

Jumping through Two Hoops

HIPAA and State Law Compliance: the Problem of the Failure of Federal Preemption

Bruce Merlin Fried, Esq.

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ShawPittman LLP



HIPAA: The Law of the Land?

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- Sort of, or is it maybe?
 - One national privacy standard would:
 - Be easier to administer
 - Create uniform privacy protection for us all.
 - BUT...
 - Don't forget about federalism
 - And then there's the abortion issue.
 - SO....
 - HIPAA is the law of the land, except...



The Law

The General Rule


- HIPAA § 261 creates part C of Title XI of the Social Security
- § 1178 -- Effect of State Law
- “(1) General Rule--Except as provided in paragraph (2), a provision or requirement under this Part, or a standard or implementation specification..., shall supercede any contrary provisions of State law, including a provision of State law that requires medical or health plan records...to be maintained or transmitted in written rather than electronic form.”





The Law

The Exceptions

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- HIPAA § 1178
 - “(2) Exceptions --A provision or requirement...or a standard or implementation provision..., shall not supersede a contrary provision of State law...if”:

The Law

The Exceptions

§ 1178 (2)

- (A) the Secretary determines the provision
 - (i) is necessary
 - (I) to prevent fraud and abuse;
 - (II) to ensure appropriate State regulation of insurance and health plans;
 - (III) for State reporting of health care delivery or costs; or
 - (IV) for other purposes; or
 - (ii) addresses controlled substances, or



The Law

The Exceptions

- § 1178 (2)
 - (B) “subject to section 264(c)(2) of [HIPAA], relates to the privacy of [IHI].”
- HIPAA § 264 (c)
 - “(2) Preemption -- A regulation...shall not supercede a contrary provision of State law, if [it is] more stringent than the requirements, standards,... imposed under the regulation.”



The Regulation

- 45 CFR Part 160, Subpart B
- §160.203 General Rule and Exceptions --
A standard, requirement or implementation specifications ...that is contrary to a provision of State law preempts the provision of State law...” unless
- (b) The provision of State law relates to the privacy of health information and is more stringent than a [HIPAA Privacy] standard...



So... What's Contrary?

- §160.202 Contrary....means:
 - (1) A covered entity would find it impossible to comply with both the State and federal requirements; or
 - (2) The provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of part C of title XI of the Act or section 264 of Pub. L. 104-191, as applicable.



So... What's More Stringent?

- §160.202 More Stringent means...a State law that meets one or more of the following criteria:
 - (1) the State law prohibits or restricts a use or disclosure that would be permitted by HIPAA, except if the disclosure is:
 - Required by the Secretary to determine HIPAA compliance, or
 - To the individual who is the subject of the IIHI



So... What's More Stringent?

- §160.202 More Stringent means, ...
 - (2) State law permits greater rights of access or amendment, provided that State law which authorizes or prohibits disclosure of PHI about a minor to a parent or guardian.
 - (3) State law provides a greater amount of information to the individual,
 - (4) State law narrows the scope or duration of an authorization or consent for use or disclosure of PHI,



So... What's More Stringent?

- §160.202 More Stringent means,...
 - (5) With respect to record keeping or accounting disclosures, provides for the retention or reporting of more detailed information or for a longer duration.
 - (6) Generally, provides greater privacy protection for the individual.



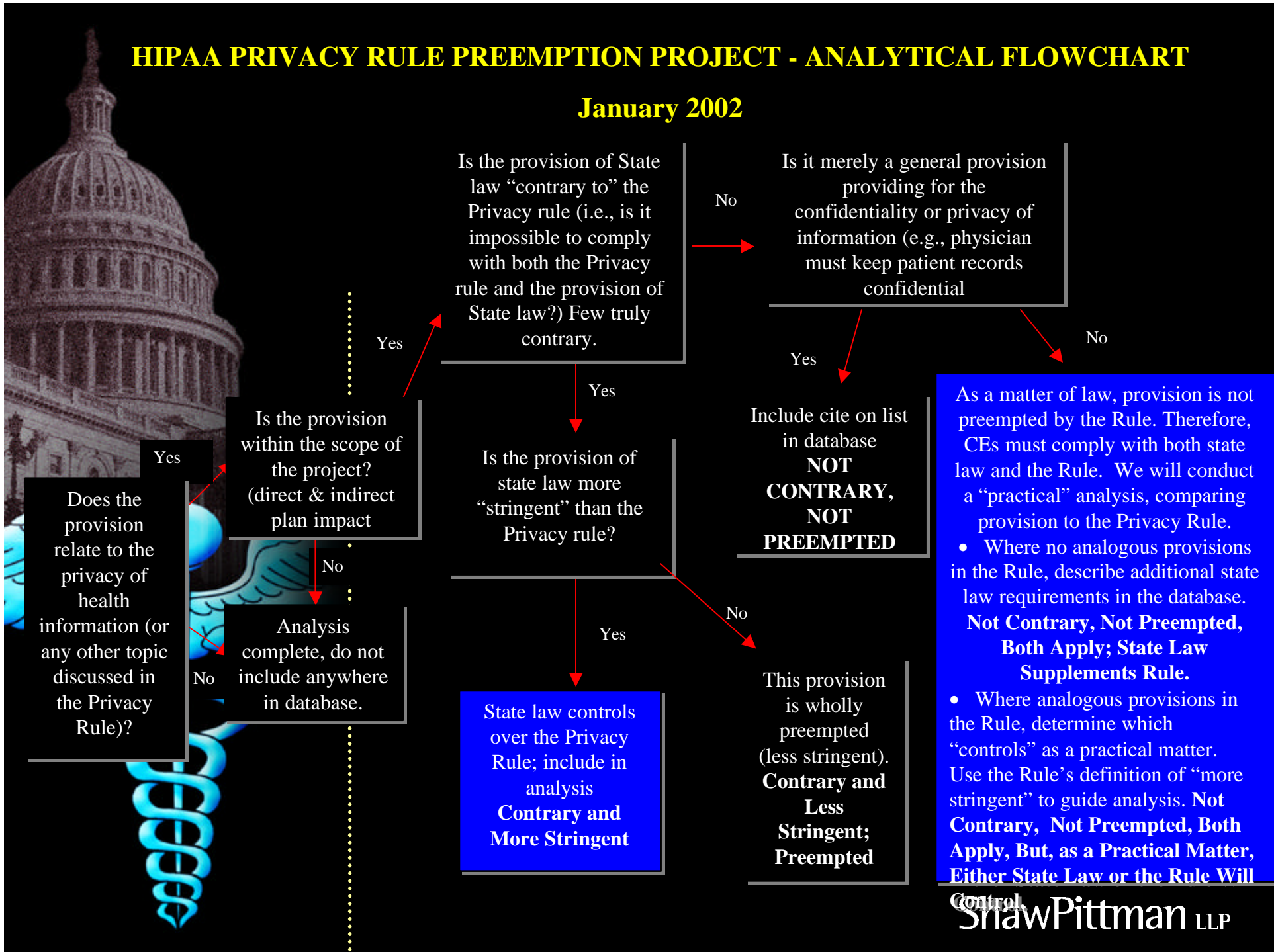
Shaw Pittman's Preemption Project

- Chosen by BCBSA and HIAA to conduct national preemption analysis.
- Other health plan associations expected to join.
- Objective--A national preemption standard for health plans
- 50 States, DC, PR, VI, GU
- Review of
 - Statutes
 - AG opinions
 - Case law based on above
 - Regs
 - Con. Law



HIPAA PRIVACY RULE PREEMPTION PROJECT - ANALYTICAL FLOWCHART

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What About the Constitution?

- Quintiles v. WebMD, USDC, Eastern District of N. Carolina, No. 5;01-CV-180-BO(3)
- “The Dormant Commerce Clause prevents the individual states from regulating the interstate transmission of data.”
- “It is well established that the Commerce Clause precludes a state from regulating a commercial transaction outside its jurisdiction, even if the article of commerce at issue had a connection to that state or the effect of that transaction would be felt by that state.”



ShawPittman

Providing Comprehensive Legal Services
for the Health Care Community

Bruce.Fried@ShawPittman.com

202-663-8006

2300 N Street, NW

Washington, D.C. 20037

Washington Virginia New York

Los Angeles London

ShawPittman LLP

