to the Subject Accident.

The above-noted permissible uses, disclosures, and maintenance provisions are not intended to circumvent the intent of this Order to protect Plaintiff's Health Information, and are not intended to unreasonably limit a party's or their counsel's or insurer's record-keeping obligations or requirements. Defendant or his/her/its agents, attorneys, or insurers may request that additional permissible categories of uses, disclosures, or maintenance be added. Plaintiff shall not unreasonably withhold consent, provided that the additional categories requested are consistent with the intent of this Order.

2. **Acknowledgment Requirement**: In order to protect Plaintiff's Health Information under this Order, any counsel, employee of Defendant, or agent or employee of any recipient who intends to disclose Plaintiff's Health Information to anyone other than Plaintiff or Defendant, or their attorneys or employees ("Others"), for substantive purposes, shall first provide such Others a complete copy of this Order and shall obtain from such Others a signed Acknowledgment of the requirements of this Order in the form attached as Exhibit "A". With respect to the Defendant's insurer, an Acknowledgment signed by an authorized representative shall suffice. A signed Acknowledgment is not required for disclosure to the court, mediator, arbitrator, or jury as related to any case, claim, or proceeding arising out of the Subject Accident.

3. **Order Compelling Compliance with Subpoena Duces Tecum**: In the event that a non-party refuses to release Plaintiff's Health Information, pursuant to a subpoena duces tecum, it is hereby ORDERED that such non-party produce the information identified in the subpoena duces tecum in its custody, possession, or control, to the counsel of record in this action or proceeding and/or their designated court reporting company, without the need for a separate Court Order or further authorizations signed by Plaintiff. This paragraph shall not apply if an objection is timely raised or a motion to quash is timely filed.

4. **Procedures for Filing Health Information**: In the event that Defendant intends to file or disclose Plaintiff's Health Information in any public filing, he/she/it will give Plaintiff ten (10) days' notice of such intention, including identification of the specific Health Information Defendant intends to file or disclose. This Order does not require or preclude the sealing of Health Information. If Plaintiff believes that the identified Health Information requires the additional protection of filing with the Court under seal, Plaintiff shall identify the specific Health Information to Defendant as soon as practicable, but no later than ten (10) days after such

notice. If within two (2) weeks after Plaintiff's identification the parties are unable to agree as to the extent of additional protection, if any, to be applied, Plaintiff shall file an appropriate motion with the Court for a determination as to whether, and to what extent, the Health Information identified by Plaintiff shall be sealed or otherwise further protected. The parties shall exercise good faith efforts to carry out the provisions of this Order.

It is further agreed that Health Information submitted for purposes of Arbitration, Mediation, and/or Evidence Rule 408 settlement communications are not to be considered public disclosures of Health Information.

5. **Return or Destruction of All Copies**: Within ninety (90) days after the final conclusion of the above-captioned case by fully-executed non-litigation settlement agreement, filed stipulation for dismissal with prejudice, or final judgment (i.e., a judgment as to which the time for appeal has run), Defendant, at his/her/its counsel's option, shall either return to Plaintiff's counsel or destroy the Health Information. Counsel for Defendant shall provide written confirmation to Plaintiff's counsel that counsel for Defendant has destroyed and/or returned all copies of Plaintiff's Health Information, and made a good faith effort to confirm that Others have destroyed all copies of Plaintiff's Health Information .

This paragraph shall not apply to Health Information retained by insurance carriers, law firms, courts, and court reporters for the specifically allowable uses, disclosures, and maintenance stated in paragraph 1(b), above, and such Health Information need not be returned or destroyed.

6. **Jurisdiction and Governing Law**: The Court of the Circuit in which the above-captioned case arose shall have jurisdiction to enforce and/or modify this Order under Hawaii law. Subject to any contrary provision of Hawaii or federal law, no citation, contempt or other

sanction shall be imposed pursuant to Hawaii law without a hearing and proof, to the satisfaction of the Court, of a material breach of this Order.

7. **Continuing Enforceability**: All provisions of this Order shall continue to be binding after the conclusion of the above-entitled case, unless otherwise agreed by the parties or ordered by a Court.

DATED: _____, Hawaii _____.

_____
Attorney for Defendant

_____
Attorney for Plaintiff

APPROVED AND SO ORDERED:

_____
JUDGE OF THE ABOVE-ENTITLED COURT
[or]
ARBITRATOR

ACKNOWLEDGMENT OF STIPULATED QUALIFIED PROTECTIVE ORDER

Re: _____ v. _____; Civil No.: _____

I have read and I understand the Stipulated Qualified Protective Order ("Order") regarding the use and disclosure of Plaintiff's Health Information. I understand that I (and my agents and employees) am/are bound to comply with the terms of the Order.

Dated: _____

_____
(Signature)

_____
NAME

_____
BUSINESS ADDRESS

_____

_____
CITY, STATE ZIP CODE

_____
BUSINESS TELEPHONE NUMBER

EXHIBIT "A"

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

_____	)	
Plaintiff,	)	
	)	
v.	)	No. _____
	)	
_____	)	
Defendant.	)	

HIPAA PROTECTIVE ORDER

This court explicitly finds that this court order is necessary to:

1. Protect a party's right to privacy as guaranteed by article I, section 6 of the Illinois constitution for each party in this lawsuit;
2. Ensure the parties' compliance with the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and its accompanying rules and regulations governing the disclosure, maintenance, use, and disposal of protected health information (PHI), *see generally* 45 C.F.R. 160.103 & 160.501,
3. Require covered entities, *see* 45 C.F.R. 160.103, to disclose a party's PHI for use in this litigation without a separate disclosure authorization;
4. Permit 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 compliance and conformity with all applicable federal laws and regulations and the Illinois Insurance Code and its accompanying rules and regulations; and
5. Further the interest of the State of Illinois in regulating the business of insurance.

A party disclosing PHI explicitly stipulates that she or he:

1. Read this court order before signing their name to be bound by it;
2. Discussed the contents of this court order with their attorney of record in this litigation and had the opportunity to ask questions;
3. Was informed of and fully understands the consequences of the entry of this court order;
4. Freely and without reservation stipulates to the entire contents of this court order; and
5. Understands that by refusing to consent to the contents of this order, the court may impose sanctions up to and including dismissal of the complaint.

[redacted]

Exhibit "E"

Based on these findings and stipulations, this court orders the following:

1. The PHI of any party in this lawsuit may not be disclosed for any reason without that party's prior written consent and an order of this court.

2. A party that has disclosed PHI and agreed (as indicated by signature) to the entry of this court order explicitly waives the right to privacy over the disclosed materials but only to the extent provided in this court order. The only disclosures explicitly waived and expressly permitted are those:

A. 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 statutes, rules, and regulations for purposes including:

1. Reporting; investigating; evaluating, adjusting, negotiating, arbitrating, litigating, or settling claims;
2. Compliance reporting or filing;
3. Identifying and reporting criminal or unlawful conduct;
4. Required inspections and audits;
5. Legally required reporting to private, federal, or state governmental health or medical insurance organizations, including, but not limited, 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;

B. Ordered by this or another court or arbitral body or by subpoena for purposes of subrogation, reimbursement, or payment of liens arising out of or related to this lawsuit; and

C. Necessary to comply with any other federal or state laws, rules, or regulations, but only with the party's express consent and entry of an appropriate court order.

3. Any covered entity over which this court has jurisdiction that fails or refuses to disclose PHI in accordance with this court order is subject to all sanctions authorized by the Code of Civil Procedure and the Illinois Supreme Court rules.

4. A party to this lawsuit may provide PHI to an undisclosed consulting expert or controlled expert witness as defined in Illinois Supreme Court Rule 213(f)(3), but only after receiving acknowledgement that each such expert or witness agrees to be bound by the terms of this order.

5. Immediately after the conclusion of this lawsuit, as indicated by a court-entered order of dismissal, all parties and other persons or entities subject to this court order possessing PHI shall by agreement either return it to the party or non-party about whom it concerns or their attorney of record in this lawsuit or destroy it by shredding, pulverizing, melting, incinerating, or degaussing. This provision does not apply to insurers who possess what would otherwise be considered PHI under HIPAA, but only to the extent as limited in paragraph 2.

6. No parties or their attorneys, agents, or representatives are permitted to request, obtain, or disclose PHI or any other type of medical bills, records, or related information other than through the formal discovery procedures authorized by the Code of Civil Procedure, Illinois Supreme Court rules, and orders of this court.

7. The parties are prohibited from including or attaching PHI to any document filed with the Clerk of the Circuit Court. PHI necessary for the court's consideration of any matter must be provided separately.

8. This court retains jurisdiction to enforce the terms of this order after the conclusion of this litigation.

_____

Printed Name

Dated: _____ _____

Signed by Plaintiff / Legally Designated Representative / Other (circle one)

Dated: _____ _____

Counsel for Plaintiff

_____

Circuit Court Judge

Adams, Phyllis v. Campione, Gloria; Campione, Joseph	2015 L 005968
Alexander, Michael v. Jackson, Thomas; Jackson, Ray; Jackson, Beatrice; Chaimberlain Group, Inc. & AR BE Garage Doors Inc.	2016 L 000508
Arreguien, Maria, et al v. Garcia, Francisco et al.	2015 L 012112
Attard, John v. Deitcher, Linnea	2015 L 009281
Berrong, Crystal, et al. v. Patel, Dipali Arvind, et al	2016 L 010345
Birholz-Benter, Irene v. Schermerhorn Commercial, et al.	2016 L 063029
Carpenter, Larry v. Niemiec, Felicjan	2016 L 000195
Cutts, Laura v. Endick, Lauren, et al.	2014 L 012461
Griffin, John and Griffin, Debra v. Dugan, Joseph; L&S Cartage Co., Inc.; Howled, Ethel; Watkins, Christopher; and Bluford, Jennifer	2016 L 010120
Hennagin, Donald v. Amato, William	2014 L 007935
Hernandez, Luis v. Gutwillig, Bradley	16 L 007556
Karsten, Maureen v. Kwon, Jun, et al.	2016 L 003990
Luna, Marlene v. McCain, Sandra	2016 L 002401 Consolidated with 2015 L 008576
Lurie, Tierni v. Futures, Inc., et al.	2015 L 012989
Marek, Marleen v. Peninsula Chicago; Peninsula Chicago Hotel; Peninsula Chicago LLC; Adams, Jimmy; Arnswald, James; Arnswald Mandy; Ghast, Thomas; Ghast Valerie; Rosenfeld, Bridget Bean; Rosenfeld , Jay Bean; Tosiou, Athena; Tosiou, Gloria; Tosiou, Mary Margaret; and Wolotka, Julianne Tosiou	2015 L 012272
McNair, Sandra Williams v. Cotton, Kenisha and McNair, Larry	2016 L 010933
Mishigian, Tamara v. Abrams, Jonathan	2016 L 005256 (2011 L 001303)
Nizami, Syed v. Haskins, Patrick, et al.	2014 L 012611
Noel, Marilyn v. Brown, Steven	2016 L 001931
Nosko, Gary v. C&E Outdoor Services, et al.	2016 L 001792
Parker, Milton, et al v. Nagornov, Alexander, et al	2016 L 009031
Podszus, Rodney v. Kenwood's Dorchester Condo; Clement, Katrina; Kenwood's Dorc Condomin; Podszus, Matthew	2017 L 000554
Proctor, Carolyn v. Muhammad, Fahir and Rodriguez, Rigoberto	2016 L 012021
Punavela, Allison v. Tirol, Dennis; Madrigal, Jose; and Saithan Satha LLC	2015 L 006088
Rivera, Teresa et al. v. Flatley, William, et al.	2011 L 002578
Salek, Krzyzstof v. Hagle, Todd; Rekuliakas, Valentinas; Taskin Construction, Inc.; Val's Construction Inc.	2016 L 12318

Exhibit "F"

Smith, Jalyssa v. Allen, Thomas and Russell, Lisa	2016 L 010307
Stevenson, Scott v. Loots, Fredrick; Bjelejac, Dragan; Charles, William; Papalucas, Robbin; and Fedex Ground Package System	2016 L 008193
Trudell, Lee v. Checker Taxi, et al.	2015 L 012939
Williams, Vetra v. Monroe, Nicole, et al	2016 L 009849
Gayford, Noreen R. v. Nordstrom Inc., SBEMCO International, Inc., an Iowa Corporation dba Matting by Design and Munoz Flooring, Inc.	2017 L 001034
Pagan, Alicia v. Clifford Sherrier and Bobbie Sherrier a/k/a Bobbie Dolack	2017 L 006835
Robinson, Joyce v. Cook-Dupage Transportation Company	2017 L 002610
Zambrano, Ricardo, et al. v. Delgado, Gabriel; Ramos-Perez, Everardo; and Rojas, Teresa	2017 L 004502
Perkins, Jacquelyn and Gordon, Derrick v. Bourgoyne, Freddie	2016 L 007844
Spingola, Valerie v. Beltrand, Julio, Mendoza, Abel, and Minkus, Sara A.	2017 L 05766
Gonzalez, Angel v. Pashke, Aaron and Lopez Jr., Francisco	2017 L 005030
Sobczak, Idiatu v. Mayfield, Jennifer and Najjarpour, Michael	2017 L 004403
Ashour, Ahmed v. Sendzik, Kaitlyn, et al.	2017 L 004254
Katsigiannis, Giovanni v. Hollywood Motors, Inc., et al.	2017 L 008817