

# A Federal Court Holds HIPAA Preempts a Florida Medical Malpractice Pre-suit Requirement

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Judge Hinkle, of the U.S. District Court for the Northern District of Florida, recently held that one of Florida's pre-suit requirements for pursuing a medical negligence claim under Florida law is contrary to federal law and expressly preempted by the Health Insurance Portability and Accountability Act ("HIPAA").

As a condition precedent to pursuing a medical negligence claim under Florida law, a plaintiff must comply with certain pre-suit requirements. One such requirement is that the plaintiff must provide the defendant with a pre-suit notice of the potential claim. On July 1, 2013, Florida Statute § 766.1065 took effect. It requires that the pre-suit notice be accompanied by an authorization signed by the plaintiff that, among other things, allows the defendant to conduct ex parte interviews of the plaintiff's other health care providers. See Fla. Stat. § 766.1065(3)(E). The ex parte interviews must be limited to matters pertinent to the potential medical-negligence claim. *Id.*

In *Murphy v. Dulay*, the plaintiff brought an action to enjoin the defendant-physician from conducting ex parte interviews of his other health care providers. 2013 WL 5498140 (N.D. Fla. Sept. 25, 2013). Specifically, the plaintiff argued that Florida Statute § 766.1065 is preempted by federal law. The State of Florida intervened as a defendant in the case to assert its interest in defending the challenged statute. The issue in the case was whether a state, by statute, may require a patient, as a condition precedent to pursuing a medical negligence claim, to sign an authorization allowing the potential defendant to conduct ex parte interviews with the patient's other health care providers. After concluding that the plaintiff had standing to bring the action and that the plaintiff had a private right of action under the Supremacy Clause and the Declaratory Judgment Act, Judge Hinkle addressed the merits of the parties' pre-emption arguments.

First, the Court noted that a HIPAA rule expressly preempts state laws that conflict with any rule included in subchapter C of Title 45 of the Code of Federal Regulations. See 45 C.F.R. § 160.203. It then cited the rule that he later concluded preempted Florida Statute § 766.1065, which provides,

"Except as otherwise permitted or required by this subchapter, a covered entity may not use or disclose protected health information without an authorization that is valid under this section. When a covered entity obtains or receives a valid authorization for its use or disclosure of protected health information, such use or disclosure must be consistent with such authorization."

45 C.F.R. § 164.508(a)(1). Under the rule, a doctor is a "covered entity." Additionally, "health information" includes a patient's medical information that would be disclosed in an ex parte interview. Thus, the Court concluded that the rule applied to the kind of ex parte interviews that are conducted pursuant to Florida Statute § 766.1065.

The defendants did not argue that the above referenced rule does not apply to ex parte interviews. Rather, they argued that the interviews comply with the rule. Judge Hinkle, however, disagreed. He explained that the health care providers that the defendant-physician proposed to interview can lawfully disclose the plaintiff's health information only if one of two conditions is met. First, a disclosure is permissible if it is otherwise permitted or required by subchapter C of Title 45. Second, disclosure is permitted if it is consistent with a valid authorization.

Judge Hinkle opined that subchapter C did not otherwise permit or require disclosures of health care information in an ex parte interview. To the contrary, he concluded that the Florida statute is an effort to dispense with, not comply with, the more restrictive federal requirements and affords a plaintiff no opportunity to object to or obtain an advance ruling on a proposed

disclosure. He also concluded that an authorization mandated by state law as a condition precedent to pursuing a medical negligence action is not valid, reasoning that:

Under the Florida system . . . the signature does not show consent. It shows only mandated compliance with state law. Instead, the Florida system is effectively this: when a patient asserts a medical-negligence claim, the defendant – or the defendant’s attorney, insurer, or adjuster – may conduct ex parte interviews of the patient’s other healthcare providers, whether or not the patient consents.

Thus, found the Court, the disclosure of a plaintiff’s healthcare information in an ex parte interview conducted pursuant to Florida Statute § 166.1065 is impermissible under HIPAA. Accordingly, *Murphy* held that the statute allowing such interviews is expressly preempted.

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