IN THE STATE COURT OF FULTON COUN
STATE OF GEORGIA

LIZABETH H. LOCKARD, individually, and as personal representative of the Estate of KENNETH C. LOCKARD, deceased Plaintiff,	:	
	:	CIVIL ACTION FILE
v.	:	
	:	NO. 05V5078568D
ANDREW L. WEISBERG, M.D., and NORTH METROPOLITAN RADIOLOGY ASSOCIATES, LLP, Defendants.	:	

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

Plaintiff filed this medical malpractice suit for the wrongful death of her husband after the recent enactment of O.C.G.A. § 9-11-9.2. O.C.G.A. § 9-11-9.2 requires a plaintiff in a medical malpractice case file contemporaneously with the complaint, a medical authorization form that directs the plaintiff's, or plaintiff's decedent's, treating physicians to release protected health information to the defendant's attorney. Plaintiff filed a medical authorization form with her complaint. Defendants' moved to dismiss Plaintiff's complaint on the grounds that the medical authorization filed by Plaintiff failed to meet the requirements of O.C.G.A. § 9-11-9.2. Plaintiff responded to Defendants' motion asserting, *inter alia*, that the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. §§ 1320d *et seq.*, and its implementing regulations, preempt the requirements of O.C.G.A. § 9-11-9.2.[1]

[1] The Plaintiff also asserted that O.C.G.A. § 9-11-9.2 violated both the Georgia and United States Constitutions; that the medical authorization she filed met the requirements of O.C. G.A. §9-11-9.2; and, alternatively, that she be permitted to amended her filing with another authorization if the authorization originally filed did not meet the requirements of O.C.G.A. § 9-11-9.2.

With HIPPA, Congress established national standards for protection of the privacy of protected health information. With certain exceptions not applicable here, HIPPA and its implementing regulations expressly preempt all contrary provisions of State law except those that are "more stringent" than the federal law. Pub. L. No. 104-191, § 264(c)(2), 110 Stat 1936 (1996)(found as Note to 24 U.S.C. § 1320d-2); 45 C.F.R. § 160.203(b) (2005).

The medical authorization requirement of O.C.G.A. § 9-11-9.2 is *less* stringent - not *more* stringent - than HIPPA's requirements. For example, under HIPPA an authorization for protected health information can be revoked in writing "at any time" by the individual providing the authorization. 45 C.F.R. §§ 164.508(b)(5) & (c)(2)(i). O.C.G.A. § 9-11-9.2 does not contemplate a plaintiff's ability to revoke - at any time - the authorization provided. In fact, a plaintiff's unilateral revocation of the authorization required by O.C.G.A. § 9-11-9.2 would appear to be antithetical to the terms of the statute.

Under HIPPA, a State law can be "more stringent' - so as to avoid preemption – if it "reduce[s] the coercive effect of the circumstances surrounding the express legal permission [to release protected health information]". 45 C.F.R § 160.202 (2005). In contrast, O.C.G.A. § 9-11-9.2(a) directs the dismissal of a plaintiff's suit for failure to file the authorization the statute mandates. As such, O.C.G.A. § 9-11-9.2 does not *reduce* the coercive effect of the circumstances surrounding the plaintiff's permission contained in the mandated authorization, but rather *increases* the coercive circumstances surrounding the plaintiff's grant of permission to release protected health information.

Inherent in the HIPAA regulatory scheme is an individual's right, in the litigation context, to prior notice of, and the opportunity to object to, each particular disclosure of protected information. *See* 45 C.F.R. § 164.512(e)(1)(i) – (vi) (2005). In contravention of HIPPA, O.C.G.A. 9-11-9.2 (including the statute's provision allowing for the defendant's attorney *ex parte* communications with the plaintiff's, or plaintiff's decedent's, treating physicians) provides the plaintiff no prior notice of, and opportunity to object to, each particular attempted disclosure of protected information.[2] It is noted that other discovery tools under the Georgia Civil Practice Act, such as depositions and requests for production to non-parties, which provide for notice and an opportunity to object, remain available to defendants as means for obtaining information from a plaintiff's, or plaintiff's decedent's, treating physicians.

THEREFORE since this Court concludes HIPAA and its implementing regulations preempt O.C.G.A. § 9-11-9.2; and, upon consideration of the parties' arguments, the matters of record and the applicable law,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss for Failure to Comply with O.C.G.A. § 9-11-9.2 is **DENIED**.

SO ORDERED this 26th day of July, 2005.

/s/ Henry M. Newkirk
HENRY M. NEWKIRK, Judge
State Court of Fulton County, Georgia

[2] The same conclusion reached here – that HIPPA does not permit *ex parte* communication by a defense attorney with a plaintiff's treating physicians has been reached by other Courts considering the issue. *See e.g.*, Crenshaw v. MONY Life Insurance Co., 318 F. Supp.2d 1015 (S.D. Cal. 2004); Law v. Zuckerman, 307 F. Supp.2d 705 (D. Md. 2004); *Or. Denying Defs.' Mot. to Compel & Denying Pls.' Mot. for Atty. Fees*, Thelman Jameel Ibrahim v. Eric S. Furie and The Buckhead Sports Medicine and Spine Center, P.C., State Court of Fulton County, Georgia, Civil Action No. 05VS077614J (Jun. 24, 2005)(J. Bessen).