

The Illinois Supreme Court recently rejected the validity of the standard protective order in Cook County on the grounds that it fails to prohibit insurers from using and disclosing protected health information outside of litigation, does not require insurers to return or destroy the protective health information at the conclusion of the litigation, and does not address what protected health information the covered entity is expressly authorized to disclose. *Haage v. Zavala*, 2021 IL 125918.

## November 2021 Case Law Update

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The *Haage* decision stems from two automobile personal injury actions filed in Lake County with conflicting motions for qualified protective orders (QPOs).<sup>1</sup> Plaintiffs' filed motions for a QPO which alleged that the treating physicians, hospitals, and other care providers were subject to the Privacy Rule, that the covered entities possessed their protected health information (PHI) in the form of medical records, and that the parties/their agents/consultants/witnesses would receive and review copies of the PHI.<sup>2</sup> Accordingly, Plaintiffs' proposed QPOs ordered: 1) that the PHI may not be disclosed for any reason without the party's prior written consent or by way of court order specifying the parameters of the disclosure; and 2) that the PHI be destroyed or returned within 60 days after the conclusion of the litigation. These QPOs were granted by the trial court.<sup>3</sup>

State Farm, the insurer for the Defendants in each case, intervened and filed objections to Plaintiffs' proposed QPOs, and looked to the standard protective order used in the Law Division of Cook County for support.<sup>4</sup> The Cook County standard protective order purportedly permits insurers to disclose, maintain, and use PHI for purposes *beyond litigation* and further exempts insurers having to return or destroy the PHI at the conclusion of the case.<sup>5</sup> For these two reasons, the trial court found that the Cook County standard protective order violated HIPAA and the appellate court agreed.<sup>6</sup> The appellate court further found that any person or entity receiving PHI in response to a QPO is bound by the terms of that order regardless of whether they are a "covered entity" or not.<sup>7</sup>

The Illinois Supreme Court affirmed the appellate court decision, finding that the Privacy Rule applies to State Farm and any insurer – the reason being that an insurer, while not the disclosing party, is the party seeking Plaintiffs' PHI and can only do so by complying with a QPO containing the "use and disclosure" prohibition and "return or destroy" requirement.<sup>8</sup> As a result, the Illinois Supreme Court found that the Cook County standard protective order conflicted with HIPAA and was preempted by the Privacy Rule.<sup>9</sup> In applying the Privacy Rule, the Illinois Supreme Court held

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<sup>1</sup> *Haage v. Zavala*, 2021 IL 125918, ¶ 1.

<sup>2</sup> *Id.* at ¶ 9-10.

<sup>3</sup> *Id.* at ¶ 12.

<sup>4</sup> *Id.* at ¶ 13-15.

<sup>5</sup> *Id.* at ¶ 16.

<sup>6</sup> *Id.* at ¶ 24-28.

<sup>7</sup> *Id.* at ¶ 26.

<sup>8</sup> *Id.* at 63.

<sup>9</sup> *Id.* at 95.

that State Farm's proposed protective orders violated Illinois Supreme Court Rule 201<sup>10</sup> to the extent that they permit the disclosure of "any and all" PHI.<sup>11</sup> The Court, looking to the decisions in *Petrillo* and *Kunkel*,<sup>12</sup> noted that the "confidentiality of personal medical information is, without question, at the core of what society regards as a fundamental component of individual privacy."<sup>13</sup> Accordingly, the Court found that protective orders need to be tailored to the issues being litigated in each case.<sup>14</sup>

As a result of this decision, a new standard protective order will be coming Cook County's way. Defendants can expect greater challenges to their subpoenas for medical records in cases involving personal injury on the grounds of relevancy. Further, "covered entities" must be cautious in reading the protective orders which accompany the subpoena requests, as they are only permitted to disclose the PHI *expressly* authorized by such order.<sup>15</sup>

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<sup>10</sup> Rule 201(b)(1) provides in relevant part: "Except as provided in these rules, a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking disclosure or of any other party \*\*\*." Ill. S. Ct. R. 201(b)(1).

<sup>11</sup> *Haage*, at ¶ 65-67.

<sup>12</sup> *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill. App. 3d 581, 589 (1986); *Kunkel v. Walton*, 179 Ill. 2d 519, 533 (1997)

<sup>13</sup> *Haage*, at ¶ 66.

<sup>14</sup> Notably, the Court did not impose a time limit on the scope of PHI being sought.

<sup>15</sup> *Id.* at ¶ 92.