



Association For Electronic Health Care Transactions

Thomas J. Gilligan
Executive Director &
Washington Representative

3513 McKinley St. NW
Washington, DC 20015 – 2513
Tel 202 244 6450 Fax 202 244 6570
E mail afehct@aol.com

October 2, 2000

Does HIPAA supersede State law?

HIPAA does "... not supplant State law, except to the extent such State law is ``contrary" to the federal statutory or regulatory scheme. (p 59994)

States may continue to regulate in the area covered by part C of title XI and the regulations and implementation specifications adopted or established thereunder, except to the extent States adopt laws that are contrary to the federal statutory and regulatory scheme, and even those contrary State laws may continue to be enforceable, if they come within the statutory exceptions or carve-outs. (p 59995)

INTRODUCTORY COMMENT

This paper addresses preemption of State law as it applies to the HIPAA standards for transactions, code sets, identifiers, and security. It specifically does not address preemption as it applies to privacy of individually identifiable health information.

BACKGROUND

The statutory authority for a discussion of preemption is section 1178 of the Social Security Act as amended by HIPAA. It states:

Section 1178(a)(1) states

“GENERAL RULE. __ Except as provided in paragraph (2) a provision or requirement under this part, or standard or implementation specification adopted or established under sections 1172 through 1174, shall supersede any contrary provision of State law...”

While “admin simp” was making its way through Congress and since enactment in 1996, the conventional wisdom was that HIPAA set the standards. No state law applied. That according to one lawyer I talked to, that the General Rule in section 1178 was an expression of “Congressional intent to occupy the entire field”. Is that a legal doctrine?

I believe that the extensive provisions for exceptions in sections 1178(a)(2), 1178(b) and 1178(c) support that contention.

The conventional wisdom continued from the earliest discussions of the legislative proposals, unaddressed in any significant manner by HCFA or HHS. Preemption was not discussed in any of the proposed regulations:

Transaction standards	Provider ID
Security standards	Employer ID

The issue of preemption did surface in the NPRM: “Standards for Privacy of Individually Identifiable Health Information”, published in the Federal Register on November 3, 1999. See pages 59994 thru 59999, and regulatory language at sections 160.201 thru 160.204(pages 60049 thru 60052). Most of the readers of this material that I talked to are confused as to how it applies. Some saw it dealing with privacy only. Almost all readers also mistakenly believe the ‘more stringent’ rule applies to the preemption issue as it applies to transaction standards, security, etc.. It does not!

In the transaction standards final rule, the administration stated: We will issue ... “...when the preemption issues have been resolved in the “context” of the Standard for Privacy for Individually Identifiable Health Information final rule”.

There’s context and then there’s “context”. One way to interpret “context” is that since the issue of preemption was being dealt with as part of the privacy regulation, it made sense to address the issue for the other HIPAA standards. A careful reread and re-analysis of the preamble to the privacy NPRM strongly suggests that considerations based solely on privacy drove HHS’s formulation of policy on the subject of preemption of state law for transaction standards, security, etc..

**Preemption of State law
as it effects non-privacy provisions
of ‘administrative simplification’
/ HIPAA**

The HHS position on preemption rests on the word ‘contrary’ as it is used in section 1178.

Section 1178(a)(1) states
“GENERAL RULE. __ Except as provided in paragraph (2) a provision or requirement under this part, or standard or implementation specification adopted or established under sections 1172 through 1174, shall supersede any contrary provision of State law...”

The relevant language, with respect to the word 'contrary', in the preamble to the privacy NPRM reads

As we read this provision, the provisions and requirements of part C of title XI, along with the standards and implementation specifications adopted thereunder, do not supplant State law, except to the extent such State law is "contrary" to the federal statutory or regulatory scheme. Moreover, the provisions and requirements of part C of (p 59994)

title XI, along with the standards and implementation specifications adopted thereunder, do not preempt contrary State law where one of the exceptions provided for by section 1178(a)(2) applies or the law in question lies within the scope of the carve-outs made by sections 1178(b) and (c). Thus, States may continue to regulate in the area covered by part C of title XI and the regulations and implementation specifications adopted or established thereunder, except to the extent States adopt laws that are contrary to the federal statutory and regulatory scheme, and even those contrary State laws may continue to be enforceable, if they come within the statutory exceptions or carve-outs. (p 59995)

We note, however, that many of the Administrative Simplifications regulations will have preemptive effect. The structure of many of the regulations, particularly those addressing the various administrative transactions, is to prescribe the use of a particular form or format for the transaction in question. Where the prescribed form or format is used, covered entities are required to accept the transaction. **A State may well not be able to require additional requirements** for such transactions consistent with the federally prescribed form or format. (p 59995)

iv. When is a provision of State law "contrary" to the analogous federal requirement?

The statute uses the same language in both section 1178(a)(1) and section 264(c)(2) to delineate the general precondition for preemption: the provision of State law must be "contrary" to the relevant federal requirement, standard, or implementation specification; the term "contrary," however, is not defined. It should be noted that this issue (the meaning of the term

``contrary") does not arise solely in the context of the proposed privacy standard. The term ``contrary" appears throughout section 1178(a) and is a precondition for any preemption analysis done under that section.

(p 59996)

The definition set out at proposed Sec. 160.202 embodies the tests that the courts have developed to analyze what is known as **``conflict preemption."** In this analysis, the courts will consider a provision of State law to be in conflict with a provision of federal law where it would be impossible for a private party to comply with both State and federal requirements or where the provision of State law ``stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." This latter test has been further defined as, where the State law in question ``interferes with the methods by which the federal statute was designed to reach (its) goal." International Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987). In Gade, the Supreme Court applied this latter test to preempt an Illinois law and regulations that imposed additional, non-conflicting conditions on employers, holding that the additional conditions conflicted with the underlying congressional purpose to have one set of requirements apply. This test, then, is particularly relevant with respect to the other HIPAA regulations, where Congress clearly intended uniform standards to apply nationwide. The Department is of the view that this definition should be workable and is probably what Congress intended in using the term--as a shorthand reference to the case law. We considered a broader definition (``inconsistent with"), but rejected it on the grounds that it would have less legal support and would be no easier to apply than the statutory term ``contrary" itself.

(p 59997)

Definition of 'contrary'

at page 60050 and section 160.202

The only definition of 'contrary' in any of the HIPAA rules thus far is in the privacy NPRM at page 60050 and section 160.202

Contrary: When used to compare a provision of state law to a standard, requirement or implementation specification adopted under this subchapter, means:

- (1) A party would find it impossible to comply with both the state and federal requirements; or
- (2) The provision of state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of part C of title XI of the ACT or section 264 of Pub. L.104-191, as applicable.tg666064

ANALYSIS

HHS believes that the transaction standards and the implementation standards are so detailed that no state law get by the 'contrary' test.

With respect to security, HHS believes that if a state specifies a particular encryption technology e.g. PGP that such a specification would run afoul of the

- “(2) The provision of state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of part C of title XI of the ACT or section 264 of Pub. L.104-191, as applicable.” p666064

in the definition of 'contrary'.

However, if the state says, with respect to physical security, you have to have a guard dog, you have to have a guard dog.

Under the HHS approach, covered entities must make decisions about the application of the tests in the 'contrary' definition. If the state decides to enforce its requirements, the covered entity is on its own to defend itself.

The 'more stringent' test only applies to the privacy provisions of HIPAA. Not the transaction standards, not the security standards, etc..

Questions

Are there other legal interpretations possible with respect to 'contrary'?

With respect to preemption, can federal law 'preempt' all state law in an area or only analogous provisions of state law? HHS claims that it only preempts analogous provisions.

Superseding: If federal law supersedes a state law does it supersede all state law in an area or only analogous provisions?

Is there a legal doctrine re: “Congressional intent to occupy the entire field”? If yes, what does one have to write in a statute in order to make sure that the federal preempts all state law in an area? If no, how would one go about creating legislative language that would make it abundantly clear that a particular law superseded / preempted all state law in an area.

Is the case law cited above, the only case law that could apply?

Are there federal statutes that preempt / supersede state law? Can examples be cited? Can specific legislative language be cited.

There is also the matter of administrative determinations. Under the preemption provision in the proposed privacy regulations, states may apply to the Secretary for a determination as to whether a particular provision of state law is superseded by federal law, or not. Covered entities don't have that privilege.

Please contact:

Thomas J. Gilligan

AFEHCT

202 244 6450

afehct@aol.com