HIPAA: Kryptonite for Privacy claims

HIPAA (the **H**ealth **I**nsurance **P**ortability and **A**ccountability **A**ct of 1996) does not create a private right of action.

In Ohio, that proposition has become axiomatic. When a legal premise gets repeated often enough, the malleability of common law tends to get overlooked.

The Law in Flux?

But sometimes it is good be reminded that not all "well settled" propositions stay well settled. In the very recently reported Connecticut case *Byrne v. Avery Ctr. for Obstetrics & Gynecology P.C.*,[i] the state's supreme court rendered a decision that may open the door to other states reconsidering HIPAA's place within state common law claims for unauthorized disclosure of medical information. In Connecticut, patients are now permitted to sue providers based on the standards set forth in HIPAA.

In *Byrne*, the plaintiff was embroiled in a paternity action with the putative father in which the defendant health care provider was subpoenaed to produce plaintiff's gynecological and obstetrical medical records. The health care provider conceded that it violated the standards established under HIPAA, as set forth in Section 164.512(e)(1) of title 45 of the Code of Federal Regulations, by unilaterally complying with the subpoena. Under that section, a healthcare provider is permitted to disclose a patient's confidential medical information based on a subpoena, which is not accompanied with an order of a court or administrative tribunal, only if the patient receives adequate notice or a qualified protective order has been sought.

Following the disclosure of her medical information, the plaintiff sued, relying in part on the federal standards. She claimed that a civil remedy exists against a physician who, without a patient's consent, discloses confidential information obtained in the course of the physician-patient relationship. The Connecticut Supreme Court ultimately held that a duty of confidentiality arises from the physician-patient relationship, and that unauthorized disclosure of confidential information obtained in the course of that relationship rises to the level of being a cause of action sounding in tort against the health care provider. Importantly, HIPAA was recognized as the baseline standard of care under the newly recognized tort claim, which is similar to Ohio's version.

Ohio has not yet taken that step to permit patients to rely on HIPAA as the standard of care. Ohio follows the majority of jurisdictions in which it is concluded that, because HIPAA does not create a private right of action, the state cannot impute the HIPAA standards into a common law, unauthorized disclosure claim. Accordingly, it is important to review where Ohio law stands with respect to an unauthorized disclosure of medical information claims in light of the recent developments.

Biddle v. Warren Gen. Hosp.

In *Biddle v. Warren Gen. Hosp.*,[ii] several patients filed a class action lawsuit against the health care provider and its law firm, claiming that the hospital disclosed confidential medical information without authorization. The provider had released the patients' medical information in order for the provider's law firm to search for potential sources federal funding to cover the unpaid medical bills. None of the patients had consented to the disclosure. The Ohio Supreme Court recognized an independent, common law tort for the unauthorized, unprivileged disclosure to a third party of nonpublic medical information, holding that without an authorization, a physician or hospital may disclose otherwise confidential medical information only in those special situations where the disclosure is made in accordance with a statutory mandate or common-law duty, or where the disclosure is necessary to protect or further a countervailing interest that outweighs the patient's interest in confidentiality. The court held further that a third party may be liable for inducing the unauthorized disclosure of nonpublic medical information that a physician or hospital has learned within a physician-patient relationship.

The Limitations of *Biddle*

Biddle is narrowly framed, and although decided before the enactment of HIPAA, a cause of action for unauthorized, unprivileged disclosure to a third party under *Biddle* remains viable.[iii] Under *Biddle*, liability may be established against two parties: (1) a physician or hospital that commits an unauthorized and unprivileged disclosure, and (2) a third-party that induces the disclosure to be made.[iv]

The *Biddle* common law tort does not extend to third parties who receive medical information but who did not induce the disclosures, such as an employer who receives an employee's medical information through an otherwise authorized disclosure.[v] And, although *Biddle* recognized limited exceptions for a physician or hospital's unauthorized disclosure, the principles underlying *Biddle* cannot be used to obtain discovery related to the confidential medical information of nonparties who have not waived the physician-patient privilege or otherwise consented to the disclosure – even if information is redacted to preserve confidentiality.[vi]

Notably, a patient who consents to disclosure of medical information cannot rely on *Biddle* for protection. For instance, if a patient consents to the release of medical information, the patient-physician privilege at the heart of the unauthorized disclosure claim is deemed waived.[vii] This concept was established in the context of a medical insurer requiring its clients to waive the confidentiality of the medical information for billing purposes, and based on that waiver, the insurer sought redacted discovery of those patients' medical records in an effort to uncover medical billing errors made by the patients' health care provider. The health care provider attempted to hide behind patient confidentiality to prevent the insurer from

conducting its audit. The attempt to use *Biddle* as a shield was rejected based on the express waiver signed by the patients.

Statute of Limitations

A claim raised pursuant to *Biddle* is not one for intentional tort and need not be pleaded as such.[viii] *Biddle* recognized an independent tort claim. In light of the independent nature of the tort, there is no requirement to file an affidavit of merit because the claim is not a medical one as defined by statute.[ix] Accordingly, courts have consistently applied the four-year statute of limitations under R.C. 2305.09(D) to such claims.[x] The tolling provisions do not apply because, as the Ohio Supreme Court recognized in *Biddle*, the wrongful disclosure of confidential medical information stems from the physician-patient relationship itself, and any breach, according to the *Biddle* court, should stand on its own. This recognition, of course, limits the use of the discovery rule for the purposes of the statute of limitations. The discovery rule is limited to claims for trespassing underground or injury to mines, the wrongful taking of property, and fraud.

Pleading HIPAA as Standard of Care: DON'T

The thorniest issue with respect to pleading *Biddle* claims is the standard of care. Several other states have recognized that HIPAA can provide the standard of care for state law unauthorized disclosure claims,[xi] but Ohio has not. And currently, any mention of HIPAA, or any implied connection to HIPAA, could be grounds for immediate dismissal of those claims. In *Sheldon v. Kettering Health Network*,[xii] for example, the Second District held that HIPAA cannot be used to define the standard of care for a state tort claim, though it also recognized that HIPAA does not preempt Ohio's independent tort recognized in *Biddle*. In *Sheldon*, two patients -- one of whom was a hospital administrator's former spouse -- asserted a *Biddle* claim against the health care provider and its employee for unauthorized disclosure of the patients' medical information. The claims against the employee survived a motion to dismiss, but the plaintiffs' attempt to impose liability upon the employer for failing to monitor the employee's access to the medical records, even if couched in terms of the common law *Biddle* claim, could not survive because that monitoring standard sounded as if it was raised through HIPAA. The court concluded there is no common law standard creating a duty for a health care provider to monitor an employee's access to confidential information, that standard only exists under HIPAA, which cannot be the basis of a state law cause of action. Consequently, at this time in Ohio, no state claim can be predicated on the federal standards.

A HIPAA Conundrum

The *Sheldon* case demonstrates the danger of referencing HIPAA, or a standard established by the federal law, as the standard of care in a common law action. HIPAA is the standard for health care providers, inextricably entangling itself with the common law that has evolved since

HIPAA was enacted. This leads to what one court recognized as a conundrum. *Biddle* found that the absence of an authorization is not critical to defending against an unauthorized disclosure of medical information. There are exceptions: a physician or hospital is privileged to disclose in those special situations where disclosure is made in accordance with a statutory mandate or common-law duty. Importantly, if the disclosure is authorized under HIPAA, there is no liability under *Biddle*.

In *OhioHealth Corp. v. Ryan* ,[xiii] the healthcare provider sued its patient to recover for unpaid medical services. The provider claimed that HIPAA authorized the disclosure because the disclosure was made for billing purposes, and therefore, the plaintiff failed to state a claim for relief under *Biddle*. Although HIPAA does authorize such disclosures, there is one important consideration: in that case there is no discussion of whether the patient waived the confidentiality of the medical information for the purposes of the provider pursuing billing. That would have been one method of protecting the medical services provider without resorting to HIPAA as a standard.

Nevertheless, HIPAA was relied upon as the standard under which to review whether the disclosure was authorized. That principle could be a double edged sword for any defenses, however. In *Byrne*, for example, the disclosure of the confidential medical information was not authorized under HIPAA, the medical information was disclosed based on a subpoena but before providing the patient notice.[xiv] In other words, HIPAA controls the analysis with respect to both what is, and what is not, an authorized disclosure. Although this concept has not been tested in Ohio, it seems inequitable to permit defendants to rely on HIPAA for what constitutes an authorized disclosure, while at the same time, permit defendants to circumvent liability for what would be an unauthorized disclosure under the federal scheme.

It is this point that was relied on in *Byrne*. The court concluded that it has become a common practice for health care providers to follow the procedures required under HIPAA. This universal application thereby creates a de facto standard in the health care industry. According to *Byrne*, it logically follows that HIPAA should be the standard of care in state law claims based on the universal compliance required by the federal scheme. Because healthcare providers must comply with HIPAA and states can create greater protections than provided under federal law, and as demonstrated in *Byrne*, the HIPAA standards are likely to subsume the state law standard of care in unauthorized disclosure cases.

Best Pleading Practice

For now, in Ohio, it is a better practice to clarify in pleadings that any claim advanced under *Biddle* is not based on HIPAA, which includes any attempt to borrow the standards set forth in the federal statute. There may come a time when Ohio joins the growing ranks recognizing the utility of applying the universally accepted HIPAA standards as the standard of care for an unauthorized disclosure of medical information claim in Ohio, one that provides greater privacy protection for patients, but until then, *Biddle* alone controls the pleading requirements.

Damages

Finally, some consideration must be placed on the damages to be sought. Proving compensatory damages depends on such things as the nature of the information disclosed, the breadth of the disclosure, and the plaintiff's psychological injury, including mental anguish, humiliation, or embarrassment. The intent of the disclosing party would be relevant to whether punitive or exemplary damages are available. Although there is little discussion in the case law focusing on damages within the specific context of *Biddle* claims, analysis of other causes of action involving unauthorized disclosures provides useful guidance.

For example, in *Lawson v. Homernuk*,[xv] an employer disclosed an employee's severe depression to other employees in violation of the Americans with Disabilities Act. The employee presented evidence, her own affidavit and those from her health care providers, demonstrating that she suffered embarrassment and anxiety, necessitating psychiatric treatment. The employer claimed that the employee could not prove damages as a matter of law because the disclosure was not causally related to her continued psychological treatment. It was concluded that regardless of the strength of the evidence demonstrating compensable damages, a reasonable trier of fact could find some measure of emotional distress and psychological injury warranting consideration of damages.

Because the damages will be dependent on the facts, it is important to consider the end game in the pleading stages. Plaintiffs, even those whose claims survive the pleading stages, must be prepared to address the question of damages that inevitably arise in the summary judgment stages of pretrial practice.

Closing Remarks

Today, in Ohio, the state of the law is this: HIPAA does not provide a private right of action. And the courts appear willing to summarily dismiss actions that directly and even impliedly invoke HIPAA as a basis for liability. Consequently, pleading HIPAA – even inadvertently – carries substantial risk. That said, we as plaintiffs' lawyers are no strangers to risk. As defendants continue to invoke HIPAA as a shield for *Biddle* claims, we may find or create opportunities to whittle away at the "well-settled law."

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[i] 327 Conn. 540, 175 A.3d 1 (2018).

[ii] 86 Ohio St.3d 395, 1999-Ohio-115, 715 N.E.2d 518 (1999),

[iii] *Roe v. Planned Parenthood Southwest Ohio Region*, 122 Ohio St.3d 399, 2009-Ohio-2973, 912 N.E.2d 61 (2009) (limiting application, but not overruling, *Biddle*).

[iv] *Templeton v. Fred W. Albrecht Grocery Co*., 9th Dist. No. 27744, 2017-Ohio-282, 72 N.E.3d 699

[v] *Id.*

[vi] *Roe v. Planned Parenthood Southwest Ohio Region*, 122 Ohio St.3d 399, 2009-Ohio-2973, 912 N.E.2d 61, ¶¶ 46-48 (2009) ; *Howell v. Park East Care & Rehabilitation,* 8th District No. 106041, 2018-Ohio-2054.

[vii] *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, 909 N.E.2d 1237, ¶ 23 (2009).

[viii] *Scott v. Ohio Dep't of *675 Rehab. & Corr.,* 2013-Ohio-4383, 999 N.E.2d 231 (10th Dist.).

[ix] *Herman v. Kratche*, 8th Dist. Cuyahoga No. 86697, 2006-Ohio-5938, ¶ 53; *Boddie v. Van Steyn*, 10th Dist. Franklin No. 11AP-263, 2011-Ohio-5660, ¶ 14.

[x] *Norris v. Smart Document Sols*., LLC, 483 Fed.Appx. 247, 250 (6th Cir.2012); *Raiser v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, 494 Fed.Appx. 506, 507 (6th Cir.2012).

[xi] COMMENT: Byrne: Closing the Gap Between HIPAA and Patient Privacy, 53 San Diego L. Rev. 201, 216 ("At least seven other states have also indicated that HIPAA may inform a standard of care in negligence suits.").

[xii] 2nd Dist. No. 26432, 2015-Ohio-3268, 40 N.E.3d 661.

[xiii] 10th Dist. Franklin No. 10AP-937, 2012-Ohio-60; *see also DelleCurti v. Walgreen Co*., 11th Dist. No. 2015-T-0097, 2016-Ohio-4741, 70 N.E.3d 111, ¶ 31.

[xiv] *Id.* (the disclosure here was not "unauthorized" because HIPAA permits the use or disclosure of health information when it is for the limited purposes of obtaining, and therefore, under HIPAA, "the disclosure cannot be deemed an 'unauthorized, unprivileged disclosure' as required under the theory announced in *Biddle*.").

[xv] S.D.N.Y. No. 15 Civ. 1510, 2018 WL 2081914, *2 (Apr. 24, 2018).