Docket No. 125918

IN THE ILLINOIS SUPREME COURT

ROSEMARIE HAAGE, Plaintiff-Appellee, v. ALFONSO MONTIEL ZAVALA, PATRICIA SANTIAGO, JOSE PACHECO-VILLANUEVO, OKAN ESMEZ and ROSALINA ESMEZ, Defendants, and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Intervenor-Appellant.	On Rule 307 Interlocutory Appeal from the Circuit Court of the Nineteenth Judicial Circuit Lake County, Illinois Consolidated Docket Nos. 2-19-0499 & 2-19-0500 Court No. 17 L 897 The Honorable Mitchell L. Hoffman, Judge Presiding
AGNIESZKA SURLOCK and EDWARD SURLOCK, Plaintiffs-Appellees, v. DRAGOSLAV STARCEVIC, Defendant, and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Intervenor-Appellant.	On Rule 307 Interlocutory Appeal from the Circuit Court of the Nineteenth Judicial Circuit Lake County, Illinois Consolidated Docket Nos. 2-19-0499 & 2-19-0500 Court No. 18 L 39 The Honorable Diane E. Winter, Judge Presiding

BRIEF AND ARGUMENT OF INTERVENOR-APPELLANT

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS AND POINTS AND AUTHORITIES

NATURE OF THE CASE

In two cases, plaintiffs sued to recover damages for bodily injuries occasioned by the alleged negligence of defendants in driving their automobiles. When plaintiffs moved for entry of a protective order and authorization to disclose protected health information ("PHI"), with a proposed HIPAA protective order,[1] defendants' liability insurer in each case, State Farm Mutual Automobile Insurance Company ("State Farm"), petitioned to intervene and proposed the standard medical protective order used in the Law Division of the Circuit Court of Cook County ("Cook County protective order"). Unlike the Cook County protective order, plaintiffs' proposed HIPAA protective order required State Farm to return or destroy all PHI pertaining to plaintiffs at the end of the litigation. The trial court granted State Farm's petition to intervene in each case. Thereafter, over State Farm's objections, the trial court found that HIPAA preempted state insurance law and regulations, granted plaintiffs' motion for the entry of their HIPAA protective order, and denied State Farm's request for the entry of the Cook County protective order. The appellate court affirmed, holding: (1) State Farm was not a "covered entity" under HIPAA but nonetheless subject to the use-and-disclosure restrictions set forth in the trial court's protective order; (2) Illinois insurance law and regulations did not require State Farm to retain plaintiffs' PHI at the end of the litigation; (3) HIPAA preempted any conflicting Illinois law and regulations requiring property and casualty insurers to retain records and allowing them to use and disclose PHI for lawful purposes at the end of the litigation; (4) the Cook County protective order violated the requirements of a HIPAA-

[1] Referring to the Health Insurance Portability and Accountability Act of 1996, Pub.L 104-191 (Aug. 21, 1996), 110 Stat.1936 (1996), codified at 42 U.S.C. § 1320d *et seq.*

qualified protective order and acted as an obstacle to accomplishing and executing HIPAA's full purposes and objectives; (5) the McCarran-Ferguson Act did not compel reverse preemption; and (6) the trial court did not have to consider alternative HIPAA-authorized methods of disclosure of plaintiffs' PHI before entering the protective order.

No questions are raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

Whether the appellate court properly held that HIPAA requires the use of HIPAA-qualified protective orders in judicial proceedings and preempts Illinois insurance laws and regulations that conflict with the requirements of HIPAA-qualified protective orders.

Whether the protective orders upheld by the appellate court improperly prevent property and casualty insurers from retaining, using, and disclosing plaintiffs' PHI for required and permitted purposes under state and federal law.

STATEMENT OF JURISDICTION

In *Surlock v. Starcevic*, Lake County Cir. Ct. No. 18 L 39, State Farm appealed under Supreme Court Rule 307(a)(1) (Ill. S. Ct. R.307(a)(1) (eff. Nov. 1, 2017)) from the trial court's memorandum opinion and order (R.C619-29) and the HIPAA protective order entered on May 15, 2019 (R.C630-33). Within 30 days, State Farm filed a notice of interlocutory appeal on June 12, 2019 (R.C689-90).

In *Haage v. Montiel Zavala*, Lake County Cir. Ct. No. 17 L 897, State Farm appealed under Supreme Court Rule 307(a)(1) from the trial court's memorandum opinion and order (R.C613-22) and the HIPAA protective order entered, respectively, on May 15, 2019 and May 16, 2019 (R.C623-26). Within 30 days, State Farm filed its notice

of interlocutory appeal on June 12, 2019 (R.C681-82).

On June 26, 2019, the appellate court consolidated both appeals for briefing and disposition. On March 13, 2020, the appellate court affirmed the trial court in an opinion filed in the consolidated appeals. On April 13, 2020, State Farm timely petitioned for leave to appeal or as a matter of right, which this court granted on September 30, 2020. This appeal is taken pursuant to Supreme Court Rules 315 (Ill. S. Ct. R.315) (eff. July 1, 2018)) and 317 (Ill. S. Ct. R.317) (eff. July 1, 2017)).

STATEMENT OF FACTS

As the appellate opinion sets forth the history leading to the appeal, State Farm will supplement its brief with additional facts only as necessary to an understanding of the issues on appeal.

Proceedings in the Trial Court on Plaintiffs' Motion for a Protective Order

Surlock v. Starcevic

In response to plaintiffs' motion for entry of a protective order, State Farm petitioned to intervene and proposed that the PHI at issue be produced subject to the Cook County protective order used pursuant to General Administrative Order 17-1 since January 2, 2018 (R.C1-73).[2] After the trial court granted State Farm leave to intervene (R.C130), State Farm objected to plaintiffs' proposed HIPAA order (R.C131-476).

[2] As the appellate court noted in its opinion, ¶ 22 n.1, General Administrative Order 17-1 was vacated by General Administrative Order 18-1 on October 29, 2018 (R.C108), which made minor modifications to the Cook County protective order not relevant to the appeal (R.C104-08). General Administrative Order 18-1 was the subject of Proposal 18-01 before the Illinois Supreme Court Rules Committee. If the proposal had been adopted, the Cook County protective order would have been incorporated into Supreme Court Rule 218. Ill. S. Ct. R.218 (eff. July 1, 2014). General Administrative Order 18-1 is included in the appendix to this brief for the Court's convenience (A.80-A.84).

State Farm supported its objections with filings and evidentiary materials submitted in the consolidated Cook County cases (R.C158-442), including protective orders entered in state and federal district cases which did not have "return or destroy" provisions, and which allowed liability insurers to retain, use and disclose records containing PHI consistent with applicable state law (R.C195-99; R.C196-98; R.C200-202; R.C203-04; R.C206-08; R.C209-11; R.C212-13; 214-19). State Farm also submitted affidavits from a former Director of the Illinois Department of Insurance and insurance industry experts which showed that property and casualty insurers use and exchange PHI with outside insurance-support organizations for a variety of statutorily required or permitted administrative, legal and financial purposes, and which are critical to allowing property and casualty insurers to efficiently provide insurance, prevent insurance fraud, and meet their regulatory obligations (R.C267-76; R.C434-37; R.C439-42; R.C444-46).

State Farm included the memorandum opinion and order entered by Cook County Circuit Court Judge John H. Ehrlich that led to the Cook County order (R.C448-76).[3] Judge Ehrlich recognized that property and casualty insurers are not among the "covered entities" subject to HIPAA and its privacy regulations concerning use or disclosure of protected PHI (R.C454-55). Judge Ehrlich found that the prevailing medical protective orders in Cook County were unenforceable because they improperly subjected property and casualty insurers to HIPAA regulations when, in fact, such insurers were not covered entities subject to HIPAA (R.C456). Judge Ehrlich also concluded that information that would be otherwise considered PHI was essential for insurers to function (R.C456-57).

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[3] For the court's convenience, the appendix to this brief includes a copy of Judge Ehrlich's opinion and order filed in *Shull v. Ellis*, Cook County Cir. Ct. No. 15 L 9759, on December 15, 2017 (A.85-A.114).

Next, Judge Ehrlich turned to the Illinois Insurance Code and Administrative Code which regulate property and casualty insurers in Illinois (R.C458-61). He noted this regulatory scheme served various and vital purposes and that the information in insurers' records was necessary for: (1) auditing insurers to ensure fair treatment of consumers; (2) evaluating and paying claims; (3) internal audits and regulatory disclosures required by Medicare and Medicaid; (4) ensuring a carrier's solvency, accreditation, ratings; and (5) providing evidence to defend insurers from bad-faith claims (R.C460-61).

Judge Ehrlich concluded that, to pass muster under state law, specifically under the 1970 Illinois Constitution, it would be necessary to strike the proper balance between a litigant's privacy rights and the state's compelling interest in allowing insurers to receive, use, and retain private medical information (R.C471-72). The order Judge Ehrlich entered with his opinion explicitly informed litigants that by executing a waiver of their privacy rights, they understood that they were allowing insurers to use their PHI for lawful purposes after the litigation ended (R.C471).

On February 1, 2019, plaintiffs replied and argued: (1) HIPAA preempted any less restrictive state law and regulations of privacy; (2) plaintiffs' proposed HIPAA order imposed no undue restrictions or obligations on State Farm and did not conflict with any federal requirements; (3) even if State Farm were exempt from HIPAA, plaintiffs' PHI would be entitled to protection; and (4) the court should adopt plaintiffs' proposed HIPAA order (R.C478-506).

On February 13, 2019 the trial court heard the parties' arguments and took the matter under advisement (R.C510-95). The trial court later asked the parties for supplemental briefing (R.C596). Plaintiffs and State Farm filed supplemental briefs on

April 18, 2018 (R.C598-608; R.C611-18).

On May 15, 2019, the trial court rejected State Farm's proposed order, granted plaintiffs' motion (R.C619-29) and entered plaintiffs' proposed HIPAA protective order (R.C630-33). State Farm timely appealed on June 12, 2019 (R.C689-90).

Haage v. Montiel Zavala

In response to plaintiff's motion for entry of a protective order, State Farm similarly petitioned to intervene and proposed the standard Cook County protective order (R.C1-73). After the trial court granted State Farm leave to intervene (R.C127-28), the parties made the same arguments in support of their protective orders that they made in *Surlock* (R.C129-471; R.C472-501; R.C594-601; R.C602-12).

On May 15, 2019, the trial court rejected State Farm's proposed order and granted plaintiffs' motion (R.C613-22). The trial court entered plaintiff's HIPAA protective order on May 16, 2019 (R.C623-26). State Farm timely appealed on June 12, 2019 (R.C681-82).

The Appellate Opinion

On March 13, 2020, the Illinois Appellate Court, Second District, filed an opinion affirming the trial court in the consolidated appeals. The court agreed with State Farm that it was not a covered entity under HIPAA. ¶¶ 39-40. Nonetheless, it held State Farm could receive plaintiffs' PHI only if State Farm was bound by the trial court's use limitations and return-or-destroy provisions. ¶¶ 44-49. Without addressing the affidavits from the former Illinois Director of Insurance and other insurance industry professionals, the appellate court held that Illinois statutes and insurance regulations did not require property and casualty insurers to retain PHI. ¶¶ 52-60. Moreover, to the extent Illinois

record-keeping requirements did conflict with the trial court's return-or-destroy requirement, the appellate court held that HIPAA preempts state law, and the standard Cook County protective order tendered by State Farm conflicted with the requirements for a HIPAA-qualified protective order ¶¶ 62-64. In so holding, the appellate court ruled that principles of reverse preemption under the McCarran-Ferguson Act did not apply. ¶¶ 65-68. Finally, the appellate court held that the trial court did not err by entering plaintiffs' HIPAA qualified protective order over alternative disclosure methods authorized under HIPAA which do not require the return or destruction of PHI at the end of the litigation. ¶ 70.

This Court granted State Farm's petition for leave to appeal or alternatively appeal as a matter of right, and this appeal now follows.

ARGUMENT

Introduction and the Standard of Review

The lower courts' finding of federal preemption based on their interpretation of federal and state law presents questions of law subject to *de novo* review. *Carter v. SSC Odin Operating Co.*, 237 Ill. 2d 30, 39 (2010). In affirming the trial court, the appellate court agreed with State Farm that the standard of review is *de novo*. *Haage v. Montiel Zavala*, 2020 IL App (2d) 190499, ¶ 62.

The lower courts erred in finding that HIPAA preempts any conflicting provisions in the Illinois Insurance and Administrative Codes regulating property and casualty insurers' retention, use, and disclosure of PHI outside the litigation. *Id.* Property and casualty insurers are not covered entities under HIPAA and not subject to HIPAA's privacy and security obligations. It is difficult to believe that Congress intended to

displace state insurance laws and comprehensive regulation of property and casualty insurers to accomplish HIPAA's objectives and purposes after the regulations exclude them from the definition of "covered entity." 45 C.F.R. § 160.103 (2018). Moreover, HIPAA regulations expressly allow for the disclosure of PHI pursuant to a valid authorization for release of medical records before suit (45 C.F.R. § 164.508 (2018)), or after suit in response to an "order of a court" (45 C.F.R. § 164.512(e)(1)(i) (2018)), without imposing the return-or-destroy terms of a HIPAA-qualified protective order. Indeed, the lower courts' finding that HIPAA preempts contrary state insurance law and regulations violates the usual presumption *against* federal disruptions of traditional areas of state regulation. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 539 (1994).

Although property and casualty insurers are not covered entities under HIPAA, they are subject to a separate regulatory framework overseen by state insurance regulators. The supporting record contains the unrebutted affidavit of a former Director of the Illinois Department of Insurance explaining, among other things, that property and casualty insurers are required by law to keep complete claim files, including "documentation" containing PHI, for regulatory purposes for minimum time periods well beyond the end of the litigation. The supporting record also contains unrebutted affidavits of insurance industry professionals who testified that the disclosure of claim information to the Illinois Department of Insurance and to insurance-support organizations such as the National Insurance Crime Bureau ("NICB") and the Insurance Services Organization ("ISO") is necessary to detect and prevent insurance fraud. It was the former Director's opinion that the destruction of medical records in each claim file would create "impenetrable barriers" to property and casualty insurers' compliance and performance of

their operational functions (R.C276).[4] The lower courts erred in disregarding these affidavits and finding that state insurance laws and regulations that conflict with a HIPAA-qualified protective order are preempted by HIPAA. The conflict could have been avoided by entering a HIPAA-compliant order under section 164.512(e)(1)(i).

The protective order upheld by the appellate court conflicts with State Farm's obligations under Illinois law in two ways. First, the protective order limits the use of PHI to the litigation in which it is produced; and second, it requires the return or destruction of records containing PHI within 60 days of the conclusion of the litigation. The appellate court's interpretation that Illinois insurance law and regulations do not require the retention of PHI at the end of litigation is unreasonable: the regulations explicitly obligate insurers to retain "detailed documentation" and preserve "records" in their claim files needed for the final settlement or disposition of claims and to enable regulators to reconstruct the company's activities and evaluate them for improper claim practices. A requirement that insurers must keep "detailed documentation" and "records" containing PHI means they must also keep PHI. The one is inseparable from the other.

The appellate court's holding that insurers can meet their regulatory obligations by destroying all PHI and placing a copy of the trial court's HIPAA-qualified protective order in each claim file at the end of litigation would thwart the process of reconstructing claim activities essential for regulators examining claim files for improper claims practices. If upheld, the appellate decision would also impair core insurance functions as enumerated in the Cook County protective order tendered by State Farm and undermine

[4] For ease of reference, all citation throughout the argument will be to the supporting record filed in *Surlock*.

the longstanding public policy supporting cooperation between insurers, regulators and law enforcement authorities to deter and detect insurance fraud.

To allow the comprehensive state regulatory framework to work as intended, this Court should vacate the opinion and judgment of the appellate court and the protective order entered by the trial court, and enter the protective order tendered by State Farm or remand for entry of a protective order that expressly allows for the retention, use, and disclosure of PHI in conformity to federal and state insurance laws and regulation.

I. THE APPELLATE COURT ERRED IN UPHOLDING THE TRIAL COURT'S FINDING THAT HIPAA PREEMPTS STATE LAW

A. State Farm as a Property and Casualty Insurer is not a "Covered Entity" Subject to HIPAA

The appellate court agreed that State Farm is not a "covered entity" as defined under HIPAA. ¶¶ 39-40. That is, State Farm is not a "health plan," "health care clearinghouse," or "health care provider who transmits any health information in electronic form." *Id.* (citing 45 C.F.R. § 160.103 (2018)). While the point is uncontested, it is important to recognize at the start that because property and casualty insurers like State Farm are not covered entities, their business operations do not fall within HIPAA's privacy and security obligations. Instead, they remain subject to carefully-crafted state insurance laws and regulations governing the use, retention, and disclosure of PHI.

It also means that property and casualty insurers like State Farm do not become a "covered entity" when they receive PHI from a "covered entity" in the ordinary course of handling claims. When the U.S. Department of Health and Human Services ("HHS") promulgated its HIPAA rules in 2000, it explicitly stated its understanding on this point:

> With regard to life and casualty insurers, we understand that such benefit providers may use and disclose individually identifiable heath

> 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.

Final Rule, Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,567 (Dec. 28, 2000), available at http://aspe.hhs.gov/admnsimp/final/PvcFR03.txt ("Final Rule"); *see also id.* at 82,568 ("[P]roperty and casualty insurers . . . are not covered entities, as they do not meet the statutory definition of 'health plan'"); *id.* at 82,578 ("'[E]xcepted benefits' . . . which includes liability programs such as property and casualty benefit providers, are not health plans for the purposes of this rule").[5] Just as other non-covered entities do not automatically become HIPAA-covered entities upon the receipt of PHI, property and casualty insurers do not become covered entities subject to HIPAA when they come into possession of PHI in their normal business operations.

HHS has explicitly recognized that the HIPAA privacy and security rules do *not* protect all PHI wherever it is found:

> The HIPAA Rules apply only to organizations known as covered entities and their business associates. *HIPAA does not apply to individuals or to other types of organizations that do not qualify as covered entities or business associates, even those that may handle or store an individual's health information.... The HIPAA Privacy Rule does not protect all health information wherever it is found.* Because the rules apply only to covered

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[5] HHS also cited HIPAA's legislative history as proof of congressional intent to prevent HIPAA's application to property and casualty insurers:

> HIPAA's legislative history shows that the House Report's...definition of 'health plan' originally included certain benefit programs, such as workers compensation and liability insurance, but was later amended to clarify the definition and remove these programs. Thus, since the statutory definition of a health plan both on its face and through legislative history evidence Congress' intention to exclude such programs, we do not have the authority to require that these programs comply with these standards.

Id. at 82,576.

> entities and their business associates, the protections do not extend to data about the health of individuals held by [non-covered entities].

(emphasis added). HHS, *Examining Oversight of the Privacy & Security of Health Data Collected by Entities Not Regulated by HIPAA*, at 13, 15 (June 17, 2016), available at https://www.healthit.gov/sites/default/files/noncovered_entities_report_june_17_2016.pdf. *See* Tamela J. White and Charlotte A. Hoffman, *The Privacy Standards Under the Health Insurance Portability and Accountability Act: A Practical Guide to Promote Oder and Avoid Potential Chaos*, 106 W. Va. L. Rev. 709, 718 (2004) ("Insurance under which benefits for health care coverage are secondary or incidental, such as property or casualty insurance policies,...are not directly regulated by HIPAA") (internal quotations and citations omitted).

Following Congress's example, HHS "added explicit language to the final rule which excludes the excepted benefit programs." 65 Fed. Reg. at 82,576; *see also id.* (rejecting commentator's position that "it would be inequitable to subject health insurance carriers to more stringent standards than other types of insurers that use individually identifiable health information"); HHS, *Summary of HIPAA Privacy Rule*, available at http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary ("Certain types of insurance entities are also not health plans, including entities providing only workers' compensation, automobile insurance, and property and casualty insurance"); F. Stephen Zielezienski & Catherine I. Paolino, *Insurance Privacy After Gramm-Leach-Bliley—Old Concerns, New Protections, Future Challenges*, 8 Conn. Ins. L. J. 315, 327 (2001-2002) ("HHS has made a determination that HIPAA does not contemplate applicability to the property and casualty sector").

HHS has rebuffed all requests to expand the definition of "covered entity" to include property and casualty insurers, explaining that such an action would exceed its jurisdiction under the Act. Although HHS recognized that "many entities may use and disclose individually identifiable health information," it has made clear that its "jurisdiction under the statute is limited to health plans, health care clearinghouses, and health care providers...." Fed. Reg. at 82,567. "Consequently, once protected health information leaves the purview of one of these covered entities...the information is no longer afforded protection under this rule." *Id.* at 82,567.

It is logical that property and casualty insurers fall outside HIPAA given the role of liability insurance in the administration of justice. Unlike a health care provider, health plan, or health care clearinghouse providing an individual with health care or medical services, property and casualty insurers do not enter into a physician-patient relationship with anyone and their role is not to provide preventive, curative, or rehabilitative health care services.[6] Rather, they insure their policyholders against the risk of bodily injury or property damage (including for liability to others) that results from an accident—not to offer medical or health care to the injured person. As one commentator has explained:

> HIPAA specifically exempts 'general liability insurance, auto liability insurance, medical payments coverage, workers' compensation insurance,

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[6] It is not surprising that HHS has consistently confirmed that liability insurers are not and are not intended to be a "covered entity" under HIPAA. *See* Fed. Reg. at 82,462, 82,568 ("In addition, we agree that workers' compensation insurers, property and casualty insurers, reinsurers, and stop-loss insurers are not covered entities, as they do not meet the statutory definition of 'health plan'"); HHS, Health Information Privacy: Frequently Asked Questions, available at http://www.hhs.gov/ocr/privacy/hipaa/faq/covered_entities/364.html ("Are the following types of insurance covered under HIPAA: long/short term disability; workers' compensation; *automobile liability that includes coverage for medical payments*? No, the listed types of policies are not health plans") (emphasis added).

> or other insurance with health or medical care coverage as a 'secondary' benefit.' While 'health care providers, 'health plans,' and 'health care clearing houses' must abide by the privacy protections of HIPAA, the property and casualty insurance industry does not. This allows insurers (except health insurers) to share medical information with each other for the purpose of claims and fraud investigations.

Gary R. Reinhardt, *Researching and Investigating Insurance Claims: Key Strategies to Prevent Fraud*, 2011 WL 6749922 *5 (Aspatore Dec. 2011) (internal citations omitted).

Recognizing the different roles of liability insurance and health insurance, Congress made a clear judgment under HIPAA to exempt property and casualty insurers and regulate only health plans, health care clearinghouses, and health care providers as "covered entities" under the Act. By explicitly excepting liability insurers from the three categories of "covered entities," Congress clearly intended to keep liability insurers' operations outside HIPAA's scope.

According to the appellate court, while property and casualty insurers are not covered entities, State Farm was unable to point to any specific language in HIPAA, the Privacy Rule, or any other regulation, authority or case law indicating that a non-covered entity is exempt from complying with a HIPAA-qualified protective order's restrictions on the use or disclosure of PHI. ¶ 49. To be clear: State Farm is not claiming it is exempt from complying with a HIPAA-qualified protective order. Nothing could be further from the truth. Rather, it respectfully submits that other HIPAA-approved means of disclosure do not carry the restrictive terms of a HIPAA-qualified protective order and that the trial court should have entered the HIPAA-compliant Cook County protective order tendered by State Farm or a similar protective order expressly allowing for the retention, use, and disclosure of information by property and casualty insurers in conformity to federal and state law and regulations.

In requiring the use of a HIPAA-qualified protective order that HIPAA does not mandate, the lower courts created a conflict with state insurance requirements entirely of their own making. As further argued below, no inherent conflict exists between HIPAA and Illinois insurance laws and regulations governing the retention, use, and disclosure of PHI because a covered entity can comply with both federal and state requirements when a covered entity produces PHI in response to an "order of a court" as defined in section 164.512(e)(1)(i). And HIPAA's full purposes and objectives are met through disclosure by covered entities in judicial proceedings made in accordance with the HIPAA-approved alternative to a qualified protective order.

B. The Appellate Court Erred in Holding That HIPAA Preempts State Insurance Laws and Regulations Governing the Retention, Use, and Disclosure of PHI

1. Because the Order State Farm Tendered in the Trial Court was "an order of a court" Under Section 164.512(e)(1)(i), a Covered Entity Would not Find it Impossible to Comply with Both State and Federal Requirements

The appellate court correctly recognized that HIPAA preempts a "contrary" state law in two situations: when either: "(1) a covered entity would find it impossible to comply with both the [s]tate and [f]ederal requirements; or (2) [t]he provision of [s]tate law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of [HIPAA]...." ¶ 62 (citing 45 C.F.R. § 160.202 (2018)). However, the appellate court created an unnecessary conflict between HIPAA and state insurance laws governing PHI by ignoring that "an order of a court" is also one of the HIPAA-approved methods of disclosure under section 164.512(e)(1)(i).

According to the appellate court, a covered entity cannot comply with both

HIPAA and the Cook County protective order tendered by State Farm because that order "does not require an insurer to return or destroy PHI at the conclusion of the litigation and would permit the insurer to use and retain PHI outside of litigation." ¶ 63. The appellate court reasoned that "by eliminating these two requirements, the Cook County protective order would not provide the confidentiality and protection of PHI envisioned when the Privacy Rule was promulgated." *Id.* The appellate court erred in concluding that, without the return-or-destroy provisions, "the Cook County protective order acts as an obstacle to accomplishing and executing HIPAA's full purposes and objectives." *Id.*

As to the first prong under section 160.202, the appellate court's analysis depends on the incorrect premise that a covered entity can disclose PHI *only* upon the entry of a HIPAA-qualified protective order under 45 C.F.R. § 164.512(e)(1)(v)(A)-(B). But section 164.512(e)(1)(i) does *not* require the parties to proceed *only* by a HIPAA-qualified protective order. Instead, disclosure is permitted by *any* court order as long as such disclosure is limited to the PHI expressly authorized by the order:

> (e) Standard: Disclosures for judicial and administrative proceedings.
>
> > (1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:
> >
> > > (i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order;....

45 C.F.R. § 164.512(e)(1)(i). Nothing in this regulation requires the "order of a court" to be a qualified protective order as defined in section 164.512(e)(1)(v)(A)-(B).

The meaning of "an order of a court" in section 164.512(e)(1)(i) was addressed in *Tomczak v. Ingalls Memorial Hosp.*, 359 Ill. App. 3d 448 (1st Dist. 2005), where the

appellate court held that the trial court was not required to enter a HIPAA-qualified protective order before ordering the production of medical records. *Id.* at 455-56. Assuming the information requested contained PHI, the appellate court held that "[a] proper reading of regulation 164.512(e)(1) shows that a qualified protective order must only be secured when a disclosure is being made in 'response to a subpoena, discovery request, or other lawful process, that is *not* accompanied by an order of a court' " (emphasis added). *Id.* at 456. Because the trial court had ordered the hospital to comply with the discovery request and produce the specified information, a HIPAA-qualified protective order was unnecessary.

If, as *Tomczak* illustrates, a qualified protective order is not a HIPAA requirement in judicial proceedings, then a covered entity can comply with both state and federal requirements when it produces PHI in response to "an order of a court" as defined in section 164.512(e)(1)(i). In conformity to both state and federal requirements, State Farm tendered a court order at the beginning of the litigation that limited a covered entity's disclosure of PHI only to the disclosure expressly authorized by that order.

The Cook County protective order tendered in *Surlock*, for example, states that a party's PHI "may not be disclosed for any reason without that party's prior written consent or an order of this court" (R.C110). It further states that "[t]he only disclosures explicitly waived and permitted by this order are to "comply and conform with…applicable federal and state statutes, rules, and regulations for [certain enumerated purposes]" and as "necessary to comply with any other federal or state laws, rules, or regulations, but only with the party's express consent and the entry of an appropriate court order" (R.C111). A covered entity producing PHI in response to this order would

not find it impossible to comply with both state and federal requirements because HIPAA does not require a qualified protective order before covered entities make their disclosures under section 164.512(e)(1). The appellate court erred in holding otherwise. ¶ 63.

That section 164.512(e)(i) provides for a disclosure order as an alternative to a HIPAA-qualified protective order led the Alaska Supreme Court to hold that HIPAA did not preempt state law in *Harold-Jones v. Drury*, 422 P.3d 568 (Alaska 2018). There, the Alaska Supreme Court addressed whether HIPAA preempted state case law permitting a defendant's *ex parte* contact with a plaintiff's treating physician. *Id.* at 569. The Court held that HIPAA did not preempt the state case law but ultimately overturned Alaska case law and held that a defendant may not make *ex parte* contact with the physician. *Id.* In holding that HIPAA did not preempt state law, the Court concluded:

> First, a covered entity would not "find it impossible to comply with both the State and Federal requirements." [footnote omitted] Though HIPAA broadly prohibits covered entities from disclosing health information without the subject's consent, [footnote omitted] HIPAA expressly contemplates exceptions to this rule. Specifically, the authorization exception allows for "use or disclosure of protected health information" when "a covered entity obtains or receives a valid authorization for its use." [footnote omitted] Harrold-Jones's treating physician could thus comply with "both the State and Federal requirements" if Harrold-Jones voluntarily consented to ex parte contact through HIPAA's authorization exception. [footnote omitted] Similarly, the litigation exception provides that a "covered entity may disclose protected health information in the course of any judicial or administrative proceeding" in response to a court order. [footnote omitted] Ex parte contacts under Alaska law are unquestionably "in the course of a[ ] judicial proceeding"; [footnote omitted] [defendant] could therefore obtain a court order authorizing Harrold-Jones's treating physician's ex parte contact with [defense] counsel. Given these exceptions, a covered entity would not "find it impossible to comply with both the State and Federal requirements." [footnote omitted]

Id. at 574. The same reasoning equally applies to the Cook County protective order.

Also contrary to the appellate court's opinion, state and federal courts across the country have entered medical protective court orders that do not contain the return-or-destroy provisions of HIPAA-qualified protective orders. *See, e.g., Sanders v. State*, No. 05-12-01186-CR, 2014 WL 1627320, *6 (Tex. App. Apr. 23, 2014) ("Further, appellant's medical records were properly disclosed under HIPAA pursuant to court order. Under section 164.512, a covered entity may disclose protected health information without authorization in certain situations....HIPAA allows disclosure of protected health information for law enforcement purposes to a law enforcement official, if disclosure is in compliance with a 'court order or court-ordered warrant, or a subpoena or summons issued by a judicial officer.' *Id.* § 164.512(f)(1)(ii). It also permits disclosure for judicial proceedings in response to an order of a court. *Id.* § 164.512(e)(1)(i). We overrule appellant's fifth point of error"); *Lal v. Felker*, CIV S-07-2060 GEB, 2011 WL 854917, *2 (E.D. Cal. Mar. 4, 2011) ("Defendants also argue that because some of the documents contain medical records, HIPAA requires a protective order before health care information of persons who are not parties to the litigation are disclosed. [footnote omitted] But the statute expressly provides that health information may be disclosed in a judicial proceeding in response to a court order. 45 C.F.R. 164.512(e)(1). This order for production satisfies that requirement"). Other orders allowing property and casualty insurers to retain PHI at the end of litigation consistent with state law requirements are in the supporting record filed in each appeal. *Calderone v. Piamchon*, No. CGC15548193 (Sup. Ct., Calif., Cty. Of San Francisco, Sept. 7, 2016); *Willis v. Brown*, 16-2015-CA-1828, Div.: CV-H (Cir. Ct. of 4th Judicial Cir., Duval Cty., Fla., Nov. 10, 2015); *Zamor v. Transport AEL*, 16-2014-CA-006922-xxx-MA (Cir. Ct. of 4th Judicial Circuit, Duval

Cty., Fla., Aug. 11, 2015); *Green v. Caudill*, 11-CV-00825 (E.Va. Feb. 16, 2012); *Harvey v. State Farm Mut. Auto. Ins. Co.*, 1:11-cv-00467-LTB-KLM (U.S. Dist. Colo., Sept. 29, 2011) (R.C191-95; R.C196-98; R.C199-200; R.C202-04; R.C205-07; R.C208-09; R.C210-15). Similarly, the Cook County protective order tendered by State Farm in each case here was an "order of a court" within the meaning of section 164.512(e)(1)(i). As these jurisdictions recognize, the "order of a court" need not be a HIPAA-qualified protective order under section 164.512(e)(1)(v)(A)-(B).

2. The Order Tendered by State Farm was not an Obstacle to Accomplishing and Executing HIPAA's Full Purposes and Objectives

As to the second prong under section 160.202, the appellate court erred in holding that entering the Cook County protective order would pose an obstacle to accomplishing and executing HIPAA's full purposes and objectives. As one of the HIPAA-authorized means of disclosure, an "order of a court" as defined in section 164.512(e)(1)(i) cannot be an obstacle to accomplishing HIPAA's full purposes and objectives. A statute should not be read in a manner that makes one part inconsistent with another part. *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (observing that a court must interpret statute "as a symmetrical and coherent regulatory scheme," and "fit, if possible, all parts into an harmonious whole"). In holding that the Cook County protective order was an "obstacle," the appellate court effectively read section 164.512(e)(1)(i) out of the HIPAA regulatory scheme.

The appellate court reasoned that "any requirement that an insurer be allowed to use and retain PHI beyond the conclusion of litigation would lower the floor of privacy protections HIPAA mandates." ¶ 63. If Congress and HHS intended to mandate the return

or destruction of all records containing PHI, they could have plainly said so. But they did not go that far. Instead, the regulations provide different ways for a covered entity to disclose PHI without requiring the return or destruction of records containing PHI. A HIPAA-qualified protective order cannot set the "floor" when other methods permit disclosure by covered entities without the return-or-destroy provisions.

In addition to disclosures by covered entities authorized in response to an "order of a court" under section 164.512(e)(1)(i), section 164.508(c)(2)(iii) makes clear that a valid medical records authorization must include notice to the individual that the information to be disclosed has the "potential" "to be subject to redisclosure by the recipient and no longer be" subject to HIPAA. §164.508(c)(iii) (2018). Other disclosure methods not requiring a qualified protective order's return-or-destroy restrictions are set forth in sections 164.512(e)(1)(ii)(A) and (vi). 45 C.F.R. §§ 164.512(e)(1)(ii)(A), (vi) (2018). The very fact that HIPAA authorizes means of disclosure other than a qualified protective order before and after suit without restriction on their use for non-litigation purposes shows that Illinois insurance laws and regulations governing the retention, use, and disclosure of PHI do not stand as an obstacle to the accomplishment and execution of HIPAA's full purposes and objectives. *See Harold-Jones*, 422 P.3d at 574-75. The appellate court erred in holding otherwise.

3. HIPAA Regulations do not Require a Qualified Protective Order Before Authorizing PHI to be Disclosed in Judicial Proceedings

Whenever a covered entity discloses PHI in response to a valid medical records authorization or to an "order of a court" in judicial proceedings, the disclosure is permissible under HIPAA. "All that section 164.512(e) should be understood to do,

therefore, is to create a procedure for obtaining authority to use medical records in litigation." *Northwestern Memoria Hosp. v. Ashcroft*, 362 F.3d 923, 925-26 (7th Cir. 2004). In other words, HIPAA creates certain procedures for the production of medical records but not a substantive rule that requires a qualified protective order.

The source of the appellate court's confusion is found in section 164.512(e)(1)(ii). The court mistakenly read that subsection as requiring a covered entity to disclose PHI in response to a protective order that requires that PHI be returned or destroyed at the end of the litigation, and used only for that litigation. ¶ 44. That section provides that PHI may be disclosed:

> **(ii)** In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:
>
> > **(A)** The covered entity receives satisfactory assurance…from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or
> >
> > **(B)** The covered entity receives satisfactory assurance…from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.

Paragraph (e)(1)(v) then contains the language requiring the destruction or return of information at the end of the litigation. ¶ 43.

These provisions apply *when there has been no court order*. In other words, they allow disclosure of PHI only if a plaintiff is given the opportunity *to obtain* an order from the court that includes return-or-destroy provisions. These provisions address the situation in which a written discovery request is left to the parties without prior court involvement. They allow a plaintiff to seek a court order which covers that situation. As

between plaintiffs and defendants in most cases, there is no reason for a defendant and non-parties (*i.e.*, experts) to retain PHI after the litigation ends.

The appellate court here made two basic mistakes in reading this subsection. First, it mistakenly read subsection 164.512(e)(1)(ii) as providing the only procedure under which PHI may be obtained in judicial proceedings. It held that the trial court did not err in failing even to consider other means for disclosing PHI to insurers. ¶ 70 (no error in trial court's "declining to consider an alternate authorized method of disclosing PHI"). But that is fundamentally wrong: the entry of a court order like the Cook County protective order is explicitly authorized under subsection 164.512(e)(1)(i). Nothing in subsection 164.512(e)(1)(ii) precludes or limits the use of such an order.

Second, the court read subsection 164.512(e)(1)(ii) as *requiring* a court to enter an order that has the return-or-destroy provisions. That, too, is wrong. What subsection 164.512(e)(1)(ii) requires is that such an order be in place or that plaintiff or affected persons be given the opportunity *to seek* such an order—nothing more. Subsection 164.512(e)(1)(ii) does not say that such an order *must* be granted to the exclusion of "an order of a court" without the return-or-destroy provisions. The *Tomczak* court rejected this interpretation. Instead, HIPAA regulations leave it to state trial courts to set the terms for protective orders.

Of course, as a practical matter, if there is no order already in place, such an order could be granted when there is no reason or need for defendants to retain, use or disclose PHI for non-litigation purposes. But that is not the situation faced by property and casualty insurers, which must retain "documentation" in their claim files for regulatory purposes and use (and sometimes disclose) PHI to discharge other core insurance

functions. Since subsection 164.512(e)(1)(ii) only mandates procedures but not a substantive rule requiring use limitations and a return-or-destroy order, the appellate court erred in holding that it did—and rejecting the form of the Cook County protective order on that basis. Indeed, this is the most unlikely setting to find federal preemption. That is because Congress, by statute, has declared that the business of insurance is a matter left to the *states* and property and casualty insurers are not covered entities subject to HIPAA.

4. The Appellate Court's Decision Is Inconsistent in Finding That HIPAA Preempts any Conflicting State law, but Then Holding There is no Conflict Between HIPAA and State law for Reverse Preemption Purposes

Specifically, the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (2018) ("McCarran-Ferguson"), gives states principal authority to regulate the business of insurance. It provides that "Act[s] of Congress" not purporting to regulate the "business of insurance" do not "invalidate, impair, or supersede" state laws regulating the business of insurance. *Id.* at § 1012(a) & (b). State laws governing insurance are controlling unless Congress, by statute, clearly states otherwise. Stated simply, McCarran-Ferguson reverses ordinary principles of federal preemption. Absent a clear contrary indication by Congress, "state laws enacted 'for the purpose of regulating the business of insurance' do not yield to conflicting federal statutes." *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 507 (1993).

The appellate court's decision was inconsistent on this issue. It correctly noted that the parties agreed McCarran-Ferguson did not apply. ¶ 66. Under McCarran-Ferguson, a state law will reverse preempt a federal law if: (1) the federal statute does not specifically relate to the business of insurance; (2) the state statute was enacted for

purposes of regulating the business of insurance; and (3) the federal statute would invalidate, impair, or supersede the state statute. ¶ 67. The appellate court ultimately held that reverse preemption did not apply because HIPAA does not invalidate, impair, or supersede any state insurance law or regulation. *Id.* But the appellate court held earlier that HIPAA preempts any conflicting state law or regulation, ¶ 62, and it invalidated the Cook County protective order on grounds that it would lower the floor of privacy protection HIPAA mandates. ¶ 63. The court left unresolved the issue of whether reverse preemption would apply in the event it determined that a state insurance law or regulation conflicts with HIPAA.

HIPAA and Illinois insurance law can be harmonized to avoid issues of federal and reverse preemption and to permit property and casualty insurers' regulated use of PHI for litigation and non-litigation purposes. Particularly in light of McCarran-Ferguson and the language of HIPAA itself, HIPAA and Illinois insurance law and regulations do not conflict. The appellate court's holding that any state regulations requiring liability insurers to retain PHI are preempted and invalidated by HIPAA therefore has no basis.

5. The Lower Courts Should Have Avoided Creating an Unnecessary Conflict by Adopting the Cook County Protective Order or a Similar Court Order Expressly Authorizing the Disclosure of PHI in Conformity to State and Federal law

While the appellate court acknowledged that other HIPAA-approved alternatives to a qualified protective order exist, it ultimately held that the trial court did not err in rejecting other HIPAA-approved methods of disclosure. ¶ 70. In affirming the trial court, the appellate court created an unnecessary conflict, which could have been avoided by entering "an order of a court" as defined in section 164.512(e)(1)(i) without imposing the

restrictive terms of a qualified protective order.

The lower courts' preference for a qualified protective order was error as a matter of law because federal preemption is *disfavored. Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 449 (2005). The basis of the desire to avoid preemption is the preservation of federalism, under which the exercise of federal supremacy "is not lightly to be presumed." *N.Y. State Dept. of Social Services v. Dublino*, 413 U.S. 405, 413 (1973). "In areas of traditional state regulation," such as insurance, courts "assume that a federal statute has not supplanted state law unless Congress has made such an intention " 'clear and manifest.' " *Bates*, 544 U.S. at 449 (quoting *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 514 U.S. 645, 655 (1995) (quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947)); *Lorillard Co. v. Reilly*, 533 U.S. 525, 541-42 (2001). By allowing for different ways that a covered entity may disclose PHI without mandating the return or destruction of records containing PHI, Congress did not manifest a clear intention to preempt all state insurance laws and regulations governing the retention, use, and disclosure of PHI once the litigation is concluded.

The appellate court noted that a "contrary" state law is not preempted under the HIPAA regulations if the Secretary of HHS determines that the state law is necessary to, *inter alia*, "prevent fraud and abuse related to the provision of or payment for health care" or "ensure appropriate State regulation of insurance and health plans to the extent expressly authorized by statute or regulation" (¶ 64, citing 45 C.F.R. § 160.203(a)(1) (2018)). As there was no indication that the State of Illinois has asked for a waiver under section 160.204 (45 C.F.R. § 160.204 (2018)), the appellate court held that the HIPAA-qualified protective order prohibited "the use or disclosure" of PHI for any purpose other

than the litigation and required the return or destruction of PHI at the end of the litigation. *Id.* But the appellate court misconstrued HIPAA. The first step in conducting the preemption analysis is whether the state law is "contrary" to HIPAA; if the state law is not contrary, no further analysis is required. *Harold-Jones*, 422 P.3d at 575. The procedure for waiver is unnecessary because the regulations provide disclosure methods that avoid a conflict between HIPAA and state law for federal and reverse preemption purposes. The lower courts' finding of federal preemption should be reversed.

C. Both Illinois Supreme Court Rule 201(c)(1) and Section 164.512(e) of the HIPAA Regulations Authorize the Entry of Protective Orders to Protect PHI While Allowing Property and Casualty Insurers to Retain, Use, and Disclose PHI for Required and Lawful Purposes Under the Insurance Code

Apart from section 164.512(e)(1)(i) of the HIPAA regulations, Illinois Supreme Court Rule 201(c)(1) (Ill. S. Ct. R.201(c)(1) (eff. July 30, 2014)) vests trial courts with the authority under state law to enter protective orders as part of a comprehensive scheme for discovery. *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 223 (2000); *Kunkel v. Walton,* 179 Ill. 2d 519, 531 (1997); *May Centers, Inc. v. S.G. Adams Printing & Stationery Co.,* 153 Ill. App. 3d 1018, 1021 (5th Dist. 1987). Rule 201(c)(1) authorizes trial courts to enter protective orders prohibiting parties and others from using, retaining, or disclosing PHI at the end of the litigation. Unlike property and casualty insurers, parties have no legal right, much less any obligation, to retain PHI for use beyond the litigation. *See May Centers*, 153 Ill. App. 3d at 1022 ("A litigant has no constitutional right to disseminate information made available only for purposes of trying his suit"). By comparison, property and casualty insurers are heavily-regulated entities that are required by law to retain and permitted to use PHI for specified purposes beyond the litigation.

Their highly-regulated status distinguishes them from other persons or entities which remain subject to a protective order at the end of the litigation.

Rule 201(c)(1) does not authorize a trial court to prohibit the disclosure of information for lawful purposes apart from the litigation. *Skolnick*, 191 Ill. 2d at 226. In *Skolnick*, a former law partner sued his firm and an associate employed at the firm alleging that they had falsely accused him of creating a forged document. *Id* at 216-17. The parties agreed to a protective order forbidding the dissemination of designated materials produced in discovery. *Id.* Later, the associate sought to modify the protective order to allow her to turn over information produced in discovery to the Attorney Registration and Disciplinary Commission ("ARDC") based on the associate's ethical reporting obligations. *Id.* The trial court refused to modify its protective order and the associate appealed. *Id.* at 217. The appellate court reversed the trial court. *Id.* This Court affirmed the appellate court, ruling the trial court abused its discretion by refusing to modify the protective order to allow for documents containing evidence of professional misconduct to be produced to the ARDC. *Id.* at 226. This Court reasoned that trial and appellate courts have the authority to modify protective orders to permit the lawful use of records produced in discovery outside the litigation. *Id.* at 229-30.

Hall v. Sprint Spectrum L.P., 368 Ill. App. 3d 820 (5th Dist. 2006), illustrates the same principle. There, a customer brought a class action against a wireless telecommunications provider, alleging abuse of "early termination fee" in the customer's cellular phone service contract. *Id.* at 821. The parties stipulated to a protective order limiting the plaintiff's use of information marked "confidential" solely to the lawsuit. *Id.* The trial court later granted the plaintiff's motion to modify the protective order to allow

documents marked "confidential" to be submitted to the Federal Communications Commission ("FCC"). *Id.* at 822. The wireless telecommunications provider appealed the modification of the protective order under Rule 307(a)(1). *Id.* Relying on *Skolnick*, after balancing the competing needs and interests of the parties, the appellate court affirmed the modification of the protective order to allow the documents to be produced to the FCC. *Id.* at 824-27.

Similarly, here, the protective order entered by the trial court in each case went beyond Rule 201(c)(1) by prohibiting property and casualty insurers from retaining, using, and disclosing information vital to state regulation of the insurance industry, and preventing insurers from meeting their responsibilities under state law. As further demonstrated below, this Court should vacate the trial court's protective orders and enter either the Cook County protective order or a similar order that complies with both Rule 201(c)(1) and section 164.512(e)(1) of the HIPAA regulations, and that expressly allows for the retention, use, and disclosure of PHI in conformity to federal and state insurance law and regulations.

II. THE APPELLATE OPINION PREVENTS INSURANCE REGULATORS FROM EVALUATING THE COMPANY'S ACTIVITIES IN CLAIM FILES, THWARTS THE DETECTION OF INSURANCE FRAUD, AND REQUIRES THE DESTRUCTION OF "DOCUMENTATION" OF PHI IN CLAIM FILES CONTRARY TO ILLINOIS INSURANCE REGULATIONS

A. Property and Casualty Insurers are Legally Required to Retain Detailed Documentation in Their Claim Files for Examination by Regulators

The appellate court held that neither the Insurance Code nor the Administrative Code requires property and casualty insurers to retain or use PHI for any purpose outside of the litigation in which it is produced in discovery. ¶ 60. The appellate court cited no

Illinois case law supporting its interpretation. It interpreted the Insurance Code and regulations in a vacuum while failing to acknowledge the unrebutted affidavits from a former Illinois Director of Insurance, Robert E. Wagner, and other insurance industry professionals, which explain that property and casualty insurers' use of PHI is critical to the evaluation of claim files, prevention of insurance fraud, other core-insurance purposes, and compliance with their regulatory obligations (R.C268-76; R.C434-37; R.C439-42; R.C444-46). In restricting property and casualty insurers' lawful uses and redisclosures under the Insurance Code and regulations, the appellate court overrode the considered judgment of the General Assembly and the experience of the Illinois Department of Insurance—without relying on any supporting evidence and contrary to the evidence in the record.

The appellate court correctly noted that insurers are prohibited from engaging in improper claims practices. ¶ 53 (citing 215 ILCS 5/154, 154.6 (West 2018)). Section 919.30 of Title 50 of the Illinois Administrative Code requires insurers to make their claim files available to the Director of the Illinois Department of Insurance for examination upon request. *Id.* (citing 50 Ill. Admin. Code 919.30(a) (1989)). With respect to examinations, the appellate court quoted section 919.30 as follows:

> (b) Each company shall maintain claim data that should be accessible and retrievable for examination by the Director. A company shall be able to provide the claim number, line of coverage, date of loss and date of payment of the claim, date of denial, or date claim closed without payment. This data must be available for all open and/or closed files *for the current year and the two preceding years*. The examiners' review may include but need not be limited to an examination of the following claims:
>
> 1) Claims Closed With Payment;
>
> 2) Claims Denied;

> 3) Claims Closed Without Payment;
>
> 4) First Party Automobile Total Losses; and/or Subrogation Claims.
>
> (c) Detailed documentation *shall be contained in each claim file in order to permit reconstruction of the company's activities relative to each claim file.*

(emphases added). 50 Ill. Admin. Code 919.30(b)-(c) (1989). The appellate court found nothing in this language that expressly requires insurers to retain PHI. ¶ 54. Instead, the court read section 919.30 as referring only to "claim data" consisting of "the claim number, line of coverage, date of loss and date of payment of the claim, date of denial, or date claim closed without payment." *Id.* The court saw no reason why placing a copy of a HIPAA-qualified protective order in each claim file would not suffice to "establish the company's activities relative to each file." *Id.* According to the court, section 919.30 and the return-or-destroy provisions of the protective order do not conflict.

The appellate court ignored the definition of "documentation" in section 919.40 of the Administrative Code:

> …all pertinent communications, transactions, notes and work papers…. properly dated and compiled in sufficient detail in order to allow for the reconstruction of all pertinent events relative to each claim file. Documentation shall include but not be limited to bills, explanations of benefits and worksheets.

50 Ill. Admins. Code 919.40 (2014). The "[d]etailed documentation" required by section 919.30(c) includes but is not limited to medical bills—which necessarily contain PHI—and which "shall" be contained in each claim file to reconstruct the company's activities for each open and/or closed file for the current year and the preceding two years.

Section 919.40 likewise states, regarding the definition of "Settlement of Claims," that "[e]vidence" of the activities relating to the settlement of claims "shall be maintained

in the company's claims files." The word "shall" is generally construed to be mandatory. *Citizens Organizing Project v. Dep't of Natural Resources*, 189 Ill. 2d 593, 598-99 (2000). There is no reason to believe the word "shall" as used in sections 919.30 and 919.40 has a different meaning here.

Because insurance companies must keep "[d]etailed documentation" to permit "reconstruction of all pertinent events" relative to their activities, claim files invariably contain PHI, but for this very reason, as Wagner testified, medical bills and records reviewed by insurance regulators as part of the examination are exempt from public disclosure under the Illinois Freedom of Information Act (5 ILCS 5/140/7 (West 2018)) and the Illinois Insurance Code. 215 ILCS 5/404(a)(1) (West 2018) (R.C276).

The appellate court's interpretation—that section 919.30 does not expressly require property and casualty insurers to retain PHI—is unreasonable. A requirement that insurers "shall" maintain "[d]etailed documentation" that includes PHI means they must also maintain PHI. The one is inseparable from the other in examining claim files. Under the appellate court's mistaken reading of sections 919.30 and 919.40, regulators would be unable to examine the "[d]etailed documentation" in claim files consisting of a claimant's medical bills, medical history, test results, or physical or mental condition which claim professionals use to evaluate and resolve claims. The appellate court's holding that insurers can satisfy section 919.30 by returning or destroying all "documentation" of PHI and simply placing a copy of the protective order in each claim file would, in practice, prevent "the reconstruction of all pertinent events relative to each claim file" and thwart regulators' ability to determine whether claims are being timely and properly paid.

B. Property and Casualty Insurers are Prohibited From Destroying Company "Records" Except in Conformity With the Requirements of the Insurance and Administrative Codes

In a related connection, Illinois law and regulations set out a detailed process for the destruction of a property and casualty insurer's records. Pursuant to section 133(2) of the Insurance Code, an insurer must retain its records until it receives permission from the Director of Insurance to destroy them. 215 ILCS 5/133(2) (West 2018). Failure to comply with this provision constitutes a "business offense" for which a fine of up to $5,000 may be imposed. *See* 215 ILCS 5/133(4) (West 2018). Section 901.5 of Title 50 goes on to provide: "No domestic company shall destroy any books, records, documents, accounts or vouchers, hereafter referred to as 'records', *except in conformity with the requirements of this Part*" (emphasis added). 50 Ill. Adm. Code 901.5, codified at 7 Ill. Reg. 4213 (eff. Mar. 28, 1983). Section 901.20 sets out a time period of not less than "the current year plus 5 years," as follows:

> The company is authorized to dispose of or destroy records in its custody *that do not have sufficient administrative, legal or fiscal value to warrant their further preservation and 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, *except that these records must be maintained for the current year plus 5 years*; 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 the current year plus 5 years.

(emphases added). 50 Ill. Adm. Code 901.20, amended in 40 Ill. Reg. 7895 (eff. May 23, 2016). This provision sets forth the minimum retention period for records pertaining to

the final settlement or disposition of claims.

The appellate court held that this provision likewise does not affirmatively require the retention of PHI or its use for a particular purpose. ¶ 59. The appellate court quoted the definition of "records" as follows:

> …material means all books, papers and documentary materials regardless of physical form or characteristics, made, produced, executed or received by any domestic insurance company pursuant to law or in connection with the transaction of its business and preserved or *appropriate for preservation* by such company or its successors as evidence of the organization, function, policies, *decisions*, procedures, obligations and business activities of the company or *because of the informational data contained therein.* If doubt arises as to whether certain papers are 'non-record' materials, it should be assumed that the documents are 'records'.

(emphases added) 50 Ill. Adm. Code 901.10, codified at 7 Ill. Reg. 4213 (eff. Mar. 28, 1983). Contrary to the appellate court's opinion, the Administrative Code's definition of "records" quoted above is broad enough to include medical bills and records as they are "received" "in connection with" the company's "decisions" and "because of the informational data contained therein" used in the "final settlement or disposition of any claim" under section 901.20. And if there is any doubt, the regulation expressly resolves the doubt in favor of treating all such "documents" as "records."

In holding that sections 901.10 and 901.20 do not require the preservation of "records" containing PHI, the appellate court did not explain how it would be possible for regulators to evaluate a claim for improper claim handling under section 154.6 of the Insurance Code without the claimant's medical bills and records. The regulations make clear that all such "records" having "sufficient administrative, legal or fiscal value to warrant their further preservation" for a minimum retention period of "the current year plus 5 years" cannot be destroyed other than in conformity with the Administrative Code.

Preservation of such "records" requires preservation of the "informational data" used for "final settlement or disposition" of claims—and contrary to the 60-day return-or-destroy provisions of the protective order entered by the trial court in each case here.

In holding otherwise, the appellate court's reliance on *Small v. Ramsey*, 280 F.R.D. 264, 279-80 (N.D. W.Va. 2012), was misplaced. ¶ 59. There, the district court noted in passing that there was no "evidence before the court" to support the conclusion that plaintiff's medical records were necessary or required under section 910.10. 280 F.R.D. at 280. Here, unlike *Small*, Wagner, the former Insurance Director, testified that the destruction of medical records would create "impenetrable barriers" to property and casualty insurers' compliance and performance of their operational functions (R.C276). Moreover, the appellate court failed to note that the protective order entered in *Small* applied West Virginia law and allowed State Farm to retain the medical records for up to six years from the date of settlement or final judgment, whereas the protective order in this case requires their return or destruction within 60 days. *Id.* The appellate court ignored the district court's reasoning that the six-year retention period would not impede State Farm's obligations to report settlements and judgments made to Medicare beneficiaries pursuant to 42 U.S.C. § 1395y(b)(8) (2010) (Medicare Secondary Payer Act) and comply with West Virginia law requiring periodic review of insurance company files. *Id.* at 277. By comparison, the 60-day limit that the HIPAA qualified protective order imposes here deprives State Farm and other property and casualty insurers of the six-year retention period in which to comply with their federal and state regulatory obligations. *Small* does not support the appellate court's unreasonably restrictive interpretation of Illinois insurance law and regulations.

C. The Trial Court's Protective Orders Impede Compliance With Federal Reporting Obligations

In addition to state requirements, as indicated above, property and casualty insurers are also subject to federal reporting requirements. For instance, under the secondary payer provisions, automobile or liability insurers must report payments made to Medicare beneficiaries, along with information about the alleged cause of injury, incident, or illness. 42 U.S.C. §1395y(b)(2)(A) (2018). Retention of medical records is crucial to this process. Additionally, insurers need medical records if Medicare seeks recovery of a "conditional payment." 42 U.S.C. § 1395y(b)(2)(B) (2018). To evaluate demands by Medicare for recovery of conditional payments, insurers must rely on claimants' medical records to determine whether the conditional payments warrant reimbursement. Based on the lengthy nature of the Medical Secondary Payer conditional payment recovery process, as *Small*, 280 F.R.D. 264 recognizes, insurers must be able to retain claimants' medical records past the conclusion of the claim. These determinations often cannot be made within 60 days of the end of the litigation.

D. The Trial Court's Protective Order Prevents Property and Casualty Insurers From Retaining, Using, and Disclosing PHI Which is Necessary to Prevent Fraud and for Core Insurance Purposes

Section 155.23 of the Insurance Code permits property and casualty insurers to provide claim information to facilitate fraud detection:

> (1) The Director is authorized to promulgate reasonable rules *requiring insurers*, as defined in Section 155.24, doing business in the State of Illinois *to report factual information in their possession that is pertinent to suspected fraudulent insurance claims*,...after he has made a determination that the information is necessary to detect fraud or arson. Claim information may include:
>
> (a) Dates and description of accident or loss.

(b) Any insurance policy relevant to the accident or loss.

(c) Name of the insurance company claims adjustor and claims adjustor supervisor processing or reviewing any claim or claims made under any insurance policy relevant to the accident or loss.

(d) Name of claimant's or insured's attorney.

(e) Name of claimant's or insured's physician, or any person rendering or purporting to render medical treatment.

(f) Description of alleged injuries, damage or loss.

(g) History of previous claims made by the claimant or insured.

(h) Places of medical treatment.

* * * *

(j) Material relating to the investigation of the accident or loss, including statements of any person, proof of loss, and any other relevant evidence.

(k) any facts evidencing fraud or arson.

* * * *

(2) The Director of Insurance may designate one or more data processing organizations or governmental agencies to assist him in gathering such information and making compilations thereof, and may by rule establish the form and procedure for gathering and compiling such information. The rules may name any organization or agency designated by the Director to provide this service, and may in such case provide for a fee to be paid by the reporting insurers directly to the designated organization or agency to cover any of the costs associated with providing this service. After determination by the Director of substantial evidence of false or fraudulent claims,...the information shall be forwarded by the Director or the Director's designee to the proper law enforcement agency or prosecutor. Insurers shall have access to, and may use, the information compiled under the provisions of this Section. Insurers shall release information to, and shall cooperate with, any law enforcement agency requesting such information.

In the absence of malice, no insurer, or person who furnishes information on its behalf, is liable for damages in a civil action or subject to criminal

> prosecution for any oral or written statement made or any other action taken that is necessary to supply information required pursuant to this Section.

(emphases added). 215 ILCS 5/155.23(1)-(2) (West 2018). The statute expresses the Illinois public policy against insurance fraud. *See Phoenix Ins. Co. v. Rosen*, 242 Ill. 2d 48, 58 (2011).

Thus, section 155.23(1) authorizes insurers to retain claim information, including place(s) of medical treatment, the identity of physician(s) rendering medical care, a description of the alleged injuries, and a history of prior claims, and section 155.23(2) authorizes the Director to designate data-processing organizations to help compile data that can be forwarded to the appropriate law enforcement agency or prosecutor. PHI is inherent in the claim information that insurers are required to furnish under the statute when cooperating with law enforcement agencies in insurance fraud investigations.

According to the appellate court, however, section 155.23 did not authorize State Farm to retain PHI for two reasons specific to each case. ¶ 56. First, no indication of suspected fraud existed on the part of plaintiffs in either case, and second, an insurer that has returned or destroyed PHI in compliance with a HIPAA-qualified protective order cannot violate the statute because it no longer has any such factual information in its possession. *Id.* The appellate court did not explain how claim information could still be gathered and complied by insurance-support organizations designated by the Director for law enforcement purposes if the information can be used only in the litigation and must be returned or destroyed within 60 days of the end of the litigation.

The appellate court's reasoning that there was no evidence of fraud in these two cases is beside the point. As set forth in the affidavits of insurance industry experts, insurance fraud is often investigated by assessing and identifying patterns of claim

activity involving healthcare institutions, doctors, attorneys, and other persons, and contrary to the appellate court's opinion, these patterns cannot be identified without access to claim and medical information from multiple claim files (R.C440; R.C445).

In explaining the authorized use and sharing of PHI under the Insurance Code, Wagner testified that insurers provide PHI to the National Insurance Crime Bureau ("NICB") and Insurance Services Organization ("ISO") to facilitate statutory fraud detection, comply with reporting requirements, and perform the critical function of aggregating data across state lines subject to the Director's strict oversight (R.C434-35). The NICB and the Department of Insurance have entered into a memorandum of understanding designating the NICB as the repository and developer of a database for reporting potentially fraudulent insurance claims in Illinois (R.C445).

Affidavits from high level ISO and NICB employees describe in greater detail the activities of their insurance-support organizations, including Medicare secondary compliance and state fraud bureau reporting, the development of databases and the importance of PHI to their activities, and the safeguards they must follow in sharing information under the Insurance Code (R.C439-42; R.C444-46). According to these affidavits, fraud detection and Medicare secondary payer compliance require detailed information about the identity of the person submitting the claim, including the diagnosis, treatment codes and payments made (R.C442-43). The efforts of ISO and NICB are important components in reducing insurance premiums for consumers and facilitating fair and efficient claim operations (R.C439-40; R.C442). The terms of the protective orders affirmed by the appellate court would prevent the use and disclosure of PHI expressly

permitted by section 155.23(1)-(2), and would frustrate fraud-detection and Medicare secondary compliance.

If the appellate court's opinion is affirmed, the ultimate losers will be the people of Illinois. By preventing property and casualty insurers from sharing claim information with state and federal agencies, law enforcement officials, and insurance-support organizations, the protective order and the countless of others that will be entered like it will unnecessarily hinder regulators and the detection of insurance fraud.

The appellate court further refused to consider other core-insurance purposes for which property and casualty insurers retain claim files, including actuarial and rate development, reinsurance evaluation and pricing, and long-tail exposure. ¶ 57. The appellate court gave short shrift to these and other uses, refusing to address them on the merits, instead holding that State Farm waived any argument by failing to cite any statute, policy or regulation requiring the use of PHI for any of these purposes. *Id.* The appellate court ignored the evidence that claim records are needed for these and other purposes consistent with the public policy of encouraging a healthy and competitive insurance market for Illinois consumers (R.C274-76), while also ignoring the analysis set forth in Judge Ehrlich's memorandum opinion and order in *Shull v. Ellis*.

In reviewing the overall regulatory scheme, Judge Ehrlich concluded in his memorandum opinion and order that the information is necessary for: (1) auditing insurers to ensure the fair treatment of consumers; (2) evaluating and paying claims; (3) internal audits and regulatory disclosures required by Medicare and Medicaid (42 U.S.C. §§ 1395y(b)(2)(A)-(B) (2018)); (4) ensuring a carrier's solvency, accreditation, ratings;

and (5) providing evidence used to defend bad-faith claims (R.C460-61). The Cook County protective order specifically enumerates eleven purposes altogether:

1. Reporting; investigating; evaluating; adjusting; negotiating; arbitrating; litigating or settling claims;

2. Compliance reporting or filing;

3. Conduct described in 215 ILCS 5/1014;

4. Required inspections and audits;

5. Legally required reporting to private, federal, or state governmental organizations, including health or medical insurance organizations, and to the Centers for Medicare and Medicaid Services (CMS);

6. Rate setting and regulations;

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.

(R.C159). It was error for the appellate court to refuse to consider all the important uses of PHI by property and casualty insurers enumerated above.

E. The Appellate Court's Opinion Subjects Insurers to Disparate Record Retention Burdens Depending on how PHI is Acquired

Most importantly, the appellate court did not consider the effect its holding will have on the record retention practices of property and casualty insurers. The Illinois Insurance Code does not distinguish between PHI disclosed before or after suit; all documentation containing PHI is treated the same. The appellate court recognized that

covered entities may disclose PHI to recipients in multiple ways, ¶ 43, including a patient's valid medical records authorization which allows for redisclosure by the recipient. ¶ 47 (citing 45 C.F.R. § 164.508). Although the appellate court correctly noted that the appeals did not involve a valid authorization, the decision treats PHI differently depending on whether the insurer obtains it by a valid authorization or in response to a court-mandated HIPAA-qualified protective order.

The protective orders' return-or-destroy requirements are especially problematic given that State Farm, like many other property and casualty insurers, conducts its business in states across the country and responds to lawsuits in both state and federal courts. State Farm and other property and casualty insurers will face different legal obligations depending on whether suit is filed in Illinois or in a jurisdiction that does not require a HIPAA-qualified protective order.

Furthermore, as a result of the appellate court's holding, while PHI produced through valid records authorizations need not be returned or destroyed at the end of litigation, the same is not true of PHI produced through HIPAA-qualified protective orders. The appellate court's opinion subjects property and casualty insurers to disparate and potentially confusing retention burdens for PHI in their claim files, depending on whether the claim has gone into litigation and how the PHI was acquired. Insurers, which maintain records and documentation to meet their responsibilities to the Department of Insurance and to such other entities as reinsurers and fraud detection and prevention organizations, should not be subject to conflicting directions over the retention of information in claim files. To maintain uniformity in the regulation of PHI by property and casualty insurers, as the Illinois insurance law contemplates, the trial court's

protective orders should be vacated in favor of the Cook County protective order or a similar order that expressly allows for the handling of PHI in conformity to federal and state insurance laws and regulation.

F. The Protective Order Tendered by State Farm Safeguards Plaintiffs' Right of Privacy Under Existing State Law While Allowing Property and Casualty Insurers to Retain, Use, and Disclose PHI for Non-Litigation Purposes Without Unreasonably Invading Their Right of Privacy

Although property and casualty insurers are not covered entities under HIPAA, they are governed by a carefully-crafted regulatory framework that safeguards the privacy of Illinois residents. Article XL of the Illinois Insurance Code is dedicated to Insurance Information and Privacy Protection ("IIPP") (215 ILCS 5/1001 *et seq.*) and property and casualty insurers are subject to the IIPP law (R.C275; R.C441).[7]

At the same time, Illinois law recognizes that property and casualty insurers must obtain and evaluate confidential and personal financial and health information from persons making claims for benefits. The Illinois legislative and regulatory bodies have carefully developed a statutory and regulatory framework to balance property and casualty insurers' proper use and retention of private information with the protection of individual privacy (R.C441). 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*

---

[7] The IIPP is derived from model rules and regulations created by the National Association of Insurance Commissioners ("NAIC")—a standard-setting organization of regulators from all fifty states. The IIPP applies to life, health, and property and casualty insurance, and establishes standards and procedures for (a) privacy notices to applicants and policyholders, (b) access and correction rights, (c) disclosure of nonpublic personal information to others, and (d) information used in adverse underwriting decisions. Zielezienski & Paolino, 8 Conn. Ins. L. J. at 317-18.

> *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 collected 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.

(emphasis added). 215 ILCS 5/1001. The term "medical record information" in Article XL refers to "personal information," which includes:

> …any individual identifiable information gathered in connection with an insurance transaction from which judgments can be made about an individual's character, habits, avocations, finances, occupation, general reputation, credit, health or any other personal characteristics.

215 ILCS 5/1003(T). "Medical record information" relates to a person's mental or physical health, whether received from a medical provider, a hospital, or from a person. 215 ILCS 5/1003(R). As Wagner testified, any medical records provided to insurance regulators are exempt from public disclosure under the Illinois Freedom of Information Act (5 ILCS 5/140/7) and the Illinois Insurance Code (215 ILCS5/404(a)(1)) (R.C276).

Wagner further testified without contradiction that Illinois law protects personal or privileged information received in handling claims while still allowing property and casualty insurers to make disclosures reasonably necessary to rate-making, anti-fraud programs, consumer protection research, and regulatory compliance (R.C274-76). *See* 215 ILCS 5/1014. Section 1014 specifically enumerates the narrow circumstances under which an insurance company may disclose personal or privileged information in its possession, without the person's consent, which Wagner testified is subject to strict regulation by the Illinois Department of Insurance (R.C276; R.C436). *Id.* Article XL

includes a range of penalties for insurers which violate the Insurance Code, starting with hearings and cease-and-desist orders and escalating to monetary fines, suspensions and license revocations (R.C436). 215 ILCS 5/1020. The robust safeguards codified in Article XL protect the privacy interests of Illinois residents from the unauthorized use of personal and privileged information under the Insurance Code.

At the same time, the right of privacy is not absolute; only unreasonable invasions of privacy are prohibited under the privacy clause in article I, section 6, of the Illinois Constitution of 1970, art. I, § 6. *Hope Clinic for Women, Ltd. v. Flores*, 2013 IL 112673, ¶ 66; *Burger v. Lutheran Gen. Hosp.*, 198 Ill. 2d 21, 51-52 (2001); *Kunkel v. Walton*, 179 Ill. 2d 519, 538 (1997). Under Illinois law, a court can compel disclosure of relevant PHI in litigation involving that party's medical condition. *In re Lakisha M.,* 227 Ill. 2d 259, 264 (2008); *Kunkel*, 179 Ill. 2d at 538; *Monier v. Chamberlain*, 31 Ill. 2d 400, 403 (1964); *Carlson v. Jerousek*, 2016 IL App (2d) 141248, ¶¶ 34-35. Once a court determines that initial disclosure of PHI does not conflict with the Illinois Constitution, the constitutional scrutiny ends there, and the court need not determine whether subsequent retention, use, and disclosure by property and casualty insurers for lawful purposes raise constitutional concerns.

For example, in *Lakisha*, 227 Ill. 2d 259, this Court found constitutional a statute requiring juvenile offenders to provide a DNA sample for indexing. *Id.* at 266-68. In upholding the statute, the Court held that after a properly compelled disclosure, the government's later retention and use of the DNA did not lead to any new or additional invasion of the privacy interest:

> As a final matter we note that, because the taking of respondent's DNA pursuant to statute does not violate the fourth amendment, it follows that

> the perpetual storage and potential future use of the genetic marker grouping analysis information derived from the sample does not give rise to an independent fourth amendment claim. If the initial search is lawful, the subsequent use of the information by the limited number of law enforcement officials, as currently set forth in the statute, is not a separate fourth amendment search because there is no additional invasion of the respondent's privacy interest.

Lakisha, 227 Ill. 2d at 277. Here, too, the disclosure of PHI is permissible because it is relevant in litigating the issues in each case. Because the use of plaintiffs' PHI in the litigation does not violate their right to privacy, State Farm's retention of records containing PHI for lawful, non-litigation purposes does not give rise to any additional invasion of a privacy interest, while serving its highly-regulated needs to the information.

Consistent with Supreme Court Rule 201, relevancy has long defined the permitted scope of civil discovery of medical records in Illinois. In *Kunkel*, a case involving a litigant's privacy rights in medical records, this Court observed that it "is reasonable to require full disclosure of medical information that is relevant to the issues in the lawsuit." 179 Ill. 2d at 538. The Court noted there that only an "unreasonable" invasion of privacy is prohibited and that: "[i]n the context of civil discovery, reasonableness is a function of relevance." *Id.* Nothing in the proposed protective order that State Farm tendered in any way alters, modifies, or violates safeguards mandated by the Illinois Constitution, Rule 201 or any other Illinois Supreme Court Rule, Illinois statute or common law, and the protective order proposed by State Farm complies with the constitutional requirement that a state-invasion of the right of privacy must be reasonable.

CONCLUSION

For all the reasons set forth in the petition for leave to appeal or alternatively as a

matter of right and this brief, the intervenor-appellant, State Farm Mutual Automobile Insurance Company, respectfully requests that the Illinois Supreme Court reverse the opinion and judgment of the Illinois Appellate Court, Second Judicial District, and enter the protective order tendered by intervenor-appellant, State Farm, or remand with directions for the entry of a protective order that expressly allows for the use, retention, and disclosure of PHI in conformity to all federal and state insurance laws and regulations.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b) of the Supreme Court Rules. The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and points and authorities, the Rule 341(c) certificate of compliance, and those matters to be appended to this brief pursuant to Rule 342(a), is 47 pages.

By: /s/ Michael Resis

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APPENDIX

TABLE OF CONTENTS FOR APPENDIX

2020 IL App (2d) 190499
Nos. 2-19-0499 & 2-19-0500 cons.
Opinion filed March 13, 2020

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ROSEMARIE HAAGE, Plaintiff-Appellee, v. ALFONSO MONTIEL ZAVALA, PATRICIA SANTIAGO, JOSE PACHECO-VILLANUEVO, OKAN ESMEZ, and ROSALINA ESMEZ, Defendants (State Farm Mutual Automobile Insurance Company, Intervenor-Appellant).	)	Appeal from the Circuit Court of Lake County. No. 17-L-897 Honorable Mitchell L. Hoffman, Judge, Presiding.
AGNIESZKA SURLOCK and EDWARD SURLOCK, Plaintiffs-Appellees, v. DRAGOSLAV STARCEVIC, Defendant (State Farm Mutual Automobile Insurance Company, Intervenor-Appellant).	)	Appeal from the Circuit Court of Lake County. No. 18-L-39 Honorable Diane E. Winter, Judge, Presiding.

2020 IL App (2d) 190499

JUSTICE HUDSON delivered the judgment of the court, with opinion.
Presiding Justice Birkett and Justice Zenoff concurred in the judgment and opinion.

OPINION

¶ 1 I. INTRODUCTION

¶ 2 This consolidated appeal concerns the scope of protective orders involving the disclosure of protected health information (PHI) to a property and casualty insurer. In each of the two underlying cases, plaintiffs sued to recover damages occasioned by the alleged negligence of defendants in driving their automobiles. Plaintiffs subsequently moved for the entry of qualified protective orders pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified as amended in scattered sections of Titles 18, 26, 29, and 42 of the United States Code)) (HIPAA qualified protective orders). Among other things, the protective orders proposed by plaintiffs would have (1) prohibited the parties and any other persons or entities from using or disclosing PHI for any purpose other than the litigation for which it was requested and (2) required the return or destruction of the PHI within 60 days after the conclusion of the litigation. See 45 C.F.R. § 164.512(e)(1)(v)(A), (B) (2018) (setting forth requirements for a qualified protective order under HIPAA). State Farm Mutual Automobile Insurance Company (State Farm), the liability insurer for at least one of the named defendants in each case, petitioned to intervene. After the circuit court of Lake County granted the petition in each case, State Farm filed objections to the HIPAA qualified protective orders. State Farm argued, *inter alia*, that the HIPAA qualified protective orders (1) sought to bind State Farm to the requirements of HIPAA, although State Farm is expressly exempt from the statute's application and (2) directly conflicted with State Farm's obligations and rights under the Illinois Insurance Code (215 ILCS 5/1 *et seq.* (West 2018)) and the administrative regulations governing its business operations. State Farm requested that the trial court deny the HIPAA qualified

protective orders and enter, pursuant to Illinois Supreme Court Rule 201(c)(1) (eff. May 29, 2014), protective orders similar to one used in the law division of the circuit court of Cook County (Cook County protective orders). The Cook County protective orders would permit 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 certain designated purposes and exempt insurers from any "return or destroy" provisions.

¶ 3 Following a combined hearing and additional briefing, the trial court in each case granted plaintiffs' motions for the HIPAA qualified protective orders and denied State Farm's request for the Cook County protective orders. The trial courts determined, among other things, that (1) to the extent that State Farm's obligations and rights under Illinois law conflict with HIPAA requirements, the federal statute and its regulations preempt state law and (2) any individual or entity receiving PHI in response to a HIPAA qualified protective order is bound to follow the terms of the order. State Farm filed an interlocutory appeal in each case, pursuant to Illinois Supreme Court Rule 307(a)(1) (eff. Nov. 1, 2017). On appeal, State Farm contends that the trial courts erred in granting plaintiffs' motions for the HIPAA qualified protective orders. We affirm.

¶ 4 II. BACKGROUND

¶ 5 To provide context to the parties' arguments, we briefly review the relevant provisions of HIPAA before discussing the facts underlying this appeal.

¶ 6 A. HIPAA

¶ 7 In 1996, Congress passed, and President Clinton signed into law, HIPAA (Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified as amended in scattered sections of Titles 18, 26, 29, and 42 of the United States Code)). Among HIPAA's purposes were to establish national privacy

standards and fair information practices regarding individually identifiable health information. *Brende v. Hara*, 153 P.3d 1109, 1114 (Haw. 2007); see also *Wade v. Vabnick-Wener*, 922 F. Supp. 2d 679, 687 (W.D. Tenn. 2010) ("HIPAA embodies Congress' recognition of 'the importance of protecting the privacy of health information in the midst of the rapid evolution of health information systems.' " (quoting *South Carolina Medical Ass'n v. Thompson*, 327 F.3d 346, 348 (4th Cir. 2003)); *Law v. Zuckerman*, 307 F. Supp. 2d 705, 710 (D. Md. 2004) ("Congress enacted HIPAA, in part, to protect the security and privacy of individually identifiable health information."); U.S. Dep't of Health & Human Servs., Office for Civil Rights, Summary of the HIPAA Privacy Rule 1 (May 2003), https://www.hhs.gov/sites/default/files/privacysummary.pdf [https://perma.cc/F66C-T4TR] ("A major goal of [HIPAA] is to assure that individuals' health information is properly protected while allowing the flow of health information needed to provide and promote high quality health care and to protect the public's health and well being."). To this end, HIPAA authorized the Secretary of the Department of Health and Human Services (HHS) to issue regulations governing individually identifiable health information if Congress did not enact privacy legislation within three years of the passage of the statute. HIPAA, Pub. L. No. 104-191, § 264(c)(1), 110 Stat. 1936, 2033-34 (1996); U.S. Dep't of Health & Human Servs., Office for Civil Rights, Summary of the HIPAA Privacy Rule 1-2 (May 2003), https://www.hhs.gov/sites/default/files/privacysummary.pdf [https://perma.cc/F66C-T4TR]; *Arons v. Jutkowitz*, 880 N.E.2d 831, 840 (N.Y. 2007). Congress did not meet its self-imposed deadline, so HHS proposed and subsequently adopted the "Privacy Rule," a series of regulations governing permitted uses and disclosures of PHI. Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462 (Dec. 28, 2000); U.S. Dep't of Health & Human Servs., Office for Civil Rights, Summary of the HIPAA Privacy Rule 2 (May 2003), https://www.hhs.gov/sites/default/files/

privacysummary.pdf [https://perma.cc/F66C-T4TR]; *Arons*, 880 N.E.2d at 840. The Privacy Rule is codified at parts 160 and 164 of Title 45 of the Code of Federal Regulations (45 C.F.R. pt. 160, 164 (2018)). U.S. Dep't of Health & Human Servs., Office for Civil Rights, Summary of the HIPAA Privacy Rule 2 (May 2003), https://www.hhs.gov/sites/default/files/privacysummary.pdf [https://perma.cc/F66C-T4TR]; *Arons*, 880 N.E.2d at 840.

¶ 8 The Privacy Rule prohibits the use or disclosure of an individual's PHI by a "covered entity" or "business associate" unless the individual has consented in writing or unless the use or disclosure is otherwise specifically permitted or required by the Privacy Rule. 45 C.F.R. §§ 164.502, 164.506, 164.508, 164.510, 164.512 (2018). With exceptions not relevant here, the Privacy Rule defines the term "protected health information" as "individually identifiable health information" transmitted by electronic media, maintained in electronic media, or transmitted or maintained in any other form or medium. 45 C.F.R. § 160.103 (2018). In turn, "individually identifiable health information" means information, including demographic data, that (1) relates to "the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual" and (2) "identifies the individual" or where "there is a reasonable basis to believe the information can be used to identify the individual." 45 C.F.R. § 160.103 (2018). A "covered entity" means "[a] health plan," "[a] health care clearinghouse," or "[a] health care provider who transmits any health information in electronic form" as those terms are defined in the regulation. 45 C.F.R. § 160.103 (2018). A "business associate" is a person, other than a member of a covered entity's workforce, who performs certain functions or activities on behalf of or provides certain services to a covered entity that involve the use or disclosure of PHI. 45 C.F.R. § 160.103 (2018).

¶ 9 Relevant to this dispute, the Privacy Rule permits a "covered entity" to use or disclose PHI, in the course of any judicial or administrative proceeding, without the written authorization of the individual to whom it belongs. 45 C.F.R. § 164.512(e) (2018). However, the Privacy Rule places certain requirements on both the party providing the information and the party seeking it. U.S. Dep't of Health & Human Servs., Office for Civil Rights, Summary of the HIPAA Privacy Rule 6 (May 2003), https://www.hhs.gov/sites/default/files/privacysummary.pdf [https://perma.cc/F66C-T4TR]. Hence, a covered entity may disclose PHI expressly authorized by a court order. 45 C.F.R. § 164.512(e)(1)(i) (2018). A covered entity may also disclose PHI "[i]n response to a subpoena, discovery request, or other lawful process, not accompanied by an order of a court," if the covered entity "receives satisfactory assurance *** from the party seeking the information" that the party has made reasonable efforts (1) to ensure that the individual who is the subject of the PHI has been given notice of the request or (2) to secure a qualified protective order. 45 C.F.R. § 164.512(e)(1)(ii) (2018). In addition, a covered entity may disclose PHI in response to "lawful process," without receiving satisfactory assurance from the requesting party, if the covered entity itself makes reasonable efforts to notify the individual or seek a qualified protective order. 45 C.F.R. § 164.512(e)(1)(vi) (2018). With respect to PHI, a "qualified protective order" under the Privacy Rule means an order of the court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that (1) "[p]rohibits the parties from using or disclosing the [PHI] for any purpose other than the litigation or proceeding for which such information was requested" and (2) "[r]equires the return to the covered entity or destruction of the [PHI] (including all copies made) at the end of the litigation or proceeding." 45 C.F.R. § 164.512(e)(1)(v)(A), (B) (2018).

¶ 10 HIPAA and its regulations establish a "uniform federal 'floor' of privacy protections for individual medical information." Scott D. Stein, *What Litigators Need to Know About HIPAA*, 36 J. Health L. 433, 434 (2003); see also Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. at 82,471 ("The protections [(provided by HIPAA and its regulations)] are a mandatory floor, which other governments and any covered entity may exceed."); 45 C.F.R. § 164.502(a) (2018). As a result, HIPAA preempts "contrary" state laws unless the state law is "more stringent" than the standards set forth in the Privacy Rule. 42 U.S.C. § 1320d-7 (2018); 45 C.F.R. §§ 160.202, 160.203(b), 164.502(a) (2018); *Giangiulio v. Ingalls Memorial Hospital*, 365 Ill. App. 3d 823, 840 (2006); Stein, *supra*, at 434. A state law is "contrary" to HIPAA if a "covered entity or business associate would find it impossible to comply with both the State and Federal requirements" or if the "provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of [HIPAA]." 45 C.F.R. § 160.202 (2018). A state law is "more stringent" than HIPAA if the state law provides greater privacy protection or privacy rights. 45 C.F.R. § 160.202 (2018); *Giangiulio*, 365 Ill. App. 3d at 840; *Caldwell v. Chauvin*, 464 S.W.3d 139, 153 (Ky. 2015) ("[I]f a 'contrary' [state] law requires a *more stringent* standard of privacy, HIPAA's preemption provisions are inapplicable and state law controls." (Emphasis in original.)). In addition, HIPAA will not preempt a contrary state law if the Secretary of HHS determines, in response to a request by the State, that, among other things, the state law is necessary for one of the specified purposes set forth in section 160.203(a)(1) of the Privacy Rule. 45 C.F.R. §§ 160.203(a)(1), 160.204 (2018).

¶ 11 B. Underlying Facts

¶ 12 1. Haage Complaint

¶ 13 On November 15, 2017, plaintiff, Rosemarie Haage, filed a five-count complaint against defendants Alfonso Montiel Zavala, Patricia Santiago, Jose Pacheco-Villanuevo, Okan Esmez, and Rosalina Esmez. The action arose out of a multi-vehicle collision near the intersection of Lakeview Parkway and Route 60 in Vernon Hills. Count I of the complaint alleged negligence on the part of Zavala, count II alleged negligent entrustment on the part of Santiago, count III alleged negligence on the part of Pacheco-Villanuevo, count IV alleged negligence on the part of Okan Esmez, and count V alleged negligent entrustment on the part of Rosalina Esmez. All counts sought to recover damages for, *inter alia*, Haage's bodily injuries.

¶ 14 2. Surlock Complaint

¶ 15 On January 11, 2018, plaintiffs, Agnieszka and Edward Surlock, filed a two-count complaint against defendant Dragoslav Starcevic. The action arose out of an automobile accident between Agnieszka and Starcevic on January 24, 2016, at the intersection of Grand Avenue and Route 45 in Lindenhurst. Count I of the complaint alleged negligence and sought to recover damages for, *inter alia*, Agnieszka's bodily injuries. Count II of the complaint alleged loss of consortium on behalf of Edward, Angieszka's husband.

¶ 16 3. Motions for Entry of Protective Orders

¶ 17 On August 23, 2018, the Surlocks and Haage each filed a "Motion for Entry of Protective Order and Authorization to Disclose Protected Health Information" in their respective lawsuits. The motions alleged that Agnieszka's and Haage's treating physicians, hospitals, and other healthcare providers, all of whom are "covered entities" as defined by the Privacy Rule, possess their PHI. The motions further alleged that both the prosecution and the defense in each case "will require that the parties, their attorneys, their attorneys' agents, consultants and various witnesses and other personnel receive and review copies of the protected health information" but that HIPAA

"potentially prohibits covered entities from disclosing protected health information in judicial proceedings other than by authorization or Qualified Protective Order." See 45 C.F.R. § 164.512(e) (2018). Accordingly, the Surlocks and Haage requested HIPAA qualified protective orders permitting the use and disclosure of PHI pertaining to Agnieszka and Haage. Relevant to these appeals, the HIPAA qualified protective orders proposed by the Surlocks and Haage would (1) require any person or entity in possession of PHI received pursuant to the protective order, including an insurance company, to return or destroy any and all PHI pertaining to the plaintiffs within 60 days after the conclusion of the litigation (45 C.F.R. § 164.512(e)(1)(v)(B) (2018)) and (2) prohibit the parties, their attorneys, and their insurers from using or disclosing PHI for any purpose other than the litigation at issue (45 C.F.R. § 164.512(e)(1)(v)(A) (2018)). A hearing on plaintiffs' motions was scheduled for October 6, 2018.

¶ 18 4. Petitions to Intervene

¶ 19 On September 17, 2018, State Farm filed a petition to intervene in the Surlock case as a matter of right pursuant to section 2-408(a)(2) of the Code of Civil Procedure (Code) (735 ILCS 5/2-408(a)(2) (West 2018)). On September 28, 2018, State Farm filed a nearly identical petition to intervene in the Haage litigation. State Farm sought to intervene on the basis that, as the liability insurer for Starcevic and at least one of the named defendants in the Haage case, the proposed HIPAA qualified protective orders would impose upon it "significant restrictions and obligations." State Farm asserted that it met the threshold requirements to intervene as of right pursuant to section 2-408(a)(2) of the Code, because (1) its petitions were timely, having been filed before the entry of the HIPAA qualified protective orders, (2) representation of its interest by existing parties would be inadequate, as the attorneys representing its policyholders are not conversant with either the legal issues raised by the proposed HIPAA qualified protective orders or the laws and

regulations applicable to State Farm's business operations, and (3) the negative effect on State Farm if the HIPAA qualified protective orders were entered is of no concern or consequence to State Farm's policyholders. Over plaintiffs' objections, the trial court granted State Farm's petitions to intervene and allowed State Farm leave to file objections to the HIPAA qualified protective orders.

¶ 20 5. State Farm's Objections

¶ 21 In support of its objections, State Farm initially argued that the HIPAA qualified protective orders proposed by plaintiffs seek to bind it to HIPAA's requirements, even though it is exempt from the statute's application. In this regard, State Farm asserted that, as a property and casualty insurer, it is not a "covered entity" under HIPAA. State Farm also argued that restrictions in the proposed HIPAA qualified protective orders would directly conflict with its obligations and rights under Illinois law in two principal ways. First, State Farm asserted that requiring it to return or destroy all copies of PHI following the conclusion of the litigation would interfere with its obligations under provisions of both the Illinois Insurance Code and the Illinois Administrative Code, which require it to maintain a complete record of all books, records, and accounts, including claim files and claim data, and to make that information available for examination upon request to the Illinois Department of Insurance. See 215 ILCS 5/133(2) (West 2018); 50 Ill. Adm. Code 919.30 (1989). According to State Farm, this would encompass medical records and PHI produced to it. State Farm maintained that its failure to comply with its obligations under Illinois law could subject the company to possible disciplinary action by the state. Second, State Farm asserted that restricting the use of the PHI to the litigation at issue would interfere with its rights under Illinois law to use plaintiffs' information to perform "certain insurance functions," including (1) claims administration; (2) the detection, investigation, or reporting of actual or potential fraud,

misrepresentation, or criminal activity; (3) underwriting; (4) ratemaking and guaranty fund functions; (5) reinsurance and excess loss insurance; and (6) actuarial, scientific, medical, or public policy research.

¶ 22 State Farm also questioned the use of a qualified protective order in light of the fact that the Privacy Rule provides that PHI may be produced in litigation by several other procedures that would not impede the access, use, and retention of medical records by a property and casualty insurer. See 45 C.F.R. §§ 164.502(b)(2), 164.508, 164.512(e)(1)(i), (ii) (2018). As an alternative to plaintiffs' proposed HIPAA qualified protective orders, State Farm urged the courts to adopt and enter, pursuant to Illinois Supreme Court Rule 201(c)(1) (eff. May 29, 2014), the Cook County protective order, which is the standard "HIPAA Protective Order" used by the law division of the circuit court of Cook County pursuant to General Administrative Order 17-4 (Cook County Cir. Ct. Law Div. Gen. Adm. Order 17-4 (Dec. 15, 2017)).[1] Paragraph two of the Cook County

[1]After State Farm petitioned to intervene, General Administrative Order 17-4 was vacated by the law division of the circuit court of Cook County, pursuant to General Administrative Order 18-1 (Cook County Cir. Ct. Law Div. Gen. Adm. Order 18-1 (Oct. 29, 2018)). General Administrative Order 18-1 adopted a "HIPAA Qualified Protective Order" to replace the standard "HIPAA Protective Order" that had been previously used under General Administrative Order 17-4. Other than some minor modifications, the "HIPAA Qualified Protective Order" approved by General Administrative Order 18-1 is nearly identical to the standard "HIPAA Protective Order" adopted pursuant to General Administrative Order 17-4. General Administrative Order 18-1 is the subject of Proposal 18-01, which would amend Illinois Supreme Court Rule 218 (eff. July 1, 2014). A public meeting regarding Proposal 18-01 was held before the Illinois Supreme Court Rules

protective order permits 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 the 11 designated purposes enumerated therein. Cook County Cir. Ct. Law Div. Gen. Adm. Order 17-4 (Dec. 15, 2017). The Cook County protective order also exempts insurance companies from any "return or destroy" provision, but only for the purposes listed in paragraph two. Cook County Cir. Ct. Law Div. Gen. Adm. Order 17-4 (Dec. 15, 2017). State Farm maintained that the Cook County protective order "omits unnecessary restrictions and explicitly accommodates casualty insurers' obligations under applicable state and federal law."

¶ 23 6. Plaintiffs' Replies to State Farm's Objections

¶ 24 In their replies to State Farm's objections, plaintiffs argued that, absent a waiver from the federal government, HIPAA prohibits the use or disclosure of PHI for any purpose other than the litigation or proceeding for which such information was requested and requires the return or destruction of PHI at the end of the litigation or proceeding. See 45 C.F.R. § 164.512(e)(1)(v)(A), (B) (2018). Thus, plaintiffs reasoned, to the extent that any state law or regulation permits State Farm to use, store, maintain, or distribute PHI outside the scope of litigation and for their own business operations, it is preempted by HIPAA. See 42 U.S.C. § 1320d-7 (2018); 45 C.F.R. § 160.203 (2018) (providing that a standard, requirement, or implementation specification adopted under HIPAA regulations that is contrary to a provision of state law preempts the state law provision).

Committee on June 19, 2019. At oral argument, the parties represented that, to the best of their knowledge, no additional action has been taken with respect to Proposal 18-01.

¶ 25 Plaintiffs further asserted that no fact or law supports State Farm's claim that their proposed HIPAA qualified protective orders impose upon insurers undue restrictions or obligations. According to plaintiffs, there is no language in either the Illinois Insurance Code or the Illinois Administrative Code requiring non-health insurers to retain PHI and there has never been a disciplinary action taken against State Farm for failing to maintain PHI despite the entry each year of thousands of HIPAA qualified protective orders. Thus, plaintiffs concluded, their proposed HIPAA qualified protective orders do not place any obligations or restrictions on State Farm that would affect the reporting obligations of non-health insurers. Plaintiffs also disputed State Farm's claim that it requires PHI in order to perform "certain insurance functions," arguing that State Farm failed to cite any policies or regulations that would require the use of PHI for such purposes. Plaintiffs further posited that, even if State Farm is correct and Illinois law does require it to maintain PHI for purposes other than the litigation, any statute or regulation would be preempted by HIPAA.

¶ 26 Plaintiffs also asserted that, whether State Farm is exempt from HIPAA because it is not a "covered entity" is "a moot point," because a determination of that issue does not control a court's ability to enter a HIPAA qualified protective order restricting what a "non-covered entity" can do with PHI received from a covered entity. In this regard, State Farm obtains the ability to review plaintiffs' PHI only because of a valid protective order. Thus, if State Farm wishes to access the PHI at issue, it must abide by the terms of any HIPAA qualified protective order entered by the court. Plaintiffs concluded that, if State Farm's arguments are accepted, then a court could never enter a meaningful protective order that would require the destruction of PHI at the conclusion of litigation, as clearly required by HIPAA.

¶ 27 7. Trial Court Proceedings and Orders

¶ 28 On February 13, 2019, the trial courts held a combined hearing on plaintiffs' motions for HIPAA protective orders. On May 15, 2019, following additional briefing by the parties, the trial courts issued a memorandum opinion and order granting plaintiffs' motions. In so ruling, the trial courts determined that, to the extent that State Farm's obligations and rights under Illinois law conflict with HIPAA's requirements, the federal statute preempts state law. The courts noted that it would be impossible to comply with both Illinois law and HIPAA requirements for a qualified protective order. Specifically, in direct conflict with HIPAA, adoption of the Cook County protective order would allow insurance companies to disclose, maintain, use, and dispose of PHI outside of the litigation and would not require insurers to return the PHI at the end of the litigation. See 45 C.F.R. § 164.512(e)(1)(v)(A), (B) (2018). The courts also concluded that State Farm's interpretation of Illinois law defeats the full purposes and objectives of HIPAA. In this regard, the courts determined that, by eliminating the two requirements for a HIPAA qualified protective order, the Cook County order would not provide the confidentiality and protection of PHI envisioned when the Privacy Rule was enacted and would lower the protective floor that Congress provided in enacting HIPAA.

¶ 29 Next, the courts addressed State Farm's claim that plaintiffs' proposed HIPAA qualified protective orders seek to bind it to HIPAA's requirements, although it is expressly exempt from the statute's application. While the courts agreed that, as a property and casualty liability insurer, State Farm is not a covered entity under HIPAA, they also determined that State Farm is not exempt from obeying a protective order entered with respect to PHI that has been produced by a covered entity. The courts concluded that *all* parties receiving PHI must follow the qualified protective order, regardless of whether they are covered entities under HIPAA in the first instance. The courts reasoned that a qualified protective order would "lose[ ] its effectiveness" in protecting

an individual's PHI if a non-covered entity may ignore the restrictions required by HIPAA. The courts further concluded that Congress could not have intended that, at the close of litigation, noncovered entities may use PHI for their own private business purposes simply by virtue of their status as a non-covered entity.

¶ 30 Finally, the courts considered whether to avoid conflict with State Farm's alleged obligations and rights under Illinois law by treating plaintiffs' motions as proposals for a court order pursuant to 45 C.F.R. § 164.512(e)(1)(i) (2018) instead of as "qualified protective order[s]" accompanying "a subpoena, discovery request, or other lawful process" pursuant to 45 C.F.R. § 164.512(e)(1)(ii) (2018). The courts acknowledged that the Privacy Rule provides several different methods by which a covered entity may disclose PHI, but they noted that plaintiffs elected to seek HIPAA qualified protective orders, under 45 C.F.R. § 164.512(e)(1)(ii) (2018). As such, the courts concluded, it was "irrelevant" whether a different method could be used that would avoid conflict with State Farm's alleged obligations and rights under Illinois law.

¶ 31 Accordingly, the courts denied State Farm's request for the Cook County protective orders and granted plaintiffs' motions for the HIPAA qualified protective orders. On May 15, 2019, the court in the Surlock case entered a HIPAA qualified protective order. On May 16, 2019, the court in the Haage case entered a HIPAA qualified protective order. Relevant here, the HIPAA qualified protective orders entered by the courts provided:

> "8. Within 60 days after the conclusion of the litigation, including appeals, the parties, their attorneys, *insurance companies* and any person or entity in possession of PHI received pursuant to this Order, *shall return Plaintiff's PHI to the covered entity or destroy any and all copies of PHI pertaining to Plaintiff*,

including any electronically stored copy or image, except that counsel are not required to secure the return or destruction of PHI submitted to the Court.

* * *

12. All requests by or on behalf of any Defendant for protected health information, including but not limited to subpoenas, shall be accompanied by a complete copy of this Order. *The parties—including their insurers and counsel—are prohibited from using or disclosing protected health information for any purpose other than this litigation.* 'Disclose' shall have the same *** scope and definition as set forth in 45 C.F.R. § 160.103: 'the release, transfer, provision of access to, or divulging in any manner of information outside the entity holding the information.' " (Emphases added.)

¶ 32 8. Postentry Proceedings

¶ 33 On June 6, 2019, State Farm filed a motion to stay portions of the HIPAA qualified protective orders, pursuant to Illinois Supreme Court Rule 305(b) (eff. July 1, 2017), pending interlocutory appeal by State Farm. On June 12, 2019, State Farm filed a notice of interlocutory appeal in each case pursuant to Illinois Supreme Court Rule 307(a)(1) (eff. Nov. 1, 2017) (allowing an appeal to be taken to the appellate court from an interlocutory order granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction). On June 26, 2019, this court granted State Farm's motion to consolidate the appeals. On June 28, 2019, plaintiffs filed with this court a motion to dismiss the appeals as improper under Rule 307(a)(1). This court denied plaintiffs' motion to dismiss on July 10, 2019. See *In re Appointment of Special Prosecutor*, 2017 IL App (1st) 161376, ¶ 31 ("A protective order 'circumscribing the publication of information is reviewable as an interlocutory injunctive order, pursuant to Rule 307(a)(1).' " (quoting *Skolnick v.*

Altheimer & Gray, 191 Ill. 2d 214, 221 (2000))); see also *In re Daveisha C.*, 2014 IL App (1st) 133870, ¶ 25 (holding that Rule 307(a)(1) allows review of an order granting or denying injunctive relief, including a protective order entered during the discovery phase of the proceedings); *Bush v. Catholic Diocese of Peoria*, 351 Ill. App. 3d 588, 590 (2004) (deciding interlocutory appeal pursuant to Rule 307(a)(1) from entry of protective order).

¶ 34 III. ANALYSIS

¶ 35 On appeal, State Farm argues that it is not a "covered entity" subject to HIPAA and that, therefore, the trial court erred in finding that HIPAA and the Privacy Rule preempted its obligations under state law. State Farm further contends that the HIPAA qualified protective orders entered by the trial courts conflict in two principal ways with the use, retention, and disclosure of PHI authorized by the Illinois Insurance Code and the Illinois Administrative Code. First, the protective orders limit the use of PHI to the litigation in which it was produced. Second, they require the return or destruction of records containing PHI within 60 days of the conclusion of the litigation. In the interests of consistency and uniformity, State Farm requests that this court vacate the HIPAA qualified protective orders and enter in their stead the Cook County protective orders.

¶ 36 In response, plaintiffs contend that the trial court did not err in entering the HIPAA qualified protective orders. Plaintiffs do not dispute that State Farm is not a "covered entity" under HIPAA, but they argue that this fact does not discharge State Farm from obeying a protective order entered by the court with respect to PHI that has been produced by a "covered entity." Plaintiffs further argue that neither the Illinois Insurance Code nor the administrative regulations governing insurers' business operations require State Farm to retain PHI.

¶ 37 A. Covered Entity

¶ 38 State Farm initially argues that, as a property and casualty insurer, it is not a "covered entity" under HIPAA and, therefore, is not subject to HIPAA's Privacy Rule. Whether State Farm falls within the definition of a "covered entity" for purposes of HIPAA requires us to construe the Privacy Rule. "Because administrative regulations have the force and effect of law, the familiar rules that govern construction of statutes also apply to the construction of administrative regulations." *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 368 (2009). The cardinal rule of statutory construction is to ascertain and give effect to the intent of the drafter. *State Bank of Cherry v. CGB Enterprises, Inc.*, 2013 IL 113836, ¶ 56. The most reliable indicator of the drafter's intent is the language of the regulation itself, which must be given its plain and ordinary meaning. *State Bank of Cherry*, 2013 IL 113836, ¶ 56. If the language of the enactment is clear, we must apply it as written, without resort to extrinsic aids. *State Bank of Cherry*, 2013 IL 113836, ¶ 56. Moreover, we will not depart from the plain meaning of an administrative regulation by reading into it exceptions, limitations, or conditions that conflict with the expressed intent. *State Bank of Cherry*, 2013 IL 113836, ¶ 56. Statutory construction presents a question of law, subject to *de novo* review. *Van Dyke v. White*, 2019 IL 121452, ¶ 45.

¶ 39 The Privacy Rule defines a "covered entity" as a "health plan," "health care clearinghouse," or "health care provider who transmits any health information in electronic form." 45 C.F.R. § 160.103 (2018). In turn, each of these three entities has its own statutory definition. The term "health plan" is defined as "an individual or group plan that provides, or pays the cost of, medical care" but excludes "[a]ny policy, plan, or program to the extent that it provides, or pays for the cost of, excepted benefits that are listed in *** 42 U.S.C. § 300gg-91(c)(1)." 45 C.F.R. § 160.103 (2018). "Excepted benefits" include benefits under "[l]iability insurance, including general liability insurance and automobile liability insurance." 42 U.S.C. § 300gg-91(c)(1)(C) (2018).

Here, State Farm presents itself as a property and casualty insurer that insures its policyholders against the risk of third-party liability for bodily injury and property damage that results from an accident. Plaintiffs do not dispute this portrayal of State Farm. Indeed, State Farm's description comports with the generally recognized definitions of automobile, liability, property, and casualty insurance—an agreement to indemnify against property damage or loss. See Black's Law Dictionary (11th ed. 2019) (defining "automobile insurance" as "[a]n agreement to indemnify against one or more kinds of loss associated with the use of an automobile, including damage to a vehicle and liability for personal injury"); Black's Law Dictionary (11th ed. 2019) (defining "casualty insurance" as "[a]n agreement to indemnify against loss resulting from a broad group of causes such as legal liability, theft, accident, property damage, and workers' compensation"); Black's Law Dictionary (11th ed. 2019) (defining "liability insurance" as "[a]n agreement to cover a loss resulting from the insured's liability to a third party, such as a loss incurred by a driver who injures a pedestrian, and [usually] to defend the insured or to pay for a defense regardless of whether the insured is ultimately found liable"); Black's Law Dictionary (11th ed. 2019) (defining "property insurance" as "[a]n agreement to indemnify against property damage or destruction"). In light of the foregoing, we agree that State Farm, as a property and casualty insurer, does not constitute a "health plan" as defined by the Privacy Rule.

¶ 40 Likewise, State Farm does not constitute a "health care clearinghouse" or a "health care provider" as those terms are defined by the Privacy Rule. A "health care clearinghouse" is defined as a public or private entity that either "[p]rocesses or facilitates the processing of health information received from another entity in a nonstandard format or containing nonstandard data content into standard data elements or a standard transaction" or "[r]eceives a standard transaction from another entity and processes or facilitates the processing of health information into

nonstandard format or nonstandard data content for the receiving entity." 45 C.F.R. § 160.103 (2018). There is no evidence that State Farm performs either of the functions that would qualify it as a "health care clearinghouse." A "health care provider" means "a provider of services (as defined in section 1861(u) of the [Social Security] Act, 42 U.S.C. 1395x(u)), a provider of medical or health services (as defined in section 1861(s) of the [Social Security] Act, 42 U.S.C. 1395x(s)), and any other person or organization who furnishes, bills, or is paid for health care in the normal course of business." 45 C.F.R. § 160.103 (2018). With exceptions not relevant here, a "provider of services" is "a hospital, critical access hospital, skilled nursing facility, comprehensive outpatient rehabilitation facility, home health agency, [or] hospice program." 42 U.S.C. § 1395x(u) (2018). A "provider of medical or health services" includes, *inter alia*, physician services, services and supplies furnished incident to a physician's services, hospital services, and diagnostic tests. 42 U.S.C. § 1395x(s) (2018). There is no evidence that State Farm is a provider of services, a provider of medical or health services, or one who furnishes, bills, or is paid for health care in the normal course of business. Because State Farm does not fall within the definition of a "health plan," "health care clearinghouse," or "health care provider," we conclude that it is not a covered entity for purposes of HIPAA. See *Small v. Ramsey*, 280 F.R.D. 264, 276 (N.D. W. Va. 2012) ("This Court finds no language extending the provision of the HIPPA [*sic*] statutes [citation] and regulations [citation] to liability insurers ***.").

¶ 41 B. Application of HIPAA

¶ 42 The trial courts agreed that State Farm, as a property and casualty insurer, is not a covered entity under HIPAA. They then determined that State Farm's status as a "non-covered entity" did not exempt it from obeying a protective order entered with respect to PHI produced by a covered entity. The trial courts held that *all* parties receiving PHI are bound to follow a HIPAA qualified

protective order regardless of whether the party is a covered entity under HIPAA in the first instance, reasoning that a qualified protective order would "lose[ ] its effectiveness in protecting a patient's PHI if a non-covered entity may ignore the restrictions required by HIPAA." The question thus becomes whether a "non-covered entity" that receives PHI from a covered entity in response to a HIPAA qualified protective order is bound to comply with any of the order's restrictions regarding the use and disclosure of PHI. State Farm insists that, because it is not a covered entity, it is not subject to any use or disclosure restrictions. Plaintiffs counter that, although State Farm is not a covered entity for purposes of HIPAA, this fact does not discharge it from obeying a HIPAA qualified protective order entered with respect to PHI that has been produced by a covered entity. Whether State Farm's status as a "non-covered entity" exempts it from obeying the terms of a HIPAA qualified protective order requires us to construe the Privacy Rule. As such, it presents an issue of statutory construction, which is subject to *de novo* review. *Van Dyke*, 2019 IL 121452, ¶ 45; *State Bank of Cherry*, 2013 IL 113836, ¶ 22.

¶ 43 Section 164.512(e) of the Privacy Rule (45 C.F.R. § 164.512(e) (2018)) governs the circumstances under which a covered entity may disclose PHI to another party, in the course of a judicial proceeding. Section 164.512(e)(1)(i) permits a covered entity to disclose specified PHI in the course of a judicial proceeding, "[i]n response to an order of a court." 45 C.F.R. § 164.512(e)(1)(i) (2018). Section 164.512(e)(1)(ii) permits a covered entity to disclose PHI in the course of a judicial proceeding, "[i]n response to a subpoena, discovery request, or other lawful process" that is not accompanied by an order of a court, if:

> "(A) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the

protected health information that has been requested has been given notice of the request; or

(B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section." 45 C.F.R. § 164.512(e)(1)(ii)(A), (B) (2018).

For the purposes of paragraph (e)(1)(ii)(B), a covered entity receives satisfactory assurances from a party seeking PHI if the covered entity receives from such party a written statement and accompanying documentation demonstrating that "[t]he parties to the dispute giving rise to the request for information have agreed to a qualified protective order and have presented it to the court *** with jurisdiction over the dispute" or "[t]he party seeking the [PHI] has requested a qualified protective order from such court." 45 C.F.R. § 164.512(e)(1)(iv) (2018). Further, paragraph (e)(1)(v) states:

"For purposes of paragraph (e)(1) of this section, a qualified protective order means, with respect to [PHI] requested under paragraph (e)(1)(ii) of this section, an order of a court *** that:

(A) Prohibits the parties from using or disclosing the [PHI] for any purpose other than the litigation or proceeding for which such information was requested; and

(B) Requires the return to the covered entity or destruction of the [PHI] (including all copies made) at the end of the litigation or proceeding." 45 C.F.R. § 164.512(e)(1)(v) (2018).

Thus, in the absence of an order of the court, HIPAA authorizes a covered entity to disclose PHI in a judicial proceeding, pursuant to a subpoena, discovery request, or other lawful process, provided that adequate notice was given to the individual whose information is to be produced or a qualified protective order containing the specified restrictions has been entered in the litigation.

¶ 44 It is important to note that State Farm is not the disclosing party in this case. Rather, it is the party wishing to obtain PHI. In this regard, after plaintiffs moved for the HIPAA qualified protective orders with respect to the disclosure of their PHI, State Farm intervened and filed objections, requesting entry of an alternative HIPAA protective order, the Cook County protective order. As the plain language of the Privacy Rule indicates, a covered entity may disclose PHI to State Farm only if the protective order meets the requirements of section 164.512(e)(1)(v) of the Privacy Rule (45 C.F.R. § 164.512(e)(1)(v) (2018)). Yet, the Cook County protective order would exempt State Farm from any obligation to limit the use or disclosure of PHI to the litigation or to return or destroy the PHI at the end of the litigation. State Farm cites no provision in HIPAA, the Privacy Rule, any other regulations, or case law that would allow such exemptions. Again, State Farm obtains the ability to review plaintiffs' PHI only in response to a protective order issued in accordance with the requirements of section 164.512(e)(1)(v) (45 C.F.R. § 164.512(e)(1)(v) (2018)). Hence, if State Farm wishes to access the PHI at issue, it must abide by the terms of the HIPAA qualified protective orders entered by the court. Accordingly, we agree with the trial courts and conclude that State Farm, as an entity wishing to receive PHI from a covered entity in response to a HIPAA qualified protective order, is bound to comply with the use and disclosure restrictions set forth in the orders.

¶ 45 Citing various extrinsic sources, including the Federal Register, State Farm contends that the trial courts' reasoning "ignores that possession of PHI does not convert a non-covered entity

into a covered entity under HIPAA and its regulations." To be sure, the passages State Farm cites support the notion that Congress did not intend property and casualty insurers to constitute "covered entities" for purposes of HIPAA. See Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. at 82,567 ("Congress did not include life insurers and casualty insurance carriers as 'health plans' for purposes of this rule and therefore they are not covered entities."); Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. at 82,568 ("[P]roperty and casualty insurers *** are not covered entities, as they do not meet the statutory definition of 'health plan.' "); Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. at 82,578 (" '[E]xcepted benefits' as defined under 42 U.S.C. 300gg-91(c)(1), which includes liability programs such as property and casualty benefit providers, are not health plans for purposes of this rule."). Indeed, as explained earlier, we have no quarrel with State Farm's proposition. The passages it cites, however, say nothing about whether a non-covered entity is exempt from obeying a HIPAA qualified protective order entered with respect to PHI that has been produced by a covered entity.

¶ 46 State Farm further asserts that HHS has recognized that the Privacy Rule does not protect all PHI "wherever it is found." In support of this position, State Farm directs us to the following passages from a report authored by HHS:

> "The HIPAA Rules apply only to organizations known as covered entities and their business associates. HIPAA does not apply to individuals or to other types of organizations that do not qualify as covered entities or business associates, even those that may handle or store an individual's health information.
>
> * * *

> The HIPAA Privacy Rule does not protect all health information wherever it is found. Because the rules apply only to covered entities and their business associates, the protections do not extend to data about the health of individuals held by [non-covered entities]." U.S. Dep't of Health & Human Servs., Examining Oversight of the Privacy & Security of Health Data Collected by Entities Not Regulated by HIPAA 13, 15 (June 17, 2016), https://www.healthit.gov/sites/default/files/non-covered_entities_report_june_17_2016.pdf [https://perma.cc/3HRT-TMA7].

State Farm's reliance on this passage is unpersuasive. While the Privacy Rule does not protect all health information wherever it is found, nothing in the language quoted above indicates that a noncovered entity is exempt from obeying a HIPAA qualified protective order entered with respect to PHI that it has received from a covered entity in response to a HIPAA qualified protective order.

¶ 47 State Farm also asserts that "[a] plaintiff should be well-aware that PHI disclosed by a covered entity to the recipient has the potential to be subject to redisclosure by the recipient." In support of this assertion, State Farm relies on section 164.508(c)(2)(iii) of the Privacy Rule (45 C.F.R. § 164.508(c)(2)(iii) (2018)). Section 164.508 of the Privacy Rule is entitled "Uses and disclosures for which an authorization is required." 45 C.F.R. § 164.508 (2018). It sets forth the process by which a covered entity may disclose PHI with a valid *authorization*. See 45 C.F.R. § 164.508 (2018). To be "valid" for purposes of section 164.508, the authorization must, among other things, "contain statements adequate to place the individual on notice of *** [t]he potential for information disclosed pursuant to the authorization to be subject to redisclosure by the recipient and no longer be protected by this subpart." 45 C.F.R. § 164.508(c)(2)(iii) (2018). Section 164.508 makes clear that redisclosure in this context applies only with respect to PHI disclosed with a valid

authorization. In this case, we are not dealing with the disclosure of PHI pursuant to a valid authorization. Thus, State Farm's reliance on this provision is misplaced.

¶ 48 Citing a passage from the Federal Register, State Farm next observes that HHS has stated that, because its jurisdiction under the statute is limited to covered entities, "once protected health information leaves the purview of *** [a] covered entit[y], *** the information is no longer afforded protection under this rule." Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. at 82,567. Again, nothing in the language of this passage indicates that a noncovered entity is exempt from obeying the restrictions in a HIPAA qualified protective order entered with respect to PHI that has been produced by a covered entity.

¶ 49 In short, while State Farm is not a "covered entity" under HIPAA, it has not directed us to any specific language in HIPAA, the Privacy Rule, or any other regulation, authority, or case law indicating that a noncovered entity that receives PHI from a covered entity in response to a HIPAA qualified protective order is exempt from complying with the order's restrictions regarding the use or disclosure of the PHI. Thus, if State Farm wishes to access the PHI at issue, it must abide by the terms of the HIPAA qualified protective orders entered by the trial courts.

¶ 50 C. Illinois Law

¶ 51 Next, State Farm argues that the trial courts erred in entering the HIPAA qualified protective orders, because they conflict with State Farm's obligations under state law. According to State Farm, it must be permitted to use and retain plaintiffs' PHI to fulfill its obligation with respect to various provisions of the Illinois Insurance Code (215 ILCS 5/1 *et seq.* (West 2018)) and the administrative regulations governing its business operations. As a result, State Farm maintains, the trial courts should instead have entered the Cook County protective orders. According to State Farm, the Cook County protective order "strikes the proper balance between a

litigant's interest in PHI and the State's interest in allowing property and casualty insurers to retain PHI beyond litigation."

¶ 52 To begin, State Farm directs us to article XL of the Insurance Code (215 ILCS 5/1001 *et seq.* (West 2018)), which is titled "Insurance Information and Privacy Protection." 215 ILCS 5/art. XL (West 2018). One of the stated purposes of article XL is 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." 215 ILCS 5/1001 (West 2018). Citing section 1014 of article XL (215 ILCS 5/1014 (West 2018)), State Farm argues that Illinois law protects personal or privileged information received in handling claims while still allowing property and casualty insurers to make disclosures reasonably necessary to rate-making, anti-fraud programs, consumer-protection research, and regulatory compliance. Specifically, section 1014 provides that "[a]n insurance institution, agent or insurance-support organization *shall not disclose* any personal or privileged information about an individual collected or received in connection with an insurance transaction unless the disclosure" meets one of the enumerated exceptions. (Emphasis added.) 215 ILCS 5/1014 (West 2018). However, as plaintiffs point out, there is a clear difference between language stating that an insurer "shall not disclose" personal or privileged information and language mandating the retention or use of PHI for a particular purpose. The passage to which State Farm directs us does not contain any mandatory affirmative language requiring the retention of PHI or its use for any particular purpose. This language in no way supports State Farm's claim that state law requires it to retain or otherwise use PHI.

¶ 53 State Farm further asserts that insurers retain records for a variety of legal and operational reasons. For instance, State Farm notes that insurers are prohibited from engaging in improper

claims practices. See 215 ILCS 5/154.5, 154.6 (West 2018). To this end, section 919.30 of Title 50 of the Illinois Administrative Code requires insurers to make their claim files available to the Director of the Illinois Department of Insurance (Director) for examination upon request. 50 Ill. Adm. Code 919.30(a) (1989). According to State Farm, the requirements governing the examination process conflict with the "return or destroy provisions" of the protective orders entered here.

¶ 54 With respect to examinations by the Director as part of improper-claims practice, section 919.30 provides in relevant part as follows:

> "b) Each company shall maintain claim data that should be accessible and retrievable for examination by the Director. A company shall be able to provide the claim number, line of coverage, date of loss and date of payment of the claim, date of denial, or date claim closed without payment. This data must be available for all open and/or closed files for the current year and the two preceding years. The examiners' review may include but need not be limited to an examination of the following claims:
>
> 1) Claims Closed with Payment;
>
> 2) Claims Denied;
>
> 3) Claims Closed Without Payment;
>
> 4) First Party Automobile Total Losses; and/or Subrogation Claims.
>
> c) Detailed documentation shall be contained in each claim file in order to permit reconstruction of the company's activities relative to each claim file." 50 Ill. Adm. Code 919.30 (1989).

According to State Farm, because this regulation requires maintaining "detailed documentation" in each claim file "to permit the reconstruction of the insurer's activities," it effectively mandates

an insurer "to maintain all records of each claim for 'all open and/or closed files for the current year and the two preceding years.' " However, we find no language in section 919.30 requiring an insurer to expressly retain PHI. Rather, the regulation refers to "claim data," which it describes as "the claim number, line of coverage, date of loss and date of payment of the claim, date of denial, or date claim closed without payment." Moreover, we see no reason why keeping in the company's file a copy of the HIPAA qualified protection order, specifying that the company was prohibited from using or disclosing PHI for any purpose other than the litigation and was required to return or destroy the PHI at the end of the litigation, would not suffice to establish "the company's activities relative to each file." For these reasons, we are unpersuaded by State Farm's claim that the requirements governing examinations for improper-claims practice conflict with the "return or destroy" provisions of the protective orders entered in this case.

¶ 55 State Farm also asserts that the HIPAA qualified protective orders prevent insurers from performing functions related to fraud detection and deterrence. State Farm asserts that, because the Illinois Department of Insurance relies on property and casualty insurers to detect and combat insurance fraud, Illinois law authorizes them to report information, including PHI, to the Illinois Department of Insurance and insurance support organizations, such as the National Insurance Crime Bureau and the Insurance Services Organization. See 215 ILCS 5/155.23 (West 2018). According to State Farm, if insurers must return to covered entities or destroy all PHI within 60 days of the end of litigation, they cannot later provide necessary information to help the state with fraud detection and prevention.

¶ 56 The statute State Farm cites authorizes the Director

> "to promulgate reasonable rules requiring insurers *** doing business in the State of Illinois to report factual information *in their possession that is pertinent* to suspected

> fraudulent insurance claims, fraudulent insurance applications, or premium fraud *after* [the Director] has made a determination that the information is necessary to detect fraud or arson." (Emphases added.) 215 ILCS 5/155.23(1) (West 2018).

We find State Farm's reliance on section 155.23 unpersuasive for two principal reasons. First, the statute applies only to suspected fraudulent insurance claims, fraudulent insurance applications, or premium fraud and only after the Director has determined that the information is necessary to detect fraud or arson. In this case, there is no indication of fraud and no evidence that the Director has determined that any PHI is necessary to detect fraud or arson. Thus, there can be no factual information pertinent to any suspected fraud. Second, the statute requires an insurer to report only factual information in their possession. An insurer that has returned or destroyed PHI in accordance with a HIPAA qualified protective order cannot violate the statute, because it does not possess any such information.

¶ 57 State Farm claims that other purposes for which property and casualty insurers retain claims files include actuarial and rate development, reinsurance evaluation and pricing, and long-tail exposure.[2] However, State Farm neither develops this argument nor cites any statute, policy, or regulation that would require it to use or retain PHI for any of those purposes. As such, we find

[2]"Reinsurance" is "[i]nsurance of all or part of one insurer's risk by a second insurer, who accepts the risk in exchange for a percentage of the original premium." Black's Law Dictionary (11th ed. 2019). "Long-tail claims" are "claims that are made or settled a long time after the insurance policy has expired." Collins English Dictionary, https://www.collinsdictionary.com/us/dictionary/english/long-tail-claims (last visited Feb. 21, 2020) [https://perma.cc/3SQ7-CQSQ].

any such claim forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018) (requiring appellant's brief to include argument "which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities"); *Lee v. Lee*, 2019 IL App (2d) 180923, ¶ 24.

¶ 58 Lastly, we address State Farm's reliance on part 901 of Title of 50 of the Illinois Administrative Code (50 Ill. Adm. Code 901) in support of its claim that it must be permitted to use and retain plaintiffs' PHI to fulfill its obligations with respect to Illinois law. Section 901.5 of Title 50 of the Illinois Administrative Code provides that "[n]o domestic company shall destroy any books, records, documents, accounts or vouchers, hereafter referred to as 'records', except in conformity with the requirements of this Part." 50 Ill. Adm. Code 901.5, codified at 7 Ill. Reg. 4213 (eff. Mar. 28, 1983). Section 901.20 of Title 50 sets out a time period for the disposal and destruction of records:

> "The company is authorized to dispose of or destroy records in its custody that do not have sufficient administrative, legal or fiscal value to warrant their further preservation and 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, except that these records must be maintained for the current year plus 5 years; 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 the current year plus 5 years." 50 Ill. Adm. Code 901.20 (2016).

According to State Farm, part 901 sets out a detailed process for the destruction of an insurer's records. Yet, it asserts, the HIPAA qualified protective orders entered in this case "create[ ] a Catch-22 for *** insurers, which must decide whether to comply with its 'return or destroy' provisions or continue to comply with the regulations requiring the maintenance of complete claim records for much longer periods."

¶ 59 Although part 901 of Title 50 defines the term "records," State Farm does not explain how PHI falls within this definition. The term "records" is defined in section 901.10 of Title 50 as follows:

> " 'Records' material means all books, papers and documentary materials regardless of physical form or characteristics, made, produced, executed or received by any domestic insurance company pursuant to law or in connection with the transaction of its business and preserved or *appropriate for preservation* by such company or its successors as evidence of the organization, function, policies, decisions, procedures, obligations and business activities of the company or because of the informational data contained therein. If doubt arises as to whether certain papers are 'non-record' materials, it should be assumed that the documents are 'records'." (Emphasis added.) 50 Ill. Adm. Code 901.10, codified at 7 Ill. Reg. 4213 (eff. Mar. 28, 1983).

In this case, State Farm does not explain how plaintiffs' PHI is "appropriate for preservation," especially given that (1) the trial courts entered HIPAA qualified protective orders expressly requiring the destruction of PHI within 60 days after the conclusion of the litigation and (2) State Farm failed to cite any statute, regulation, or case law that affirmatively requires the retention of PHI or its use for a particular purpose. See *Small*, 280 F.R.D. at 279-80 (rejecting similar argument by State Farm, in part because section 901.10 of Title 50 does not specifically reference medical

records). Moreover, as noted, a copy of the HIPAA qualified protective order in the file would explain why the PHI was not present. Thus, this provision does not support State Farm's position.

¶ 60 In short, State Farm has failed to direct us to any provision of the Insurance Code or the Illinois Administrative Code that requires it to use or disclose plaintiffs' PHI after the conclusion of the litigation. We find nothing in the statutory and administrative regulations cited by State Farm in its brief requiring it to retain PHI or use it for any particular purpose after the conclusion of litigation. As such, we reject State Farm's argument that the terms of the HIPAA qualified protective order conflict with its obligations under state law.

¶ 61 D. Preemption

¶ 62 Although we have concluded that the terms of the HIPAA qualified protective orders do not conflict with State Farm's obligations under state law, to the extent that they could be so construed, we agree with the trial courts that the state law provisions are preempted by HIPAA. As noted earlier, among HIPAA's purposes were to establish national privacy standards and fair information practices regarding individually identifiable health information. *Brende*, 153 P.3d at 1114; *Wade*, 922 F. Supp. 2d at 687 (citing *South Carolina Medical Ass'n*, 327 F.3d at 348); *Law*, 307 F. Supp. 2d at 710; U.S. Dep't of Health & Human Servs., Office for Civil Rights, Summary of the HIPAA Privacy Rule 1 (May 2003), https://www.hhs.gov/sites/default/files/privacysummary.pdf [https://perma.cc/F66C-T4TR]. To this end, HIPAA and its regulations establish a "uniform federal 'floor' of privacy protections for individual medical information." Stein, *supra*, at 434; see also Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. at 82,471 ("The protections [(provided by HIPAA and its regulations)] are a mandatory floor, which other governments and any covered entity may exceed."); 45 C.F.R. § 164.502(a) (2018). Thus, HIPAA preempts "contrary" state laws unless the state law is "more

stringent" than the standards set forth in the Privacy Rule. 42 U.S.C. § 1320d-7 (2018); 45 C.F.R. §§ 160.202, 160.203(b), 164.502(a) (2018); *Giangiulio*, 365 Ill. App. 3d at 840; Stein, *supra*, at 434. A state law is "contrary" to HIPAA if a "covered entity or business associate would find it impossible to comply with both the State and Federal requirements" or if the "provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of [HIPAA]." 45 C.F.R. § 160.202 (2018). Whether a state law is preempted by federal law is a question of law, subject to *de novo* review. *Fosler v. Midwest Care Center II, Inc.*, 398 Ill. App. 3d 563, 569 (2009).

¶ 63 In this case, a covered entity cannot comply with HIPAA if the statutory and administrative regulations, as interpreted by State Farm, are inserted in the qualified protective order. In this regard, the Cook County protective order does not require an insurer to return or destroy PHI at the conclusion of litigation and would permit the insurer to use and retain PHI outside of litigation. This directly conflicts with the requirements for a HIPAA qualified protective order under section 164.512(e)(1)(v) of the Privacy Rule. Likewise, by eliminating these two requirements, the Cook County protective order would not provide the confidentiality and protection of PHI envisioned when the Privacy Rule was promulgated. Stated differently, any requirement that an insurer be allowed to use and retain PHI beyond the conclusion of litigation would lower the floor of privacy protections HIPAA mandates. As such, the Cook County protective order acts as an obstacle to accomplishing and executing HIPAA's full purposes and objectives.

¶ 64 In so holding, we also observe that section 160.203(a)(1) of the Privacy Rule provides that HIPAA will not preempt a contrary state law if the Secretary of HHS determines, in response to a request by a state, that the state law is necessary to, *inter alia*, "prevent fraud and abuse related to the provision of or payment for health care" or "ensure appropriate State regulation of insurance

and health plans to the extent expressly authorized by statute or regulation." 45 C.F.R. §§ 160.203(a)(1)(i), (ii), 160.204 (2018). State Farm does not indicate that any such exception was requested by the state with respect to an insurer's purported obligations under Illinois law. In the absence of such a waiver from the federal government, a HIPAA qualified protective order prohibits the use or disclosure of PHI for any purpose other than the litigation or proceeding for which such information was requested and requires the return or destruction of PHI at the end of the litigation or proceeding.

¶ 65 E. Reverse Preemption

¶ 66 Typically, when a state law conflicts with a federal law, the federal law preempts the state law, rendering the state law without effect. U.S. Const., art. VI, cl. 2; *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008); *Milliman, Inc. v. Roof*, 353 F. Supp. 3d 588, 600 (E.D. Ky. 2018). However, the McCarran-Ferguson Act (15 U.S.C. § 1011 *et seq.* (2018)) created an exception to this rule with respect to state laws that regulate the "business of insurance." *Milliman, Inc.*, 353 F. Supp. 3d at 600-01. The trial courts here asked the parties to address the implications, if any, of the McCarran-Ferguson Act to these cases. Neither party argued that the McCarran-Ferguson Act applied, so the courts did not further address the issue. State Farm briefly mentions the McCarran-Ferguson Act in its brief but does not fully develop the issue. Nevertheless, we find it appropriate to briefly discuss this matter.

¶ 67 The McCarran-Ferguson Act provides, in relevant part, that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b) (2018). "[T]he McCarran-Ferguson Act gives rise to the doctrine of 'reverse preemption,' which, if applicable,

can cause state insurance laws to trump federal laws that interfere with them." *Western Insurance Co. v. A&H Insurance, Inc.*, 784 F.3d 725, 727 (10th Cir. 2015). Under the statute, a state law will reverse preempt a federal law if (1) the federal statute does not specifically relate to the business of insurance, (2) the state statute was enacted for the purpose of regulating the business of insurance, and (3) the federal statute would invalidate, impair, or supersede the state statute. *United States v. Rhode Island Insurers' Insolvency Fund*, 80 F.3d 616, 619 (1st Cir. 1996). Ultimately, we conclude that the McCarran-Ferguson Act does not compel reverse preemption in this case, because HIPAA does not invalidate, impair, or supersede any state insurance law or regulation cited by State Farm.

¶ 68 The United States Supreme Court has stated that "invalidate" means "to render ineffective, generally without providing a replacement rule or law" and that "supersede" means "to displace (and thus render ineffective) while providing a substitute rule." (Internal quotation marks omitted.) *Humana Inc. v. Forsyth*, 525 U.S. 299, 307 (1999). "To impair" for purposes of the McCarran-Ferguson Act means to "frustrate any declared state policy" or "interfere with a State's administrative regime." *Humana Inc.*, 525 U.S. at 310. As noted above, nothing in any Illinois statute or regulation State Farm cites requires the retention of PHI or its use for any particular purpose. Thus, the HIPAA qualified protective orders entered in this case do not "invalidate, impair, or supersede" the Illinois statutes and regulations State Farm cites. As such, we conclude that the doctrine of reverse preemption does not apply here.

¶ 69 F. Alternative Methods of Disclosing PHI

¶ 70 Alternatively, State Farm argues that the Privacy Rule did not require the trial courts to enter the HIPAA qualified protective orders proposed by plaintiffs to the exclusion of other authorized means of permitted disclosure of PHI. State Farm notes, for instance, that the Privacy

Rule permits the disclosure of PHI "[i]n response to an order of a court." 45 C.F.R. § 164.512(e)(1)(i) (2018). According to State Farm, "[n]othing in this section [(of the Privacy Rule)] says that the 'order of the court' can only be a qualified protective order." State Farm also notes that, absent a court order, the Privacy Rule allows the disclosure of PHI "[i]n response to a subpoena, discovery request, or other lawful process," provided that the party seeking the information either notifies the individual whose information is requested *or* makes a "reasonable effort[ ]" to secure a qualified protective order. 45 C.F.R. § 164.512(e)(1)(ii) (2018). State Farm points out that, of the authorized means of disclosure, only a HIPAA qualified protective order carries the restrictions that prohibit the use of PHI outside litigation and require the return of PHI to the covered entity or its destruction at the end of the litigation. See 45 C.F.R. § 164.512(e)(1)(v) (2018). State Farm therefore argues that the trial courts erred in rejecting any alternative to plaintiffs' proposed protective orders. Although we agree that the Privacy Rule provides several different methods by which a covered entity may disclose PHI in the course of a judicial proceeding, neither plaintiffs nor State Farm sought the disclosure of PHI by any means other than a protective order. Plaintiffs' motions referenced HIPAA and the Privacy Rule, and they proposed the HIPAA qualified protective order, which expressly cites the restrictions set forth in section 164.512(e)(1)(v) of the Privacy Rule (45 C.F.R. § 164.512(e)(1)(v) (2018)). Likewise, in its objections to plaintiffs' motions, State Farm proposed the Cook County protective order. The record reflects that the trial courts considered and ruled on this issue. Given these circumstances, we find that the trial courts did not err in declining to consider an alternate authorized method of disclosing PHI.

¶ 71 IV. CONCLUSION

¶ 72 For the reasons set forth above, we affirm the judgment of the circuit court of Lake County.

¶ 73 Affirmed.

TABLE OF CONTENTS FOR SUPPORTING RECORD—SURLOCK V. STARCEVIC (2-19-0499)

TABLE OF CONTENTS FOR SUPPORTING RECORD—HAAGE V. MONTIEL ZAVALA (2-19-0500)

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Clerk of the Circuit Court
Lake County, Illinois

Firm I.D. No. 13757

ON INTERLOCUTORY APPEAL TO THE ILLINOIS APPELLATE COURT
SECOND JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

AGNIESZKA SURLOCK and EDWARD SURLOCK, Plaintiffs-Appellees, v. DRAGOSLAV STARCEVIC, Defendant, and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Intervenor-Appellant.	Court No. 18 L 39 The Honorable Diane E. Winter, Judge Presiding

NOTICE OF INTERLOCUTORY APPEAL

NOW COMES the intervenor-appellant, State Farm Mutual Automobile Insurance Company, by and through the law firm of SmithAmundsen LLC, and hereby appeals, pursuant to Supreme Court Rule 307(a)(1) (Ill. S. Ct. S.R. 307(a)(1) (eff. November 1, 2017)), from the memorandum opinion and order and the HIPAA protective order filed on May 15, 2019.

By this interlocutory appeal, the intervenor-appellant will ask the Appellate Court to vacate the memorandum opinion and order and the HIPAA protective order and to enter the HIPAA protective order tendered by the intervenor-appellant or to remand for the entry of said order or for such additional relief to which it may be entitled on appeal.

Respectfully submitted,

/s/ Michael Resis
Attorneys for Intervenor-Appellant
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Clerk of the Circuit Court
Lake County, Illinois

ON INTERLOCUTORY APPEAL TO THE ILLINOIS APPELLATE COURT
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AGNIESZKA SURLOCK and EDWARD SURLOCK, Plaintiffs-Appellees, v. DRAGOSLAV STARCEVIC, Defendant, and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Intervenor-Appellant.	Court No. 18 L 39 The Honorable Diane E. Winter, Judge Presiding

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on the **June 12, 2019**, we electronically filed with the Clerk of the Circuit Court of Lake County, Illinois, through the CM/ECF system, the attached **State Farm Mutual Automobile Insurance Company's Notice of Interlocutory Appeal**, a copy of which is hereby served upon you.

SmithAmundsen, LLC

By: /s/ Michael Resis
Attorneys for Intervenor-Appellant,
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AFFIDAVIT OF SERVICE

The undersigned, Jacqueline Y. Smith, a non-attorney, under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, certifies that the statements set forth in this instrument are true and correct, and that I caused the foregoing Notice of Filing and notice of interlocutory appeal to be served upon the parties listed below on this 12th day of June, 2019, by electronic mail and electronically through the court's Odyssey electronic filing manager.

/s/ Jacqueline Y. Smith

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

AGNIESZKA SURLOCK and EDWARD SURLOCK

Plaintiffs,

v.

DRAGOSLAV STARCEVIC

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MAY 15 2019
CIRCUIT CLERK

MEMORANDUM OPINION AND ORDER

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

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

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

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

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

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

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

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

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

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

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

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

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

The Cook County order contains additional language permitting disclosures:

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

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

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

Preemption of State Law by HIPAA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Applicability of HIPAA to Liability Insurers

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

[1] The Court asked the parties to address the possible application of the McCarran-Ferguson Act, which prohibits federal preemption of state laws that regulate insurance, "unless the federal statute expressly pronounce[s] Congress' specific intention to inject itself into the area of state insurance law." *U.S. v. Rhode Island Insurers' Insolvency Fund*, 80 F.3d 616, 620 (1996). Neither party argued that the Act applied in this case. Therefore, this Court will not address the issue.

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

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

Alternatives to a Qualified Protective Order

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

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

CONCLUSION

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

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

So Ordered.

DATE: May 15, 2019

ENTER: DIANE E. WINTER

Diane E. Winter,
Circuit Judge

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FILED

MAY 15 2019

Pina Carvajal Wilson
CIRCUIT CLERK

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

AGNIESZKA SURLOCK and EDWARD SURLOCK	)	
Plaintiffs,	)	
	)	No. 18 L 39
vs.	)	
DRAGOSLAV STARCEVIC	)	
Defendant.	)	

HIPAA PROTECTIVE ORDER

This court 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. Protect a party's right to remedy as guaranteed by article I, section 12 of the Illinois Constitution for each party in this lawsuit;

3. Ensure the parties' compliance with the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and its accompanying rules and regulation governing the disclosure, maintenance, use, and disposal of protected health information (PHI);

4. For the purposes of this HIPAA Protective Order, "protected health information" shall have the same scope and definition as set forth in 45 C.F.R. §160.103 and 164.501; Protected health information includes, but is not limited to: health information, including demographic information, relating to either (a) the past, present, or future physical or mental condition of an individual; (b) the provision of care of an individual, or (c) the payment for care provided to an individual, which identifies the individual or which reasonably could be expected to identify the individual.

5. Require covered entities, as defined in 45 C.F.R. 160.103, to disclose a party's PHI expressly provided in this Order as required pursuant to 45 C.F.R. 164.512(e) for use in this litigation without a separate disclosure authorization; however, nothing in this order relieves any covered entity, party, their attorneys, their attorneys' agents or representatives, consultants, other witnesses, and other personnel who request, receive, and/or review documents containing PHI, from complying with the additional requirements of:

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

The Aids Confidentiality Act (410 ILCS 305/1 et seq.);

Alcoholism & Other Drug Abuse & Dependency Act (20 ILCS 301/30-5 et seq.);

Federal law which protects certain drug and alcohol records (42 U.S.C. §§ 290dd-3, 290ee-3; 42 C.F.R. Part 2);

The Genetic Information Privacy Act (410 ILCS 513/15);

Physician and Patient, 735 ILCS 5/8-802(4);

Medical Patients Rights Act (410 ILCS 50/1 et seq); and

Any and all other applicable federal and state laws and regulations regulating or governing the request, review, or disclosure of PHI, to the extent such laws and regulations are not pre-empted by HIPAA.

6. Authorize the parties and their attorneys to receive, subpoena, and transmit PHI pertaining to Plaintiff, to the extent and subject to the conditions outlined herein;

7. Permit the parties and their attorneys to use or disclose Plaintiff's PHI for purposes of prosecuting or defending this action including any appeals in this case. This includes, but is not necessarily limited to, disclosure to their attorneys, experts, consultants, court personnel, court reporters, copy services, trial consultants, and other entities or persons involved in the litigation process.

8. Permit the parties and their attorneys to receive PHI from covered entities, business associates, and parties in litigation, provided that the covered entity, business associates, and parties in litigation disclose only the PHI expressly authorized in this Order.

9. Prohibit the parties and any other persons or entities from using or disclosing the PHI for any purpose other than the litigation or proceeding for which it was requested as required by 45 C.F.R. 164.512(e)(1)(v)(A);

10. Require the return of the PHI to the covered entity or the destruction of the information at the end of the litigation or proceeding as required by 45 C.F.R. 164.512(e)(1)(v)(B).

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 or an Order of this court specifying the scope of the PHI to be disclosed, the recipients of the disclosed PHI, and the purpose of the disclosure. No consent to disclosure shall constitute a consent to re-disclosure unless so specified in detail.

2. Pursuant to 45 C.F.R. § 164.512(e)(1)(i) No subpoenas for information or tangible items pertaining to Plaintiff shall be served by Defendant without Court Order, unless by prior agreement of counsel. No subpoena for "any and all" records shall issue; rather, any

subpoena must specifically be restricted to five (5) years prior to the incident and relate to the condition and portions of Plaintiff's body complained of; specifically, her back, hip and lower extremities.

3. Any subpoena may issue only upon no less than fourteen days notice to Plaintiff. Defendant shall provide a copy of records received in response to any subpoena to all parties within seven days of receipt of records. Defendant shall provide a copy of records received in response to any subpoena to all parties within seven days of receipt of records.

4. The only disclosures permitted by this Order are these:

   A. All patients/parties whose PHI is subject to disclosure are presumed to have opted out of any disclosure or maintenance of PHI to any Health Information Exchange, however called, and whether or not such Health Information Exchange or similar informational depository is licensed in Illinois;

   B. As ordered by this or another court or arbitral body or by subpoena with reasonable notice to the parties attorney of record in the instant matter or their designee, for purposes of subrogation, reimbursement, or payment of liens arising out of or related to this lawsuit;

   C. To the parties of this lawsuit and their agents; and

   D. As necessary to comply with any other federal or state laws, rules, or regulations, but only to the extent that each comply with the requirements set forth by HIPAA or have more stringent protection not pre-empted by HIPAA.

6. Any covered entity over which this court has jurisdiction that fails or refuses to disclose PHI in accordance with this Court Order may be subject to all sanction authorized by the Code of Civil Procedure and the Illinois Supreme Court rules.

7. 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 written acknowledgement that each such expert or witness agrees to be bound by the terms of this order. Counsel shall take all other reasonable steps to ensure that persons receiving Plaintiff's PHI do not use or disclose such information for any purpose other than this litigation.

8. Within 60 days after the conclusion of the litigation, including appeals, the parties, their attorneys, insurance companies and any person or entity in possession of PHI received pursuant to this Order, shall return Plaintiff's PHI to the covered entity or destroy any and all copies of PHI pertaining to Plaintiff, including any electronically stored copy or image, except that counsel are not required to secure the return or destruction of PHI submitted to the Court. "Conclusion of the Litigation" shall be 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. . Proof of

destruction/deletion of all protected health information and copies thereof which have not been filed with the Court may be made by affidavit of counsel of record, filed with the Court and opposing counsel.

9. The parties are prohibited from including or attaching PHI to any document filed with the Clerk of the Circuit Court without leave of Court. PHI necessary for the court's consideration of any matter must be provided separately. Any party receiving the Court's permission to attach any PHI to a document to be filed with the Clerk of the Circuit Court shall identify such information to the Clerk of the Court for sealing of the information and Clerk shall so seal such information. A separate order sealing the records shall not be required.

10 Protected health information admitted into evidence shall be sealed at the close of the proceeding in which the evidence was admitted. Disclosures pursuant to this Order shall cease at the close of the proceeding or termination of the litigation or arbitration.

11. Other than the party whose PHI is at issue or that party's attorneys, no parties or their agents 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.

12. All requests by or on behalf of any Defendant for protected health information, including but not limited to subpoenas, shall be accompanied by a complete copy of this Order. The parties—including their insurers and counsel—are prohibited from using or disclosing protected health information for any purpose other than this litigation. "Disclose" shall have the same the same scope and definition as set forth in 45 C.F.R. §160.103: "the release, transfer, provision of access to, or divulging in any manner of information outside the entity holding the information."

13. If any party utilizes the services of a third-party to issue any subpoena for protected health information of Plaintiff, it shall be the requesting party's obligation to ensure that this order is complied with by the third party; including that the issuing subpoena and any accompanying correspondence comply with this Order.

14. This Court retains jurisdiction of the case after judgment or dismissal, for the purposes of ensuring compliance with this Order.

JUDGE

DIANE E. WINTER

Date:

FILED
6/12/2019 8:46 AM
ERIN CARTWRIGHT WEINSTEIN
Clerk of the Circuit Court
Lake County, Illinois

Firm ID No. 13757

ON INTERLOCUTORY APPEAL TO THE ILLINOIS APPELLATE COURT
SECOND JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

ROSEMARIE HAAGE, Plaintiff-Appellee, v. ALFONSO MONTIEL ZAVALA, PATRICIA SANTIAGO, JOSE PACHECO-VILLANUEVO, OKAN ESMEZ and ROSALINA ESMEZ, Defendants, and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Intervenor-Appellant.	Court No. 17 L 897 The Honorable Mitchell L. Hoffman, Judge Presiding

NOTICE OF INTERLOCUTORY APPEAL

NOW COMES the intervenor-appellant, State Farm Mutual Automobile Insurance Company, by and through the law firm of SmithAmundsen LLC, and hereby appeals, pursuant to Supreme Court Rule 307(a)(1) (Ill. S. Ct. S.R. 307(a)(1) (eff. November 1, 2017)), from the memorandum opinion and order filed on May 15, 2019 and the HIPAA protective order filed on May 16, 2019.

By this interlocutory appeal, the intervenor-appellant will ask the Appellate Court to vacate the memorandum opinion and order and the HIPAA protective order and to enter the HIPAA protective order tendered by the intervenor-appellant or to remand for the entry of said order or for such additional relief to which it may be entitled on appeal.

Respectfully submitted,

/s/ Michael Resis
Attorneys for Intervenor-Appellant
State Farm Mutual Automobile Insurance Company

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Michael Resis, ARDC No. 6180385
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FILED
6/12/2019 8:46 AM
ERIN CARTWRIGHT WEINSTEIN
Clerk of the Circuit Court
Lake County, Illinois

Firm I.D. No. 13757
Atty No. 6180385

ON INTERLOCUTORY APPEAL TO THE ILLINOIS APPELLATE COURT
SECOND JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

ROSEMARIE HAAGE, Plaintiff-Appellee, v. ALFONSO MONTIEL ZAVALA, PATRICIA SANTIAGO, JOSE PACHECO-VILLANUEVO, OKAN ESMEZ and ROSALINA ESMEZ, Defendants, and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Intervenor-Appellant.	Court No. 17 L 897 The Honorable Mitchell L. Hoffman, Judge Presiding

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on the **June 12, 2019**, we electronically filed with the Clerk of the Circuit Court of Lake County, Illinois, through the CM/ECF system, the attached **State Farm Mutual Automobile Insurance Company's Notice of Interlocutory Appeal**, a copy of which is hereby served upon you.

SmithAmundsen, LLC

By: /s/ Michael Resis
Attorneys for Intervenor-Appellant,
State Farm Mutual Automobile Insurance Co.

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Michael Resis, ARDC No. 6180385
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AFFIDAVIT OF SERVICE

The undersigned, Jacqueline Y. Smith, a non-attorney, under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, certifies that the statements set forth in this instrument are true and correct, and that I caused the foregoing notice of filing and notice of interlocutory appeal to be served upon the parties listed below on this 12th day of June, 2019, by electronic mail and electronically through the court's Odyssey electronic filing manager.

/s/ Jacqueline Y. Smith

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

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

MEMORANDUM OPINION AND ORDER

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

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

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

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

> Dispose of or destroy records in its custody that are not needed;
> a) In the transaction of current business;

b) For the final settlement or disposition of any claim arising out of a policy of insurance issued by the company; or
c) To determine the financial condition of the company for the period since the date of the last examination report of the company officially filed with the Department of Insurance, except that these records must be maintained for at least 7 years.

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

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

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

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

The Cook County order contains additional language permitting disclosures:

> To insurance companies to disclose, maintain, use, and dispose of PHI or what would otherwise be considered PHI to comply and conform with current and future applicable federal and state statute, rules, and regulations for these purposes:
>
> 1. Reporting; investigating; evaluating; adjusting, negotiating, arbitrating, litigating, or settling claims;
> 2. Compliance reporting or filing;
> 3. Conduct described in 215 ILCS 5/1014;
> 4. Required inspections and audits;
> 5. Legally required reporting to private, federal, or state governmental organizations, including health or medical

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

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

Preemption of State Law by HIPAA

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

The court begins its analysis with the bedrock principle that the Constitution designates the laws of the United States as the supreme law of the land, requiring that "all conflicting state provisions be without effect." *Maryland v. Louisiana,* 451 U.S. 725, 746, 101 S.Ct. 2114, 2128–29 (1981); *see also* U.S. Const. art. VI, cl. 2. Accordingly, where state and federal law directly

conflict, "state law must give way." *PLIVA, Inc. v. Mensing*, 131 S.Ct. 2567, 2577 (2011). In addition, "[t]here is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision." *Arizona v. United States*, 132 S.Ct. 2492, 2500–01 (2012). As the Supreme Court has explained, "[w]hen a federal law contains an express preemption clause, we focus on the plain wording of the clause," as the plain language of the text is "the best evidence of Congress' preemptive intent." *Chamber of Commerce of U.S. v. Whiting*, 131 S.Ct. 1968, 1977 (2011) (internal quotation omitted).

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

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

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

As to the first element,, whether a covered entity would "find it impossible to comply with both the State and Federal requirements, State Farm has argued that it cannot comply with both the HIPAA requirements for a qualified protective order and Illinois law. Likewise, covered entities cannot comply with HIPAA if Illinois legal requirements for record retention and use of PHI are inserted into the qualified protective order. State Farm's suggested order allows insurance companies to disclose, maintain, use and dispose of PHI outside of the litigation

and does not require them to destroy or return the PHI at the end of litigation. This directly contrasts with the requirements of HIPAA. *See* 164.512(e)(1)(v)(A) and 164.512(e)(1)(v)(B).

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

As to the second element, whether Illinois law is an "obstacle to the accomplishment and execution of the full purposes and objectives of [HIPAA section 264]," the court must consider Congress' intent. One of the congressional objectives in enacting HIPAA was to address concerns about the confidentiality of patients' individually identifiable health information. *See* Health Insurance Portability and Accountability Act of 1996, Pub.L. No. 104–191, § 264, 110 Stat. 1936; *see also S.C. Med. Ass'n v. Thompson,* 327 F.3d 346, 348, 354 (4th Cir.2003) ("Recognizing the importance of protecting the privacy of health information in the midst of the rapid evolution of health information systems, Congress passed HIPAA in August 1996."). To that end, Congress provided for the Secretary of Health and Human Services to promulgate privacy regulations addressing individuals' rights to individually identifiable health information, procedures for exercising such rights, and the uses and disclosures of such information. Pub.L. No. 104–191, § 264(b) & (c)(1); *S.C. Med. Ass'n,* 327 F.3d at 349. In compliance with the statute, the Department of Health and Human Services issued final regulations known as the "Privacy Rule." *S.C. Med. Ass'n,* 327 F.3d at 349; *see also Citizens for Health v. Leavitt,* 428 F.3d 167, 172–74 (3d Cir.2005) (detailing the history of the Privacy Rule's promulgation and explaining its requirements). As the Department explained when announcing

the Privacy Rule: "It is important to understand this regulation as a new federal floor of privacy protections that does not disturb more protective rules or practices.... The protections are a mandatory floor, which other governments and any covered entity may exceed." (65 Fed.Reg. 82471 (Dec. 28, 2000).)

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

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

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

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

Applicability of HIPAA to Liability Insurers

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

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

[1] The Court asked the parties to address the possible application of the McCarran-Ferguson Act, which prohibits federal preemption of state laws that regulate insurance, "unless the federal statute expressly announce[s] Congress' specific intention to inject itself into the area of state insurance law." *U.S. v. Rhode Island Insurers' Insolvency Fund*, 80 F.3d 616, 620 (1996). Neither party argued that the Act applied in this case. Therefore, this Court will not address the issue.

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

Alternatives to a Qualified Protective Order

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

CONCLUSION

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

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

DATE: May 15th, 2019

ENTER: Mitchell L. Hoffman
Mitchell L. Hoffman,
Circuit Judge

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

ROSEMARIE HAAGE)
)
Plaintiff,)
) No.: 17 L 897
v.)
)
ALFONSO MONTIEL ZAVALA, PATRICIA SANTIAGO)
JOSE PACHECO-VILLANUEVO,)
OKAN ESMEZ, and ROSALINA ESMEZ)
)
Defendants.)

FILED
MAY 16 2019
CIRCUIT CLERK

HIPAA PROTECTIVE ORDER

This court 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. Protect a party's right to remedy as guaranteed by article I, section 12 of the Illinois Constitution for each party in this lawsuit;

3. Ensure the parties' compliance with the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and its accompanying rules and regulation governing the disclosure, maintenance, use, and disposal of protected health information (PHI);

4. For the purposes of this HIPAA Protective Order, "protected health information" shall have the same scope and definition as set forth in 45 C.F.R. §160.103 and 164.501; Protected health information includes, but is not limited to: health information, including demographic information, relating to either (a) the past, present, or future physical or mental condition of an individual; (b) the provision of care of an individual, or (c) the payment for care provided to an individual, which identifies the individual or which reasonably could be expected to identify the individual.

5. Require covered entities, as defined in 45 C.F.R. 160.103, to disclose a party's PHI expressly provided in this Order as required pursuant to 45 C.F.R. 164.512(e) for use in this litigation without a separate disclosure authorization; however, nothing in this order relieves any covered entity, party, their attorneys, their attorneys' agents or representatives, consultants, other witnesses, and other personnel who request, receive, and/or review documents containing PHI, from complying with the additional requirements of:

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

The Aids Confidentiality Act (410 ILCS 305/1 et seq.);

Alcoholism & Other Drug Abuse & Dependency Act (20 ILCS 301/30-5 et seq.);

Federal law which protects certain drug and alcohol records (42 U.S.C. §§ 290dd-3, 290ee-3; 42 C.F.R. Part 2);

The Genetic Information Privacy Act (410 ILCS 513/15);

Physician and Patient, 735 ILCS 5/8-802(4);

Medical Patients Rights Act (410 ILCS 50/1 et seq); and

Any and all other applicable federal and state laws and regulations regulating or governing the request, review, or disclosure of PHI, to the extent such laws and regulations are not pre-empted by HIPAA.

6. Authorize the parties and their attorneys to receive, subpoena, and transmit PHI pertaining to Plaintiff, to the extent and subject to the conditions outlined herein;

7. Permit the parties and their attorneys to use or disclose Plaintiff's PHI for purposes of prosecuting or defending this action including any appeals in this case. This includes, but is not necessarily limited to, disclosure to their attorneys, experts, consultants, court personnel, court reporters, copy services, trial consultants, and other entities or persons involved in the litigation process.

8. Permit the parties and their attorneys to receive PHI from covered entities, business associates, and parties in litigation, provided that the covered entity, business associates, and parties in litigation disclose only the PHI expressly authorized in this Order.

9. Prohibit the parties and any other persons or entities from using or disclosing the PHI for any purpose other than the litigation or proceeding for which it was requested as required by 45 C.F.R. 164.512(e)(1)(v)(A);

10. Require the return of the PHI to the covered entity or the destruction of the information at the end of the litigation or proceeding as required by 45 C.F.R. 164.512(e)(1)(v)(B).

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 or an Order of this court specifying the scope of the PHI to be disclosed, the recipients of the disclosed PHI, and the purpose of the disclosure. No consent to disclosure shall constitute a consent to re-disclosure unless so specified in detail.

2. Pursuant to 45 C.F.R. § 164.512(e)(1)(i) No subpoenas for information or tangible items pertaining to Plaintiff shall be served by Defendant without Court Order, unless by prior

agreement of counsel. No subpoena for "any and all" records shall issue; rather, any subpoena must specifically be restricted to five (5) years prior to the incident and relate to the condition and portions of Plaintiff's body complained of; specifically, her back, hip and lower extremities.

3. Any subpoena may issue only upon no less than fourteen days notice to Plaintiff. Defendant shall provide a copy of records received in response to any subpoena to all parties within seven days of receipt of records. Defendant shall provide a copy of records received in response to any subpoena to all parties within seven days of receipt of records.

4. The only disclosures permitted by this Order are these:

   A. All patients/parties whose PHI is subject to disclosure are presumed to have opted out of any disclosure or maintenance of PHI to any Health Information Exchange, however called, and whether or not such Health Information Exchange or similar informational depository is licensed in Illinois;

   B. As ordered by this or another court or arbitral body or by subpoena with reasonable notice to the parties attorney of record in the instant matter or their designee, for purposes of subrogation, reimbursement, or payment of liens arising out of or related to this lawsuit;

   C. To the parties of this lawsuit and their agents; and

   D. As necessary to comply with any other federal or state laws, rules, or regulations, but only to the extent that each comply with the requirements set forth by HIPAA or have more stringent protection not pre-empted by HIPAA.

6. Any covered entity over which this court has jurisdiction that fails or refuses to disclose PHI in accordance with this Court Order may be subject to all sanction authorized by the Code of Civil Procedure and the Illinois Supreme Court rules.

7. 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 written acknowledgement that each such expert or witness agrees to be bound by the terms of this order. Counsel shall take all other reasonable steps to ensure that persons receiving Plaintiff's PHI do not use or disclose such information for any purpose other than this litigation.

8. Within 60 days after the conclusion of the litigation, including appeals, the parties, their attorneys, insurance companies and any person or entity in possession of PHI received pursuant to this Order, shall return Plaintiff's PHI to the covered entity or destroy any and all copies of PHI pertaining to Plaintiff, including any electronically stored copy or image, except that counsel are not required to secure the return or destruction of PHI submitted to the Court. "Conclusion of the Litigation" shall be 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. . Proof of destruction/deletion of all protected health information and copies thereof which have not been filed with the Court may be made by affidavit of counsel of record, filed with the Court and opposing counsel.

9. The parties are prohibited from including or attaching PHI to any document filed with the Clerk of the Circuit Court without leave of Court. PHI necessary for the court's consideration of any matter must be provided separately. Any party receiving the Court's permission to attach any PHI to a document to be filed with the Clerk of the Circuit Court shall identify such information to the Clerk of the Court for sealing of the information and Clerk shall so seal such information. A separate order sealing the records shall not be required.

10 Protected health information admitted into evidence shall be sealed at the close of the proceeding in which the evidence was admitted. Disclosures pursuant to this Order shall cease at the close of the proceeding or termination of the litigation or arbitration.

11. Other than the party whose PHI is at issue or that party's attorneys, no parties or their agents 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.

12. All requests by or on behalf of any Defendant for protected health information, including but not limited to subpoenas, shall be accompanied by a complete copy of this Order. The parties—including their insurers and counsel—are prohibited from using or disclosing protected health information for any purpose other than this litigation. "Disclose" shall have the same the same scope and definition as set forth in 45 C.F.R. §160.103: "the release, transfer, provision of access to, or divulging in any manner of information outside the entity holding the information."

13. If any party utilizes the services of a third-party to issue any subpoena for protected health information of Plaintiff, it shall be the requesting party's obligation to ensure that this order is complied with by the third party; including that the issuing subpoena and any accompanying correspondence comply with this Order.

14. This Court retains jurisdiction of the case after judgment or dismissal, for the purposes of ensuring compliance with this Order.

JUDGE

Mitchell L. Hoffman

Date:

4

ILLINOIS APPELLATE COURT
SECOND DISTRICT

55 SYMPHONY WAY
ELGIN, IL 60120
(847) 695-3750

April 2, 2020

Michael L. Resis
SmithAmundsen LLC
150 N. Michigan Avenue, Suite 3300
Chicago, IL 60601

RE: Surlock, Agnieszka, et al. v. Starcevic, Dragoslav
Appeal No.: 2-19-0499, 2-19-0500
County: Lake County
Trial Court No.: 17L897, 18L39

Appellant's petition for a certificate of importance is denied. Appellant's motion to expedite the ruling on the petition is denied as moot.

If the decision is an opinion, it is hereby released today for publication.

Honorable Donald C. Hudson
Honorable Joseph E. Birkett
Honorable Kathryn E. Zenoff

Jeffrey H. Kaplan
Clerk of the Court

cc: Glen Edward Amundsen
Jason Neal Fink
Jeffrey S. Greenbaum
Marc J. Prendergast
Robert Don Fink
Sulema Medrano Novak
Thomas L. Burdelik

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

GENERAL ADMINISTRATIVE ORDER 18-1
STANDARD HIPAA QUALIFIED PROTECTIVE ORDER

Pursuant to the order entered in the case of Marc Shull v. Eric Ellis, 15-L-9759 (and all consolidated cases), 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, proposed in the above-captioned order.

All motions and orders for HIPAA Qualified Protective Orders shall be presented on all motion and individual calendars in accordance with any applicable standing orders, or "Routine Motions," with proper notice, must be specifically labeled and contain a specific reference to the HIPAA statute.

General Administrative Order 17-4 be and is hereby vacated.

IT IS HEREBY ORDERED that this Order is entered October 29, 2018, and will be spread upon the records of the court.

Dated at Chicago, Illinois this 29th day of October 29, 2018.

JUDGE JAMES P. FLANNERY
OCT 29 2018
Circuit Court-1505

ENTER:
HON. JAMES P. FLANNERY, JR.
Presiding Judge
Law Division

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

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

HIPAA QUALIFIED PROTECTIVE ORDER

Findings

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 & 164.501;

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; however, nothing in the attached order relieves any covered entity, party, business associate, or their attorneys, attorneys' agents, representatives, or consultants, or various other witnesses, or other personnel who request, receive, or review documents containing PHI, from complying with the requirements of the following statutes and regulations:

Mental Health and Developmental Disabilities Confidentiality Act, 740 ILCS 110/1 – 17;

AIDS Confidentiality Act, 410 ILCS 305/1 – 16;

Alcoholism and Other Drug Abuse and Dependency Act, 20 ILCS 301/30-5 – 10;

Any federal statute or regulation protecting certain drug and alcohol records, *see, e.g.*, 42 U.S.C. §§ 290dd-3, 290ee-3; 42 C.F.R. Part 2;

Genetic Information Privacy Act, 410 ILCS 513/15 – 50; and

Any and all other applicable state and federal laws regulating or governing the disclosure, maintenance, use, and disposal of PHI.

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 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.

Stipulations

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. Understands the contents of this court order;

3. Stipulates to the entire contents of this court order;

4. Understands that by refusing to consent to the contents of this court order, the court may impose sanctions up to and including the dismissal of the complaint.

Order

BASED ON THESE FINDINGS, STIPULATIONS, AND THE SIGNATURE OF ANY PARTY CONSENTING TO THE LIMITED DISCLOSURE OF PHI AS STATED IN THIS DOCUMENT, 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 or an order of this court.

2. A party who has disclosed PHI and agreed 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 by this order are these:

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 these purposes:

1. Reporting; investigating; evaluating, adjusting, negotiating, arbitrating, litigating, or settling claims;

2. Compliance reporting or filing;

3. Conduct described in 215 ILCS 5/1014;

4. Required inspections and audits;

5. Legally required reporting to private, federal, or state governmental organizations, including health or medical insurance organizations, and to the Centers for Medicare and Medicaid Services (CMS);

6. Rate setting and regulation;

7. Statistical information gathering;

8. Underwriting, reserve, loss, and actuarial calculation;

9. Drafting policy language;

10. Workers' compensation; and

11. Determining the need for and procuring excess or umbrella coverage or reinsurance.

B. As ordered by this or another court or arbitral body or by subpoena with reasonable notice to the parties and their attorneys for purposes of subrogation, reimbursement, or payment of liens arising out of or related to this lawsuit;

C. To the parties to this lawsuit and their agents; and

D. As 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 may be 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 written acknowledgement that each such expert or witness agrees to be bound by the terms of this order.

5. At 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 in compliance with 45 C.F.R. section § 164.512(e), such as by shredding, pulverizing, melting, incinerating, or degaussing. This provision does not apply to insurers that possess what would otherwise be considered PHI under HIPAA, but only to the extent as limited in paragraph 2, or to the party who disclosed PHI or her or his attorneys.

6. Other than the party who disclosed PHI or that party's attorneys, no other parties or their agents 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 a 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.

Dated: _____ _____
Plaintiff or Legally Designated Representative

Dated: _____ _____
Plaintiff's Attorney

Dated: _____ _____
Defendant's Attorney

_____
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

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[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.[6]

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

[6] 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.

> 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.

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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 HC 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

Docket No. 125918

IN THE ILLINOIS SUPREME COURT

ROSEMARIE HAAGE, Plaintiff-Appellee, v. ALFONSO MONTIEL ZAVALA, PATRICIA SANTIAGO, JOSE PACHECO-VILLANUEVO, OKAN ESMEZ and ROSALINA ESMEZ, Defendants, and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Intervenor-Appellant.	On Rule 307 Interlocutory Appeal from the Circuit Court of the Nineteenth Judicial Circuit Lake County, Illinois Consolidated Docket Nos. 2-19-0499 & 2-19-0500 Court No. 17 L 897 The Honorable Mitchell L. Hoffman, Judge Presiding
AGNIESZKA SURLOCK and EDWARD SURLOCK, Plaintiffs-Appellees, v. DRAGOSLAV STARCEVIC, Defendant, and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Intervenor-Appellant.	On Rule 307 Interlocutory Appeal from the Circuit Court of the Nineteenth Judicial Circuit Lake County, Illinois Consolidated Docket Nos. 2-19-0499 & 2-19-0500 Court No. 18 L 39 The Honorable Diane E. Winter, Judge Presiding

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PLEASE BE ADVISED that on this 30th day of December, 2020, we caused to be electronically filed with the Clerk of the Illinois Supreme Court the attached brief and argument of intervenor-appellant, State Farm Mutual Automobile Insurance Company, a copy of which, along with this notice of filing and proof of service, is herewith served upon you.

Respectfully submitted

By: /s/ Michael Resis
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AFFIDAVIT OF SERVICE

The undersigned, Jacqueline Y. Smith, a non-attorney, pursuant to the provisions of Section 1-109 of the Illinois Code of Civil Procedure, and Ill. S. Ct. R. 12, the undersigned certifies that the statements set forth in this instrument are true and correct, and that I caused the foregoing brief of intervenor-appellant, State Farm Mutual Automobile Insurance Company, and this notice of filing to be sent to the parties listed above on this 30th day of December, 2020, by electronic mail and electronically through the court's Odyssey electronic filing manager before the hour of 5:00 p.m.

/s/ Jacqueline Y. Smith