SENATE BILL 3: Full of Sound and Fury, Authorizing Nothing
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On February 15, 2005, a new tort reform package, commonly known as Senate Bill 3, went into effect in the State of Georgia amid much debate regarding the constitutionality of numerous provisions contained therein.\(^1\) The Georgia General Assembly, following the path tread by numerous states throughout the nation, enacted this legislation as a response to the present “crisis affecting the provision and quality of health care services in this state.”\(^2\) In less than one year from the effective date, the “vanishing venue provision” contained within SB3 would fall as a result of constitutional challenges.\(^3\) This onerous start does not bode well for the remaining provisions.

Another provision of SB3 is now under attack. Georgia’s statute regarding medical authorizations provides that “in any action for damages alleging medical malpractice …contemporaneously with the filing of the complaint, the plaintiff shall be required to file a medical authorization form.”\(^4\) Failure to provide such an authorization subjects the complaint to dismissal.\(^5\) The major beef some Plaintiff’s attorneys have with O.C.G.A. § 9-11-9.2 concerns the provision’s mandatory inclusion within the authorization of the Defendant's attorney's right to discuss the care and treatment of the plaintiff or, where applicable, the Plaintiff’s decedent with all of the Plaintiff’s or decedent's treating physicians.\(^6\) This mandatory inclusion, Plaintiff’s claim, is preempted by federal law; specifically, by the “Health Insurance Portability and Accountability Act” (Hereinafter “HIPAA”).\(^7\) Specifically, they argue that HIPAA regulations are designed to protect a person’s privacy by restricting the use and disclosure of “protected health information”, and, conversely, the Georgia statute allows the use and disclosure of this information during ex parte interviews of the Plaintiff’s treating physicians.\(^8\) Therefore, since the Georgia statute is less restrictive, the argument goes, it is preempted by HIPAA.\(^9\)

This argument has blurred what is actually required by the Georgia statute. This protected information being used or disclosed by the treating physician during an ex parte...

\(^1\) Ga. L. 2005, p. 1, SB 3
\(^2\) Ga. L. 2005, p. 1, § 1
\(^3\) EHCA Cartersville, LLC v. Turner, 2006 Ga. LEXIS 114
\(^4\) O.C.G.A. § 9-11-9.2; Tex. Civ. Prac. & Rem. Code § 74.052 (2005) contains a similar provision requiring an authorization filed contemporaneously with the required notice under § 74.051. It is the author’s understanding that similar arguments regarding this provision are currently being litigated.
\(^5\) Id.
\(^6\) See Id. at (b)
\(^9\) There are numerous arguments put forth by the defense bar against this argument, however, these arguments are beyond the scope of this article. This article focuses only on an argument regarding the statutory and regulatory construction and legislative intent of HIPAA as compared to the requirements of O.C.G.A. § 9-11-9.2.

It should be noted that ex parte communications with treating physicians has become a hot topic, however, although the topic is similar, that topic is whether ex parte communications with treating physicians are prohibited by HIPAA, which is not what is at issue in this paper. The analysis of that debate within the courts is beyond the scope of this article.
communication is being communicated/used/disclosed pursuant to the authorization, signed by Plaintiff, that is required to be executed and filed contemporaneously with the complaint. Thus, assuming the authorization is valid, the physician is not violating HIPAA when he discloses protected health information to the defense attorney, because he is doing so with apparently the Plaintiff’s full knowledge and authorization. However, the statute does not require the physician to disclose this information, nor, for that matter, does it require the physician to do anything. It merely requires the Plaintiff, upon bringing a medical malpractice claim, to file an authorization.

Some Defense attorneys are also obviously missing this point. The HIPAA regulations provide that a covered entity may not use or disclose protected health information, except as otherwise permitted or required by the regulations. The regulations explicitly permit uses and disclosures as required by law. Defense attorneys regularly cite this provision in response to Plaintiffs’ preemption arguments. However, this code section isn’t necessarily applicable to this instance.

A covered entity may disclose protected health information in the course of any judicial or administrative proceeding in response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order, or in response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if other provisions, relating to adequate assurances from individuals seeking the information that the information will be protected, are satisfied. Accordingly, HIPAA permits disclosure when required by law, and Defense attorneys therefore argue that the ex parte disclosure by the physician is permitted. But, again, O.C.G.A. § 9-11-9.2 does not require a use or disclosure; it simply requires an authorization that says it is O.K. for the covered entity to disclose this information. Also routinely overlooked is the fact that, according to 164.512(e), the covered entity is not required to disclose the information. The regulation merely states that the covered entity “may” disclose the information.

This argument, however, does bring to light a very persuasive point in regard to preemption. The commentary accompanying the final HIPAA regulations state that "required by law" is intended to be read broadly to include the full array of binding legal authority, such as constitutions, statutes, rules, regulations common law or other governmental actions having the effect of law. It encompasses federal, state or local actions with legally binding effect. The commentary states that § 164.512(a) was generally meant not to interfere with access to information considered important enough by state and federal authorities to require its disclosure. “Required uses and disclosures also may address broad national concerns or particular regional or state concerns. It is not possible, or appropriate, for [Health and Human Services] to reassess the legitimacy of or the need for each of these mandates in each of their

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10 45 C.F.R. § 164.502(a)
11 45 C.F.R. 164.512 (e)
12 Id.
14 65 Fed. Reg. 82462, 82667
specialized contexts.” Arguably, one such state concern is that concern voiced within §1 of SB3, improvement of access to healthcare through civil practice reform.

Regardless, the debate continues; but this author does not believe O.C.G.A. § 9-11-9.2 is preempted. Federal preemption of state law can occur in three circumstances: (1) express preemption where Congress explicitly preempts state law; (2) implied preemption where Congress has occupied the entire field (field preemption); and (3) implied preemption where there is an actual conflict between federal and state law (conflict preemption). Obviously the first instance is not implicated here. The second instance arguably does not apply simply because of the language of 164.512(e), as discussed supra. Moreover, the comprehensive nature of a federal regulatory scheme, however, is not sufficient to support the conclusion that Congress intends to preempt all state regulation. But the best argument that field preemption does not apply to O.C.G.A. § 9-11-9.2 is more easily explained in reference to the third instance, conflict preemption. For a state law to be impliedly preempted by a federal law under conflict preemption, there must be an actual conflict. No conflict exists here. The Georgia statute was not an attempt by the General Assembly to regulate the disclosure of protected information; it simply requires the filing of a form.

However, I do not believe this statute is without its vulnerability. It could be argued that the authorization as outlined in O.C.G.A. § 9-11-9.2 does not comply with the required elements of a valid authorization under 45 C.F.R. § 164.508(c)(1), (2). The requirements stated in the federal regulation include elements that are not included in 9.2. However, the federal regulation states that, except as otherwise permitted, a

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15 Id.
16 It should also be noted that the commentary specifically disagrees with comments suggesting that the final rule is contrary to the preemption provisions in HIPAA, which are often cited by Plaintiff’s counsel.
17 "The General Assembly finds that there presently exists a crisis affecting the provision and quality of health care services in this state. Hospitals and other health care providers in this state are having increasing difficulty in locating liability insurance and, when such hospitals and providers are able to locate such insurance, the insurance is extremely costly. The result of this crisis is the potential for a diminution of the availability of access to health care services and a resulting adverse impact on the health and well-being of the citizens of this state. The General Assembly further finds that certain civil justice and health care regulatory reforms as provided in this Act will promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims and will thereby assist in promoting the provision of health care liability insurance by insurance providers. The General Assembly further finds that certain needed reforms affect not only health care liability claims but also other civil actions and accordingly provides such general reforms in this Act." Ga. L. 2005, p. 1, § 1

19 See Hillsborough County v. Automated Med. Lab. Inc., 471 U.S. 707, 717, (105 S. Ct. 2371) (1985) ("To infer preemption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence").

20 45 C.F.R. § 164.508
21 Compare O.C.G.A. § 9-11-9.2 with 45 C.F.R. § 164.508(c)(1), (2); interestingly, the same argument could be made regarding the Texas statute
22 Id.
covered entity may not use or disclose protected health information without an authorization valid under the section. The difference between this regulation and the Georgia statute is that the Georgia statute states nothing about disclosure by the covered entity. It is merely a procedural requirement, similar to the required filing of an expert affidavit under O.C.G.A. § 9-11-9.1, or filing of a certificate of service under Georgia Uniform Superior Court Rule 5.2.\textsuperscript{23} Again, it does not require a disclosure by the covered entity. Therefore, the covered entity could, and should, require an additional authorization, or one that fully meets the requirements, prior to disclosing this information. Otherwise, it would be violating HIPAA.

Accordingly, O.C.G.A. § 9-11-9.2, although not preempted by HIPAA, requires an authorization that does not comply with HIPAA if the covered entity wishes to disclose the information pursuant to that particular “authorization”. Additionally, even if the authorization did comply with HIPAA, the covered entity would not be required to disclose the protected information. Thus, effectively, the statute requires the filing of an authorization that has no legal effect on covered entities. Therefore, O.C.G.A. § 9-11-9.2 has no practical legal significance, except that noncompliance therewith will subject a complaint to dismissal; a penalty extremely important to Plaintiff’s attorneys…and their malpractice carriers.

If the Georgia General Assembly wishes to streamline discovery of Plaintiff’s medical history, they should revise the statute to mirror those requirements as stated in HIPAA rule § 164.508(c). In addition, there should be a stated requirement, thereby invoking §164.512(e), that the covered entity must disclose that information in accordance with the “Privacy Rule”. Otherwise, they have not tailored the rule to achieve the desired result.

\textsuperscript{23} This procedural requirement can be likened to service of notice under Tex. Civ. Prac. & Rem. Code § 74.051 (2005), or any other procedural requirement.