


June 5, 2019

Committee Secretary
Supreme Court Rules Committee
222 N. LaSalle Street, 13th Floor
Chicago, Illinois 60601


**RE: Illinois Supreme Court Rules Committee
 Notice of Public Hearing – June 19, 2019
 Comments re Proposal 18-01 (P.R. 0252)**

Dear Members of the Illinois Supreme Court Rules Committee:

The American Property Casualty Insurance Association (APCIA) is a trade association representing nearly 60 percent of the nation's property casualty insurance market. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers. APCIA has an interest in the clear, consistent and reasoned development of law that affects its members and the policyholders they insure. We respectfully submit the following comments in support of Proposal 18-01, which would amend Illinois Supreme Court Rule 218, as offered by Cook County Circuit Court Judge John Ehrlich.

When an individual asserts a personal injury claim and/or files a personal injury lawsuit ultimately seeking recompense from a property casualty insurance policy, the property casualty insurer requires full access to the claimant's relevant health history, medical records, and bills to adequately and accurately assess the claim. As a practical matter, once a lawsuit is filed this information is obtained by property casualty insurers, their lawyers, and lawyers for their insureds through the discovery process. State trial court judges managing discovery across the state are faced with balancing the privacy interests of personal injury claimants and the legitimate needs of property casualty insurers to obtain the information necessary to defend their insureds.

The amendment to Illinois Supreme Court Rule 218 offered under Proposal 18-01 appropriately balances those interests. Proposal 18-01 would amend Illinois Supreme Court Rule 218 to require a personal injury plaintiff to submit "an executed waiver of the plaintiff's right to privacy *over the plaintiff's medical information to be produced in discovery*" and requires that the waiver be "in the form provided." [emphasis added] The "form provided" is a Proposed Uniform Order that does *not* grant a property casualty insurer unfettered access to a plaintiff's medical information but instead grants the property casualty insurer access to a plaintiff's medical information "to be produced in discovery in the case" *subject to the terms of the order*. Paragraph 4 of the proposed uniform order recognizes that property casualty insurers must have the ability to use medical information "...in conformity with all applicable federal laws

and regulations and the Illinois Insurance Code and its accompanying rules and regulations”¹ and limits property casualty insurers to use of the medical information for only the eleven purposes specifically enumerated in Paragraph 2.A. of the order. ²

Illinois law imposes an obligation on Illinois insurers to preserve “records” under the Disposal and Destruction of Records part of Title 50 of the Illinois Administrative Code (50 Ill. Adm. Code §§901.5 et seq.). That part states that Illinois domestic companies are prohibited from destroying records except as otherwise allowed by that part. Records material includes “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’.”

Trial lawyer comments opposing Proposal 18-01, suggesting that the proposal will allow property casualty insurers unrestricted access to obtain a claimant’s health information, and will allow those insurers to freely use the information for nefarious purposes are, at best, misleading. Such comments disregard the limitations included in the form order and completely ignore the state regulatory framework within which property casualty insurers must operate³ (which includes state insurance information privacy laws that require insurers to have strong controls of over the confidentiality and security of records containing consumer personal information, including health or medical information received by an insurer in connection with its business.) The comments also fail to acknowledge the myriad of other privacy laws (e.g., GLBA and FCRA) to which property casualty insurers are subject.

Comments opposing Proposal 18-01 suggesting that HIPAA preempts state law and that state courts may thus enter orders requiring property casualty insurers, despite not being “covered entities” under HIPAA, to comply with HIPAA regardless of any conflicts with state law are also misguided. These comments conflate the requirements of the federal HIPAA statute with the requirements imposed by a state trial court discovery order. The McCarran Ferguson Act delegates insurance regulation to the states. HIPAA sets forth the terms under which a “covered entity” may disclose protected health information. When a state trial court judge enters an order that authorizes a “covered entity” to disclose protected health information, that order allows the disclosing “covered entity” to comply with its obligations under federal law. The order, subject to enforcement by the state court, does not itself become federal law and thus its terms cannot preempt state law that governs the entities to whom the disclosure is made. The form order offered in Proposal 18-01 appropriately balances plaintiffs’ privacy rights without making insurers have to choose between conflicting legal requirements.

Thank you for the opportunity to comment and for your consideration of our perspective. We urge the Supreme Court Rules Committee to adopt Proposal 18-01 to amend Illinois Supreme Court rule 218, as

¹ See e.g., 50 Ill. Adm. Code §901.5; 901.20; 919.30; 5/155.23 9 (fraud reporting)

² APCIA hereby submits that Proposal 18-01 would be made even stronger by the addition of the following as sub-paragraph 12 under Section 2.A.:

12. Purposes for which records are required to be kept under 50 Ill. Adm. Code §§901.5 et seq.

³ See, e.g., 215 ILCS 5/1001 *et. Seq.*

offered by Cook County Circuit Court Judge John Ehrlich, with the addition of the language set forth in footnote 2 as paragraph 12 under Section 2.A. The amendment will bring needed clarity to the judicial process and help ensure that property casualty insurers are not subjected to conflicting legal requirements.



Sincerely,

A handwritten signature in black ink, appearing to read "P. Blume", written over a faint dotted line.

Paul C. Blume
Senior Vice President, State Government & Member Relations
American Property Casualty Insurance Association