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Expert Analysis  
**No-Fault Insurance Wrap-Up**

#### APPLICABILITY OF HIPAA TO **NO-FAULT** INSURANCE LITIGATION

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A burgeoning issue in **no-fault** insurance litigation has been the applicability of HIPAA and the Privacy Rule to actions brought for recovery of monies for services rendered pursuant to **no-fault** insurance policies. In particular, issue has been raised whether a medical provider who has treated an individual involved in a motor vehicle accident must comply with HIPAA and the Privacy Rule in order to sustain its action. The issue typically arises in two scenarios: The court sua sponte demands that the medical provider, to proceed, produce a 'HIPAA authorization'; or the court sua sponte demands that the medical provider prove the patient was given notice of his/her HIPAA rights.

This article serves as an examination of HIPAA and the Privacy Rule as it relates to **no-fault** litigation. Specific attention is paid to how to identify who is a 'covered entity' under HIPAA, and examined are the permissive uses of protected health information even where a party is a 'covered entity.'

#### Background and Provisions

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) was enacted, '[P]rincipally to increase the portability and continuity of health insurance and to simplify administrative procedures so as to reduce health care costs.' [FN1] Included in the HIPAA law are 'Administration Simplification' provisions, the purpose of which are to, '[E]ncourag[e] the development of a health information system through the establishment of standards and requirements for the electronic transmission of certain health information.' [FN2]

Pursuant thereto, the Secretary of Health and Human Services (HHS) was required to submit recommendations to Congress regarding standards for the privacy of individually identifiable health information, and imposed on Congress was a three-year deadline to pass privacy legislation.[FN3] In the event that Congress failed to meet the deadline, HHS was required to promulgate final privacy regulations within 12 months of such failure.[FN4] Congress failed to meet its deadline, and pursuant to its charge, HHS promulgated a 'Privacy Rule,' codified at 45 CFR §164.100, et seq., effective April 14, 2003.[FN5]

Pursuant to the Privacy Rule, a 'covered entity' may not use or disclose protected health information without authorization of the patient.[FN6] However, as exceptions to this general standard, the Privacy Rule mandates disclosure to the individual pursuant to his or her request, or when HHS asks for access in order to enforce HIPAA; and permits

disclosure in numerous circumstances as set forth in [45 CFR §164.502\(a\)\(1\)](#), as discussed infra.

The Privacy Rule also provides that a ‘covered entity’ must provide notice to its patients of the uses and disclosures of protected health information that may be made by the ‘covered entity’ and of the patient’s rights and the ‘covered entity’s’ legal duties with respect to protected health information.[FN7]

Enforcement of HIPAA violations rests with the HHS Office for Civil Rights. Penalties for unlawful disclosure range from a \$100 fine to a \$250,000 fine and 10 years in prison.[FN8] However, HHS has indicated that its primary aim is to foster compliance, and therefore monetary fines are only imposed as a last resort.[FN9]

#### Who Are ‘Covered Entities’?

As previously set forth, HIPAA and the Privacy Rule apply only to ‘covered entities.’[FN10] Therefore, as a threshold inquiry to determine the applicability of such rules, it must first be determined whether the party is a ‘covered entity.’

As provided by [45 CFR §164.104\(a\)](#) and [42 USCA §1320d-1\(a\)](#), covered entities are: (1) health plans; (2) health care clearinghouses; and (3) health care providers who transmit any health information in electronic form in connection with a transaction covered by HIPAA.[FN11]

‘Health plans’ are defined as including individual or group plans that provide, or pay the cost of, medical care, rendered pursuant to (1) [A]n employee welfare benefit plan; (2) health insurers subject to State law regulating insurance within the meaning of the Employee Retirement Income Security Act of 1974;[FN12] (3) HMOs; (4) Medicaid and Medicare; (5) long-term care policies; and (6) various health plans for veterans and active military personnel.[FN13]

‘Health care clearinghouses’ are defined as public or private entities that process or facilitate the processing of non-standard data elements of health information into standard data elements.[FN14]

‘Health care providers’ are providers of medical or health services, and any other person or organization who furnishes, bills, or is paid for health care in the normal course of business.[FN15]

Concerning **no-fault** litigation, plaintiff medical providers are ‘health care providers’ as defined above. However, HIPAA dictates that ‘health care providers’ are not ‘covered entities’ unless they transmit health information in electronic form in connection with a transaction covered by HIPAA.[FN16] The practical result of this rule is that only providers who accept insurance plans that require or encourage electronic submission of health information, such as Medicaid and Medicare, will, as a result thereof, become a ‘covered entity,’ while medical providers that only accept **no-fault** and other types of insurance not requiring electronic transactions will not be ‘covered entities.’

Insurance companies are logically considered under the ‘health plan’ category of covered entities. However, **no-fault** insurers are, with limited exception described below, specifically excepted from the definition of ‘health plans’ under HIPAA. Indeed, 45CFR §160.103 and [42 USCA §300gg-91\(c\)\(1\)](#) exclude, as ‘covered entities,’ insurers that provide coverage only for medical payments resulting from automobile accidents.[FN17]

HHS has opined on this exact issue and confirmed that automobile liability insurance that includes coverage for medical payments is not covered under HIPAA.[FN18] Likewise, the New York State Insurance Department (NY-SID) has held that **no-fault** insurers are not affected by HIPAA unless they also offer other types of insurance covered by HIPAA.[FN19] Such ‘hybrid entities’ may segregate their health care ‘components,’ dividing those not otherwise covered but for the common ownership of the other component(s)—thereby limiting most HIPAA requirements to those components of the entity that would be covered entities if they were separately owned, unaffiliated entities.[FN20]

Concerning questions of which types of entities are covered under HIPAA, HHS provides on its Web site, free of charge, ‘Covered Entity Charts,’ which provide a useful resource for medical providers and other entities curious as to the applicability of HIPAA on their respective businesses.[FN21] HHS also provides another chart of covered entities, indicating ‘If an entity is not a covered entity, it does not have to comply with the Privacy Rule.’[FN22] These materials provide valuable guidance in determining who is a ‘covered entity’ under HIPAA.

In sum, in the **no-fault** insurance context, defendant **no-fault** insurance carriers are not covered entities under HIPAA and the Privacy Rule unless they also offer other types of insurance covered by HIPAA and have not been designated as a ‘hybrid entity.’ Likewise, plaintiff medical providers are not covered entities unless they transmit health information in electronic form.[FN23] For the most part, the plaintiff medical providers and the defendant **no-fault** insurance carriers appearing in the state and local courts in New York are not ‘covered entities’ under HIPAA. Therefore, any inquiry—made sua sponte or otherwise—as to the existence of a ‘HIPAA authorization’ or proof the patient was given notice of his/her HIPAA rights, is patently improper and irrelevant.

Assuming, arguendo, that it is established that a particular entity is covered under HIPAA, a further inquiry must be made whether the disclosure of the protected health information is nevertheless allowed under the ‘routine use’ exception as provided in the Privacy Rule.[FN24]

#### ‘Routine’ Use Exception

Even if a medical provider is a ‘covered entity,’ 45CFR§164.506(a) permits disclosure of protected health information without the need for a HIPAA authorization under certain instances, under what has been coined the ‘routine use’ exception.[FN25] Pursuant to the exception, a covered entity may disclose protected health information without a HIPAA authorization for its own ‘treatment, payment and health care operations.’[FN26] Interestingly, while a patient may request his or her protected health information not be disclosed for the provider’s treatment, payment and health care operations, the provider is not required to agree to any restriction.[FN27]

The ‘treatment, payment and health care operations’ exception was subject to much debate and legal action. This history is recounted in the seminal case on the issue, [Citizens for Health v. Leavitt](#), 428 F.3d 167 (3d Cir. 2005) cert. denied 549 U.S. 941 (2006). As provided therein, the Privacy Rule, as originally promulgated, required covered entities to obtain a HIPAA authorization before disclosure for ‘treatment, payment and health care operations.’ Prior to the effective date of the original Privacy Rule, HHS was ‘inundated with unsolicited criticism’ from health insurers and medical providers, who warned that requiring a HIPAA authorization for such ‘routine uses’ would significantly impact the ability of the health care industry to operate efficiently and interfere with the day-to-day operations of medical providers.

In response, HHS promulgated [45 CFR§164.506](#), providing the ‘routine use’ exception. Various citizen groups then brought suit against HHS challenging the rule, alleging, inter alia, that [45 CFR §164.506](#) violated privacy rights protected by the U.S. Constitution. The action was ultimately dismissed and [45 CFR §164.506](#) and its ‘routine use’ exception survived.

The ‘payment’ exception contained in [45CFR§164.506](#) is broadly defined by the Privacy Rule, and includes all activities undertaken by a health care provider ‘to obtain reimbursement for the provision of health care,’ including ‘billing,’ ‘claims management,’ ‘adjudication of health benefit claims,’ ‘collection activities,’ and ‘review of health care services with respect to medical necessity.’[FN28]

Likewise, the ‘health care operations’ exception is also broadly defined and permits disclosure without authorization for, inter alia, ‘Conducting or arranging for medical review’ and ‘legal services.’[FN29]

Accordingly, it appears clear that a covered medical provider bringing an action to recover **nofault** benefits may disclose protected health information without the need for a HIPAA authorization under both the ‘payment’ and ‘health care operations’ exceptions. In fact, HHS Office of Civil Rights, the governmental body responsible for implementation and enforcement of HIPAA and the Privacy Rule, provides guidance on this exact issue. HHS, relying on [45 CFR §164.502](#) and [45 CFR §164.506](#), held, ‘Where a covered entity is a party to a legal proceeding, such as a plaintiff or defendant, the covered entity may use or disclose protected health information for purposes of the litigation as part of its health care operations.’[FN30]

Likewise, the NYSID has also opined that a medical provider does not need a HIPAA authorization to sustain an action to recover **no-fault** benefits.[FN31]

While there is an understandable dearth of case law interpreting the ‘payment’ and ‘health care operations’ exceptions of [45 CFR §164.506\(c\)](#), the available cases indicate that HHS’s and NYSID’s interpretations are correct. See, [Zaborac v. Mutual Hospital Service Inc., 2004 WL 2538643 \(U.S. Dist. Ct., S.D.Ind. 2004\)](#) (‘HIPAA allows a collection agency to disclose protected health information as necessary to obtain payment for health care services’); See, [Kirell v. Vytra Health Plans Long Island Inc., 29 A.D.3d 638 \(2d Dept. 2006\)](#) (Request for HIPAA authorization ‘unfounded’ as [45 CFR §164.506\(c\)](#) allows medical provider to disclose protected health information for payment and health care operations); [Citizens for Health v. Thompson, 2004 WL 765356 \(U.S. Dist. Ct., E.D.Pa. 2004\)](#)(Disclosure of protected health information allowed for legal proceedings).

Although a covered medical provider may disclose protected health information as described above, the provider must make reasonable efforts to limit such information to the minimum necessary to accomplish the intended purpose of the disclosure.[FN32] It should be noted that this requirement does not mandate that all risk of inadvertent disclosure be eliminated, but only that reasonable safeguards be applied.[FN33]

## Conclusion

**No-fault** medical providers are not ‘covered entities’ under the HIPAA and the Privacy Rule unless they transmit health information in electronic form in connection with a transaction covered by HIPAA. Likewise, **no-fault** insurers are, with limited exception, specifically excepted from HIPAA. Assuming, arguendo, that **no-fault** providers were covered entities, the ‘payment’ and ‘health care operations’ exceptions permit the disclosure, without an authorization, of health information by such entities for the purpose of billing, collections and litigation of such claims.

Accordingly, despite the recent stir, HIPAA and the Privacy Rule have little, if any, impact on **no-fault** insurance litigation.

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FN1. [Arons v. Jutkowitz, 9 N.Y.3d 393 \(2007\)](#).

FN2. [Pub. L. 104-191](#), §§261-264.

FN3. [Pub. L. 104-191](#), §264.

FN4. Id.; See, Kutzko, Boyer, Thoman and Scott, ‘[HIPAA in Real Time: Practical Implications of the Federal Privacy Rule](#),’ [51 Drake L. Rev. 403, 407 \[2002-2003\]](#).

FN5. Arons v. Jutkowitz, supra; [45 CFR §164.102](#).

FN6. [45 CFR §164.508\(a\)](#).

FN7. [45 CFR §164.520](#).

FN8. [Pub. L. 104-191](#), §262.

FN9. <http://www.cms.hhs.gov/Education-Materials/Downloads/Enforcement.pdf> (last visited 12/9/09).

FN10. [45 CFR §164.502\(a\)](#).

FN11. As defined by [42 U.S.C.A. §1320d\(3\)](#).

FN12. [42 U.S.C.A. §300gg-91\(b\)\(2\)](#).

FN13. [42 U.S.C.A. §1320d\(5\)](#); [45 CFR §160.103](#).

FN14. [42 U.S.C.A. §1320d\(2\)](#); [45 CFR §160.103](#).

FN15. [45 CFR §160.103](#).

FN16. [45 CFR §164.104\(a\)\(3\)](#). Note that transmitting health information in electronic form does not include sending information by fax, as the information is not in electronic format prior to transmission. <http://www.cms.hhs.gov/HIPAAgenInfo/Downloads/CoveredEntitycharts.pdf> (last visited 12/9/09).

FN17. [45 CFR §160.103](#); [42 U.S.C.A. §300gg-91\(c\)\(1\)](#).

FN18. <http://www.hhs.gov/ocr/privacy/hipaa/faq/providers/covered/364.html> (last visited 12/9/09).

FN19. <http://www.ins.state.ny.us/ogco2003/rg030711.htm> (last visited 12/9/09).

FN20. [45 CFR §164.103](#); [45 CFR §164.105](#).

FN21. <http://www.cms.hhs.gov/HIPAAgen-Info/Downloads/CoveredEntitycharts.pdf> (last visited 12/9/09).

FN22. <http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/index.html> (last visited 12/9/09).

FN23. Note that transmitting health information in electronic form does not include sending information by fax, as the information is not in electronic format prior to transmission. <http://www.cms.hhs.gov/HIPAAgenInfo/Downloads/CoveredEntitycharts.pdf> (last visited 12/9/09).

FN24. [45 CFR §164.506\(a\)](#).

FN25. [Citizens for Health v. Leavitt, 428 F.3d 167 \(3rd Cir. 2005\)](#) cert. denied [549 U.S. 941 \(2006\)](#).

FN26. [45 CFR §164.502 \(a\)\(1\)\(ii\)](#); [45 CFR §164.506\(c\)](#).

FN27. [45 CFR §164.522\(a\)\(1\)](#).

FN28. [45 CFR §164.501](#).

FN29. Id.

FN30. <http://www.hhs.gov/ocr/privacy/hipaa/faq/permitted/judicial/704.html> (last visited 12/9/09).

FN31. <http://www.ins.state.ny.us/ogco2003/rg030524.htm> (last visited 12/9/09).

FN32. [45 CFR §164.502\(b\)\(1\)](#); [45 CFR §164.514\(d\)](#); [Chapman v. Health and Hospitals Corps.](#), 7 Misc.3d 933 (N.Y. Sup. 2005); See, <http://www.hhs.gov/ocr/privacy/hipaa/faq/providers/smaller/482.html> (last visited 12/9/09); <http://www.hhs.gov/ocr/privacy/hipaa/faq/use/356.html> (last visited 12/9/09).

FN33. See, <http://www.hhs.gov/ocr/privacy/hipaa/faq/limited/206.html> (last visited 12/9/09).  
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