MEDICAL MALPRACTICE LAWS THAT VIOLATE HIPAA

COLLEEN CARBOY, RN, JD
Carboy Law Firm
2540 King Arthur Blvd., Suite 215
Lewisville, TX 75056
(972) 410-4200
CCarboy@TexasNurseAttorney.com

State Bar of Texas
ADVANCED MEDICAL TORTS COURSE
March 13-14, 2014
Santa Fe, NM

CHAPTER 15
Colleen Carboy is board certified by the Texas Board of Legal Specialization in Personal Injury Trial Law, and is also a Registered Nurse who specializes in complex litigation involving health care. With Ms. Carboy's experience and other qualifications, she has the unique ability to master the medical issues in cases while effectively exposing health care provider's careless errors. Ms. Carboy has successfully handled numerous complex cases involving physician errors, hospital negligence, pharmaceutical mistakes and nursing home neglect. In addition to achieving successful settlements and verdicts for her clients, she vigorously strives to improve health care in Texas by negotiating settlements that include changes in hospital policies and mandatory continuing education for defendant health care providers. Ms. Carboy is also a frequent invited lecturer for attorney and health care organizations.

Ms. Carboy has achieved a Martindale-Hubbell AV® Preeminent Rating. Ms. Carboy is a life member of the Multi-Million Dollar Advocates Forum, which recognizes lawyers who have achieved superior results in complex litigation. Ms. Carboy has also been named to the “Super Lawyers” list in Personal Injury Plaintiff, Medical Malpractice from 2009 to 2013. Ms. Carboy is a fellowship member of The College of the State Bar of Texas. Ms. Carboy's cases have been featured on Dateline, and she has appeared on Good Morning America, CNN, The O’Reilly Factor and WFAA, the Dallas ABC Affiliate.

Ms. Carboy is the Program Co-Director for the Annual Medical Malpractice Conference of the Texas Trial Lawyers Association. Ms. Carboy is on the Board of Directors of the Texas Trial Lawyers Association, the Dallas Trial Lawyers Association and the Texas Association of Nurse Attorneys. Ms. Carboy is a member of the American Association of Nurse Attorneys, the American Nurses Association, and the Texas Nurses Association.
TABLE OF CONTENTS

I. INTRODUCTION ................................................................................................................................................... 1

II. OVERVIEW OF HIPAA ........................................................................................................................................ 1

III. PREEMPTION OF STATE LAWS THAT CONFLICT WITH HIPAA ............................................................... 1

IV. THE MANDATORY PRE-SUIT MEDICAL AUTHORIZATION REQUIRED BY FLORIDA IS SIMILAR TO THE MANDATORY PRE-SUIT MEDICAL AUTHORIZATION REQUIRED IN TEXAS. ........................................... 1

V. MURPHY V. DULAY – FLORIDA’S 2013 LAW THAT REQUIRES MEDICAL MALPRACTICE CLAIMANTS TO AUTHORIZE PRE-SUIT EX PARTE INTERVIEWS IS PREEMPTED BY HIPAA. ............ 2
   A. The District Court’s Order in Murphy v. Dulay ................................................................. 2
   B. Appeal of the Court’s Ruling in Murphy v. Dulay ............................................................. 2
      1. Highlights from Defendant’s Brief in seeking to overrule the Court’s Ruling in Dulay v. Murphy ...... 3
      2. Highlights from Plaintiff’s Brief in Affirmance of the Court’s Ruling in Dulay v. Murphy .......... 3
      3. Highlights from Florida Justice Association’s Amicus Brief In Support of Affirmance of the Court’s Ruling in Dulay v. Murphy .................................................................................. 4

VI. PRACTICAL CONCERNS .................................................................................................................................... 5

APPENDIX A ................................................................................................................................................................. 7
MEDICAL MALPRACTICE LAWS THAT VIOLATE HIPAA

I. INTRODUCTION

This paper will discuss whether the provision in Chapter 74 of the Texas Civil Practice & Remedies Code that requires a claimant to sign a pre-suit medical authorization as a condition precedent to pursuing a medical malpractice case is preempted by the Health Insurance Portability & Accountability Act (“HIPAA”). Pub. L. No. 104-191, 110 Stat. 1036 (1996). Since the State of Florida recently passed a very similar law requiring a medical authorization as a condition precedent to filing a medical malpractice case, and that law is being challenged in federal court, this paper will discuss the court’s ruling and the arguments made by the parties.

II. OVERVIEW OF HIPAA

Congress enacted the Health Insurance & Portability Act of 1996 (the “HIPAA statute”) to improve the portability of health insurance coverage and establish standards to protect private health information. The HIPAA statute directed the U.S. Department of Health & Human Services (HHS) to enact regulations to protect the privacy of individual identifiable health information. See 42 U.S.C. § 1320d-1. These regulations, which are known as the “HIPAA Privacy Rule,” became effective in April of 2003.

The HIPAA Privacy Rule establishes a set of national standards to protect and enhance the rights of consumers by providing them access to their health information and controlling the inappropriate use thereof.” 65 Fed. Reg. 82462, 82463 (Dec. 28, 2000). The HIPAA Privacy regulations indicate that providers may not “disclose protected health information except as permitted or required by this subpart or by subpart C of part 160 of this subchapter.” 45 C.F.R. § 164.502(a). The regulations protect information that “[r]elates 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.” Id. § 160.103.

In order to disclose private health information in a manner not set forth in the HIPAA Privacy Rule, a covered entity must have a valid authorization that complies with 45 C.F.R. § 164.508. See id. § 164.508(a). The authorization must contain a description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion and a must contain a description of each purpose of the requested use of disclosure. See id. § 160.508(c)(i) and (iv). The authorization must also contain the name of the persons or class of persons authorized to make the disclosure, the name or of the person or class of persons to whom the health information may be disclosed, the expiration date or expiration event, the signature of the individual (or the individual’s personal representative with a description of the person’s authority) and the date the authorization is signed. See id. §160.508(c)(ii),(iii),(v) and (vi).

The HIPAA statute and HIPAA Privacy Rule will hereinafter be collectively referred to as “HIPAA” in this paper.

III. PREEMPTION OF STATE LAWS THAT CONFLICT WITH HIPAA

State laws that are contrary to HIPAA are preempted by the Federal requirements, unless a specific exception applies. See 45 C.F.R. § 160.203. State laws that are more stringent and provide greater protections than those provided by HIPAA are not preempted. See id. § 160.203(b). Upon specific request from a State, HHS may determine that a provision of State law, which is contrary to HIPAA, will not be preempted by the Federal requirements. See id. § 160.203. The exceptions include state laws that regulate controlled substances, state laws that are necessary to prevent fraud, state laws that report health care delivery and costs, and state laws that serve a compelling public health safety or welfare need if the intrusion into privacy is warranted when balanced against the state law. See id.

In 2004, the Texas Attorney General’s office created a report that concluded very few Texas laws were preempted by HIPAA. The Texas Attorney General determined that the required medical authorization set forth in §74.502 of the Texas Civil Practice & Remedies Code was not preempted by HIPAA because it was not contrary to federal law. See Report: Preemption Analysis of Texas Laws Relating to the Privacy of Health Information and the Health Insurance Portability & Accountability Act & Privacy Rules (HIPAA), 75 (Nov. 1, 2004) (Tex. Att’y Gen.).

IV. THE MANDATORY PRE-SUIT MEDICAL AUTHORIZATION REQUIRED BY FLORIDA IS SIMILAR TO THE MANDATORY PRE-SUIT MEDICAL AUTHORIZATION REQUIRED IN TEXAS.

In 2013, a Florida statute was enacted that is nearly identical to the Texas statute, which requires claimants to sign a medical authorization allowing the prospective defendant, or his insurance carrier, experts, attorney or attorney’s staff to obtain the claimant’s medical records and to engage in ex parte communications with the claimant’s other treating physicians as a condition precedent to pursuing a medical negligence claim. The laws in Florida and Texas require claimants to list health care providers in the medical authorization to which the authorization
does not apply because the health care rendered by those providers is not relevant to the damages being claimed or to the physical, mental, or emotional condition arising out of the claim.

The Florida pre-suit medical notice requirements are different from the Texas pre-suit requirements in two respects. First, the Florida medical authorization only requires the claimant to identify health care providers who treated the claimant for a two-year period before the alleged malpractice. The Texas authorization requires disclosure for a five-year period. Second, the Florida law permits the prospective defendant or his legal representative to seek an ex parte interview with a claimant’s treating health care provider by requesting the claimant’s attorney arrange the interview. If the claimant’s attorney does not arrange the interview within fifteen (15) days of the request, the defendant or his legal representative may conduct the interview without notice to the claimant or his counsel. See Fla. Stat. § 766.106(6)(b)(5). Subsequent interviews then only require a 72–hour notice to the claimant’s counsel. See id. Texas law does not provide any such procedural mechanism.

V. MURPHY V. DULAY – FLORIDA’S 2013 LAW THAT REQUIRES MEDICAL MALPRACTICE CLAIMANTS TO AUTHORIZE PRE-SUIT EX PARTE INTERVIEWS IS PREEMPTED BY HIPAA.

The Plaintiff in Murphy v. Dulay filed a declaratory action in the U.S. District Court for the Northern District of Florida seeking an order prohibiting the Defendant from conducting ex parte interviews with his treating health care providers. See No. 4:13-cv-378-RH/CAS (N.D. Fla. July 1, 2013). Mr. Murphy’s position was that the Florida statute requiring claimants to sign a medical authorization that allows ex parte interviews with his health care providers was invalid because it violates federal HIPAA laws. The State of Florida intervened in the lawsuit to defend the new law.

On September 25, 2013, the District Court granted Plaintiff’s Motion for an injunction and held the Florida law was invalid because it was contrary to federal law. See Appendix “A.” Judge Robert Hinkle indicated in his Order that he was aware of the Texas case, In re Collins, M.D., 286 S.W.3d 911 (Tex. 2009), when he issued his ruling. The court in Collins held that it was the Plaintiff’s choice to file a medical malpractice suit and to be subjected to the requirement to sign a medical authorization allowing ex parte communications with non-party treating physicians. Id. at 920.

A. The District Court’s Order in Murphy v. Dulay

After U.S. District Judge Robert Hinkle held that the court had standing, a case or controversy existed and the dispute was ripe for adjudication, he ruled:

1. The consent given by the Plaintiff as required by Florida Statute § 766.1065 as a pre-suit condition is a “charade” and was not voluntary. Murphy v. Dulay, No. 4:13-cv-378-RH/CAS (N.D. Fla. Sept. 25, 2013) at 18.
2. The Florida statute that requires claimants to sign a medical authorization allowing ex parte communications as a prerequisite to filing a medical malpractice case is an attempt to circumvent federal HIPAA requirements. Id. at 16-17.
3. The Florida statute allowing ex parte interviews without voluntary consent and without the safeguards for disclosure in a judicial or administrative proceeding under 45 C.F.R. §§ 164.512(e) is contrary to federal law and preempted under 45 C.F.R. § 160.203. Id. at 13-15.
4. Mr. Murphy is entitled to an injunction prohibiting Dr. Dulay and his agents and attorney from conducting ex parte interviews with his treating health care providers. Id. at 18-19.

B. Appeal of the Court’s Ruling in Murphy v. Dulay

The physician defendant filed his Notice of Appeal of the Court’s ruling in Murphy v. Dulay on September 30, 2013, and the State of Florida filed its Notice of Appeal on October 7, 2013. The parties filed their respective briefs and have requested oral argument.

The Texas Medical Association, the Florida Medical Association, the American Medical Association and the Texas Alliance for Patient Access collectively filed an Amicus curiae brief supporting reversal of the District Court’s Order. The Amici indicated in their brief that they have an interest in this matter “since a ruling from this Court affirming the court below will certainly create new litigation in Texas arguing that a decision from this Court trumps a decision on the same issue from the Texas Supreme Court.” The Florida Justice Association filed a brief seeking to affirm the District Judge’s Order.

Since the appellate court will determine whether HIPAA preempts a Florida statute, the court’s review will be de novo. See Connecticut State Dental Assn v. Anthem Health Plans, Inc., 591 F.3d 1337, 1343 (11th Cir. 2009).
1. **Highlights from Defendant’s Brief in seeking to overrule the Court’s Ruling in Dulay v. Murphy**

   a. Since the Florida pre-suit authorization contains all of the information and language needed to be deemed a “valid” authorization under HIPAA, and the Florida statute requires that it be construed in accordance with HIPAA, it is not contrary to HIPAA. Initial Brief of Appellants at pp. 6-7, Dulay v. Murphy, No. 13-14637 (11th Cir. Dec. 19, 2013).

   b. The court should adopt the same reasoning as the courts in In re Collins, 286 S.W.3d 911 (Tex. 2009) and Stevens v. Hickman Community Health Care Services, Inc., __ S.W.3d __, 2013, WL 6158000 *6 (Tenn. Nov. 25, 2013), since those state supreme courts found that a state law that mandates execution of a medical authorization as a condition precedent to filing a medical malpractice case does not violate HIPAA. Initial Brief of Appellants at pp. 12-13.

   c. A state law that requires compliance with a mandatory condition precedent (such as requiring a person to provide a social security number in order to obtain a driver’s license or signing a mandatory pre-suit medical authorization as a condition precedent to filing a medical malpractice lawsuit) does not render the action involuntary. Id. at 13.

   d. General preemption principals support Dr. Dulay because there is a strong presumption against preemption that “reinforces the appropriateness of a narrow reading” of a federal statute’s preemptive effect under the Supremacy Clause. Initial Brief of Appellants at pp. 18-19 (citing Cipollone v. Liggett Group, Inc., 505 U.S. 504, 518, 112 S.Ct. 2608, 120 L.Ed.2d 407(1992)).

   e. The objectives of the Florida pre-suit requirements and HIPAA requirements are consistent with each other because the Florida statute promotes early settlement of claims through early discovery and HIPAA promotes standards for administrative simplification. Id. at 21-25.

   f. The Florida authorization form specifically limits disclosure of health information related to “the injuries complained of” so the claimant is the “gatekeeper” of the list of physicians who have information (who are authorized to disclose information), and also is the “gatekeeper” of the list of the physicians who do not have relevant information (who are not authorized to disclose information). Id. at 27.

2. **Highlights from Plaintiff’s Brief in Affirmance of the Court’s Ruling in Dulay v. Murphy**

   a. HIPAA imposes specific requirements for disclosure of private health information obtained during litigation to balance the interests of the claimant’s privacy and the disclosure of litigation-necessary information. These regulations require a court order, subpoena, discovery request or other lawful process. 45 C.F.R. § 164.512(e). Florida may not bypass these federal litigation-specific requirements when state law grants permission for unlimited ex parte interviews with defendant’s litigation allies. Plaintiff-Appellee’s Response Brief at 14-15, Murphy v. Dulay, No. 13-14637 (11th Cir. Jan. 30, 2013).


   c. With regard to ex parte interviews, the Florida pre-suit authorization law fails to incorporate at least three of HIPAA’s safeguards set forth in 45 C.F.R. § 164.512(e). First, Florida law does not require the prospective defendant to obtain a court order to obtain an ex parte interview. Second, if the claimant’s counsel fails to make an appointment with a treating physician within fifteen (15) days of a request, then the prospective defendant or his counsel, insurer or consulting expert may arrange a meeting without any notice to the claimant or his counsel. See Fla. Stat. § 766.106(6)(b)(5). This deprives the claimant of an opportunity to raise an objection to the court. Third, when the claimant is not given notice and an opportunity to adjudicate his objections, HIPAA still allows the party seeking the protected health information to request a qualified protective order. 45 C.F.R. § 164.512(e)(1)(iv)(B). The Florida law is missing this protection. Plaintiff-Appellee’s Response Brief at 17-18.

   d. The Florida Supreme Court does not approve of ex parte interviews in medical malpractice cases because the claimant cannot object and
protect against inadvertent disclosure of privileged information and can’t even prove the inadvertent disclosure took place. *Id.* at 19-20 (citing *Acosta v. Richter*, 671 So.2d 149, 153 (Fla. 1996) (quoting *Kirkland v. Middleton*, 639 So.2d 1002 (Fla. 5th DCA 1994)).

c. “[T]he physician witness might feel compelled to participate in the ex parte interview because the insurer of the defendant may also insure the physician witness.” *Id.* at 20 (quoting *Duquette v. Superior Court*, 778 P.2d 634, 641 (Ariz. Ct. App. 1989)).

d. “[A]sking the physician, untrained in the law, to assume this burden of determining relevancy to the case is a great gamble and is unfair…” *Id.* at 20-21 (quoting *Roosevelt Hotel Ltd. P’ship v. Sweeney*, 394 N.W.2d 353, 357 (Iowa 1986)).

e. The defendant’s comparison that the requirement for people to disclose private information such as a social security number to obtain a driver’s license is similar to the requirement that a medical malpractice claimant must waive his privacy rights in order to pursue a medical malpractice case is incorrect. In Florida, the right to bring a tort action is a constitutionally protected right, not a mere public benefit such as obtaining a driver’s license. *Id.* at 24-25.

f. The authorization required by section 766.1065, Florida Statutes, is not voluntary, but compelled and, therefore, does not constitute a valid authorization. *Id.* at 31.

g. Even though the pre-suit authorization required by Florida law states that the individual has a right to revoke the authorization, the law indicates that revocation will invalidate the notice of intent to sue, which would prohibit pursuit of the malpractice claim. This effect cannot be squared with HHS’s recognition that the right to revoke “is essential to ensuring that the authorization is truly voluntary.” *Id.* at 32 (citing 65 Fed. Reg. at 82658).

h. The Florida pre-suit authorization requires disclosure of “each health care provider to whom this authorization does not apply and the inclusive dates of examination, evaluation, or treatment to be withheld from disclosure.” Fla. Stat. § 766.1065(3)(C). This requirement clashes with HIPAA because it requires disclosure of private health information without any rational purpose and discloses more than the necessary information to accomplish the intended purpose of the disclosure. *Id.* at 34 (citing 45 C.F.R. § 160.103 and § 164.502(b)(1)).

i. The Florida pre-suit authorization violates HIPAA because it permits disclosure of all health information in possession of the health care provider instead of identifying the information to be disclosed in a “specific and meaningful fashion,” as required by 45 C.F.R. § 164.508(c)(1)(i). *Id.* at 35.

j. The Florida pre-suit authorization “requires a doctor to judge what is necessary in litigation, while hearing from only one side, the side likely to be more expansive about those needs than a neutral party, such as a court, and far more expansive than the authorizing patient.” *Id.* at 36.

k. The Florida pre-suit authorization conflicts with the HIPAA prohibition on compound authorizations in 45 C.F.R. § 164.508(b)(3). Since the authorization must be combined with the claimant’s notice of intent, which adds meaning to the contents of the authorization, it violates HIPAA’s prohibition that a valid medical authorization must not be compound except under limited circumstances that do not apply here. *Id.* at 37-38.

l. “The Texas decision in *In re Collins* provides no persuasive reason to uphold this law.” *Id.* at 39. The Texas case did not consider whether state law could by-pass HIPAA safeguards with regard to judicial proceedings by making it mandatory for a prospective medical malpractice claimant to sign an authorization. “Moreover, *Collins* held that the execution of a written release by the plaintiffs forecloses any argument that state procedures are preempted by HIPAA. *In re Collins*, 286 S.W.3d at 920. That circular reasoning would allow a state to evade the preemptive effect of HIPAA by mandating a written release in conflict with all of HIPAA’s requirements, plainly a result that conflicts with the very purpose of the Supremacy Clause.” Plaintiff-Appellee’s Response Brief at 41.

3. Highlights from Florida Justice Association’s Amicus Brief In Support of Affirmance of the Court’s Ruling in *Dulav v. Murphy*

a. Florida law Section 766.1065(3)(B) requires that the medical malpractice claimant list his health care providers into the following categories: 1) health care providers who have examined, evaluated, or treated the claimant
in connection with injuries complained of after the alleged act of negligence; and 2) health care providers who have examined, evaluated, or treated the claimant during a period commencing two years before the incident that is the basis of the accompanying pre-suit notice. Fla. Stat. 766.1065(3)(B). “Either class of physicians, but particularly those in class two, may very well have medical information that is irrelevant, private, and sensitive, and that would not be subject to disclosure in litigation.” Amicus Curiae Brief of Florida Justice Association at 4-5, Murphy v. Dulay, No. 13-14637 (11th Cir. Jan. 30, 2013). A primary care physician may have treated the claimant for many years before the date of incident and after the incident as well. Frequently, the primary care physician’s records will contain both relevant information as well as information that has no relevance to the medical malpractice allegations. The Florida pre-suit medical authorization requires disclosure of the relevant and irrelevant information in violation of HIPAA. Id. at 5-6.

b. The following is a real world example of a case reported by a member of the Florida Justice Association where a claimant was hesitant to seek compensation for injuries that occurred as a result of medical malpractice due to Florida’s mandatory pre-suit medical authorization requirement. The claimant had surgery at the wrong site due to negligence. The claimant had been molested by her brother as a child. She was extremely fearful that this information would be disclosed because her husband did not know of her past abuse. Unlike Florida law, HIPAA has protections to prevent disclosure of this type of irrelevant and private information. Id. at 5-6.

c. Ex parte interviews can be used to intimidate treating physicians and improperly influence their testimony. There are documented cases of efforts by defense counsel to improperly alter the testimony of treating physicians during ex parte communications. Id. at 10-13 (citing Order Granting Plaintiff’s Motion for Sanctions in Hannon v. Shands Treating Hospital & Clinics, Inc, Case 13-14637 Circuit Ct., Third Judicial Dist., Suwannee County, Fla. (2/6/14)).

VI. PRACTICAL CONCERNS

Defense counsel should be aware that health care providers that fail to comply with HIPAA can face civil penalties ($100 to $50,000 or more per violation with a $1,500,000 cap per year) and criminal penalties (up to $50,000 and one year imprisonment for knowing violations). 42 U.S.C. § 1320d-6 (2006). The HHS Office for Civil Rights is the federal department responsible for enforcing HIPAA standards. As of February 2014, the HHS Office for Civil Rights has investigated and found deficiencies in over 22,026 cases, and some of the reported cases required payments over one million dollars. See http://www.hhs.gov/ocr/privacy/hipaa/enforcement/highlights/index.html

If defense counsel elects to use the mandatory pre-suit medical authorization that a claimant signed as required by Texas law to arrange an ex parte interview, he should be aware that the authorization is highly suspect and potentially invalid based on U.S. Judge Hinkle’s Order in Murphy v. Dulay.

Further, defense counsel should be aware that the pre-suit authorization, required under Texas law, only permits ex parte communications “in connection with the injuries alleged to have been sustained in connection with the claim asserted in the accompanying Notice of Health Care Claim.” Tex. Civ. Prac. & Rem. Code § 74.052(B)(1). The Notice of Health Care Claim may or may not contain many facts about the injuries alleged to have been sustained in connection with the claim. There is no language in the Chapter 74 medical authorization that allows defense counsel to add information about the claim or the claimant’s injuries, or which allows defense counsel to furnish other documents to the physician being interviewed so that defense counsel can extend the purpose of the authorization beyond what is expressly set forth in the Notice of Health Care Claim.

If defense counsel uses the medical authorization to discuss information with a treating physician that is outside of the description set forth in the Notice of Health Care Claim, he is more than likely violating the claimant’s authorization and could be subject to professional disciplinary actions by a court or the Texas State Bar.

Prior to relying on the authorization to schedule an ex parte interview with the claimant’s treating physician, defense counsel should inform the physician that a federal district court judge in Florida ruled that a nearly identical state mandated pre-suit medical authorization constitutes a “charade” which makes it involuntarily and invalid. Pursuant to 45 C.F.R. § 164.508(b)(2)(v), the physician may not use a medical authorization to disclose protected health information if “any material information in the authorization is known…to be false.” Id. Defense counsel should consider having the physician sign an acknowledgment that defense counsel informed the physician of the Court’s order in Murphy v. Dulay, the requirements set forth in 45 C.F.R. § 164.508(b)(2)(v), and the range of
civil and criminal penalties available to the HHS Office for Civil Rights, and he was still willing to engage in ex parte communications after full disclosure of this information.
APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

GLEN MURPHY,

Plaintiff,

v.                                              CASE NO. 4:13cv378-RH/CAS

ADOLFO C. DULAY, M.D., and
ADOLFO C. DULAY, M.D., P.A.,

Defendants.

ORDER ON THE MERITS

The plaintiff is a former patient of the defendant doctor. The plaintiff intends to pursue a medical-negligence action against the doctor. The plaintiff asserts that a presuit condition imposed by Florida law is preempted by federal law. The issue is 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—and the potential defendant’s attorneys, insurers, and adjusters—to conduct ex parte interviews with the patient’s other healthcare providers. Because federal law prohibits ex parte interviews of this kind with exceptions not applicable here, this order holds the statute invalid and enjoins the

Case No. 4:13cv378-RH/CAS
defendant doctor—and those in concert with him—from conducting ex parte interviews with the patient’s other healthcare providers, except as authorized by federal law.

I. The Parties and the Trial

The plaintiff is Glen Murphy. He filed the complaint under the pseudonym “John Doe” but now has disclosed his identity and has agreed to go forward under his proper name. This order changes the case style accordingly.

The original defendants were Dr. Adolfo C. Dulay and his professional association, Adolfo C. Dulay, M.D., P.A. For convenience, this order usually refers to Dr. Dulay without also mentioning the professional association.

The State of Florida has intervened as a defendant to assert its interest in defending the challenged statute. This order sometimes refers to the original defendants and the State collectively as “Defendants.”

With the consent of all parties, the case has been submitted for a final ruling—for findings of fact and conclusions of law—based on the written record and oral argument. Each side has fully briefed the procedural issues and the merits. Defendants have presented some of the procedural issues by motions to dismiss. This order sets out the court’s findings of fact and conclusions of law, together with rulings on the motions to dismiss. The parties reconfirmed their consent to these procedures at the oral argument.
II. The Background

Mr. Murphy asserts that Dr. Dulay injured Mr. Murphy through medical negligence. Mr. Murphy has retained experts in the requisite specialties who will testify that that is so.

As a condition precedent to pursuing a medical-negligence claim under Florida law, a plaintiff must comply with specific presuit requirements. See § 766.106, Fla. Stat.\(^1\) One presuit requirement is this: the plaintiff must provide the defendant a presuit notice of the potential claim. *Id.* § 766.106(2). The presuit-notice requirement has long been in force and is plainly valid. Mr. Murphy does not contend otherwise.

The statute now at issue, Florida Statutes § 766.1065, took effect on July 1, 2013. The statute added a new requirement: the presuit notice must be accompanied by an “authorization” signed by the plaintiff that, among other things, allows the defendant—or the defendant’s attorney, insurer, or adjuster—to conduct ex parte interviews of the plaintiff’s *other* healthcare providers, limited to matters pertinent to the potential medical-negligence claim. *See id.* § 766.1065(3)(E). Thus if a patient was treated by Dr. A, allegedly suffered injury from medical negligence, and then went to Dr. B for follow-up care, the new statute would allow

\(^1\) This order’s citations to the Florida Statutes are to the 2013 officially compiled version that is now available online and will soon be published in hard copy.
Dr. A or Dr. A’s attorney, insurer, or adjuster to conduct an ex parte interview of Dr. B—obtaining the patient’s private medical information—so long as Dr. B agreed. The subject of the interview would be limited to matters pertinent to the medical-negligence claim, but nobody would be there to determine pertinence or enforce the limitation.

Mr. Murphy has testified that his decision whether to give the required presuit notice to Dr. Dulay and to pursue his medical-negligence claim will depend, in part, on whether he must give the required authorization for ex parte interviews. At oral argument, Mr. Murphy’s attorney declared unequivocally that if the authorization requirement is declared invalid in this action, Mr. Murphy will pursue the medical-negligence claim. That Mr. Murphy has incurred the substantial expense of hiring experts supports the assertion.

Mr. Murphy’s position is that the Florida statute requiring a plaintiff to authorize ex parte interviews is invalid because contrary to federal law—specifically, contrary to rules adopted under the Health Insurance Portability and Accountability Act (“HIPPA”), Pub. L. No. 104-191, 110 Stat. 1936 (1996). Mr. Murphy seeks a declaration upholding his position and an injunction prohibiting Dr. Dulay from conducting ex parte interviews in violation of federal law. Mr. Murphy does not challenge any other Florida presuit requirement.
III. Standing, Case or Controversy, Ripeness

Defendants assert that Mr. Murphy lacks standing, that there is no actual case or controversy, and that the case is not ripe. A federal court can adjudicate a claim for declaratory and injunctive relief of this kind only if the plaintiff faces actual, imminent injury that could be redressed in the action. See, e.g., Atlanta Gas Light Co. v. Aetna Cas. & Sur. Co., 68 F.3d 409, 414 (11th Cir. 1995).

Defendants say Mr. Murphy has not met these requirements here because any potential injury to Mr. Murphy is entirely speculative.

Not so. If Mr. Murphy wins this case, he will pursue his medical-negligence claim, and there will be no ex parte interviews of his other healthcare providers. If Mr. Murphy loses this case, he will forgo his medical-negligence claim, or he will sign the required authorization for ex parte interviews, and nothing will prevent Dr. Dulay—or his attorney, insurer, or adjuster—from conducting the interviews. Forgoing a medical-negligence claim that otherwise would be pursued is a real injury sufficient to allow a claim to go forward. Having private information disclosed in an illegal interview is a real injury sufficient to allow a claim to go forward. And either of these injuries can be redressed in this action by an order prohibiting Dr. Dulay, and those acting in concert with him, from conducting the interviews.
Defendants say, though, that the interviews might not go forward, even if Mr. Murphy signs an authorization, because the challenged Florida statute and the authorization only allow—they do not require—other healthcare providers to submit to interviews. True enough. But in defense of this action, Dr. Dulay has asserted his right to ask for the ex parte interviews. If Dr. Dulay agreed not to conduct the interviews, there would be no case or controversy—and the case would be moot—as Mr. Murphy explicitly acknowledged in his papers and again at oral argument. Knowing this, at oral argument Dr. Dulay explicitly refused to agree not to conduct the interviews. If, as is clearly the case, Dr. Dulay prefers to defend this lawsuit rather than give up the right to seek the interviews, then Dr. Dulay intends to ask for the interviews and believes the chance of actually conducting the interviews is substantial, not merely a remote possibility. I find that if Mr. Murphy signs the authorization, then, in the absence of an injunction prohibiting ex parte interviews, it is more likely than not that one or more ex parte interviews will in fact take place.

So the situation is this. If Mr. Murphy wins this case, he will go forward with the medical-negligence claim, and no ex parte interviews will occur. If Mr. Murphy loses this case, he will forgo the medical-negligence claim, or he will go forward with the claim and one or more ex parte interviews will occur. It is virtually certain that if an ex parte interview occurs, private information otherwise
protected from disclosure by federal law—that is, information that could be disclosed in this setting only if the authorization is valid—will be disclosed.

This is enough to give Mr. Murphy standing, to make this an actual case or controversy, and to make the dispute ripe for adjudication. Real-world consequences of significance will flow from the ruling in this case. And if Mr. Murphy is right on the merits, the harm he would otherwise suffer from the invalid authorization requirement will be remediable in this action, by an order prohibiting Dr. Dulay from conducting ex parte interviews.

In reaching these conclusions, I have not overlooked a fact emphasized by Defendants. If an ex parte interview occurs, most of the disclosed information will be information for which any state-law privilege—as distinct from any limitation on disclosure under HIPAA—will have been waived by the assertion of the medical-negligence claim. Still, it is a reasonable possibility—though uncertain—that the disclosed information also will include information that is not pertinent to the medical-negligence claim and for which the state-law privilege thus will not have been waived.

Moreover, state-law privilege and HIPAA protections are not coextensive. A waiver of state-law privilege does not always signal a waiver of HIPAA protections. Thus even when a patient brings a lawsuit putting the patient’s medical condition at issue, a healthcare provider is not free to disclose information
in violation of HIPAA. To the contrary, the provider still must comply with the applicable federal rules, which, as discussed ahead, allow disclosures only if specific conditions are met. Regardless of whether Mr. Murphy’s pursuit of the medical-negligence claim waives any state-law privilege, asserting the claim will not waive the HIPAA requirements, except as set out in the governing HIPAA rules. It is certain that if ex parte interviews occur, information will be disclosed for which HIPAA protections have not been waived.

IV. Private Right of Action


This is a bona fide dispute between Mr. Murphy, who wishes to initiate medical-negligence presuit proceedings against Dr. Dulay but first needs to find out whether doing so will allow Dr. Dulay to conduct ex parte interviews, and Dr. Dulay, who wishes to conduct the interviews. This is precisely the kind of dispute for which the Declaratory Judgment Act creates a remedy.

Bypassing the Declaratory Judgment Act, Defendants say HIPAA creates no private right of action and that even if, as Mr. Murphy says, the state-law authorization requirement is contrary to, and thus preempted by, the HIPAA rules, Mr. Murphy cannot pursue an action for declaratory and injunctive relief on that
basis. Mr. Murphy responds that he asserts his claim not as a private right of action under HIPAA but as a claim under the Supremacy Clause. Defendants say there is no private right of action under the Supremacy Clause, either.

In asserting that Mr. Murphy cannot maintain this action, Defendants explain away, distinguish, or just disagree with a substantial number of Supreme Court and Eleventh Circuit decisions. See, e.g., Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 n. 14 (1983) (collecting cases); Ex parte Young, 209 U.S. 123, 160-62 (1908); Georgia Latino Alliance for Human Rights v. Governor of Ga., 691 F.3d 1250, 1262 (11th Cir. 2012). And Defendants say four justices recently expressed dissatisfaction with the notion that a litigant can bring an action under the Supremacy Clause. See Douglas v. Indep. Living Ctr. of S. Cal., 132 S. Ct. 1204, 1211 (2012) (Roberts, C.J., dissenting for four justices).

Even if persuasive, a dissent garnering four votes does not make the law. Moreover, Douglas was an attempt to increase payments to private parties under spending-clause legislation that created no private right of action. In arguing that the plaintiffs there should not be able to proceed, the dissent explicitly recognized that a person may bring an action to preemptively assert a defense—including a defense founded on the Supremacy Clause—that otherwise would be available in an enforcement action. 132 S. Ct. at 1213. This is the equivalent of such a case: Mr. Murphy preemptively asserts that a defense that otherwise would be available
in a medical-negligence action—the defense of failure to comply with the presuit requirement by delivering an authorization to conduct ex parte interviews—fails because the authorization requirement contravenes federal law.

The Supreme Court and Eleventh Circuit have said repeatedly that if a Supreme Court decision is to be overruled, the Supreme Court itself, not a circuit or district court, must do the overruling. A recent Eleventh Circuit decision could not have been clearer on this point. See Evans v. Sec'y, Fla. Dep't of Corrs., 699 F.3d 1249, 1263-64 (11th Cir. 2012) (collecting authorities). Indeed, even when five justices have said in concurrences or dissents in separate cases that they disagree with an earlier Supreme Court holding, the Eleventh Circuit has said the earlier holding remains the law, until the Supreme Court, as a court, holds to the contrary. See United States v. Guadamuz-Solis, 232 F.3d 1363, 1363 (11th Cir. 2000).

In addition, when the Eleventh Circuit has decided an issue, later Eleventh Circuit panels and district courts within the circuit must follow the decision until the Supreme Court or the Eleventh Circuit sitting en banc holds to the contrary. See, e.g., Main Drug, Inc. v. Aetna U.S. Healthcare, Inc., 475 F.3d 1228, 1230 (11th Cir. 2007).

Earlier this year, the Eleventh Circuit affirmed a judgment for declaratory and injunctive relief in a private action asserting that a Florida statute was
preempted by HIPAA. *OPIS Mgmt. Res., LLC v. Sec'y, Fla. Dep't for Health Care Admin.*, 713 F.3d 1291 (11th Cir. 2013). The case is directly contrary to Defendants’ assertion that a plaintiff cannot bring an action asserting that a state statute is preempted by HIPAA. The State says that perhaps the defendant in that case did not contest the existence of a private right of action. Perhaps not. But *OPIS* was an action by a private party against a state agency, represented (as is the State in the case at bar) by the Attorney General, that resulted in an Eleventh Circuit decision just this year, holding a state statute preempted by HIPAA. Based on *OPIS* and the Supreme Court and Eleventh Circuit decisions allowing preemption claims to go forward, I decline Defendants’ invitation to chart a new course.

In one respect, though, Defendants’ assertion that Mr. Murphy has failed to state a claim on which relief can be granted is correct. Mr. Murphy asserts a right to recover not only under the Supremacy Clause and Declaratory Judgment Act but also under 42 U.S.C. § 1983. A § 1983 action may proceed only against a person acting under color of law. Private parties sometimes act under color of law, but here Dr. Dulay has not done so. All Dr. Dulay proposes to do is take an action that he and countless others are authorized to take by state law. A person does not act under color of law merely by taking action authorized by state law. *See Campbell v. United States*, 962 F.2d 1579, 1583 (11th Cir. 1992) ("Even when state laws
permit private conduct which allegedly deprives claimants of constitutional rights, these laws do no transform private conduct into state action.”). If it were otherwise, a person would act under color of law each time the person drove down a state highway or entered a public library.

V. The Merits

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. The preemption rule provides:

A standard, requirement, or implementation specification adopted under this subchapter that is contrary to a provision of State law preempts the provision of State law. This general rule applies, except if one or more of the following conditions is met: . . . . 45 C.F.R. § 160.203. Defendants do not challenge the validity of the rule.

Especially in light of OPIS, Defendants could not reasonably do so.

The rule continues with exceptions, including an exception for a state law that is more stringent than federal law, that is, a state law that prohibits disclosures that would be permitted under federal law. None of the exceptions applies here.

A rule that is part of subchapter C—and that therefore preempts contrary state law—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). A doctor is a “covered entity.” “Health information” includes a patient’s medical information—information of the kind that would be disclosed in an ex parte interview. So the rule plainly applies to an ex parte interview of the kind Dr. Dulay proposes to conduct with Mr. Murphy’s other healthcare providers. Defendants do not assert the contrary. Their position is not that the rule is inapplicable to ex parte interviews; their position instead is that the interviews at issue will comply with the rule.

Under the rule’s plain terms, the healthcare providers that Dr. Dulay proposes to interview can lawfully disclose Mr. Murphy’s health information—including in ex parte interviews—only if one of two conditions is met. First, a disclosure is permissible if “otherwise permitted or required by” subchapter C. Second, disclosure is permissible if consistent with a “valid authorization.” But if neither of these conditions is met, the proposed disclosure is impermissible—and a state law that authorizes the disclosure is expressly preempted by 45 C.F.R. § 160.203.

This order addresses each of the two conditions in turn.

First, “otherwise permitted or required.” Subchapter C does not otherwise permit or require disclosures in an ex parte interview of the kind at issue. Quite the contrary. Under 45 C.F.R. § 164.512(e), a disclosure can be made in connection
with a judicial or administrative proceeding, but the rule imposes restrictions that the Florida presuit authorization statute does not. The rule authorizes a disclosure in response to a court or administrative order. In the absence of an order, the rule authorizes a disclosure only on specific conditions that give the patient an opportunity to object and to obtain a judicial or administrative ruling on the objection in advance of the disclosure. The Florida statute, in contrast, takes a court or administrative tribunal out of the process altogether; a patient has no opportunity to object or obtain an advance ruling on proposed disclosures. In short, the Florida statute is an effort to dispense with—not comply with—the more restrictive federal requirements.

Second, “valid authorization.” Even though 45 C.F.R. § 164.512(e) deals explicitly with disclosures in connection with judicial or administrative proceedings, it does not supersede the “valid authorization” provision. If a patient issues a valid authorization allowing a disclosure, the disclosure may be made, even if the disclosure relates to a judicial or administrative proceeding and the conditions of § 164.512(e) are not met. See id. § 164.512(e)(vi)(2).

To be valid, an authorization must contain specific elements. The authorization mandated by the Florida statute includes those elements. Mr. Murphy quibbles with this conclusion in some respects, but the objections are just that—quibbles.
Defendants suggested in their papers that an authorization that includes the required elements is always, without more, valid. But to their credit, at oral argument Defendants acknowledged that that is not so. An authorization must be signed by the patient or by a personal representative. *Id.* § 164.508(c)(1)(vi). As Defendants now acknowledge, an authorization signed by an incompetent person is not valid. An authorization signed under duress—a gun to the head, for example—is not valid. On any reasonable view, an authorization obtained by fraud or under any of the other circumstances that, under established law, invalidate a signature or consent is not valid. In short, an authorization’s inclusion of the specific elements listed in the rule is necessary, but not always sufficient, to establish validity.

So that brings the analysis to the critical question: is an authorization mandated by state law as a condition precedent to pursuing a medical-negligence action “valid”? I conclude it is not. The whole point of the authorization provision is to recognize that a patient may consent to disclosures that otherwise would be impermissible. When a patient consents, the disclosures can be made. The requirement for consent is why an authorization must be signed. The signature confirms that the patient in fact consents.

Under the Florida system, though, the signature does not show consent. It shows only mandated compliance with state law. The Florida system says nothing about whether the patient does or does not consent to disclosures. 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.

A state statute that authorizes such ex parte interviews in connection with a medical-negligence claim, without the patient’s consent and without the safeguards included in 45 C.F.R. § 164.512(e), is squarely at odds with federal law. The Florida statute is an attempt not to comply with the federal requirements but to circumvent them—to allow ex parte interviews without consent and without the court or administrative order (or opportunity to obtain a ruling) that federal law requires. The Florida statute purports to reach this result by requiring the patient to sign an “authorization,” but the authorization is a charade; the only entity granting authority, in any meaningful sense, is the state itself, not the patient.

Defendants say the Florida statute provides important benefits, allowing a prospective medical-negligence defendant to obtain information leading to an earlier, and thus less costly, resolution of the claim. Perhaps so. But there are substantial arguments on the other side, too. The arguments on the other side have prevailed at the federal level. And the resulting federal rules expressly preempt conflicting state statutes. In these circumstances, a court’s proper role ends with
giving effect to the federal law. Evaluating the competing policy arguments is not a proper part of the analysis.

In reaching this result, I have not overlooked In re Collins, M.D., 286 S.W. 3d 911 (Tex. 2009). There the Texas Supreme Court reached the opposite result. In my view, for the reasons explained above, the Texas decision was contrary to federal law. Each side also cites a Georgia decision, Allen v. Wright, 282 Ga. 9 (Ga. 2007). I agree with that decision only to the extent consistent with this order. The Texas and Georgia state-court decisions are, of course, not binding. The issue is one of federal law, properly analyzed de novo by a federal court.

I also have not overlooked the many other decisions addressing ex parte interviews of this kind. Left to their own devices, without regard to HIPAA, some state courts would allow such interviews, some would not. Compare, e.g., Holman v. Rasak, 785 N.W.2d 98 (Mich. 2010) with, e.g., States ex rel. Proctor v. Messina, 320 S.W.3d 145 (Mo. 2010). But again, the policy arguments on one side or the other are not controlling. The question is not what federal law should require but what federal law does require. As set out above, federal law prohibits unconsented disclosures of the kind Dr. Dulay proposes to obtain.

VI. Conclusion

Under 45 C.F.R. § 164.508(a)(1), a healthcare provider may disclose a patient’s information in connection with a potential medical-negligence claim
against another provider only with the patient’s authorization—that is, with the patient’s consent—or under the safeguards provided by 45 C.F.R. § 164.512(e).

The Florida statute allowing ex parte interviews without consent and without the safeguards is contrary to federal law and thus, under 45 C.F.R. § 160.203, expressly preempted. Dr. Dulay intends to conduct ex parte interviews and thus to obtain Mr. Murphy’s information in violation of the federal rules. Mr. Murphy is entitled to a declaration that the proposed ex parte interviews will violate federal law, and Mr. Murphy is entitled to an injunction prohibiting the interviews.

IT IS ORDERED:

1. It is declared that an authorization that a patient is required to provide under Florida Statutes § 766.1065 does not authorize a healthcare provider to disclose health information about the patient in an ex parte interview (that is, in an interview when the patient or the patient’s attorney is not present).

2. The defendants Aldolfo C. Dulay, M.D., and Aldolfo C. Dulay, M.D., P.A., must not ask for or obtain health information regarding the plaintiff Glen Murphy in an ex parte interview (that is, in an interview when the plaintiff Glen Murphy or his attorney is not present), unless the interview is authorized in accordance with 45 C.F.R. § 164.512(e) or Mr. Murphy voluntarily consents. For purposes of this injunction, consent given only in an authorization that is required by Florida law as a presuit condition is not voluntary.
3. This injunction binds Aldolfo C. Dlay, M.D., and Aldolfo C. Dlay, M.D., P.A., and their officers, agents, servants, employees, and attorneys—and others in active concert or participation with any of them—who receive actual notice of this injunction by personal service or otherwise. Included in the persons who are bound are insurers and adjusters who receive notice and who do or may have a duty to defend or indemnify these defendants in any medical-negligence claim brought by the plaintiff Glen Murphy.

4. The clerk must enter a judgment in accordance with paragraphs 1 through 3 above.

5. The motions to dismiss, ECF Nos. 32 & 35, are denied.

6. The case style is amended to the case style shown on this order.

SO ORDERED on September 25, 2013.

/s/Robert L. Hinkle
United States District Judge