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What is Voluntary? What is Required? And What is Florida Statute § 766.1065?

I. Introduction

What is voluntary? What is required? While this question is often one reserved to undergraduate philosophy classes, it can often have a place in the law as well. If you are injured, do you have a right to seek recourse in a court of law? Most people would argue yes; our entire civil court system is founded upon the premise of making people whole when they are injured, be it physically or in their pursuit of business, for example. But, if in order to exercise that right in your state's court system, you were required to waive other rights, like your right to privacy, for example, would that waiver truly be voluntary, or would it simply be required?

Several states have recently enacted legislation that requires a litigant to make such a choice when filing a medical malpractice suit. They do so by requiring potential plaintiffs to waive their right to privacy in their health care records under HIPAA, the Health Insurance Portability and Accountability Act, in order to allow for *ex parte* investigation and communication between defendants and insurers, as well as the patients' other health care providers. Most importantly these laws require that the names of all health care providers visited within a period prior to the action be listed by a potential litigant, whether relevant or not to the claim itself.¹ The cost of not providing authorization for such disclosures is to be barred entirely from bringing suit. These statutes essentially require litigants to make a choice – waive their right to privacy, or find redress elsewhere.

The most recent statute to pass a state legislature was enacted in Florida in 2013. Florida Statute § 766.1065, in its broadest terms, operates as described above. However, it has the distinction of being the first of such statutes to be challenged not only before a federal district court, but also before a federal circuit court. The most important issue analyzed by both courts is

¹ Fl. Stat. § 766.1065(3).

whether the law is preempted by the HIPAA Privacy Rule,² which requires a knowing, voluntary and intelligent waiver of protected information. At its most basic level, however, the court was called upon to interpret what is voluntary, and what is required.

In order to better understand the context of the courts' decisions, a significant amount of background is required. Section II of this paper provides such a background, beginning with Texas' experience with a similar statute and a similar challenge in its State Supreme Court. Following a discussion of the forerunners to the Florida statute, a short background of the law and pre-existing notice provisions for medical malpractice suits in the state of Florida are provided.

Sections III and IV of this comment deal specifically with *Murphy v. Dula*, as decided in the District Court and Eleventh Circuit, respectively. Because the decisions tackle the exact same issues, yet come to very different results, the courts' reasoning is explained at substantial length. Section V of this comment discusses both decisions, and why the District Court was correct to hold that HIPAA's privacy rule pre-empts the Florida Statute. Section VI further argues that § 766.1065 violates a potential claimant's right to a trial by jury, under both the United States and Florida State constitutions. Section VII summarizes these arguments and offers conclusions.

II. The Law

A. Forerunners: *In re Collins, M.D.* and Texas

Florida Statute § 766.1065 is not the first statute of its kind to become operative, or to face judicial scrutiny. In 2003, Texas enacted section 74.052 of the Civil Practice and Remedies Code in an attempt to decrease what it viewed as rising medical costs, and a lack of availability of basic services to some of its citizens, by decreasing the costs of medical malpractice claims to

² 45 CFR § 164.508.

providers.³ The Texas statute operates by requiring a potential plaintiff to authorize disclosure of relevant, privileged information (both written and verbal) sixty days before filing suit in order to allow for investigation of claims by defendants and insurers, allowing for the settling of meritorious claims.⁴ Importantly, subsection (c) of the statute states that any authorization must comply with Health Insurance Portability and Accountability Act⁵,

By 2009, a challenge to this law had reached the Texas Supreme Court, in the form of *In Re Collins*.⁶ The case involved a plaintiff whose claim arose from a failure of her doctor, Dr. Lester Collins, to diagnose nasopharyngeal carcinoma for over two years, until her primary care physician discovered the cancer had reached stage IV, and was therefore inoperable.⁷ Although the plaintiff complied with the Texas Statute by submitting her authorization pre-suit, several months later, and following receipt of defendant's answer, she sought a protective order from the court barring defendant from *ex parte* communications with her physicians.⁸ Her primary concern was that defendant would abuse the ability to conduct *ex parte* interviews in order to gain verbal information not reflected in the health records, and subsequently engage in "trial-by-ambush," using the information to elicit the opinions of health care providers at trial.⁹ Both the trial court and the Court of Appeals agreed that such verbal information had the potential to create abuses, and granted (or upheld) the protective order.¹⁰

The defendant appealed to the Supreme Court of Texas, through a writ of mandamus, in order to challenge the issuance of the protective order.¹¹ The Texas Supreme Court first noted

³ *In re Collins*, 286 S.W.3d 911, 916 (Tex. 2009); Tex. Civ. Prac. & Rem. Code § 74.052.

⁴ *In re Collins*, supra, 286 S.W.3d at 916 (Tex. 2009); Tex. Civ. Prac. & Rem. Code § 74.052.

⁵ 45 CFR § 164.508 (See subsection D below).

⁶ *In re Collins*, 286 S.W.3d 911.

⁷ *Id.* at 912.

⁸ *Id.* at 913-914.

⁹ *Id.* at 914.

¹⁰ *Ibid.*

¹¹ *Id.* at 912.

that the legislative mandate clearly allowed for the use of verbal communication obtained in *ex parte* interviews.¹² It went further, however, and stated that under the Act patients are the gatekeepers to their own information, in that they can determine who and what is relevant, and delineate within the authorization which providers can be contacted.¹³ Finally, the court dismissed plaintiff's claim that HIPAA pre-empted the act due to the requirement of authorizing disclosure in order to file the lawsuit.¹⁴ It stated that the act took its authorization requirements verbatim from HIPAA, and that the authorization was voluntary - the plaintiff chose to sue.¹⁵

Although this case mainly dealt with the issuance of a protective order, it nonetheless brings forward many of the issues that would confront the District Court and the Eleventh Circuit several years later. Major differences also would present themselves in the nature of the disclosures, in that the sixty-day window had already been completed in this case, where, as we will see later, Murphy's suit was much earlier procedurally. Additionally, the Florida statute requires that potential claimants not only disclose relevant information, but also reveal the names of healthcare providers who are irrelevant to the allegations, and certify them as such.¹⁶ Nonetheless, the major themes are present: How voluntary is a waiver if it is a requirement to file suit? And, how does HIPAA affect such acts?

B. – Florida Medical Malpractice Procedure

Procedures to file suit in Florida for medical malpractice cases are often complex, and driven primarily by the goal of giving notice to both the prospective defendants and their insurers¹⁷, as embodied in provisions such as Fl. Stat. § 766.106 *et. seq.* This notice comes in

¹² *Id.* at 918.

¹³ *Ibid.*

¹⁴ *Id.* at 920.

¹⁵ *Ibid.*

¹⁶ Fl. Stat. § 766.1065(3).

¹⁷ Fl. Stat. § 766.102 *et. seq.*; 36 Fla. Jur 2d Medical Malpractice § 69.

multiple waves, from initial contact between the parties, to pre-discovery investigations, to expert affidavits, which must accompany the initial volley of court filings should a case move forward.¹⁸

Persons seeking to file a complaint for medical negligence must first notify each prospective defendant, in the manner prescribed by statute, of their intent to initiate litigation.¹⁹ The above notice is then supplemented following completion of a pre-suit investigation by the plaintiff, which essentially announces the claimant's intent to move forward and initiate litigation for medical negligence.²⁰

Although these requirements may appear to be onerous, they are construed liberally in favor of claimants, and are required by the statute to be construed in such a way as to favor access to the courts.²¹ Additionally, the Florida legislature's stated intent is to enhance judicial economy. To that end, the notice requirements allow for extensive pre-suit investigation prior to the initiation of formal discovery, and have the additional benefit of encouraging settlement between the parties.²²

A further protection against frivolity is the requirement of a verified expert affidavit. This affidavit is required to be produced by the plaintiff as part of the pre-suit investigation procedure²³, and requires a medical professional under oath to assert that the claim against the defendant is meritorious in nature.²⁴

¹⁸ Fl. Stat. § 766.102 *et. seq*

¹⁹ Blom v. Adventurist Health System/Sunbelt, Inc., 911 So.2d 211 (Fla. 5th DCA 2005).

²⁰ § 766.106(2)(a).

²¹ Arch Plaza, Inc. v. Perpall, 947 So. 2d 476 (Fla. 3d DCA 2006); Fassy v. Crowley, 884 So. 2d 359 (Fla. 2d DCA 2004); Integrated Health Care Services, Inc. v. Lang-Redway, 840 So. 2d 974 (Fla. 2002).

²² Michael v. Medical Staffing Network, Inc., 947 So. 2d 614 (Fla. 3d DCA 2007); Apostolico v. Orlando Regional Health Care Systems, Inc., 871 So. 2d 283 (Fla. 5th DCA 2004); Kukral v. Mekras, 679 So. 2d 278 (Fla. 1996).

²³ See Lergie v. Gregorian, 913 So. 2d 635 (Fla. 3d DCA 2005).

²⁴ *Ibid.*

In furtherance of its goal of promoting judicial economy, in April 2013, the Florida legislature passed into law a more controversial measure, known as Florida Statute § 766.1065²⁵, which would further enhance these pre-existing notice provisions.

C. – Florida Statute § 766.1065

Section 766.1065, titled “Authorization for release of protected health information,” was passed into law on April 12, 2013, going into effect in July of that year.²⁶ This Act requires that the pre-suit notices under § 766.106.2, discussed above, must also be accompanied by an authorization for the release of medical records.²⁷ This authorization is specifically worded to include any health information of potential relevance to the plaintiff’s claim from any provider, and goes so far as to say that any pre-suit notice under § 766.106.2 that does not include this notice is hereafter void.²⁸ Further, if at any point this authorization is revoked, it is deemed under the statute to be retroactively void from the date it was signed, not only effectively ending the suit itself, but also any tolling under the statute of limitations.²⁹

In addition to any written records relating to the claimant’s alleged injuries, the statute also requires plaintiffs to authorize the release of “verbal health information as well as written health information” in the custody of any health care provider who has treated the plaintiff for the injuries complained of, or any health care provider who has seen the plaintiff in the two years preceding the alleged malpractice.³⁰ This section goes beyond the disclosure requirements of the Texas statute at issue *In Re: Collins, M.D.*, in that even if a plaintiff deems a healthcare provider’s services to be irrelevant to the claims asserted, she is still required to disclose that she

²⁵ Fl. Stat § 766.1065(1).

²⁶ *Ibid.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Fl. Stat § 766.1065(2).

³⁰ Barbara Busharis, Medical Malpractice Reform Meets Hipaa, Trial Advoc. Q., Fall 2013, at 4.

received treatment.³¹ This oral information disclosure was included for the purpose of allowing *ex parte* interviews of plaintiff's treating physicians by the defendants' attorneys and their staff.³²

In short, the statute allows health care providers who might be deposed, called as witnesses or named as defendants in medical negligence actions to disclose patients' confidential medical information and records to a defendant's attorneys.³³ While on its face, the statute itself undoubtedly contributes to Florida's scheme of judicial economy through notice and pre-suit investigation, what about the privacy of the plaintiff? What about a patient's rights under HIPAA?

D. – HIPAA

The Health Insurance Portability and Accountability Act of 1996³⁴, or HIPAA, for short, was enacted on August 21, 1996 as Congress' response to the need for wide-reaching reform of the health care industry.³⁵ Originally passed out of concerns regarding the portability of insurance for people unable to switch jobs for fear of denial due to pre-existing health issues, the Act allows for the creation of rules and regulations by the Department of Health and Human Services.³⁶ These regulations, particularly those codified in 45 C.F.R. § 164 *et seq.*, have become known primarily for enabling the passage of extensive patient privacy regulations.³⁷

³¹ Fl. Stat. § 766.1065(3).

³² 2013 WL 1775986 (WJMEDMAL).

³³ 2013 WL 1775986 (WJMEDMAL).

³⁴ 45 C.F.R. §164.508.

³⁵ *Arons v. Jutkowitz*, 9 N.Y.3d 393, 850 N.Y.S.2d 345, 880 N.E.2d 831, 839–40 (2007); Pub.L. No. 104–191, 110 Stat.1936 (1996); *See also* *In re Collins*, 286 S.W.3d 911, 917 (Tex. 2009).

³⁶ *See* SUMMARY OF THE HIPAA PRIVACY RULE, <http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/privacysummary.pdf> (last visited February 17, 2015).

³⁷ 194 A.L.R. Fed. 133, *Validity, Construction, and Application of Health Insurance Portability and Accountability Act of 1996 (HIPAA) and Regulations Promulgated Thereunder*.

HIPAA binds any health care provider, but only if that provider transmits any information in an electronic form.³⁸ This information, known as Protected Health Information, or “PHI”, and is relevant under HIPAA if it contains individually identifiable health information.³⁹ The use, disclosure or distribution of any of this information is allowed only through methods authorized by HIPAA’s accompanying regulations.⁴⁰

Although the plaintiff *In Re Collins* claimed the Texas Statute conflicted with HIPAA, the latest wave of legislation similar to Florida Statute § 766.1065 had never been tested in an action before the Federal courts.⁴¹ That challenge would come in the form of *Murphy v. Dulay*,⁴² in which the District and Circuit Court came to very different conclusions, crystallizing the debate about the utility of such laws, and their underlying purposes.

III. Murphy v. Dulay (District Court)

Plaintiff, Glen Murphy, (originally pled as “John Doe”) was a former patient of the defendants, Adolfo C. Dulay, and his professional association.⁴³ In addition to Dr. Adolfo and his practice, the State of Florida intervened as a defendant because Mr. Murphy chose to challenge the validity of Section 766.1065.⁴⁴ The underlying facts of the suit were fairly straightforward: Dulay attempted to bring a suit and retained the required experts in various specialties; however, he refused to provide the authorization for *ex parte* interviews and

³⁸ See SUMMARY OF THE HIPAA PRIVACY RULE, <http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/privacysummary.pdf> (last visited February 17, 2015).

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ Georgia’s Supreme Court also faced a similar challenge to a similar law in *Allen v. Wright*, 282 Ga. 9, 644 S.E.2d 814 (Ga.2007), which it allowed to stand relying largely on similar logic to the Texas Supreme Court.

⁴² *Murphy v. Dulay*, 975 F. Supp. 2d 1200, 1201 (N.D. Fla. 2013)

⁴³ *Id.* at 1201.

⁴⁴ *Id.* at 1202.

communication with his healthcare providers, and stated he would not give the required notices under § 766.106 unless the court ruled in his favor.⁴⁵

Defendant first argued that Murphy did not have standing, because the federal district court can only grant declaratory and injunctive relief in the event of imminent harm, and Plaintiff's potential harm, the release of his protected health records, was speculative.⁴⁶ However, the District Court sided with Plaintiff, finding that a cognizable injury could occur through the inability of a litigant to have access to the courts.⁴⁷ Additionally, the court bolstered this finding with the determination that a real injury sufficient to allow a claim to go forward occurs when an *ex parte* interview that illegally discloses protected information is undertaken.⁴⁸ The court stated that "either of these injuries can be redressed in this action by an order prohibiting Dr. Dulay, and those acting in concert with him, from conducting the interviews", and therefore the requested relief was appropriate.⁴⁹

Defendant next argued that the threat of injury via the *ex parte* interviews was purely speculative, as the statute only provided for, but did not compel, the interviews to take place.⁵⁰ However, the court looked to the record, and found that Dr. Dulay, through his statements, had asserted his right to conduct *ex parte* interviews, and would not agree to foregoing such a right if he was successful.⁵¹ Further, Defendants' attempts to argue that disclosures of protected information would occur regardless of the case through the inevitable course of discovery were unpersuasive to the court:

⁴⁵ *Ibid.*; The court notes however that plaintiff had already secured experts, which suggests he was sincere in bringing the medical malpractice suit. The court appears to be implying this is not a test case because of this fact.

⁴⁶ *See e.g.* Atlanta Gas Light Co. v. Aetna Cas. & Sur. Co., 68 F.3d 409, 414 (11th Cir. 1995).

⁴⁷ Murphy, 975 F. Supp.2d at 1203.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

If an *ex parte* interview occurs, most of the disclosed information will be information for which any state-law privilege—as distinct from any limitation on disclosure under HIPAA—will have been waived by the assertion of the medical-negligence claim. Still, it is a reasonable possibility—though uncertain—that the disclosed information also will include information that is *not* pertinent to the medical-negligence claim and for which the state-law privilege thus will *not* have been waived.⁵²

Through this finding, the court recognized the existence of imminent harm, and therefore standing for the plaintiff, allowing it to reach the merits of the claim.⁵³

The court then discussed Defendants’ arguments that Mr. Murphy had no private right of action under HIPAA, and therefore lacked standing.⁵⁴ Because of its earlier determination that declaratory and injunctive relief were appropriate to ensure no harm in violation of Plaintiff’s Federal rights occurred, the court again insisted upon Murphy possessing standing, not under HIPAA, but under the Supremacy Clause⁵⁵ The District court explained that the Eleventh Circuit has a tradition of honoring claims for declaratory or injunctive relief under the Supremacy Clause, with the Supreme Court affirming its decision to do so in *Douglas v. Independent Living Center Of Southern California*⁵⁶, despite a “vigorous dissent” by four Justices.⁵⁷ Here, the court framed Murphy’s actions as an attempt to preemptively assert a defense to his inability to comply with both the Florida and Federal laws.⁵⁸

Reaching the merits, the court first cites to the preemption rule contained within HIPAA, which provides that a “standard, requirement, or implementation specification adopted under this

⁵² Murphy, *supra*, 975 F. Supp.2d at 1204.

⁵³ *Id.* at 1203-1204.

⁵⁴ *Id.* at 1204; HIPAA historically has been interpreted as not providing for a private right of action.

⁵⁵ *Ibid*; The court also supports its decision by invoking the Supremacy Clause, 42 U.S.C. § 1983, and the Declaratory Judgment Act, 28 U.S.C. § 2201.

⁵⁶ *Douglas v. Independent Living Center Of Southern California*, 132 S.Ct. 1204, 1213

⁵⁷ Murphy, 975 F. Supp. 2d at 1205; *Douglas v. Independent Living Center Of Southern California*, 132 S.Ct. 1204, 1213.

⁵⁸ Murphy, 975 F. Supp. 2d at 1205.

subchapter that is contrary to a provision of State law preempts the provision of State law.”⁵⁹ The court then addresses the applicable section, 45 C.F.R. § 164.508(a)(1): “Except as otherwise permitted or required by this subchapter, a covered entity may not use or disclose protected health information without an authorization that is valid under this section.”⁶⁰ Because a doctor is a covered entity, and the health information (i.e. a patient’s medical history) is the kind that would be shared in the *ex parte* proceedings envisioned by the drafters of § 766.1065, the court reasoned that in order for the law to remain valid and avoid preemption it must either: (1) be permitted by 45 C.F.R. § 164.508(c); or, (2) such disclosures must be consistent with a valid authorization.⁶¹

45 C.F.R. § 164.508(c) makes reference to 45 C.F.R. § 164.512(e), which states that “a disclosure can be made in connection with a judicial or administrative proceeding”, but such disclosures must be in response to a court or administrative order.⁶² The court viewed this requirement as more restrictive than the Florida statute.⁶³ According to the District court, the statute “takes a court or administrative tribunal out of the process altogether.”⁶⁴ The court states that this is not an effort to comply with federal requirements, but rather an attempt to dispense with them entirely, giving a patient no judicial recourse in advance of disclosure.⁶⁵ For the District court, this is a violation of § 164.512(e), because that section requires that if no such order is obtained, the patient must have the ability to object, with a judicial or administrative

⁵⁹ *Id.* at 1206; 45 C.F.R. § 160.203.

⁶⁰ 45 C.F.R. § 164.508(a)(1).

⁶¹ Murphy, 975 F. Supp. 2d at 1206.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Id.* at 1206-1207.

⁶⁵ *Id.* at 1207.

ruling deciding the matter.⁶⁶ Absent section (e), the District Court states, the only other option is valid authorization by the patient.

According to the court, a valid authorization by a patient allowing disclosures can be acceptable even if such authorization relates to judicial or administrative proceeding, but does not meet all of the requirements of 45 C.F.R. § 164.512(e).⁶⁷ In the court's analysis, the Florida Statute has all of the required elements to make an authorization valid; however, the statute lacks the voluntary nature necessary to be truly legitimate.⁶⁸ In the court's view "the whole point of the authorization provision is to recognize that a patient may consent to disclosures that otherwise would be impermissible . . . [t]he signature confirms that the patient in fact consents."⁶⁹ For the court, the signature required by the Florida statute does not show consent; it shows "mandated compliance" with the law, not knowing and voluntary consent to disclosures.⁷⁰ The District court views "the authorization [a]s a charade; the only entity granting authority, in any meaningful sense is the state itself, not the patient."⁷¹ The court then concludes that the Florida law is squarely at odds with the Federal scheme, as it attempts to circumvent it by requiring *ex parte* interviews without consent, without a court order or administrative order and the protections such a proceeding entails.⁷²

The Court in closing notes the Texas Supreme Court reached the opposite decision, in what it believes to be a decision contrary to federal law.⁷³ This interpretation of HIPAA, and this conversation about what is voluntary and what is mandated, form the core of the disagreement

⁶⁶ *Ibid.*

⁶⁷ Murphy, 975 F. Supp.2d at 1207, *citing* § 164.512(e)(vi)(2).

⁶⁸ Murphy, 975 F. Supp.2d at 1207.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Id.* at 1208.

⁷² *Ibid.*

⁷³ *Ibid.*

between the District and Circuit courts, and ultimately would lead to a reversal of the District Court's decision.

IV. Murphy v. Dulay (Appeal to the 11th Circuit)

In late 2014, the appeal of the above case was heard in the Eleventh Circuit, which reversed and remanded the decision of the District court.⁷⁴ Primarily, the Eleventh Circuit took issue with what it viewed as a narrow view of § 766.1065, and related notice provisions passed by the Florida legislature.⁷⁵

While the District court focused specifically on the negatives of the law, the Circuit court noted that Florida law had already required that the defendant and his insurer in medical malpractice suits engage in a thorough investigation within a proscribed 90-day period in order to determine the liability of the defendant.⁷⁶ After this investigational period, the defendant is required to do one of three things: deny fault, settle, or request arbitration.⁷⁷ The Eleventh Circuit views this as a good thing, as its purpose is not to dissuade meritorious claims from being filed, but instead to promote judicial economy and prevent protracted and expensive discovery.⁷⁸ The court thus views §766.1065 as being simply another mechanism through which a more thorough review can be facilitated prior to any substantial judicial involvement between the potential litigants.⁷⁹

To bolster its benign view of the statute, the Circuit Court gives the three primary functions of § 766.1065. First, the court notes that under § 766.1065, a prospective plaintiff is required to list all providers from two years prior to the actions giving rise to the claim; however, Plaintiff

⁷⁴ Murphy v. Dulay, 768 F.3d 1360, 1363 (11th Cir. 2014).

⁷⁵ *Id.* at 1365; *See also* Murphy v. Dulay, 975 F. Supp. 2d 1200, 1204 (N.D. Fla. 2013).

⁷⁶ Murphy, *supra*, 768 F.3d at 1365; *see also* Fl. Stat. 766.106(3)(a).

⁷⁷ Fl. Stat. 766.106(3)(a).

⁷⁸ Murphy, *supra*, 768 F.3d at 1365.

⁷⁹ *Ibid.*

has the option to certify that a provider did not provide services relevant to the claim, and therefore prevent the sharing of his or her entire medical history.⁸⁰ Second, although the statute allows for *ex parte* interviews with plaintiff's healthcare providers, those providers are not obligated to submit to interviews with defendant, his lawyer, or insurers.⁸¹ Finally, the court states that the form plaintiff must submit, pursuant to the statute, must include an express waiver of HIPAA, and notes that the waiver, as well as the form itself, is revocable at any time.⁸² Following this overview of the way the statute is meant to operate, the court moves on to analyze the possibility that § 766.1065 is pre-empted by HIPAA.

A. – Judicial Process Exemption

The court begins by stating its conclusion that both the judicial process exception, as well as the authorized waiver exception, allow for the Florida Statute to survive a pre-emption analysis and remain valid.⁸³ This analysis differs markedly from that of the district court, discussed above, which found explicitly that neither exception applied.

45 C.F.R. § 164.512 provides that protected health information may be shared without waiver if such disclosure is part of a judicial process.⁸⁴ Specifically, those disclosures must be made either as a result of a court order or order of an administrative tribunal, or subpoena, discovery request, or other lawful process.⁸⁵ Even when such an order is obtained, the Circuit Court continues, the party seeking protected information is still required to give notice to the individual, and allow that individual the opportunity to obtain a protective order.⁸⁶ HIPAA's

⁸⁰ *Id.* at 1365.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Id.* at 1369.

⁸⁴ 45 CFR § 164.512 ("[a] covered entity may use or disclose protected health information without the written authorization of the individual, as described in § 164.508 . . . in the situations covered by this section"; Murphy, *supra*, 768 F.3d at 1369.

⁸⁵ 45 CFR § 164.512(e)(1)(i-ii); Murphy, *supra*, 768 F.3d at 1369.

⁸⁶ 45 CFR § 164.512(e)(1)(ii).” Murphy, *supra*, 768 F.3d at 1369.

regulations further provide that these efforts be undertaken good faith.⁸⁷ The Circuit court finds that “[c]learly, § 766.1065 does not provide the same privacy safeguards as those called for in the judicial-process exception” in all cases, though it could be applicable in some instances.⁸⁸ However, because 45 C.F.R. § 164.512 provides that the judicial exception only applies where written authorization of the individual cannot be obtained, the statute could still be valid under the waiver exception.

B. – Waiver Issues.

Turning next to the issue of waiver, the court notes:

“The HIPAA regulations specify that, to be valid, an authorization must contain these elements: (1) “[a] description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion”; (2) “[t]he name or other specific identification of the person(s), or class of persons, authorized to make the requested use or disclosure”; (3) “[t]he name or other specific identification of the person(s), or class of persons, to whom the covered entity may make the requested use or disclosure”; (4) “[a] description of each purpose of the requested use or disclosure”; (5) “[a]n expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure”; and (6) the “[s]ignature of the individual and date.”⁸⁹

In addition, the party authorizing disclosure is also required to have notice that he or she will have the right at any time to revoke; not be required to sign such a waiver as a condition of continuing coverage; and be reminded that re-disclosure to other parties could result, with such re-disclosure not covered by HIPAA.⁹⁰

With HIPAA’s waiver provision in mind, the Court addresses Murphy’s arguments, and holds that the authorizations of 766.1065 meet HIPAA’s requirements.⁹¹ The Circuit Court first disagrees with Murphy’s assertion that the authorization is not revocable, and finds authorization

⁸⁷ 45 CFR §164.512(e)(1)(iii), (iv); Murphy, 768 F.3d at 1369 -70.

⁸⁸ Murphy, 768 F.3d at 1375.

⁸⁹ 45 CFR § 164.508(c)(1)(i)-(vi); Murphy, 768 F.3d at 1370.

⁹⁰ 45 § 164.508(c)(2), (b)(4); Murphy, supra, 768 F.3d at 1370.

⁹¹ Murphy, 768 F.3d at 1372.

is revocable at any time.⁹² The court notes that the result of revocation is simply the termination of a lawsuit, which, it admits, could result in the elimination of Plaintiff's claim.⁹³ However, "the HIPAA regulations do not require that a person be able to revoke an authorization free of any consequences; they just require that an authorization be revocable. The Florida statute requires the same".⁹⁴

Next, the court addresses Murphy's argument that disclosure of the identities of health care providers beyond the parties to the plaintiff's action is a HIPAA violation.⁹⁵ This claim is also dismissed by the Circuit Court, which states that "superfluous" information naming doctors not relevant to the lawsuit does not invalidate the authorization under the act.⁹⁶ As the court explains, HIPAA does not require a purpose, legitimate or otherwise, for the disclosure of a patient's entire history under the waiver provision.⁹⁷

Third, the court turns to Murphy's assertion below that the authorization violates HIPAA's specificity requirement. To this, the court simply states that,

Here, the authorization form in § 766.1065 specifically authorizes the release of health information held by health care providers that the plaintiff identifies, including those who have examined, evaluated, or treated him (or who will do so) in connection with the complained-of injury; and those who have examined, evaluated, or treated him two years prior to the injury. Fla. Stat. § 766.1065(3)(B). Murphy may not like the breadth of the authorization required by § 766.1065, but the HIPAA regulations do not require that authorizations be narrow, simply that they be specific.⁹⁸

Next, the court addresses Murphy's argument that the consent to disclose protected medical information acts as a "compound authorization" when combined with the required 90 day pre-

⁹² *Id.* at 1373.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Id.* at 1374.

suit notice.⁹⁹ “Compound authorizations” are defined as authorizations for the disclosure of protected health information that are combined with any other authorization.¹⁰⁰ As an example, the court states that an authorization to disclose protected health information combined with an informed consent to receive treatment or pay benefits to a provider would represent a compound authorization.¹⁰¹ The court states that the pre-suit notice is a condition precedent to the filing of a medical malpractice action in Florida, and one which pre-existed § 766.1065, and is separate from any authorization.¹⁰² The fact that both are required to be submitted at the same moment in time does not mean the two documents are combined so as to create compound authorization.¹⁰³ By holding that the requirements comport with the authorization provisions of HIPAA, “no other HIPAA exception for disclosure needs to be satisfied once an individual signs a valid written authorization.”¹⁰⁴

Ultimately, the court dismisses Murphy’s penultimate argument that the notice is mandatory, and thereby invalid. The court first explains that the HIPAA Statute does not say that any mandatory disclosure, other than the conditioning of treatment upon the signing of a release, is prohibited.¹⁰⁵ Such explicit prohibitions therefore suggest that requiring HIPAA authorizations under other circumstances is permissible.¹⁰⁶ Next, the court notes Murphy’s decision to file suit in the State’s judicial system is voluntary, and therefore his authorization is not mandatory.¹⁰⁷ Finally, the Court points to the decision of the Texas Supreme Court *In Re: Collins*, which, as discussed

⁹⁹ *Ibid.*

¹⁰⁰ Murphy, 768 F.3d at 1370.

¹⁰¹ *Ibid.*, citing “Standards for Privacy of Individually Identifiable Health Information”, 65 Fed. Reg. 82, 462, 85, 511 (Dec. 28, 2000).

¹⁰² Murphy, *supra*, 768 F.3d at 1374.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Id.* at 1375.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

above, upheld a similar legislative scheme,¹⁰⁸ relying primarily on the fact that the decision to file suit is not mandatory.¹⁰⁹ Additionally, the regulations have been revised several times since the Texas Supreme Court's decision.¹¹⁰ The Circuit suggests that this is evidence of the statutes legitimacy, because if Congress is aware of a contradictory interpretation of Federal law, yet does not change that law, the courts will presume that when it is re-enacted without change that the judicial decision is valid.¹¹¹

V –Argument.

The District court was correct to hold the HIPAA preempts the Florida statute, as none of the exceptions for the disclosure of protected health information under the HIPAA privacy rules are applicable to § 766.1065. The Eleventh Circuit's analysis in the *Dulay* case incorrectly differentiates between what is voluntary and what is required when addressing the issue of waiver pursuant to HIPAA, and incorrectly states that the judicial exception may apply in certain instances. The Circuit court frames the choice to authorize disclosure of PHI in terms of voluntariness, yet under the Florida statute plaintiffs will be required to waive their rights to privacy pursuant to HIPAA's regulations in order to bring an actionable claim for medical malpractice.

As the District court correctly identified, the Florida legislature in passing § 766.1065 effectively side steps the regulatory safe guards put in place by HIPAA's privacy rule, specifically the judicial exception¹¹² and the minimal disclosure standard.¹¹³ Further, § 766.1065

¹⁰⁸ Murphy, 768 F.3d at 1376.

¹⁰⁹ Murphy, 768 F.3d at 1375-77.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² 45 C.F.R. 164.512(e).

¹¹³ 45 C.F.R. 164.502(b).

frustrates the purpose of the HIPAA privacy regulations, as well as the overall legislative purpose behind HIPAA.¹¹⁴

A. - The Judicial Exception.

The District court's holds that the "judicial exception" to the HIPAA privacy rule does not apply to the Florida statute.¹¹⁵ The Circuit court, however, holds that in some cases the judicial exception would apply under § 766.1065, allowing the statute to survive its preemption analysis.¹¹⁶ The District court was correct to hold that the judicial exception does not apply under any circumstances, because under the Florida statute claimants are required to disclose more than the minimum necessary information,¹¹⁷ and are not offered the opportunity to secure a protective order¹¹⁸, in contradiction of the HIPAA privacy regulations.

The judicial exception, found in 45 C.F.R. 164.512(e), states that a covered individual may disclose otherwise protected information as the result of any judicial or administrative order, or as a result of a subpoena or discovery so long as the subject has (1) received notice and consented, or (2) the subject has the ability to seek a protective order.¹¹⁹ This portion of the regulations has traditionally been the mechanism through which defendants have sought to conduct *ex parte* interviews in medical malpractice litigation.¹²⁰ The judicial exception is a well articulated, well defined series of regulations, addressing the process for disclosing protected information before, during and after litigation, whether this information is in the form of

¹¹⁴ See SUMMARY OF THE HIPAA PRIVACY RULE, <http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/privacysummary.pdf> (last visited February 17, 2015).

¹¹⁵ Murphy, 975 F. Supp. 2d at 1206.

¹¹⁶ Murphy, 768 F.3d at 1375.

¹¹⁷ See 45 C.F.R. 164.502(b).

¹¹⁸ See 45 C.F.R. 164.512(e)(1)(ii).

¹¹⁹ 45 C.F.R. 164.512(e)(1)(i-ii).

¹²⁰ See Daniel J. Sheffner, State Ex Rel. Proctor v. Messina and Ex Parte Communications Under the Hipaa Privacy Rule: The "Judicial Proceedings" Split, 39 S. Ill. U. L.J. 71, 81-82 (2014).

documents or interviews.¹²¹ As a result of the extensive regulations, and the case law that has interpreted them, the judicial exception requires considerable involvement from the courts in order to effectively control the flow of information, and ensure its relevance to the litigation at issue through the issuance of protective orders, if need be. Because the Florida statute offers no mechanism for obtaining a protective order, and lacks any mechanism for impartial decisions on the relevance of protected information, it entirely ignores the safeguards set forth in the regulations under 45 C.F.R. 164.512(e).

Additionally, the lack of protections in the Florida statute to ensure that only limited, relevant information is released adds to the inapplicability of the judicial exception to § 766.1065, and undermines the very purpose of the HIPAA regulations. Because § 766.1065 requires prospective plaintiffs to provide the names and dates of visit to all healthcare providers within a two-year period prior to the litigation,¹²² the statute violates HIPAA's minimum necessary standard. Because this minimum necessary standard applies to information released via the judicial exception, it is impossible for the Florida statute to survive HIPAA preemption under this provision. 45 C.F.R. 164.502(b) states that “[w]hen using or disclosing protected health information or when requesting protected health information from another covered entity . . . a covered entity . . . must make reasonable efforts to limit protected health information to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request.”¹²³ The Florida statute, as per both the Circuit and District courts' findings, provides for no such limiting feature, in that it requires the names and dates of visit of all health care providers seen by the plaintiff in a two-year period.¹²⁴

¹²¹ 45 C.F.R. 164.512(e).

¹²² Fl St. § 766.1065.

¹²³ 45 C.F.R. 164.502(b).

¹²⁴ Fl St. § 766.1065.

§ 766.1065 further complicates the limiting of disclosures, because, as the regulations state, once privacy is waived¹²⁵, the personal information is subject to re-disclosure without any of the protections of the HIPAA privacy rule.¹²⁶ This means that in order to bring suit, a plaintiff would be required to waive their rights under HIPAA's privacy regulations, resulting in PHI of no relevance to the suit being released in perpetuity.

These features of § 766.1065 are directly at odds not only with the regulations themselves, but also with the regulatory purpose of the HIPAA privacy rules. As the Department of Health and Human Services, through its Office of Human Rights, the body responsible for regulating and enforcing HIPAA's privacy rule has stated, the privacy rule is designed to strike a balance between disclosable information and the privacy rights of the individual.¹²⁷ The Florida statute ignores this balance. As noted by the District court, this lack of oversight and balance, as provided by the judicial exception, means that in order to survive preemption the statute is entirely dependant upon the waiver exception contained within the regulations.

B. - Voluntary Waiver.

The Circuit court ultimately held that the Florida statute provides for a valid waiver of the protections provided by the HIPAA regulations. This is not the case, however, as the waiver is not voluntary, as the Circuit court suggests. The District court was correct to hold that such a waiver is defective; the voluntary nature of waivers is negated where mandatory compliance is required as a pre-requisite to the filing of a suit.¹²⁸ The District court was right to find that just as a HIPAA waiver would be deemed invalid if signed by an incompetent person, or a person "with a gun to their head, for example", the requirement that claimants provide a signed authorization

¹²⁵ Which the Circuit court notes cannot be revoked without termination of the suit.

¹²⁶ See 45 C.F.R. 164.508(c)(2)(iii).

¹²⁷ SUMMARY OF THE HIPAA PRIVACY RULE, P.1, 6 <http://www.hhs.gov/oct/privacy/hipaa/understanding/summary/privacysummary.pdf> (last visited February 17, 2015).

¹²⁸ Murphy, 975 F. Supp.2d at 1207.

for the sharing of protected health information or have their claims dismissed, negates the voluntary nature of the waiver.¹²⁹

The Circuit court rejects concerns about the purposes or protections of HIPAA's privacy regulations, focusing instead on the waiver "catch all" contained within those regulations.¹³⁰ It relies specifically on the reasoning of the *Collins* decision, which the District court rejected as "contrary to federal law".¹³¹ Both Texas' Supreme Court in *Collins* and the Circuit Court premise their argument on the concept that filing suit in order to gain redress in medical malpractice actions is a voluntary act,¹³² and the decision not to file a claim in an otherwise meritorious suits is an acceptable alternative according to the legislative scheme.¹³³ Based on the Eleventh Circuit's own definition of what is voluntary, however, a prospective plaintiff's waiver of their rights under HIPAA's privacy rule is not voluntary, but required.

In defining the term "voluntary" in previous cases regarding waiver of protected information¹³⁴, the Eleventh Circuit has used the plain meaning, defining the term using Black's Law Dictionary.¹³⁵ As stated therein, "voluntary" is defined as "1. Done by design or intention <voluntary act>" and "2. Unconstrained by interference; not impelled by outside influence <voluntary statement>."¹³⁶ Using the Eleventh Circuit's own definition, the waiver of a plaintiff's rights under HIPAA's privacy regulations are anything but voluntary. As the District court was correct to state, the threat of either alternative is enough to cause duress, by essentially

¹²⁹ *Ibid.*

¹³⁰ 45 C.F.R. 164.508(b).

¹³¹ Murphy, 975 F. Supp.2d at 1208.

¹³² Murphy, 768 F.3d at 1375-77; In re Collins, 286 S.W.3d 920.

¹³³ As noted in Section II B, a verified affidavit of merit is a pre-requisite to medical malpractice litigation in Florida.

¹³⁴ Koch Foods of AL LLC v. Gen. Elec. Capital Corp., 531 F. Supp. 2d 1318 M.D. Ala. 2008) (Discussing how to determine the voluntary nature of waiver of privileged information in a civil suit).

¹³⁵ *Id.* at 1323.

¹³⁶ *Ibid.*

“holding a gun to the head” of a prospective plaintiff.¹³⁷ By threatening a complete bar to recovery through failure to provide information to defendant, both relevant and irrelevant and without any judicial redress, the Florida statute compels individuals to involuntary action.

The District court was correct to hold that the § 766.1065 not only violates HIPAA’s privacy regulations, but also effectively requires authorization of protected information through the creation of duress. The Circuit Court, using its very own definition of voluntary, was wrong to find that the waivers called for by the Florida statute are valid.

V - Waiver of the Right to Trial by Jury

A further argument against § 766.1065 not addressed by either court is that the statute restricts the right of litigant to a trial by jury. The suppression of the right of individuals to receive redress for their otherwise actionable injuries violates both the Seventh Amendment of the United States Constitution and Article I, Section 22 of the Florida State Constitution.

A. – The Waiver is Not Voluntary.

The Circuit Court’s decision, like *Collins* before it, hinges on the determination that an individual can be made to choice between privacy protections under HIPAA, or “voluntary” waiver his or her day in court. Such a reading of the Florida statute ignores the constitutional guarantees to trial by jury expressed in the United States and Florida State Constitutions. Both the Florida and federal courts have held that this right is fundamental in both case law and their rules of civil procedure.¹³⁸ Additionally, both Florida and federal courts have held that every

¹³⁷ Murphy, 975 F. Supp.2d at 1207.

¹³⁸ Aetna Ins. Co. v. Kennedy to Use of Bogash, 301 U.S. 389, 393, 57 S. Ct. 809, 811-12, 81 L. Ed. 1177 (1937) (“the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver”); Barth v. Florida State Constructors Serv., Inc., 327 So. 2d 13, 14 (Fla. 1976) (As set forth in Article I, Section 22, of the Florida Constitution as revised in 1968, ‘The right of trial by jury shall be secured to all and remain inviolate. . . .’); See F.R.C.P. 38(a); See also FL ST RCP Rule 1.430.

reasonable inference against the waiver of this right is the rule, and not the exception, and that waiver must be made knowingly and voluntarily.¹³⁹

Using the Eleventh Circuits definition of voluntary, discussed above, it is clear that the waiver of a claimant's right to trial by jury under the statute does not meet the necessary constitutional standards. Just as the waiver argument failed in the context of the HIPAA privacy regulations because the decision to authorize disclosures was compelled by outside influence, it also fails in the context of waiver of the right to trial by jury. The waiver, as contemplated by both the Circuit Court and the Texas Supreme Court, is compelled by duress in the form of the threat of disclosure of non-relevant PHI in perpetuity, in direct violation of HIPAA's privacy regulations.

Neither the District court nor the Circuit court addressed whether the Florida statute was unconstitutional, focusing only on preemption. Constitutional arguments could be valuable in challenging the statute, and others like it, in the future. Particularly under state constitutions, such arguments have proven effective in the past when used to challenge tort reform measures, and could offer a viable path to challenging § 766.1065 in the future.

B. - Future Challenges to § 766.1065 at the State Level

The argument that the statute violates the right to trial by jury, specifically under state constitutions, has been used with mixed results in the past to challenge other tort reform measures. For example, limits to damage awards in medical malpractice actions¹⁴⁰ have

¹³⁹ RDO Fin. Servs. Co. v. Powell, 191 F. Supp. 2d 811, 813 (N.D. Tex. 2002) (waiver must be made knowingly and voluntarily, and courts will indulge every reasonable presumption against a waiver of that right.) *citing* Commodity Futures Trading Comm'n, 478 U.S. at 848, 106 S.Ct. 3245; Poller v. First Virginia Mortgage & Real Estate Inv. Trust, 471 So. 2d 104, 106 (Fla. Dist. Ct. App. 1985) ("Waiver of the right to a jury trial is to be strictly construed and not to be lightly inferred.").

¹⁴⁰ See Mo. Stat. § 538.210(1) ("In any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, no plaintiff shall recover more than three hundred fifty thousand dollars for noneconomic damages irrespective of the number of defendants."). See also Kan.

previously been challenged as infringing upon ones right to a trial by jury.¹⁴¹ When confronted with this argument, analysis of state constitutions has led to different decisions by different state supreme courts. For example, Missouri struck down its damage cap on these grounds in *Watts v. Lester E. Cox Medical Centers* in 2012.¹⁴² However, on a similar case out of Kansas, its Supreme Court upheld its statute, relying, in similar fashion to the Texas Supreme Court in *Collins* on the public policy concerns of increasing access to healthcare and mitigating the rising costs of malpractice insurance.¹⁴³

Adding to the possible weight a Florida court could give to this argument, the Kansas and Missouri Courts have shown similarities to the Florida Supreme Court when expressing their legal analytical framework for determining how rights under their state constitutions will be interpreted. For example, Kansas and Missouri's Supreme Courts have stated that the right to trial by jury is traditionally construed to require the right to a jury trial to be viewed in the context of what was meant at the time of the passing of the constitution.¹⁴⁴ Florida's courts have also interpreted their constitution in a similar fashion.¹⁴⁵ The interpretive similarities suggest that a challenge to the Florida statute premised on the right to trial by jury would be a powerful argument, just as it was before the Kansas and Missouri Courts.

Stat. § 60-19a02(b) (“In any personal injury action, the total amount recoverable by each party from all defendants for all claims for noneconomic loss shall not exceed a sum total of: (1) \$250,000 . . .”).

¹⁴¹See Hudson, Jr., David L., “More states see tort limits challenged as unconstitutional”, ABA JOURNAL, Apr 01, 2013 08:19 am CDT(found at: http://www.abajournal.com/magazine/article/more_states_see_tort_limits_challenged_as_unconstitutional/).

¹⁴² *Watts v. Lester E. Cox Med. Centers*, 376 S.W.3d 633, 636 (Mo. 2012) ([the law] is unconstitutional to the extent that it infringes on the jury's constitutionally protected purpose of determining the amount of damages sustained by an injured party... the judgment is reversed to the extent that it caps non-economic damages”).

¹⁴³ See *Miller v. Johnson*, 295 Kan. 636, 289 P.3d 1098 (2012).

¹⁴⁴ *Miller v. Johnson*, 295 Kan. 636, 289 P.3d 1098, 1108 (2012) (“Our court has consistently held that Section 5 preserves the jury trial right as it historically existed at common law when our state's constitution came into existence.”); See also *Watts v. Lester E. Cox Med. Centers*, 376 S.W.3d 633, 636 (Mo. 2012) (Stating right to trial by Jury should be viewed through the lens of when the constitution was passed in 1820).

¹⁴⁵ *Barth v. Florida State Constructors Serv., Inc.*, 327 So. 2d 13, 14 (Fla. 1976).

While this argument has been used to challenge tort cap laws with mixed results, it could prove very useful in challenging statutes such as § 766.1065, which call for a waiver of the ability to seek redress in court all together.¹⁴⁶ In the context of § 766.1065, Florida courts have consistently held that the State Constitution, in its 1968 form, is strongly committed to the right of its citizens to have their wrongs addressed in a trial by jury.¹⁴⁷ This leads to the question of whether such a claim brought in state court could invalidate the Florida statute, or those like it, without addressing HIPAA and preemption at all?

V- Conclusions

Florida Statute § 766.1065, is part of a long history of attempts to regulate medical malpractice actions in the interests of judicial economy, lessening the cost and increasing the availability of health care. As many of the decisions discussed above relate, there is a real public policy concern in ensuring that these interests are realized through legislation.

The Florida Statute, as the District court correctly held, gives too much power to defendants with too little judicial oversight. The Florida statute also fails to provide for voluntary waiver, while calling for the release of non-relevant PHI. Its provisions, and the Circuit Court's opinion, twist understandings of what is voluntary and what is required when discussing waiver under HIPAA's privacy regulations. The Circuit court further errs by allowing, through its holding, violation of Federal and State Constitutional rights in order to advance the public policy concerns of judicial economy, speed and control of costs.

Although the rising cost of healthcare, and concerns of access arguably make necessary such statutory measures, these concerns do not change federal law. By allowing for judicial

¹⁴⁶ See Hudson, Jr., David L., "More states see tort limits challenged as unconstitutional", ABA JOURNAL, Apr 01, 2013 08:19 am CDT(found at: http://www.abajournal.com/magazine/article/more_states_see_tort_limits_challenged_as_unconstitutional/).

¹⁴⁷ Barth, 327 So. 2d at 14.

oversight, protective orders, and determinations of relevance made not by the parties themselves, but by a neutral magistrate, HIPAA's regulations ensure fairness while accomplishing the very same goals and policy concerns.

Additionally, under HIPAA's regulatory framework, constitutional rights are preserved. Access to the courts is preserved, as the plaintiff in such cases gets the benefits of a judicially overseen process, while allowing defendants the ability to conduct their own internal investigations as envisioned by the Florida statute.

The District Court was correct to strike down the Florida Statute. Although its decision was reversed by the Circuit Court, viable challenges to the statute still exist, and have proven effective in the past. Further, other options that correctly balance public policy concerns and the rights of patients should be considered in order to strike the correct balance of protection for all parties, and ensure compliance with the existing HIPAA privacy regulations.