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HIPAA AND PATIENT PRIVACY IN MISSOURI

This article explores the relationship between HIPAA and the Missouri common law action for breach of patient confidentiality. The Missouri Supreme Court first recognized the state common law action three years before Congress enacted HIPAA. HIPAA now creates a comprehensive regulatory framework for protecting confidential patient information. But a patient victimized by the wrongful disclosure of such information still has an independent common law remedy under Missouri law.

Back in 1993, the Missouri Supreme Court first recognized that a patient may bring a common law damage action against a physician who breaches the fiduciary duty to protect patient confidentiality. This type of claim is based on the physician's fiduciary duty not to disclose information received in connection with the doctor's treatment of the patient. *Brandt v. Medical Defense Associates*, 856 S.W.2d 667, 670-71 (Mo. banc 1993). *Brandt* involved *ex parte* discussions between lawyers and treating physicians in a medical malpractice action. The Court held that the physicians in that case did not conspire to breach any fiduciary duty because the plaintiff waived his right of confidentiality by filing his lawsuit.

Under a more favorable set of facts, the Missouri Court of Appeals for the Eastern District later held that a plaintiff stated a proper cause of action for damages under *Brandt*. See, *Fierstein v. DePaul Health Center*, 949 S.W.2d 90, 92 (Mo. App. E.D. 1997) (*Fierstein I*). The hospital in *Fierstein* wrongfully disclosed the plaintiff's confidential medical records to the opposing counsel in a custody dispute. The hospital mailed records described in a subpoena to the opposing counsel before a scheduled deposition. This action effectively deprived the plaintiff of her right to object to the disclosure

of the records under court rules. Unlike in *Brandt*, the plaintiff in *Fierstein* never waived her right of confidentiality in the custody litigation. The Court of Appeals ultimately affirmed a judgment in favor of the plaintiff in *Fierstein v. DePaul Health Center*, 24 S.W.3d 220 (Mo.App. E.D. 2000) (*Fierstein II*).

In 1996 - three years after *Brandt* but one year before *Fierstein I* - Congress created federal patient privacy protections by enacting The Health Insurance Portability and Accountability Act (“HIPAA”), Pub.L. No. 104-191, 110 Stat. 1936 (1996). HIPAA compels healthcare providers covered by the law to provide safeguards for protecting the confidentiality of patient information. The regulatory framework for the law is known as the HIPAA Privacy Rule.

HIPAA creates no private right of action. Instead, a patient aggrieved by an alleged violation of HIPAA may file an administrative complaint with the Secretary of Health and Human Services. 45 CFR §160.306(a). The Office of Civil Rights investigates the complaint on behalf of the Secretary. 45 CFR §160.306(c). If the Secretary is unable to reach an informal resolution of the complaint, she may impose a civil monetary penalty if she determines that the covered entity violated HIPAA. 45 CFR §160.402. Upon receiving notice of the proposed penalty, the covered entity then has a right to an administrative hearing. 45 CFR §160.420.

Although the regulatory structure of the HIPAA Privacy Rule is comprehensive, Missouri healthcare providers cannot rely on HIPAA preemption to avoid a state law claim for breach of patient confidentiality. The Missouri Supreme Court has noted that the HIPAA preemption clause does not apply when, among other things, the state law is more stringent than HIPAA. *State ex rel. Proctor v. Messina*, 320 S.W.3d 145, 149 (Mo. banc 2010); see also, 42 U.S.C. Section 1320d-7.¹ Logically, the HIPAA preemption clause should have no effect on Missouri’s common law damage remedy. Missouri has the

¹ *Proctor* addressed the question of whether HIPAA preempts Missouri law on *ex parte* communications between the defendant’s lawyer and a plaintiff’s treating physician in a medical malpractice case. The Court concluded that HIPAA does not preempt Missouri law on that particular issue. *State ex rel. Proctor v. Messina*, 320 S.W.3d at 157. The Court nonetheless held that the trial judge was prohibited from giving an advisory opinion to non-party medical providers that they were permitted to engage in *ex parte* communications with the defendant’s lawyer. *Id.* at 158. *Proctor* does not bar a common law damage action against a physician for breach of patient confidentiality.

flexibility under HIPAA to provide a more stringent approach to the protection of patient confidentiality.

HIPAA should not preempt Missouri's independent state law claim for breach of patient confidentiality. In practice, courts suggest that the validity of a state law claim depends on whether the particular state recognized the existence of a common law claim prior to or independent from the adoption of HIPAA. See, e.g., *Herman v. Kratche*, 2006 Ohio App. LEXIS 5895 (Ohio Ct. App. Nov. 9, 2006) (recognizing independent tort in Ohio for unauthorized unprivileged disclosure of nonpublic medical information and invasion of privacy). Because Missouri recognized the tort for breach of patient confidentiality in *Brandt* - prior to and independent from HIPAA - HIPAA should not preempt the Missouri common law claim. And it is instructive that federal preemption under HIPAA was not even raised as a possible defense in either *Fierstein I* or *Fierstein II*.

Missouri appellate courts have not yet confronted the question of what evidentiary effect HIPAA and its regulations may have on a common law claim. Even though HIPAA creates no private right of action, HIPAA arguably helps to define the standard of care in common law actions. A North Carolina court took this position in *Acosta v. Byrum*, 638 S.E.2d 246, 253 (N.C.Ct.App. 2006) (permitting use of HIPAA regulations as evidence of the standard of care). In today's regulatory environment, healthcare providers must develop policies to ensure compliance with HIPAA. So, the HIPAA Privacy Rule arguably provides evidence of how the provider is expected to protect its confidential patient information. Yet this remains an open question under Missouri law.

In conclusion, a person in Missouri allegedly victimized by the wrongful disclosure of confidential patient information may pursue remedies under federal or state law, or both. The aggrieved person may file a federal complaint with the Secretary of Health and Human Services. Or the person may bring an independent action for damages under the Missouri common law. As of now, no reported Missouri decision has confronted the evidentiary effect of HIPAA on the common law action.

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