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PSQIA Case Law Update and Federal Preemption Discussion

Andrea Timashenka, Esq.
Senior Attorney
Office of the General Counsel
US Department of Health and Human Services
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Presentation Topics

- **Case Law Review**
  - *Tibbs v. Goff*
  - *Baptist Health Richmond, Inc. v. Clouse*
  - *Charles v. Southern Baptist Hosp. of Fla., Inc.*

- **Federal Preemption and PSQIA**
  - General overview
  - Relevant provisions of PSQIA
Case Law Review – PSQIA in State Supreme Court Cases
Tibbs v. Goff - Background

- Ms. Goff died after complications of elective spine surgery performed at the University of Kentucky hospital by Drs. Tibbs, Norman, and Brown.
- Her estate brought a wrongful death and medical malpractice action against the providers.
- In response to a discovery request, defendants declined to produce a post-incident report of her surgery, asserting it was protected PSWP under the PSQIA.
KY Supreme Court found that the incident report at issue was not PSWP because “its collection, creation, maintenance, and utilization is mandated by the Commonwealth of Kentucky as part of its regulatory oversight of its healthcare facilities.”

Petition for writ of certiorari was filed with SCOTUS seeking review of the KY Supreme Court decision.

SCOTUS invited the Solicitor General to file a brief expressing the views of the USG.
Tibbs v. Goff - Finale

- May 24, 2016: USG files amicus curiae brief recommending petition for writ of certiorari be denied.
- June 6, 2016: Petitioner (Tibbs) files a supplemental brief.
- June 27, 2016: SCOTUS denies the petition.
- Effect: Tibbs decision by KY Supreme Court stands.
Ms. Nall died following laparoscopic surgery.

Her estate sued Baptist Health and other medical providers alleging she died as a result of medical negligence.

Her estate sought, “any and all incident reports, investigation reports, sentinel event reports, root cause analysis reports, Joint Commission reports, Medicare reports, Medicaid reports, peer review reports and reports of any nature relating to” Ms. Nall.

Baptist identified records that were responsive to the request but that it withheld as privileged PSWP.
The KY Supreme Court sent the case back to the lower court with instructions on how to review the document request. The decision also discussed *Tibbs* at length.

The court stated that providers who meet their external obligations should “have no fear that trial courts will be meddling in federally protected documentation.”

However, if the provider does not fulfill its obligations, the court can conduct an *in camera* review of the information in a provider’s PSES. Then, information in the provider’s PSES that is normally contained in state-mandated reports is not PSWP and is discoverable.
In resolving PSQIA discovery disputes, the trial court should:

- First determine whether the requested documents are relevant and original provider records as defined in the HHS May 2016 guidance.

- If a document is an “original provider record,” the court should order its production, even if the record is maintained only in the provider’s PSES.

Providers are aware of their external obligations and should have required records “available for prompt production.” The trial court should only review the information in a provider’s PSES if those external obligations are unfulfilled.
Charles v. S. Baptist Hosp. of Fla., Inc. - Background

- The underlying claim is a medical malpractice action where it is alleged that the hospital’s negligence resulted in Ms. Charles suffering a catastrophic neurological injury.
- The hospital produced documents including Code 15 reports, annual reports, and two occurrence reports related to Ms. Charles that were removed from the hospital’s PSES before they were reported to the PSO.
- The hospital claimed other adverse medical incident reports were privileged and confidential PSWP.
Florida Supreme Court found that the hospital was required by Florida law to create and maintain the adverse medical incident reports at issue; therefore, they are not PSWP.

Because they are not PSWP, PSQIA does not overrule the patient’s right to access these records under “Amendment 7.”

Dissent: The parties had filed a stipulation of dismissal prior to oral arguments and were entitled to dismissal.
Federal Preemption Overview

Federal Laws

State Laws

Local Laws
Supremacy Clause

- Article VI, Clause 2 of the U.S. Constitution:

“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

- Federal law supersedes any inconsistent state law or regulation.
Types of Preemption

- Express Preemption: a law contains explicit preemption language

- Implied Preemption: when preemption exists absent express preemption language
Express Preemption

- In the text of the law, Congress clearly states that federal law prevails.
  - If a preemption clause exists, the next step is to determine the substance and scope of the preemption language.

- Alternatively, Congress can include language explicitly limiting preemption, known as a “savings clause.” It can also provide for concurrent federal-state jurisdiction.
Implied Preemption – Two Types

- **Field Preemption**
  - Where the federal law so comprehensively “occupies the field” in the area at issue that there is no room left for state laws.

- **Conflict Preemption**
  - Where it is impossible to comply with a federal and state law at the same time or the state law poses an obstacle to implementing the purposes and objectives of the Federal law.
Questions A Court May Consider Regarding Preemption

- Are the Federal and state laws in fact incompatible?
- What was Congress’ intent?
- Did Congress specify how Federal and state laws may interact? If not,
  - Is it possible to comply with both?
  - Does complying with the state law frustrate the Federal law?
  - Is the Federal law intended to completely occupy the field?
PSQIA Language Related to Preemption

- Privilege and Confidentiality Protections: 42 USC 299b-22(a) and (b)
- Rule of Construction: 42 USC 299b-22(g)
- PSWP Definition: 42 USC 299b-21(7)
Privilege and Confidentiality Protections

- 42 USC 299b-22(a):
  “Notwithstanding any other provision of Federal, State, or local law, and subject to subsection (c), patient safety work product **shall be privileged**....”

- 42 USC 299b-22(b):
  “Notwithstanding any other provision of Federal, State, or local law, and subject to subsection (c), patient safety work product **shall be confidential and shall not be disclosed**.”

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42 USC 299b-22(g): “Nothing in this section shall be construed -

(1) to limit the application of other Federal, State, or local laws that provide greater privilege or confidentiality protections than the privilege and confidentiality protections provided for in this section;

(2) to limit, alter, or affect the requirements of Federal, state, or local law pertaining to information that is not privileged or confidential under this section;

…

(5) as preempting or otherwise affecting any State law requiring a provider to report information that is not patient safety work product”
PSWP Definition

42 USC 299b-21(7)(B)(iii): “Nothing in this part shall be construed to limit -

…

(II) the reporting of … [non-PSWP] to a Federal, State, or local governmental agency for public health surveillance, investigation, or other public health purposes or health oversight purposes; or

(III) a provider’s recordkeeping obligation with respect to … [non-PSWP] under Federal, State, or local law.”
Three state supreme court decisions in two states (KY and FL) have considered PSQIA privilege and determined that information mandated by state law requirements is not PSWP and therefore not privileged under the PSQIA.

Congress provided language in the PSQIA directly addressing the scope of the Act’s preemption related to state and local laws.
Questions