2023 West Virginia Health Care Privacy Laws and HIPAA Preemption Analysis

Supplemental Preemption Guide and West Virginia HIPAA Privacy Case Law Summary

Preemption Background and Guide

The HIPAA Privacy, Security, Breach Notification and Enforcement Rules do not preempt (or replace) all state laws. Preemption is a concept or rule of law that allows the federal government to pass legislation that replaces, or preempts, state laws on a similar topic. Congress could have used total preemption to replace all state laws that relate to the privacy and security of health information. Instead, Congress chose to only draft the HIPAA as a federal privacy and security minimum standard which allows state legislatures the ability to continue to enact more stringent state laws. As a result, the state must go through a preemption analysis to determine whether state laws are preempted by the HIPAA. The preemption provision under the HIPAA is generally set forth under 45 C.F.R. 160.202 (Definitions), 160.203 (General Rule and Exceptions), and 160.204 (Process for Requesting Exception Determinations).

The general rule with regard to the HIPAA preemption is that a requirement or standard under HIPAA preempts any contrary provision of state law. This requires an evaluation of both the federal and state law to determine whether a covered entity can satisfy or comply with both laws. If the covered entity cannot satisfy both the contrary state law and HIPAA, then the state law is generally preempted, unless an exception applies.

Below is additional information including FAQs issued by the Office of Civil Rights on preemption along with a flow sheet that will be valuable to assist you in further understanding the preemption analysis process.

Preemption Frequently Asked Questions

The Office of Civil Rights, Health Information Privacy section includes a Frequently Asked Question webpage in response to various HIPAA privacy and security related questions. There are a number of FAQs provided by the Office of Civil Rights responding to various questions related to the issue of state law preemption under HIPAA. These FAQs are valuable in helping to understand how the preemption process works and the analysis one must do when confronted with a state law that may be contrary to the HIPAA privacy and security rule.

Below are a few select FAQs on the topic of preemption. You can also search for these or others related to preemption or other issues involving HIPAA at the Office of Civil Rights, Health Information Privacy section.

Question: Does the HIPAA Privacy Rule preempt State laws?

http://www.hhs.gov/ocr/privacy/hipaa/faq/preemption_of_state_law/399.html

Answer: The HIPAA Privacy Rule provides a Federal floor of privacy protections for individuals' individually identifiable health information where that information is held by a covered entity or by a business associate of the covered entity. State laws that are contrary to the Privacy Rule are preempted by the Federal requirements, unless a specific exception applies. These exceptions include if the State law:

1. relates to the privacy of individually identifiable health information and provides greater privacy protections or privacy rights with respect to such information;
2. provides for the reporting of disease or injury, child abuse, birth, or death, or for public health surveillance, investigation, or intervention; or
3. requires certain health plan reporting, such as for management or financial audits. In these circumstances, a covered entity is not required to comply with a contrary provision of the Privacy Rule.

In addition, the Department of Health and Human Services (HHS) may, upon specific request from a State or other entity or person, determine that a provision of State law which is "contrary" to the Federal requirements – as defined by the HIPAA Administrative Simplification Rules – and which meets certain additional criteria, will not be preempted by the Federal requirements. Thus, preemption of a contrary State law will not occur if the Secretary or designated HHS official determines, in response to a request, that one of the following criteria apply: the State law:

1. is necessary to prevent fraud and abuse related to the provision of or payment for health care;
2. is necessary to ensure appropriate State regulation of insurance and health plans to the extent expressly authorized by statute or regulation;
3. is necessary for State reporting on health care delivery or costs;

4. is necessary for purposes of serving a compelling public health, safety, or welfare need, and, if a Privacy Rule provision is at issue, if the Secretary determines that the intrusion into privacy is warranted when balanced against the need to be served; or

5. has as its principal purpose the regulation of the manufacture, registration, distribution, dispensing, or other control of any controlled substances (as defined in 21 U.S.C. 802), or that is deemed a controlled substance by State law.

It is important to recognize that only State laws that are "contrary" to the Federal requirements are eligible for an exemption determination. As defined by the Administrative Simplification Rules, contrary means that it would be impossible for a covered entity to comply with both the State and Federal requirements, or that the provision of State law is an obstacle to accomplishing the full purposes and objectives of the Administrative Simplification provisions of HIPAA. See 45 C.F.R. Part 160, Subpart B, for specific requirements related to preemption of State law.

Date Created: 03/12/2003

Last Updated: 12/11/2006

Question: How do I know if a State law is "contrary" to the HIPAA Privacy Rule?

http://www.hhs.gov/ocr/privacy/hipaa/faq/preemption_of_state_law/402.html

Answer: A State law is "contrary" to the HIPAA Privacy Rule if it would be impossible for a covered entity to comply with both the State law and the Federal Privacy Rule requirements, or if the State law is an obstacle to accomplishing the full purposes and objectives of the Administrative Simplification provisions of HIPAA. See the definition of "contrary" at 45 C.F.R. 160.202.

For example, a State law that prohibits the disclosure of protected health information to an individual who is the subject of the information may be contrary to the Privacy Rule, which requires the disclosure of protected health information to an individual in certain circumstances. With certain exceptions, the Privacy Rule preempts "contrary" State laws. See 45 C.F.R. Part 160, Subpart B.

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Question: How do I know if a State law is "more stringent" than the HIPAA Privacy Rule?

http://www.hhs.gov/ocr/privacy/hipaa/faq/preemption_of_state_law/403.html

Answer: In general, a State law is "more stringent" than the HIPAA Privacy Rule if it relates to the privacy of individually identifiable health information and provides greater privacy protections for individuals' identifiable health information, or greater rights to individuals with respect to that information, than the Privacy Rule does. See the definition of "more stringent" at 45 C.F.R. 160.202 for the specific criteria. For example, a State law that provides individuals with a right to inspect and obtain a copy of their medical records in a more timely manner than the Privacy Rule is "more stringent" than the Privacy Rule.

In the unusual case where a more stringent provision of State law is contrary to a provision of the Privacy Rule, the Privacy Rule provides an exception to preemption for the more stringent provision of State law, and the State law prevails. Where the more stringent State law and Privacy Rule are not contrary, covered entities must comply with both laws. See 45 C.F.R. Part 160, Subpart B, for specific requirements related to preemption of State law.

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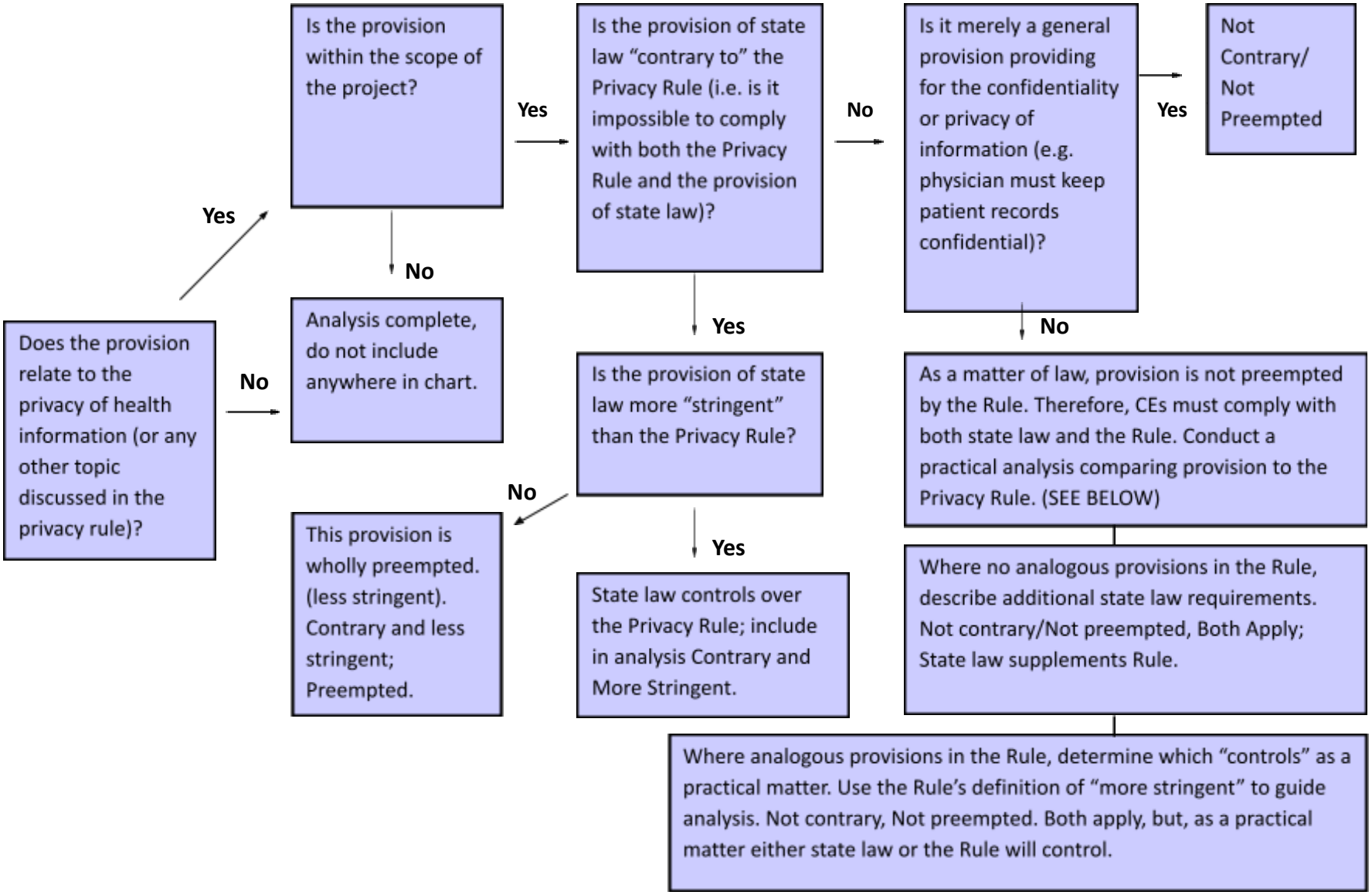
HIPAA Preemption Flowchart



HIPAA and Privacy Related Case Law in West Virginia

The following case summaries identify case law, decisions, or rulings related to HIPAA or privacy related legal issues. These summaries are intended as an educational guide and resource, and those using these summaries are encouraged to seek legal advice concerning how these cases may impact their own particular facts and circumstances. This case law summary will be regularly updated by the West Virginia State Privacy Office as it becomes aware of new cases. All attorneys who are involved in or become aware of HIPAA and privacy related cases are encouraged to provide a summary of such matters to the Chief Privacy Officer for the West Virginia State Privacy Office at: stateprivacyoffice@wv.gov

1. **State of West Virginia ex. Rel. State Farm Mutual Automobile Insurance Company v. Honorable Thomas A. Bedell, Judge of the Circuit Court of Harrison County, (commonly referred to as "State Farm I"),** 697 S.E.2d 730 (April 21, 2010). Justice Workman delivered the opinion.

Synopsis:

State Farm requested plaintiffs' medical records in a personal injury action. Plaintiffs' insurance policy obligated them to provide the requested records but plaintiff (in her own capacity and as the administrator of her husband's estate) refused to do so unless State Farm agreed to a protective order which prohibited State Farm from electronically scanning the records and required State Farm to destroy/return the records at the conclusion of the litigation.

The trial court (the Circuit Court of Harrison County) entered an order that directed plaintiff to disclose all relevant medical records. However, the order prohibited State Farm from scanning the records or storing them in any manner. The protective order also prohibited State Farm from disclosing any of the plaintiffs' medical records, including records that State Farm already possessed prior to litigation, to any third parties. The order also obligated State Farm to destroy the medical records and any copies or summaries of the records, or to return said documents to plaintiff's attorney at the close of litigation and to certify that the records had been returned or destroyed.

State Farm moved for a writ of prohibition from the Supreme Court of Appeals of West Virginia and argued that the West Virginia Insurance Commission regulations required insurers to maintain all claims documents, including medical records, for a period of approximately five years. State Farm argued that the protective order would require it to

destroy part of its claims file before the retention period expired and therefore forced it to choose between complying with the law, and disregarding the protective order, or complying with the protective order, and disregarding the law.

State Farm also argued that plaintiff had not shown good cause for those portions of the protective order that prevented it from scanning and electronically storing medical records. Plaintiff argued that the prohibition against electronic storage was necessary to prevent State Farm from disseminating the medical records to third parties, but provided no real basis for this belief. State Farm contended that a party seeking a protective order was required to support the request with a "particular and specific demonstration of fact," that plaintiff had failed to do so, and that, in any case, the Insurance Commissioner had sanctioned the use of electronic storage and had implemented regulations to protect the confidentiality of electronically-stored medical records.

Resolution:

The Supreme Court of Appeals granted State Farm's motion for a writ of prohibition. In the decision, the Court adopted each of State Farm's arguments. First, the Court determined that the protective order was erroneous as it required State Farm to destroy or return medical records before the expiration of the regulatory retention period established by the Insurance Commissioner. Because the regulation had the force of law, the Court held that any protective order issued in contravention of the regulation could not stand.

Second, the Court determined that the protective order provided no basis for the restrictions it placed upon the electronic scanning or storage of medical records. The Court held that plaintiff had not advanced any "particular and specific demonstration of fact" in support of the prohibition against electronic storage. Accordingly, the Court found that the trial court's restriction against electronic storage of the medical records constituted clear error.

2. **Angela Genzlinger v. John Doe, an unidentified male nurse and West Virginia University Hospitals East,** Berkeley County Circuit Court, Honorable John C. Yoder, Filed in November 2010.

Synopsis:

Plaintiff alleged she was sexually assaulted by a male nurse while a patient at City Hospital. Plaintiff alleged the Defendant negligently hired, retained, and/or supervised the male nurse. During discovery, Plaintiff asked for the following:

1) The identity of every person and/or corporate entity that has been provided with her records since October 1, 2010 to present; identity and description of each

such person and/or corporate entity who provided the records or access to the records, and any authorization upon which the hospital relief for disclosure; and

2) All contractual terms under which Kenneth Barton, Esq. and Steptoe & Johnson is providing legal counsel to the male nurse, including the date on which such terms were agreed on.

Defendant filed a Motion for Protective Order.

Resolution:

Protective Order granted. The Court held that HIPAA permits City Hospital to use or disclose its own medical records as part of its "healthcare operations." City Hospital's arranging for legal services for itself and its employees is included within HIPAA's definition of "healthcare operations." City Hospital is authorized by HIPAA to disclose its own medical records to counsel which City Hospital retains to defend it or its employees who perform covered functions on behalf of the hospital without a patient's consent or authorization. Under the circumstances, City Hospital appropriately and in accordance with HIPAA provided counsel a copy of Plaintiff's medical records which is the "minimum necessary" for intended purpose. City Hospital was not required to ensure the entry of a Protective Order before providing medical records to attorney, as his use and further disclosure of said records is governed by the BAA which provides sufficient protection of plaintiff's privacy rights while providing reasonable access to the information necessary to defend the employee.

3. **Joshua M. Beane v. Ashton Medical Associates, Inc.,** Kanawha County Circuit Court, West Virginia, Honorable Paul Zakaib, Jr., January 2011.

Synopsis:

Plaintiff was sent to Defendant for pre-employment physical for a job. He called in sick to his current employer, and then asked for an excuse from work slip from Defendant. Defendant supplied excuse. Plaintiff gave excuse to his supervisor the next day. His supervisor called Defendant and inquired if Plaintiff was ok to return to work. Defendant's employee responded, "Sure, he was just here for a pre-employment physical." Current employer fired Plaintiff.

Resolution:

Jury Trial; Verdict for Plaintiff in the amount of $22,880.

4. **State of West Virginia ex. rel. State Farm Mutual Automobile Insurance Company v. Honorable Thomas A. Bedell, Judge of the Circuit Court of Harrison County (commonly referred to as "State Farm II"),** 719 S.E. 2d 722 (April 1, 2011). Justice Davis delivered the opinion. Justice Benjamin and Justice Ketchum dissented.

Synopsis:

After the Court granted State Farm's writ in State Farm I, plaintiff returned to the trial court with a revised protective order. This order permitted State Farm to retain the medical records for a sufficient period of time to permit compliance with the West Virginia insurance regulations, and did not prohibit State Farm from electronically storing the records. The revised protective order still restricted State Farm's ability to disclose medical records (including records that it had obtained outside of litigation) to third parties without authorization, required records to be returned to plaintiff's counsel or destroyed following the expiration of the regulatory period, and required State Farm's counsel to certify that the records had been returned or destroyed. The trial court signed this protective order.

State Farm sought a writ of prohibition in the Supreme Court of Appeals of West Virginia, arguing that plaintiff had failed to show good cause for the protective order. State Farm argued that, because the protective order prohibited it from disclosing medical records that it already possessed, it was unconstitutional. State Farm also argued that compliance with the protective order would require it to disregard its regulatory obligations, noting that West Virginia law required insurers to report fraudulent activity (which necessarily required the maintenance of complete files for perpetuity). Without complete claims files, State Farm argued that it could not conduct the analysis necessary to identify fraud. State Farm also noted that, as an Illinois company, it was subject to Illinois law which required State Farm to maintain its claims files forever. Plaintiffs contended that State Farm failed to raise its compliance arguments before the trial court, and that such arguments were therefore not ripe for the appellate court to review.

State Farm also argued that the order would require destruction of business records that were necessary to defend future cases because the protective order required the return or destruction of any documents, notes, attorney-client correspondence, etc., that contained information referring to medical records. Plaintiff responded that the protective order was not seeking the return or destruction of every document making reference to the medical records, only that references to the medical records be removed or redacted.

Finally, State Farm argued that compliance with the protective order would be needlessly burdensome, and impossible, as it required State Farm's counsel to certify

the return or destruction of the records, despite the fact that counsel had no control over third parties.

Resolution:

Writ denied. In its decision, the Court upheld the protective order and determined that plaintiff had demonstrated good cause for the protective order.

The Court refused to consider State Farm's argument that compliance with the protective order would require it to disregard its statutory obligations, holding that because State Farm had not raised this argument before the trial court the issue was not ripe for appellate review.

The Court determined that the protective order did not require State Farm to destroy all of its business records but only to destroy or redact records containing references to medical records. The court found that this approach would preserve plaintiff's privacy and enable State Farm to maintain the remainder of the records.

The Court rejected State Farm's undue burden and impossibility arguments, noting that protective orders have become an accepted means of safeguarding privacy interests, and that certification clauses were an accepted practice in West Virginia and in other jurisdictions.

Significantly, the Court altogether ignored State Farm's constitutional arguments.

5. Small v. Ramsey, 280 F.R.D. 264 (N.D.W. Va. 2012)

Synopsis:

Plaintiff, who was seriously injured in an automobile accident, brought a personal injury action against the involved vehicles' drivers, owner, and insurers. Plaintiff refused to surrender his medical records to the defendant insurers (State Farm and Nationwide) without a protective order, which State Farm and Nationwide refused to sign. Accordingly, there could be no adequate discovery or evaluation, no settlement, and no preparation for trial. Plaintiff moved for a discovery protective order with respect to his medical records.

While admitting that Plaintiff has a right to privacy with respect to his medical records, State Farm and Nationwide argued that the filing of Plaintiff's law suit and claims imposed limits on any privacy right he had in his medical records. The insurers further argued that, should they actually violate Plaintiff's privacy by disclosing his records, Plaintiff's right to redress in the courts would be adequate.

In addition to asserting his common law right of privacy, Plaintiff argued that HIPAA gives him a right to privacy in his non-public medical records against a first party liability insurer or a third party liability insurer.

Resolution:

The Court reaffirmed that under West Virginia common law the Plaintiff has a right of privacy in his non-public medical records. Specifically, insurers are prohibited from disclosing non-public personal health information without authorization by the individual.

The Court also noted that the insurers had failed to explain how Plaintiff would have knowledge of any authorized disclosure of his medical records. Accordingly, the Court held that none of Plaintiff's medical records would become public, unless Plaintiff consented to their dissemination or until the records are introduced at trial.

With regard to Plaintiff's HIPAA argument, the Court found that no language extends HIPAA or its regulations to liability insurers, such as State Farm and Nationwide.

6. **R.K. v. St. Mary's Medical Center, Inc. d/b/a St. Mary's Medical Center**, 735 S.E. 2d 715, November 15, 2012. Justice Davis delivered the opinion. Justice McHugh did not participate.

Synopsis:

The Cabell County Circuit Court granted St. Mary's Medical Center 12(b)(6) motion to dismiss based upon its conclusion that R.K.'s state law claims were preempted by HIPAA. R.K, plaintiff below/petitioner, sought reversal of the Circuit Court order dismissing numerous state law claims asserted against St. Mary's Medical Center.

Resolution:

Supreme Court held that state common law claims for the wrongful disclosure of medical or personal health information are not inconsistent with HIPAA. Rather, state law claims compliment HIPAA by enhancing the penalties for its violation and thereby encouraging HIPAA compliance. Accordingly, the Court held that common law tort claims based upon the wrongful disclosure of medical or personal health information are not preempted by the Health Insurance Portability and Accountability Act of 1996.

7. **Tabata v. Charleston Area Medical Center, Inc.**, 759 S.E.2d 459 (W. Va. 2014). Per Curiam Opinion.

Synopsis:

The petitioners received a letter in February 2011 stating that some of their personal and medical information had accidently been placed on the internet. The database contained names, contact details, Social Security numbers, dates of birth and basic respiratory care information for 3,655 patients. As a result, CAMC provided a year of credit monitoring at CAMC's cost to all whose data was potentially exposed.

The petitioners and plaintiffs filed an action in the Circuit Court of Kanawha County individually and as a class for breach of duty of confidentiality, among other things. Further, the petitioners filed a motion for a class action for at least 3,655 affected patients. The Circuit Court issued an order denying class certification. The Circuit Court found that the petitioners lacked standing because they failed to show they have suffered a concrete and particularized injury that is not hypothetical or conjectural as the future possibility of identity theft was not an injury. The petitioners and plaintiffs appealed to the Supreme Court of Appeals.

Resolution:

The Supreme Court agreed with the Circuit Court that a future possibility of identity theft was not an injury but held that a breach of the patient's legal interest in maintaining the confidentiality of their medical information constituted a concrete, particularized and actual injury sufficient to permit standing. It was not necessary for the plaintiffs to show they had suffered an injury or damage. Accordingly, the Supreme Court reversed the standing decision of the Circuit Court and remanded for further proceedings on the class action issue.

8. **West Virginia Dept. of Health and Human Resources v. E.H.,** 778 S.E.2d 728 (October 15, 2015). Justice Loughry delivered the opinion. Justice Davis dissented. Petition for Writ of Certiorari filed in the United States Supreme Court denied October 11, 2016.

Synopsis:

Since 1990, the West Virginia Department of Health and Human Resources ("DHHR") has contracted with Legal Aid of West Virginia ("Legal Aid") to provide patient advocacy services within state psychiatric hospitals to protect the rights of institutionalized patients. In that role, Legal Aid assists with individual patient grievances, conducts fraud and abuse investigations, educates staff and patients about patient rights, and monitors psychiatric hospitals for the purpose of ensuring compliance with state regulations.

After a 2008 report documented conditions and patient treatment at two state hospitals, the Circuit Court of Kanawha County reopened litigation regarding the civil rights of state patients with mental disabilities. The parties subsequently entered into a court-approved agreement, which, in part, requires periodic review of the DHHR to

ensure compliance with specific terms. In response to the periodic review requirement, the DHHR contracted with Legal Aid to produce reports for the Judge regarding the hospitals' compliance with state regulations addressing issues of patient care and advocacy. Specifically, the DHHR agreed that quarterly audits should be conducted by providing Legal Aid with complete access to at least two patients from each unit.

For years, the DHHR provided Legal Aid with full access to computerized patient records, as well as the patient wards and other areas of the hospitals. Then, in June 2014, the DHHR began requiring Legal Aid to obtain signed releases from each patient before obtaining any information from or about the patient. Under the new policy, a new release specifying the basis of inquiry was required each time Legal Aid sought to review a patient's records. In addition to the new release requirement, Legal Aid was denied access to the hospitals' network of patient records, which it needed to conduct its quarterly audits of the facilities.

In response to the policy change, Legal Aid filed a motion for emergency relief. Finding no violation of federal or state law, the Circuit Court of Kanawha County directed the DHHR to immediately restore Legal Aid to its previous level of access at the hospitals.

In challenging the Circuit Court's ruling, the DHHR argued that the order violated both the patients' constitutional right to privacy and HIPAA. Legal Aid insisted that the order should be affirmed due to the clear lack of constitutional or HIPAA violations.

Resolution:

Affirmed. In a decision grounded solely on state law, the Court of Appeals agreed with the Circuit Court's decision to restore Legal Aid's patient access to the level it experienced prior to the June 2014 policy change.

The Court rejected the DHHR's argument that the access afforded to Legal Aid prior to the policy change violated patients' constitutionally-based rights of privacy. Instead, the Court found that because the record failed to demonstrate any indiscriminate disclosure of confidential information by Legal Aid, no meritorious issue existed with regard to its dissemination of confidential health information.

Turning next to HIPAA considerations, the Court agreed with the DHHR's argument that Legal Aid does not come within any exemptions provided under HIPAA that would eliminate its need to obtain patient consent before viewing medical records. Specifically, the Court disagreed with the Circuit Court's determination that Legal Aid falls within the HIPAA definitions for a "business associate," a "health oversight agency," or "health care operations." Rather, the Court held that no exemption of HIPAA entitled Legal Aid to records without patient consent.

Having determined that federal law does not provide the necessary authority for disclosure of patient records to Legal Aid without express written consent, the Court turned to state law (specifically, Title 64, Series 59 of the Code of State Regulations

governing "Behavioral Health Patient Rights" pursuant to W. Va. Code § 27-5-9) to determine whether it provided an independent basis to support the Circuit Court's ruling. West Virginia law provides that while a patient may authorize the release of his or her medical records, those records may also be obtained by the "providers of health, social, or welfare services involved" in caring for a patient. State law further provides that "[n]o written consent is necessary for . . . advocates under contract with" the department serving the patient.

The Court held that the written agreement between the DHHR and Legal Aid specifying the legal obligations of the parties (including the manner of payment and the duties associated with the provision of patient advocacy services) constitutes a contract for purposes of permitting Legal Aid to access records without written consent of individuals hospitalized in state mental health facilities. The Court further held that the contract falls within the meaning of the state regulation permitting disclosure of patient records without written consent under contract. Accordingly, the Court affirmed the Circuit Court's ruling that the DHHR's revocation of Legal Aid's access to patient records violates state law.

In addition, the Court found that the policy adopted by the DHHR is not preempted by HIPAA because the state's laws are more stringent than those set forth in HIPAA, consistent with the findings of West Virginia's HIPAA Preemption Analysis.

Finally, the Court affirmed the Circuit Court's order restoring Legal Aid's access to the hospitals' patients without limitation, except when patients expressly request limitations on the disclosure of their identifiable health information. The Court identified a clear need for periodic review of patient records to identify systemic issues of noncompliance with state regulations and noted the court-approved agreement's requirement for a report to the Judge on such issues.

The DHHR submitted a Petition for Writ of Certiorari to the United States Supreme Court in March, 2016. The United States Supreme Court denied the Petition for Writ of Certiorari on October 11, 2016. (See Docket No. 15-1142).

9. **Mays v. Marshall University Bd. of Governors,** Not reported, 2015 WL 6181508, No. 14-0788 (October 20, 2015). Memorandum Opinion.

Synopsis:

Plaintiff, a breast cancer survivor, brought an invasion of privacy action against a plastic surgeon after the surgeon's office mistakenly sent photos of the plaintiff's naked torso to the human resources department of her employer to obtain pre-authorization for insurance coverage for a proposed surgery to correct a breast implant. Plaintiff argued that by divulging her medical information to her employer, the defendant caused unreasonable publicity to be given to her private life.

The Circuit Court of Cabell County granted summary judgment in favor of the surgeon, finding that the only applicable cause of action for wrongful disclosure of healthcare information under West Virginia law is one based on a breach of the duty of physician confidentiality, and thus, holding that Plaintiff's invasion of privacy claim failed as a matter of law.

Two months before the Circuit Court issued its order granting summary judgment on the invasion of privacy claim, the Supreme Court of Appeals published its opinion in *Tabata*, which pertained to an invasion of privacy claim against a hospital. Although the Circuit Court did not discuss *Tabata* in its order, the parties argued its applicability on appeal.

Resolution:

Affirmed. Distinguishing the plaintiff's case from *Tabata*, the Supreme Court of Appeals held that the surgeon's office did not invade the plaintiff's privacy.

The Court rejected the plaintiff's argument that the disclosure of the photos to her employer constituted "unreasonable publicity," noting that publicity, in the context of privacy, requires that disclosure be widespread and not limited to a single person or small group. In *Tabata*, the plaintiffs' names, medical information, contact details, Social Security numbers and dates of birth were published on the Internet for six months, which made the information accessible to anyone using an Internet search. By contrast, here, only Plaintiff's limited medical information (i.e., picture of her naked torso) was disclosed to only two people at her work. The Court found it significant that, unlike in *Tabat*a, the plaintiff's medical information was not disclosed to the public at-large.

Accordingly, the Court affirmed the Circuit Court's finding that Plaintiff did not have a viable claim for invasion of privacy.

10. **State ex rel. Healthport Techs., LLC v. Stucky, 239 W. Va. 239, 800 S.E.2d 506 (2017).**

Synopsis:

The underlying Plaintiff sued a nursing home for malpractice, alleging they used non-sterilized tools during his recovery from surgery. The Plaintiff's attorneys requested their client's medical file, which was provided with an invoice for $4,463.43. This fee was calculated to be 55 cents a page, plus taxes and shipping, which was abnormally high considering another major WV Hospital provided similar records for $3.57 and the law firm's own costs of approximately 1.4 cents a page.

Defendants asserted that the Plaintiff lacked standing, as his attorneys paid the costs for copying and the contingency agreement required the Plaintiff to reimburse his

attorneys upon recovery in his malpractice case. Plaintiff counter argued that his attorneys were personal representatives under W.Va. Code § 16-29-1(a).

Resolution:

The Majority opinion held that the Plaintiff lacked standing to pursue the case, as his injury was hypothetical at the time. His obligation to reimburse his attorneys was not yet certain and was pending the resolution of his underlying malpractice claim. Since the Plaintiff could have lost the underlying medical malpractice case, his injuries were not concrete or particularized. The Court noted that the law firm had a particularized injury as the party who paid for the records, and noted that the Plaintiff could potentially gain standing upon being contractually liable to his attorneys for those costs.

The Court cited in a footnote that the WV Legislature recently amended W.Va. Code § 16-29-2, which sets forth limits on fees for receiving copies of medical records and allows for healthcare providers to charge HIPAA fees and taxes. The changes in this legislation had no effect on the case due to the timing of the legislative enactment.

11. **Constellium Rolled Prod. Ravenswood, LLC v. Rogers, No. 2:15-CV-13438, 2017 WL 1552325 (S.D.W. Va. Apr. 28, 2017).**

The Plaintiff asserted multiple causes of action, including a common law claim for retaliation in violation of "the substantial public policy found in HIPAA." While the complaint alleges several reasons for the Plaintiff's firing, the complaint asserts that the Defendant "terminated the Plaintiff for truthfully reporting the potential liabilities stemming from Defendant's systemic HIPAA violations." The Court noted that the state law claim was supported by the WV Supreme Court's decision in *Harless v. First National Bank*, 246 S.E.2d 270 (W. Va. 1978). However, the Plaintiffs voluntarily withdrew the claim prior to this ruling and the Court did not discuss the matter in a substantive manner.

12. **Oser v. Weirton Med. Ctr., Inc., No. 5:17CV68, 2017 WL 2951923 (N.D.W. Va. July 10, 2017).**

Synopsis:

The Plaintiff filed a civil action alleging breach of an employment agreement, including claims of Outrage and Tortious Interference. The Defendant removed the case to District Court alleging that the basis of the claim for Outrage and Tortious Interference

contained federal law claims under HIPAA and the Stark Law (a provision in the Social Security Act generally prohibiting physicians referring patients to entities they have a financial relationship with). The Plaintiff filed a motion to remand.

The Plaintiff argued that the HIPAA violation was not an alleged cause of action, and he only referenced HIPAA in his state law claim for Outrage by stating that the Defendant had viewed his confidential medical files without proper authorization. The Defendant argued that access was permitted due to the alleged use being for treatment, payment, and/or health care operations activities by the Defendant. The Plaintiff argued that the Defendant did not actually cite the language in their complaint, but their interpretation of it, and asserted the complaint didn't present a federal question on its face. The Defendant argued that the doctrine articulated in *Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005), applied, and that there was a substantial question of federal law.

Resolution:

The Court found that there was no substantial federal question, as the HIPAA and Stark Law issues did not have to be resolved for the state law claims to be fully adjudicated and were included for the purposes of evidentiary support for those state law claims. The Court cited to District Court decisions from other Jurisdictions where alleged HIPAA violations were "referenced only as an element of the petition's state law negligence and privacy causes of action." The Court also noted that HIPAA does not provide a private cause of action to individuals for violations, and that HIPAA enforcement actions are only authorized for the Secretary of Health and Human Services or authorized state agencies.

13. **Barber v. Heslep, No. 3:14-CV-27349, 2017 WL 3097495 (S.D.W. Va. July 20, 2017).**

Synopsis:

During a Workers Compensation trial, the Defendant was attempting to access the Plaintiff's mental health records pursuant to W. Va. Code §27-3-1. The Plaintiff sought compensation for emotional distress, mental anguish, and pain and suffering. During discovery the Defendant learned that the Plaintiff received mental health treatment approximately 30 years prior as a teenager. The Defendant attempted to obtain these records for purposes of evaluating the Plaintiff's mental suffering. The Plaintiff refused to

produce her records and moved to quash the subpoena issued to her former healthcare provider.

Resolution:

The Court stated that the request was governed by both Federal Rule of Civil Procedure 26 and §27-3-1. The Court noted that the applicable subsection, §27-3-1(a)(3) was applicable to the request and conducted the two step analysis required under that subsection. §27-3-1(a)(3) requires the Court to determine if the information is relevant to the proceeding, and if so, whether it is sufficiently relevant to outweigh the importance of maintaining the confidentiality of mental health records.

The Court noted that a Plaintiff's mental health records are generally relevant to mental anguish and emotional distress claims, but the second factor was not met in this case. The Court held that the records were too remote in time to be relevant, as they were from almost 30 years prior. The Court noted that the need for the records was diminished due to the fact that there was no additional mental health treatment in the intervening period between her treatment and the underlying incident which caused the litigation. The Court held that the potential litigation benefits connected to the disclosure of these old records was substantially outweighed by the Plaintiff's right to keep them confidential under West Virginia law.

14. Barber v. Camden Clark Mem'l Hosp. Corp., 240 W. Va. 663, 815 S.E.2d 474 (2018).

Synopsis:

The Plaintiff produced mental health records to a Defendant pursuant to a subpoena asking for all medical records. The Plaintiff did not tell their attorney about the mental health treatment and the records were not reviewed prior to disclosure. When asked about mental health treatment during deposition, Plaintiff denied having received mental health treatment and was then confronted with those records. She subsequently filed suit against Camden Clark Memorial Hospital for producing her records in violation of "statutory and common law duties" to maintain confidential information under WV Code §27-3-1. Specifically, the Plaintiff complained that they disclosed her confidential information without her consent or a court order as required in §27-3-1(b)(3). In addition, she pleaded a claim for intention infliction of emotional distress.

The Defendant filed a motion to dismiss on the basis that a patient cannot rely on §27-3-1 to bring suit against an entity that complied with WV and HIPAA regulation in responding to a valid subpoena where the patient does not raise an objection to the

subpoena. The Circuit Court dismissed the action and the case was appealed to the WV Supreme Court of Appeals.

Resolution:

The Court began by recognizing a private cause of action in §27-3-1. However, they noted that the WV Code §57-5-4a(a), defining records, states that it is "without restriction" and therefore includes that this language includes mental health treatment records. Noting that the two statutes were in conflict, the Court held that §27-3-1 must be given more weight due to its specificity. The Court noted that the exceptions in §27-3-1 do not include a valid subpoena, and indicate that to void the requirements for mental health disclosure would render part of the statute meaningless and refused to interpret the Plaintiff's failure to object to be consent which would be in compliance with §27-3-1.

Ultimately, the Court held that producing mental health records pursuant to a valid subpoena, without written authorization or other criteria which satisfies §27-3-1(b), are in violation of §27-3-1. The Court also reaffirmed a prior decision that wrongful disclosures of personal health information are not preempted by HIPAA.

15. **Fint v. Brayman Construction Corp., 5:17-cv-04043 (S.D.W.V. January 8, 2019)**

Synopsis:

During a deliberate intent case, the Plaintiff had provided Defense counsel with a HIPAA complaint authorization, which was sent to a psychologist who performed a one-time independent medical examination for litigation purposes. The psychologist refused to provide Defense counsel with a copy of the Plaintiff's mental health file due to confidentiality concerns. She provided an evaluation report and allowed the Defense counsel to examine the Plaintiff's chart in person during her deposition, but refused to provide full copies of the file. She cited ethical rules prohibiting disclosure of information and the security of psychotherapy notes.

Resolution:

The Court noted that while psychotherapy notes receive additional protection, but that a valid authorization does allow for their release. The court discussed the protections available to mental health records under both federal regulations, via HIPAA, and WV Code §16-29-1 and §27-3-1. Under the first statute, the Court noted that mental health records are reachable through 16-29-1(c). On the second statute, the Court noted that because the physical and mental health of the Plaintiff was in question during the case that the disclosure was appropriate due to the Court's relevant order to produce the

materials. The Court also examined the APA Ethics Code section that was relevant and indicated that the ethical standard did not create a blanket ban on disclosure on test data.

The Court ordered that the Plaintiff's medical file be produced to the Defense. The Court, in its holding, recognized that psychotherapy notes are afforded greater protections when the Court is weighing if disclosure is appropriate. They noted that the psychologist's objections were not based on harm to the Plaintiff, but on a reading of an associated professional standard. Further, they noted that the existence of therapy notes was minimal due to the one-time nature of the Plaintiff's treatment.

16. **State ex rel. W. Va. Univ. Hosps., Inc. v. Gaujot, 829 S.E.2d 54 (W.Va. 2019).**

Synopsis:

This case began due to the Plaintiffs being in separate accidents and suffering injuries that they both were treated for at Ruby Memorial Hospital. The Plaintiffs both retained attorneys for compensation for the damages caused by their injuries. However, this matter involves the fees issued by West Virginia University Hospitals, Inc., to provide these individuals with copies of their own medical files. The fees were 40 cents per page, plus a $10.00 processing fee, which was alleged to be a violation of WV Code § 16-29-2(a). The cases were consolidated and the Plaintiffs moved to certify a class under Rule 23.

Resolution:

The Court discussed the necessary requirements for class certification, focusing on the commonality of damages and liability. They noted that the uniform policy of charging a flat page for documents is uniform, but that the "reasonable expenses" that may be required to produce 1000 pages of documents can differ depending on the contents of the medical records. The Plaintiffs' argument is that while they may require individual analysis to determine specific damages, the commonality is in the core issue of whether the Defendants were liable. However, the WV Supreme Court stated that "the statute is framed as such that liability and damages are two sides of the same coin" and couldn't see how the Plaintiff could establish that they were overcharged without establishing by how much. The case was remanded to the Circuit Court for additional factual analysis of the commonality element.

17. **Ciox Health, LLC v. Azar, 435 F. Supp. 3d 30 (D.D.C. 2020).**

Synopsis:

This is a Federal case relating to the HIPAA right of self-access and the "third party directive" provisions of the regulations. While this case did not take place in West Virginia, administrative cases in the DC District Court have national effects on the enforceability of regulations. Ciox Health, the Plaintiff, was a medical-records provider firm which contracts with healthcare providers around the country and would respond to record requests by patients and third parties, such as other medical providers, insurance companies, and law firms. To avoid barriers to access, the HIPAA privacy rule regulations included regulations on what fees may be assessed for an individual requesting their own records. The HITECH Act, passed in 2009, addressed a number of issues stemming from the growth in electronic health records. This included the "third party directive" process for providing a third party with electronic health records without the requirements for a detailed authorization form. This also included a definitive fee cap on the production of electronic health records. In 2016, the Department of Health and Human Services issued guidance which applied this fee cap to authorized third parties requesting these records. The Plaintiff contended that the fee cap did not apply to requests made by third parties due to the specific wording of the HITECH Act.

Resolution:

The Court held that the imposition of the 2016 guidance was a substantive change in the regulation that required the agency to go through the regulatory process of notice and comment prior to the adoption of this substantive change. The Court's holding has a few key ramifications to a patient's rights to access their medical records and to designate those records to be sent to third parties.

The Court's ruling means that the right for a third-party directive applies only to copies of protected health information in an electronic format, and that the fee caps for the production of medical records only applies to an individual requesting their own medical records. Best practices for avoiding the additional costs which may be imposed on third party access can be avoided by having an individual make the request for health records themselves and to then forward their records.

18. TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021).

Synopsis:

This case stems from the disclosure of a misleading credit report in which Mr. Ramirez was wrongfully identified as a potential terrorist. This misleading credit report was disclosed to an auto dealer when the Plaintiff was attempting to purchase a motor

vehicle. Mr. Ramirez joined a class action lawsuit after the incident. However, out of the class members only some had the misleading credit reports disclosed to third parties.

Resolution:

The Court reaffirmed that a showing of actual harm was required for Article III standing and held that part of the rest of class could not establish any kind of physical, monetary, or reputational harm which would satisfy the standing requirements. The Court held that a showing of concrete harm must be similar to a traditionally recognized harm through a historical or common law analogue. The Court identified personal injury and monetary injury. When discussing intangible harms, the Court noted reputation harms, disclosures of private information, and intrusion upon seclusion. The Court also recognized that harms could be harms specified by the Constitution, citing cases related to abridgement of free speech rights. The Court stated that the class members who did not have their information disclosed to third parties lacked standing due to a lack of a concrete injury. The Court said that while Congress may "elevate" previously inadequate harms to legally cognizable injuries, standing "still requires a concrete injury even in the context of a statutory violation." The Court states that "under Article III, an injury in law is not an injury in fact."

This holding has significant implications for Article III standing in data breaches and other unauthorized disclosures.

19. Whole Woman's Health v. Jackson 142 S. Ct. 522 (2022)

Synopsis:

Abortion providers sought pre- enforcement review of the Texas Heartbeat Act, which bans abortions after six weeks of pregnancy and allows for enforcement via private civil actions against anyone who performs an abortion or assists someone in gaining access to one.

Resolution:

The Supreme Court held 5-4 that Eleventh Amendment sovereign immunity precluded abortion providers from bringing a pre-enforcement challenge to the Texas Heartbeat Act against a state court judge and a state court clerk, as the Ex parte Young exception did not normally permit federal courts to issue injunctions against state court judges or clerks. In addition, there was no U.S. Const. art. III case or controversy because clerks and judges were not adversaries in the dispute; [2]-The Texas attorney general was not a proper defendant because the attorney general did not have any enforcement

authority in connection with the Act that a federal court might enjoin him from exercising; [3]-A court majority agreed that the suit could proceed against licensing officials who might or must take enforcement actions against the providers if they violated the Texas Health and Safety Code, including the Act.

20. Biden v. Missouri 142 S. Ct. 647 (2022)

Synopsis:

After the Secretary of Health and Human Services ("HHS") imposed the COVID vaccine requirement on all healthcare facilities participating in the Medicare and Medicaid programs, groups of states led by Louisiana and Missouri challenged the rule, leading to preliminary injunctions against its enforcement.

Resolution:

The Supreme Court held 5-4 that [1]-The Secretary of Health and Human Services did not exceed his statutory authority in requiring that, in order to remain eligible for Medicare and Medicaid dollars, facilities covered by an interim rule had to ensure that their employees be vaccinated against COVID-19 given his authority per 42 U.S.C.S. § 1395x(e)(9) to impose conditions he found necessary in the interest of the health and safety of individuals who were furnished services; [2]-The interim rule was not arbitrary and capricious where the Secretary had examined the relevant data and articulated a satisfactory explanation; [3]-The finding of good cause to delay notice and comment on the interim rule was appropriate as the finding that accelerated promulgation of the rule in advance of the winter flu season would significantly reduce COVID-19 infections, hospitalizations, and deaths constituted the required something specific.

21. NFIB v. OSHA 142 S. Ct. 661 (2022)

Synopsis:

A vaccine mandate enacted by the Secretary of Labor and the Occupational Safety and Health Administration ("OSHA") required approximately 84 million workers to receive COVID vaccines (or obtain a weekly COVID test and wear a mask at work).

Resolution:

In a 6-3 decision, the Court held [1]-Applicants were likely to succeed on the merits of their claim that the Secretary of Labor lacked statutory authority to impose a COVID-19 vaccine mandate by rule, covering virtually all employers with at least 100 employees, because the Occupational Safety and Health Act, 29 U.S.C.S. § 651 et seq., did not authorize the mandate. The Act was limited to regulating hazards that employees faced at work, and the risk of contracting COVID-19 was not a work-related danger, but was a universal risk of daily life. Because the mandate extended beyond the agency's legitimate reach, a stay of the rule was justified.

22. Marietta Memorial Hospital Employee Health Benefit Plan v. DaVita, Inc. 142 S. Ct. 1968 (2022)

Synopsis:

The Marietta Memorial Hospital Employee Health Benefit Plan has three tiers of reimbursement, and dialysis providers like DaVita fall within the lowest tier of reimbursement. As such, dialysis services are subject to relatively limited reimbursement rates. DaVita argued that the Plan's limited coverage for dialysis violated the Medicare Secondary Payer statute. The Court determined that the Plan did not differentiate in the benefits it provides for individuals with and without end-stage renal disease, because the Plan's terms applied uniformly to all Plan participants.

Resolution:

The Supreme Court held 7-2 that a group health plan that provided limited benefits for outpatient dialysis, but did so uniformly for all plan participants, did not differentiate in benefits between individuals with and without end-stage renal disease and therefore did not violate the Medicare Secondary Payer statute, 42 U.S.C.S. § 1395y(b)(1)(C)(ii). The text of the statute could not be read to encompass a disparate-impact theory.

23. Becerra v. Empire Health Foundation (06/24/2022).

Synopsis:

HHS followed the correct procedures when it promulgated a rule changing the way it calculates Medicare Part A reimbursement rates for disproportionate share hospitals ("DSH")—which are qualifying hospitals that treat low-income patients. The HHS regulation reduced the proportion of patients considered low-income, resulting in decreased payments for most DSH hospitals. The Empire Health Foundation argued

that the regulation was inconsistent with the calculation methods outlined in the Medicare statute.

Resolution:

The Supreme Court held 5-4 that [1]-The Supreme Court approved HHS's understanding of the Medicare fraction, under which individuals "entitled to [Medicare Part A] benefits" are all those qualifying for the program, regardless of whether they are receiving Medicare payments for part or all of a hospital stay. That reading gives the "entitled" phrase the same meaning it has throughout 42 U.S.C.S. § 426. And it best implements the statute's bifurcated framework by capturing low-income individuals in each of two distinct populations a hospital serves. If "entitled to [Part A] benefits" bore the meaning ascribed to it by respondent, Medicare beneficiaries would lose important rights and protections. Perhaps most significantly, a patient could lose the ability to enroll in other Medicare programs whenever the patient lacked a right to Part A payments for hospital care.

24. West Virginia v. EPA 142 S. Ct. 420 (2022)

Synopsis:

The Trump administration repealed the 2015 Clean Power Plan, which established guidelines for states to limit carbon dioxide emissions from power plants, and issued in its place the Affordable Clean Energy (ACE) Rule, which eliminated or deferred the guidelines. However, the U.S. Court of Appeals for the D.C. Circuit vacated the ACE Rule as arbitrary and capricious. One of the challengers, North American Coal Corporation, challenged the Environmental Protection Agency's authority to so broadly regulate greenhouse gas emissions.

Resolution:
The Supreme Court held 6-3 that Congress did not grant the Environmental Protection Agency in Section 111(d) of the Clean Air Act the authority to devise emissions caps based on the generation shifting approach the Agency took in the Clean Power Plan.

Under the "major questions doctrine," there are "extraordinary cases" in which the "history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority. This is one such case, so the EPA must point to "clear congressional authorization" for the authority it claims. It cannot do so.

The EPA has admitted that issues of electricity transmission, distribution, and storage are not within its traditional expertise, yet it claims that Congress implicitly tasked it with the regulation of how Americans get their energy. Without "clear congressional authorization" for the EPA to regulate in such a manner, the agency lacks authority to implement the Clean Power Plan under the Clean Air Act.

25. Twitter v. Taamneh 598 U.S. 471 (2023) and Gonzalez v. Google LLC 143 S. Ct. 80(2023)

Synopsis:

Nohemi Gonzalez, a U.S. citizen, was killed by a terrorist attack in Paris, France, in 2015—one of several terrorist attacks that same day. The day afterwards, the foreign terrorist organization ISIS claimed responsibility by issuing a written statement and releasing a YouTube video. Gonzalez's father filed an action against Google, Twitter, and Facebook, claiming, among other things, that Google aided and abetted international terrorism by allowing ISIS to use its platform—specifically YouTube—"to recruit members, plan terrorist attacks, issue terrorist threats, instill fear, and intimidate civilian populations." Specifically, the complaint alleged that because Google uses computer algorithms that suggest content to users based on their viewing history, it assists ISIS in spreading its message.

Gonzalez claimed that all three platforms were also liable for aiding and abetting international terrorism by failing to take meaningful or aggressive action to prevent terrorists from using its services, even though they did not play an active role in the specific act of international terrorism that actually injured Gonzalez.

Resolution:

Section 2333 establishes liability for anyone "who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism." To "aid and abet" requires three elements: (1) the party whom the defendant aids must perform a wrongful act that causes an injury, (2) the defendant must be generally aware of his role as part of an illegal activity at the time he provides assistance, and (3) the defendant must knowingly and substantially assist the principal violation."

The plaintiffs (respondents) in this case satisfied the first two elements by alleging both that ISIS committed a wrong and that the defendants knew they were playing some sort

of role in ISIS's enterprise. They failed to show, however, that the defendants gave such knowing and substantial assistance to ISIS that they culpably participated in the Reina attack.

Courts use six flexible factors to assess the third element, whether a defendant knowingly and substantially assisted the principal violation: (1) "the nature of the act assisted," (2) the "amount of assistance" provided, (3) whether the defendant was "present at the time" of the principal tort, (4) the defendant's "relation to the tortious actor," (5) the "defendant's state of mind," and (6) the "duration of the assistance" given. Applying these factors, the Court found that the plaintiffs failed to allege that Twitter did more than transmit information by billions of people—most of whom use the platform for interactions that once took place via mail, on the phone, or in public areas. Without more, their claim that Twitter aided and abetted ISIS in its terrorist attack on a nightclub in Istanbul must fail.