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Health Law

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Insurer Compelled to Comply with HIPAA Privacy Rule Requirements

The Illinois Appellate Court Second District recently considered whether State Farm was a "covered entity" under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) in connection with overruling State Farm's objections to a qualified protective order. *Haage v. Zavala*, 2020 IL App (2d) 190499, ¶¶ 2-3. The court ultimately concluded that State Farm was not a covered entity under the Act, but was nevertheless subject to HIPAA's privacy rule requirements under a qualified protective order, including requirements for the return or destruction of protected health information. *Haage*, 2020 IL App (2d) 190499, ¶¶ 2-3.

Factual Background

The *Haage* case stemmed from two lawsuits which arose out of separate motor vehicle accidents, and were later consolidated. *Id*. ¶ 2. The issue on appeal involved the scope of protective orders relating to protected health information (PHI) that would be disclosed during the case to State Farm Mutual Automobile Insurance Company (State Farm), a liability insurer for certain defendants in the two underlying cases. *Id*.

In each case, the plaintiffs moved for the entry of qualified protective orders pursuant to HIPAA, given that their treating physicians, hospitals, and other healthcare providers possessed protected health information that would be sought in litigation. *Id*. ¶ 2. The plaintiff asserted that these healthcare providers were "covered entities" pursuant HIPPA's "Privacy Rule," which is a series of regulations promulgated by the United States Department of Health and Human Services that governs permitted uses and disclosures of PHI. *Id*. ¶ 7. The Privacy Rule prohibits the use or disclosure of an individual's protected health information by a "covered entity." *Id*. ¶ 8. If granted, the plaintiffs' proposed protective orders would have: (1) prohibited the parties and any other persons or entities from using or disclosing protected health information for any purpose other than litigation for which it was requested; and (2) required the return or destruction of the protected health information within 60 days after the conclusion of the litigation. *Id*. ¶¶ 2, 17.

State Farm petitioned to intervene and requested the trial court deny a motion for entry of the HIPAA qualified protective orders. *Id*. ¶ 19. State Farm opposed the requested HIPAA qualified protective orders on the grounds that they improperly sought to bind State Farm to the requirements of HIPAA, even though, according to State Farm, it was exempt from the statute's application. *Id*. ¶¶ 19-22. State Farm also opposed the requested orders on the grounds that the proposal directly conflicted with State Farm's obligations and rights under the Illinois Insurance Code and the administrative regulations governing its business operations. *Id*. As an alternative to the plaintiff's requested order, State Farm proposed that the courts use protective orders similar to those entered in Cook County, known as the Cook County protective orders, which 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 statues, rules and regulations" for certain designated purposes and exempt insurers from any "return or destroy" provisions. *Id*.

In each underlying case, State Farm's objections were overruled, and the trial courts granted the plaintiffs' motions for the HIPAA qualified protective orders. *Id*. ¶ 3. The trial courts ruled that HIPAA and its regulations preempt state law. *Id*. Thus, any individual or entity that received protected health information was required to follow the terms of the order. *Id*. The trial courts agreed that State Farm, as a property and casualty insurer, was not a covered entity under HIPAA. *Id*. ¶ 42. The courts further held that State Farm's status as a "non-covered entity" did not exempt it from obeying a protective order entered with respect to protective health information produced by a covered entity. *Id.* Thus, the courts held that anyone that received or expected to receive protected health information in connection with the cases were bound to follow a HIPAA qualified protective order regardless of whether that party was a covered entity under HIPAA. *Id*.

Second District Analysis

On appeal, State Farm argued that it was not a "covered entity" subject to HIPAA and that the trial court therefore erred in concluding that HIPAA and the Privacy Rule preempted its obligations under state law. *Id*. ¶ 35. In response, the plaintiffs argued that the fact that State Farm was not a "covered entity" under HIPAA did not discharge State Farm from abiding by the terms of the protective order. *Id*. ¶ 36. In analyzing this issue, the Second District looked at the definitions contained within the HIPPA Privacy Rule. *Id*. ¶ 39. A "covered entity" was defined as a "health plan," "health care clearinghouse," or "health care provider who transmits any health information in electronic form." *Id*. A "health plan" was further defined as "an individual or group plan that provides, or pays the cost of, medical care," but excluded a "policy, plan or program to the extent it provides, or pays for the cost of, excepted benefits." "Excepted benefits" included liability insurance, general liability insurance, and automobile liability insurance. *Id*. Given these definitions, the appellate court held that State Farm was not a "covered entity" because it did not constitute a "health plan," "health care clearinghouse," or a "health care provider" as defined by the Privacy Rule. *Id*. ¶¶ 39-40.

Next, the court analyzed whether a non-covered entity that receives protected health information from a covered entity in response to a HIPAA qualified protective order was bound to comply with any of the order's restrictions regarding the use and disclosure of protected health information. *Id*. ¶ 42. State Farm argued that because it was not a covered entity, it could not be subjected to any use or disclosure restrictions. *Id.* However, the plaintiffs countered that State Farm could not be discharged from obeying a HIPAA qualified protective order. *Id*. The court again looked to the language within the Privacy Rule, which governs the circumstances under which a covered entity may disclose protected health information to another party in the course of a judicial proceeding. *Id*. ¶ 43. HIPAA authorizes a covered entity to disclose protected health information in a judicial proceeding pursuant to a subpoena, discovery request, or other lawful process. *Id*. The court correctly observed that State Farm was the party who requested the protected health information and was not the disclosing party. *Id*. ¶¶ 43-44. Consequently, the court held that State Farm was required to abide by the terms of the HIPAA qualified protective orders entered by the court in order to access the protected health information at issue. *Id*. According to the Second District, the Cook County protective orders conflict with HIPAA requirements because they do not require the insurer to return or destroy protected health information at the conclusion of litigation, and they permit the insurer to use and retain protected health information outside of litigation. *Id.* Thus, the Second District concluded that State Farm was bound to comply with the use and disclosure restrictions set forth in the orders because it was the entity that requested the protected health information from a covered entity in response to a HIPAA qualified protective order. *Id*.

State Farm also argued that the trial courts erred in entering the HIPAA qualified protective orders because they conflicted with State Farm's obligations under state law. *Id*. ¶¶ 50-51. In making this assertion, State Farm argued that it was permitted to use and retain plaintiffs' protected health information to fulfil its obligation with respect to various provisions of the Illinois Insurance Code and the administrative regulations that govern its business operations. *Id.* Therefore, State Farm concluded that the trial courts should have entered the Cook County protective orders because they properly balanced the litigant's interest in protected health information and the State's interest in allowing property and casualty insurers to retain protected health information beyond litigation. *Id*. The court disagreed, concluding that State Farm failed to direct the court to any specific language in HIPAA, the Privacy Rule, or any other regulation, authority, or case law indicating that a non-covered entity that receives personal health information from a covered entity in response to a HIPAA qualified protective order is exempt from complying with the court's restrictions regarding the use or disclosure of protected health information. *Id*. ¶¶ 49-52. Therefore, the court instructed State Farm to comply with the terms of the HIPAA Qualified Protective Orders entered by the trial courts to access the protected health information at issue. *Id*.

Conclusion

The court in *Haage* held that a "non-covered entity" that receives protected health information from a covered entity pursuant to a HIPAA qualified protective order is required to comply with all of the restrictions regarding the use and disclosure of the information contained therein. HIPAA qualified protective orders may provide additional hurdles for defense counsel and their insurer-clients by requiring the return or destruction of protected health information at the conclusion of litigation. HIPAA qualified protective orders proposed by plaintiff's counsel should be reviewed carefully prior to entry.

About the Authors

Roger R. Clayton is a partner in the Peoria office of *Heyl, Royster, Voelker & Allen, P.C.*, where he chairs the firm's healthcare practice group. He also regularly defends physicians and hospitals in medical malpractice litigation. Mr. Clayton is a frequent national speaker on healthcare issues, medical malpractice, and risk prevention. He received his undergraduate degree from Bradley University and law degree from Southern Illinois University in 1978. He is a member of the Illinois Association of Defense Trial Counsel (IDC), the Illinois State Bar Association, past president of the Abraham Lincoln Inn of Court, president and board member of the Illinois Association of Healthcare Attorneys, and past president and board member of the Illinois Society of Healthcare Risk Management. He co-authored the chapter on Trials in the IICLE Medical Malpractice Handbook.

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