2017 West Virginia Health Care Privacy Laws and HIPAA Preemption Analysis

Supplemental Preemption Guide and West Virginia HIPAA Privacy Case Law Summary

Preemption Background and Guide

The HIPAA Privacy, Security, Breach Notification and Enforcement Rules do not preempt (or replace) all state laws. Preemption is a concept or rule of law that allows the federal government to pass legislation that replaces, or preempts, state laws on a similar topic. Congress could have used total preemption to replace all state laws that relate to the privacy and security of health information. Instead, Congress chose to only draft the HIPAA as a federal privacy and security minimum standard which allows state legislatures the ability to continue to enact more stringent state laws. As a result, the state must go through a preemption analysis to determine whether state laws are preempted by the HIPAA. The preemption provision under the HIPAA is generally set forth under 45 C.F.R. 160.202 (Definitions), 160.203 (General Rule and Exceptions), and 160.204 (Process for Requesting Exception Determinations).

The general rule with regard to the HIPAA preemption is that a requirement or standard under HIPAA preempts any contrary provision of state law. This requires an evaluation of both the federal and state law to determine whether a covered entity can satisfy or comply with both laws. If the covered entity cannot satisfy both the contrary state law and HIPAA, then the state law is generally preempted, unless an exception applies.

Below is additional information including FAQs issued by the Office of Civil Rights on preemption along with a flow sheet that will be valuable to assist you in further understanding the preemption analysis process.

Preemption Frequently Asked Questions

The Office of Civil Rights, Health Information Privacy section includes a Frequently Asked Question webpage in response to various HIPAA privacy and security related questions. There are a number of FAQs provided by the Office of Civil Rights responding to various questions related to the issue of state law preemption under HIPAA. These FAQs are valuable in helping to understand how the preemption process works and the analysis one must do when confronted with a state law that may be contrary to the HIPAA privacy and security rule.

Below are a few select FAQs on the topic of preemption. You can also search for these or others related to preemption or other issues involving HIPAA at the Office of Civil Rights, Health Information Privacy section.

Question: Does the HIPAA Privacy Rule preempt State laws?

http://www.hhs.gov/ocr/privacy/hipaa/faq/preemption_of_state_law/399.html

Answer: The HIPAA Privacy Rule provides a Federal floor of privacy protections for individuals' individually identifiable health information where that information is held by a covered entity or by a business associate of the covered entity. State laws that are contrary to the Privacy Rule are preempted by the Federal requirements, unless a specific exception applies. These exceptions include if the State law:

1. relates to the privacy of individually identifiable health information and provides greater privacy protections or privacy rights with respect to such information;
2. provides for the reporting of disease or injury, child abuse, birth, or death, or for public health surveillance, investigation, or intervention; or
3. requires certain health plan reporting, such as for management or financial audits. In these circumstances, a covered entity is not required to comply with a contrary provision of the Privacy Rule.

In addition, the Department of Health and Human Services (HHS) may, upon specific request from a State or other entity or person, determine that a provision of State law which is "contrary" to the Federal requirements – as defined by the HIPAA Administrative Simplification Rules – and which meets certain additional criteria, will not be preempted by the Federal requirements. Thus, preemption of a contrary State law will not occur if the Secretary or designated HHS official determines, in response to a request, that one of the following criteria apply:

The State law:

1. is necessary to prevent fraud and abuse related to the provision of or payment for health care;
2. is necessary to ensure appropriate State regulation of insurance and health plans to the extent expressly authorized by statute or regulation;
3. is necessary for State reporting on health care delivery or costs;

4. is necessary for purposes of serving a compelling public health, safety, or welfare need, and, if a Privacy Rule provision is at issue, if the Secretary determines that the intrusion into privacy is warranted when balanced against the need to be served; or

5. has as its principal purpose the regulation of the manufacture, registration, distribution, dispensing, or other control of any controlled substances (as defined in 21 U.S.C. 802), or that is deemed a controlled substance by State law.

It is important to recognize that only State laws that are "contrary" to the Federal requirements are eligible for an exemption determination. As defined by the Administrative Simplification Rules, contrary means that it would be impossible for a covered entity to comply with both the State and Federal requirements, or that the provision of State law is an obstacle to accomplishing the full purposes and objectives of the Administrative Simplification provisions of HIPAA. See 45 C.F.R. Part 160, Subpart B, for specific requirements related to preemption of State law.

Date Created: 03/12/2003

Last Updated: 12/11/2006

Question: How do I know if a State law is "contrary" to the HIPAA Privacy Rule?

http://www.hhs.gov/ocr/privacy/hipaa/faq/preemption_of_state_law/402.html

Answer: A State law is "contrary" to the HIPAA Privacy Rule if it would be impossible for a covered entity to comply with both the State law and the Federal Privacy Rule requirements, or if the State law is an obstacle to accomplishing the full purposes and objectives of the Administrative Simplification provisions of HIPAA. See the definition of "contrary" at 45 C.F.R. 160.202.

For example, a State law that prohibits the disclosure of protected health information to an individual who is the subject of the information may be contrary to the Privacy Rule, which requires the disclosure of protected health information to an individual in certain circumstances. With certain exceptions, the Privacy Rule preempts "contrary" State laws. See 45 C.F.R. Part 160, Subpart B.

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Question: How do I know if a State law is "more stringent" than the HIPAA Privacy Rule?

http://www.hhs.gov/ocr/privacy/hipaa/faq/preemption_of_state_law/403.html

Answer: In general, a State law is "more stringent" than the HIPAA Privacy Rule if it relates to the privacy of individually identifiable health information and provides greater privacy protections for individuals' identifiable health information, or greater rights to individuals with respect to that information, than the Privacy Rule does. See the definition of "more stringent" at 45 C.F.R. 160.202 for the specific criteria. For example, a State law that provides individuals with a right to inspect and obtain a copy of their medical records in a more timely manner than the Privacy Rule is "more stringent" than the Privacy Rule.

In the unusual case where a more stringent provision of State law is contrary to a provision of the Privacy Rule, the Privacy Rule provides an exception to preemption for the more stringent provision of State law, and the State law prevails. Where the more stringent State law and Privacy Rule are not contrary, covered entities must comply with both laws. See 45 C.F.R. Part 160, Subpart B, for specific requirements related to preemption of State law.

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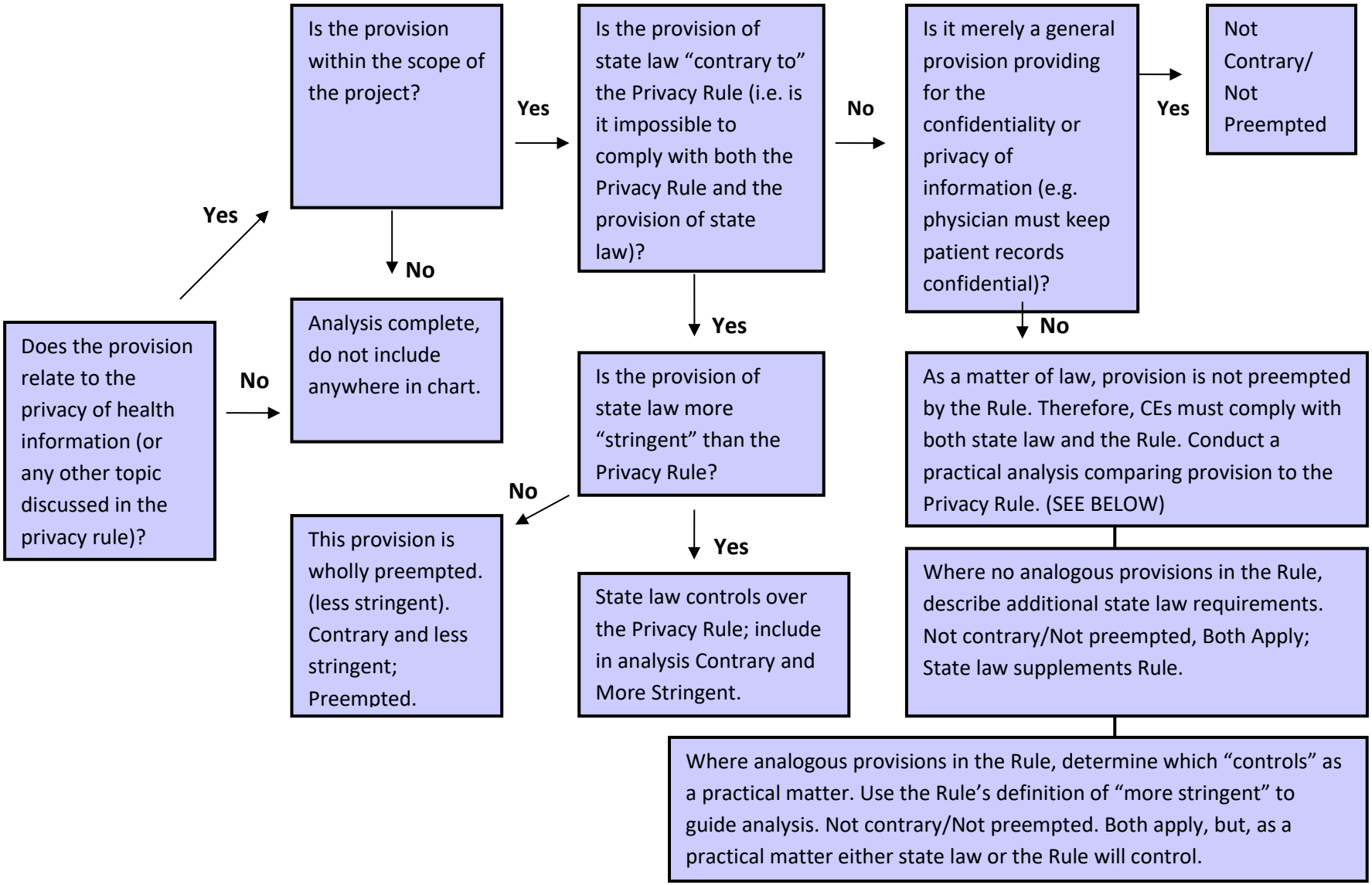
HIPAA Preemption Flowchart



HIPAA and Privacy Related Case Law in West Virginia

The following case summaries identify case law, decisions, or rulings related to HIPAA or privacy related legal issues. These summaries are intended as an educational guide and resource, and those using these summaries are encouraged to seek legal advice concerning how these cases may impact their own particular facts and circumstances. This case law summary will be regularly updated by the West Virginia State Privacy Office as it becomes aware of new cases. All attorneys who are involved in or become aware of HIPAA and privacy related cases are encouraged to provide a summary of such matters to Sallie H. Milam, Chief Privacy Officer for the West Virginia State Privacy Office at: sallie.h.miliam@wv.gov.

1. State of West Virginia ex. Rel. State Farm Mutual Automobile Insurance Company v. Honorable Thomas A. Bedell, Judge of the Circuit Court of Harrison County, (commonly referred to as "State Farm I"), 697 S.E.2d 730 (April 21, 2010). Justice Workman delivered the opinion.

Synopsis:

State Farm requested plaintiffs' medical records in a personal injury action. Plaintiffs' insurance policy obligated them to provide the requested records but plaintiff (in her own capacity and as the administrator of her husband's estate) refused to do so unless State Farm agreed to a protective order which prohibited State Farm from electronically scanning the records and required State Farm to destroy/return the records at the conclusion of the litigation.

The trial court (the Circuit Court of Harrison County) entered an order that directed plaintiff to disclose all relevant medical records. However, the order prohibited State Farm from scanning the records or storing them in any manner. The protective order also prohibited State Farm from disclosing any of the plaintiffs' medical records, including records that State Farm already possessed prior to litigation, to any third parties. The order also obligated State Farm to destroy the medical records and any copies or summaries of the records, or to return said documents to plaintiff's attorney at the close of litigation and to certify that the records had been returned or destroyed.

State Farm moved for a writ of prohibition from the Supreme Court of Appeals of West Virginia and argued that the West Virginia Insurance Commission regulations required insurers to maintain all claims documents, including medical records, for a period of approximately five years. State Farm argued that the protective order would require it to destroy part of its claims file before the retention period expired and therefore forced it

to choose between complying with the law, and disregarding the protective order, or complying with the protective order, and disregarding the law.

State Farm also argued that plaintiff had not shown good cause for those portions of the protective order that prevented it from scanning and electronically storing medical records. Plaintiff argued that the prohibition against electronic storage was necessary to prevent State Farm from disseminating the medical records to third parties, but provided no real basis for this belief. State Farm contended that a party seeking a protective order was required to support the request with a "particular and specific demonstration of fact," that plaintiff had failed to do so, and that, in any case, the Insurance Commissioner had sanctioned the use of electronic storage and had implemented regulations to protect the confidentiality of electronically-stored medical records.

Resolution:

The Supreme Court of Appeals granted State Farm's motion for a writ of prohibition. In the decision, the Court adopted each of State Farm's arguments. First, the Court determined that the protective order was erroneous as it required State Farm to destroy or return medical records before the expiration of the regulatory retention period established by the Insurance Commissioner. Because the regulation had the force of law, the Court held that any protective order issued in contravention of the regulation could not stand.

Second, the Court determined that the protective order provided no basis for the restrictions it placed upon the electronic scanning or storage of medical records. The Court held that plaintiff had not advanced any "particular and specific demonstration of fact" in support of the prohibition against electronic storage. Accordingly, the Court found that the trial court's restriction against electronic storage of the medical records constituted clear error.

2. Angela Genzlinger v. John Doe, an unidentified male nurse and West Virginia University Hospitals East, Berkeley County Circuit Court, Honorable John C. Yoder, Filed in November 2010.

Synopsis:

Plaintiff alleged she was sexually assaulted by a male nurse while a patient at City Hospital. Plaintiff alleged the Defendant negligently hired, retained, and/or supervised the male nurse. During discovery, Plaintiff asked for the following:

1) The identity of every person and/or corporate entity that has been provided with her records since October 1, 2010 to present; identity and description of each

such person and/or corporate entity who provided the records or access to the records, and any authorization upon which the hospital relief for disclosure; and

2) All contractual terms under which Kenneth Barton, Esq. and Steptoe & Johnson is providing legal counsel to the male nurse, including the date on which such terms were agreed on.

Defendant filed a Motion for Protective Order.

Resolution:

Protective Order granted. The Court held that HIPAA permits City Hospital to use or disclose its own medical records as part of its "healthcare operations." City Hospital's arranging for legal services for itself and its employees is included within HIPAA's definition of "healthcare operations." City Hospital is authorized by HIPAA to disclose its own medical records to counsel which City Hospital retains to defend it or its employees who perform covered functions on behalf of the hospital without a patient's consent or authorization. Under the circumstances, City Hospital appropriately and in accordance with HIPAA provided counsel a copy of Plaintiff's medical records which is the "minimum necessary" for intended purpose. City Hospital was not required to ensure the entry of a Protective Order before providing medical records to attorney, as his use and further disclosure of said records is governed by the BAA which provides sufficient protection of plaintiff's privacy rights while providing reasonable access to the information necessary to defend the employee.

3. Joshua M. Beane v. Ashton Medical Associates, Inc., Kanawha County Circuit Court, West Virginia, Honorable Paul Zakaib, Jr., January 2011.

Synopsis:

Plaintiff was sent to Defendant for pre-employment physical for a job. He called in sick to his current employer, and then asked for an excuse from work slip from Defendant. Defendant supplied excuse. Plaintiff gave excuse to his supervisor the next day. His supervisor called Defendant and inquired if Plaintiff was ok to return to work. Defendant's employee responded, "Sure, he was just here for a pre-employment physical." Current employer fired Plaintiff.

Resolution:

Jury Trial; Verdict for Plaintiff in the amount of $22,880.

4. State of West Virginia ex. rel. State Farm Mutual Automobile Insurance Company v. Honorable Thomas A. Bedell, Judge of the Circuit Court of Harrison County (commonly referred to as "State Farm II"), 719 S.E. 2d 722 (April 1, 2011). Justice Davis delivered the opinion. Justice Benjamin and Justice Ketchum dissented.

Synopsis:

After the Court granted State Farm's writ in State Farm I, plaintiff returned to the trial court with a revised protective order. This order permitted State Farm to retain the medical records for a sufficient period of time to permit compliance with the West Virginia insurance regulations, and did not prohibit State Farm from electronically storing the records. The revised protective order still restricted State Farm's ability to disclose medical records (including records that it had obtained outside of litigation) to third parties without authorization, required records to be returned to plaintiff's counsel or destroyed following the expiration of the regulatory period, and required State Farm's counsel to certify that the records had been returned or destroyed. The trial court signed this protective order.

State Farm sought a writ of prohibition in the Supreme Court of Appeals of West Virginia, arguing that plaintiff had failed to show good cause for the protective order. State Farm argued that, because the protective order prohibited it from disclosing medical records that it already possessed, it was unconstitutional. State Farm also argued that compliance with the protective order would require it to disregard its regulatory obligations, noting that West Virginia law required insurers to report fraudulent activity (which necessarily required the maintenance of complete files for perpetuity). Without complete claims files, State Farm argued that it could not conduct the analysis necessary to identify fraud. State Farm also noted that, as an Illinois company, it was subject to Illinois law which required State Farm to maintain its claims files forever. Plaintiffs contended that State Farm failed to raise its compliance arguments before the trial court, and that such arguments were therefore not ripe for the appellate court to review.

State Farm also argued that the order would require destruction of business records that were necessary to defend future cases because the protective order required the return or destruction of any documents, notes, attorney-client correspondence, etc., that contained information referring to medical records. Plaintiff responded that the protective order was not seeking the return or destruction of every document making reference to the medical records, only that references to the medical records be removed or redacted.

Finally, State Farm argued that compliance with the protective order would be needlessly burdensome, and impossible, as it required State Farm's counsel to certify

the return or destruction of the records, despite the fact that counsel had no control over third parties.

Resolution:

Writ denied. In its decision, the Court upheld the protective order and determined that plaintiff had demonstrated good cause for the protective order.

The Court refused to consider State Farm's argument that compliance with the protective order would require it to disregard its statutory obligations, holding that because State Farm had not raised this argument before the trial court the issue was not ripe for appellate review.

The Court determined that the protective order did not require State Farm to destroy all of its business records but only to destroy or redact records containing references to medical records. The court found that this approach would preserve plaintiff's privacy and enable State Farm to maintain the remainder of the records.

The Court rejected State Farm's undue burden and impossibility arguments, noting that protective orders have become an accepted means of safeguarding privacy interests, and that certification clauses were an accepted practice in West Virginia and in other jurisdictions.

Significantly, the Court altogether ignored State Farm's constitutional arguments.

5. Small v. Ramsey, 280 F.R.D. 264 (N.D.W. Va. 2012)

Synopsis:

Plaintiff, who was seriously injured in an automobile accident, brought a personal injury action against the involved vehicles' drivers, owner, and insurers. Plaintiff refused to surrender his medical records to the defendant insurers (State Farm and Nationwide) without a protective order, which State Farm and Nationwide refused to sign. Accordingly, there could be no adequate discovery or evaluation, no settlement, and no preparation for trial. Plaintiff moved for a discovery protective order with respect to his medical records.

While admitting that Plaintiff has a right to privacy with respect to his medical records, State Farm and Nationwide argued that the filing of Plaintiff's law suit and claims imposed limits on any privacy right he had in his medical records. The insurers further argued that, should they actually violate Plaintiff's privacy by disclosing his records, Plaintiff's right to redress in the courts would be adequate.

In addition to asserting his common law right of privacy, Plaintiff argued that HIPAA gives him a right to privacy in his non-public medical records against a first party liability insurer or a third-party liability insurer.

Resolution:

The Court reaffirmed that under West Virginia common law the Plaintiff has a right of privacy in his non-public medical records. Specifically, insurers are prohibited from disclosing non-public personal health information without authorization by the individual.

The Court also noted that the insurers had failed to explain how Plaintiff would have knowledge of any authorized disclosure of his medical records. Accordingly, the Court held that none of Plaintiff's medical records would become public, unless Plaintiff consented to their dissemination or until the records are introduced at trial.

With regard to Plaintiff's HIPAA argument, the Court found that no language extends HIPAA or its regulations to liability insurers, such as State Farm and Nationwide.

6. R.K. v. St. Mary's Medical Center, Inc. d/b/a St. Mary's Medical Center, 735 S.E. 2d 715, November 15, 2012. Justice Davis delivered the opinion. Justice McHugh did not participate.

Synopsis:

The Cabell County Circuit Court granted St. Mary's Medical Center 12(b)(6) motion to dismiss based upon its conclusion that R.K.'s state law claims were preempted by HIPAA. R.K, plaintiff below/petitioner, sought reversal of the Circuit Court order dismissing numerous state law claims asserted against St. Mary's Medical Center.

Resolution:

Supreme Court held that state common law claims for the wrongful disclosure of medical or personal health information are not inconsistent with HIPAA. Rather, state law claims compliment HIPAA by enhancing the penalties for its violation and thereby encouraging HIPAA compliance. Accordingly, the Court held that common law tort claims based upon the wrongful disclosure of medical or personal health information are not preempted by the Health Insurance Portability and Accountability Act of 1996.

7. Tabata v. Charleston Area Medical Center, Inc., 759 S.E.2d 459 (W. Va. 2014). Per Curiam Opinion.

Synopsis:

The petitioners received a letter in February 2011 stating that some of their personal and medical information had accidently been placed on the internet. The database

contained names, contact details, Social Security numbers, dates of birth and basic respiratory care information for 3,655 patients. As a result, CAMC provided a year of credit monitoring at CAMC's cost to all whose data was potentially exposed.

The petitioners and plaintiffs filed an action in the Circuit Court of Kanawha County individually and as a class for breach of duty of confidentiality, among other things. Further, the petitioners filed a motion for a class action for at least 3,655 affected patients. The Circuit Court issued an order denying class certification. The Circuit Court found that the petitioners lacked standing because they failed to show they have suffered a concrete and particularized injury that is not hypothetical or conjectural as the future possibility of identity theft was not an injury. The petitioners and plaintiffs appealed to the Supreme Court of Appeals.

Resolution:

The Supreme Court agreed with the Circuit Court that a future possibility of identity theft was not an injury but held that a breach of the patient's legal interest in maintaining the confidentiality of their medical information constituted a concrete, particularized and actual injury sufficient to permit standing. It was not necessary for the plaintiffs to show they had suffered an injury or damage. Accordingly, the Supreme Court reversed the standing decision of the Circuit Court and remanded for further proceedings on the class action issue.

8. West Virginia Dept. of Health and Human Resources v. E.H., 778 S.E.2d 728 (October 15, 2015). Justice Loughry delivered the opinion. Justice Davis dissented. Petition for Writ of Certiorari filed in the United States Supreme Court denied October 11, 2016.

Synopsis:

Since 1990, the West Virginia Department of Health and Human Resources ("DHHR") has contracted with Legal Aid of West Virginia ("Legal Aid") to provide patient advocacy services within state psychiatric hospitals to protect the rights of institutionalized patients. In that role, Legal Aid assists with individual patient grievances, conducts fraud and abuse investigations, educates staff and patients about patient rights, and monitors psychiatric hospitals for the purpose of ensuring compliance with state regulations.

After a 2008 report documented conditions and patient treatment at two state hospitals, the Circuit Court of Kanawha County reopened litigation regarding the civil rights of state patients with mental disabilities. The parties subsequently entered into a court-approved agreement, which, in part, requires periodic review of the DHHR to ensure compliance with specific terms. In response to the periodic review requirement, the DHHR contracted with Legal Aid to produce reports for the Judge regarding the

hospitals' compliance with state regulations addressing issues of patient care and advocacy. Specifically, the DHHR agreed that quarterly audits should be conducted by providing Legal Aid with complete access to at least two patients from each unit.

For years, the DHHR provided Legal Aid with full access to computerized patient records, as well as the patient wards and other areas of the hospitals. Then, in June 2014, the DHHR began requiring Legal Aid to obtain signed releases from each patient before obtaining any information from or about the patient. Under the new policy, a new release specifying the basis of inquiry was required each time Legal Aid sought to review a patient's records. In addition to the new release requirement, Legal Aid was denied access to the hospitals' network of patient records, which it needed to conduct its quarterly audits of the facilities.

In response to the policy change, Legal Aid filed a motion for emergency relief. Finding no violation of federal or state law, the Circuit Court of Kanawha County directed the DHHR to immediately restore Legal Aid to its previous level of access at the hospitals.

In challenging the Circuit Court's ruling, the DHHR argued that the order violated both the patients' constitutional right to privacy and HIPAA. Legal Aid insisted that the order should be affirmed due to the clear lack of constitutional or HIPAA violations.

Resolution:

Affirmed. In a decision grounded solely on state law, the Court of Appeals agreed with the Circuit Court's decision to restore Legal Aid's patient access to the level it experienced prior to the June 2014 policy change.

The Court rejected the DHHR's argument that the access afforded to Legal Aid prior to the policy change violated patients' constitutionally-based rights of privacy. Instead, the Court found that because the record failed to demonstrate any indiscriminate disclosure of confidential information by Legal Aid, no meritorious issue existed with regard to its dissemination of confidential health information.

Turning next to HIPAA considerations, the Court agreed with the DHHR's argument that Legal Aid does not come within any exemptions provided under HIPAA that would eliminate its need to obtain patient consent before viewing medical records. Specifically, the Court disagreed with the Circuit Court's determination that Legal Aid falls within the HIPAA definitions for a "business associate," a "health oversight agency," or "health care operations." Rather, the Court held that no exemption of HIPAA entitled Legal Aid to records without patient consent.

Having determined that federal law does not provide the necessary authority for disclosure of patient records to Legal Aid without express written consent, the Court

turned to state law (specifically, Title 64, Series 59 of the Code of State Regulations governing "Behavioral Health Patient Rights" pursuant to W. Va. Code § 27-5-9) to determine whether it provided an independent basis to support the Circuit Court's ruling. West Virginia law provides that while a patient may authorize the release of his or her medical records, those records may also be obtained by the "providers of health, social, or welfare services involved" in caring for a patient. State law further provides that "[n]o written consent is necessary for . . . advocates under contract with" the department serving the patient.

The Court held that the written agreement between the DHHR and Legal Aid specifying the legal obligations of the parties (including the manner of payment and the duties associated with the provision of patient advocacy services) constitutes a contract for purposes of permitting Legal Aid to access records without written consent of individuals hospitalized in state mental health facilities. The Court further held that the contract falls within the meaning of the state regulation permitting disclosure of patient records without written consent under contract. Accordingly, the Court affirmed the Circuit Court's ruling that the DHHR's revocation of Legal Aid's access to patient records violates state law.

In addition, the Court found that the policy adopted by the DHHR is not preempted by HIPAA because the state's laws are more stringent than those set forth in HIPAA, consistent with the findings of West Virginia's HIPAA Preemption Analysis.

Finally, the Court affirmed the Circuit Court's order restoring Legal Aid's access to the hospitals' patients without limitation, except when patients expressly request limitations on the disclosure of their identifiable health information. The Court identified a clear need for periodic review of patient records to identify systemic issues of noncompliance with state regulations and noted the court-approved agreement's requirement for a report to the Judge on such issues.

The DHHR submitted a Petition for Writ of Certiorari to the United States Supreme Court in March 2016. The United States Supreme Court denied the Petition for Writ of Certiorari on October 11, 2016. (See Docket No. 15-1142).

9. Mays v. Marshall University Bd. of Governors, Not reported, 2015 WL 6181508, No. 14-0788 (October 20, 2015). Memorandum Opinion.

Synopsis:

Plaintiff, a breast cancer survivor, brought an invasion of privacy action against a plastic surgeon after the surgeon's office mistakenly sent photos of the plaintiff's naked torso to the human resources department of her employer to obtain pre-authorization for insurance coverage for a proposed surgery to correct a breast implant. Plaintiff argued

that by divulging her medical information to her employer, the defendant caused unreasonable publicity to be given to her private life.

The Circuit Court of Cabell County granted summary judgment in favor of the surgeon, finding that the only applicable cause of action for wrongful disclosure of healthcare information under West Virginia law is one based on a breach of the duty of physician confidentiality, and thus, holding that Plaintiff's invasion of privacy claim failed as a matter of law.

Two months before the Circuit Court issued its order granting summary judgment on the invasion of privacy claim, the Supreme Court of Appeals published its opinion in *Tabata*, which pertained to an invasion of privacy claim against a hospital. Although the Circuit Court did not discuss *Tabata* in its order, the parties argued its applicability on appeal.

Resolution:

Affirmed. Distinguishing the plaintiff's case from *Tabata*, the Supreme Court of Appeals held that the surgeon's office did not invade the plaintiff's privacy.

The Court rejected the plaintiff's argument that the disclosure of the photos to her employer constituted "unreasonable publicity," noting that publicity, in the context of privacy, requires that disclosure be widespread and not limited to a single person or small group. In *Tabata*, the plaintiffs' names, medical information, contact details, Social Security numbers and dates of birth were published on the Internet for six months, which made the information accessible to anyone using an Internet search. By contrast, here, only Plaintiff's limited medical information (i.e., picture of her naked torso) was disclosed to only two people at her work. The Court found it significant that, unlike in *Tabata*, the plaintiff's medical information was not disclosed to the public at-large.

Accordingly, the Court affirmed the Circuit Court's finding that Plaintiff did not have a viable claim for invasion of privacy.

10. State ex rel. Healthport Techs., LLC v. Stucky, 239 W. Va. 239, 800 S.E.2d 506 (2017).

Synopsis:

The underlying Plaintiff sued a nursing home for malpractice, alleging they used non-sterilized tools during his recovery from surgery. The Plaintiff's attorneys requested their client's medical file, which was provided with an invoice for $4,463.43. This fee was calculated to be 55 cents a page, plus taxes and shipping, which was abnormally high considering another major WV Hospital provided similar records for $3.57 and the law firm's own costs of approximately 1.4 cents a page.

Defendants asserted that the Plaintiff lacked standing, as his attorneys paid the costs for copying and the contingency agreement required the Plaintiff to reimburse his attorneys upon recovery in his malpractice case. Plaintiff counter argued that his attorneys were personal representatives under W.Va. Code § 16-29-1(a).

Resolution:

The Majority opinion held that the Plaintiff lacked standing to pursue the case, as his injury was hypothetical at the time. His obligation to reimburse his attorneys was not yet certain and was pending the resolution of his underlying malpractice claim. Since the Plaintiff could have lost the underlying medical malpractice case, his injuries were not concrete or particularized. The Court noted that the law firm had a particularized injury as the party who paid for the records, and noted that the Plaintiff could potentially gain standing upon being contractually liable to his attorneys for those costs.

The Court cited in a footnote that the WV Legislature recently amended W.Va. Code § 16-29-2, which sets forth limits on fees for receiving copies of medical records and allows for healthcare providers to charge HIPAA fees and taxes. The changes in this legislation had no effect on the case due to the timing of the legislative enactment.

11. Constellium Rolled Prod. Ravenswood, LLC v. Rogers, No. 2:15-CV-13438, 2017 WL 1552325 (S.D.W. Va. Apr. 28, 2017).

The Plaintiff asserted multiple causes of action, including a common law claim for retaliation in violation of "the substantial public policy found in HIPAA." While the complaint alleges several reasons for the Plaintiff's firing, the complaint asserts that the Defendant "terminated the Plaintiff for truthfully reporting the potential liabilities stemming from Defendant's systemic HIPAA violations." The Court noted that the state law claim was supported by the WV Supreme Court's decision in *Harless v. First National Bank*, 246 S.E.2d 270 (W. Va. 1978). However, the Plaintiffs voluntarily withdrew the claim prior to this ruling and the Court did not discuss the matter in a substantive manner.

12. Oser v. Weirton Med. Ctr., Inc., No. 5:17CV68, 2017 WL 2951923 (N.D.W. Va. July 10, 2017).

Synopsis:

The Plaintiff filed a civil action alleging breach of an employment agreement, including claims of Outrage and Tortious Interference. The Defendant removed the case to District Court alleging that the basis of the claim for Outrage and Tortious Interference contained federal law claims under HIPAA and the Stark Law (a provision in the Social

Security Act generally prohibiting physicians referring patients to entities they have a financial relationship with). The Plaintiff filed a motion to remand.

The Plaintiff argued that the HIPAA violation was not an alleged cause of action, and he only referenced HIPAA in his state law claim for Outrage by stating that the Defendant had viewed his confidential medical files without proper authorization. The Defendant argued that access was permitted due to the alleged use being for treatment, payment, and/or health care operations activities by the Defendant. The Plaintiff argued that the Defendant did not actually cite the language in their complaint, but their interpretation of it, and asserted the complaint didn't present a federal question on its face. The Defendant argued that the doctrine articulated in *Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005), applied, and that there was a substantial question of federal law.

Resolution:

The Court found that there was no substantial federal question, as the HIPAA and Stark Law issues did not have to be resolved for the state law claims to be fully adjudicated and were included for the purposes of evidentiary support for those state law claims. The Court cited to District Court decisions from other Jurisdictions where alleged HIPAA violations were "referenced only as an element of the petition's state law negligence and privacy causes of action." The Court also noted that HIPAA does not provide a private cause of action to individuals for violations, and that HIPAA enforcement actions are only authorized for the Secretary of Health and Human Services or authorized state agencies.

13. Barber v. Heslep, No. 3:14-CV-27349, 2017 WL 3097495 (S.D.W. Va. July 20, 2017).

Synopsis:

During a Workers Compensation trial, the Defendant was attempting to access the Plaintiff's mental health records pursuant to W. Va. Code §27-3-1. The Plaintiff sought compensation for emotional distress, mental anguish, and pain and suffering. During discovery the Defendant learned that the Plaintiff received mental health treatment approximately 30 years prior as a teenager. The Defendant attempted to obtain these records for purposes of evaluating the Plaintiff's mental suffering. The Plaintiff refused to produce her records and moved to quash the subpoena issued to her former healthcare provider.

Resolution:

The Court stated that the request was governed by both Federal Rule of Civil Procedure 26 and §27-3-1. The Court noted that the applicable subsection, §27-3-1(a)(3) was applicable to the request and conducted the two-step analysis required under that subsection. §27-3-1(a)(3) requires the Court to determine if the information is relevant to the proceeding, and if so, whether it is sufficiently relevant to outweigh the importance of maintaining the confidentiality of mental health records.

The Court noted that a Plaintiff's mental health records are generally relevant to mental anguish and emotional distress claims, but the second factor was not met in this case. The Court held that the records were too remote in time to be relevant, as they were from almost 30 years prior. The Court noted that the need for the records was diminished due to the fact that there was no additional mental health treatment in the intervening period between her treatment and the underlying incident which caused the litigation. The Court held that the potential litigation benefits connected to the disclosure of these old records was substantially outweighed by the Plaintiff's right to keep them confidential under West Virginia law.