

## **LIABILITIES**

*Interstate Compact Development Template* **[DRAFT DATED JUNE 17, 2009]**

### **1. Component, Element, or Area for Consideration:**

Liabilities (defined below) that may arise in connection with the transfer of protected health information (“PHI”) across state lines and its subsequent use or disclosure.

### **2. Purpose and Description of Component, Element or Area for Consideration:**

The purpose of the compact is to provide legal protection to (A) persons (individuals and entities) of Responding States if they provide PHI to legitimate users in a Requesting State whose laws are less stringent than the laws of the Responding State, as well as to (B) persons of Requesting States if they receive PHI which is subsequently used or disclosed in a manner that would otherwise violate the Responding State's laws. This section addresses the nature of such liabilities.

An important assumption is that state laws related to PHI use and disclosure, and related liability laws, differ and cannot be easily harmonized. The Liability issue would disappear (or at least be greatly minimized) if the interstate compact statutes in effect harmonized state law.

Another assumption, because the real party in interest injured by the disclosure of PHI is the patient, is that each state (as the provider state) can reach the conclusion that the benefits to its citizens of allowing access to health records by out-of-state providers outweighs what would otherwise be a the violation of its privacy laws.

The liabilities could take the form of: (i) claims by a patient or other holders of rights with respect to PHI, (ii) claims by third parties seeking indemnification because of claims by the parties described in subpart (i), and (iii) claims by governmental entities, whether in a court or via an administrative action and whether civil and criminal in nature (collectively “Liabilities”). The person seeking protection from Liabilities could be either the person transferring the PHI or the person receiving the PHI.

### **3. Summary of Various Approaches:**

We have identified three approaches to address the Liabilities of disclosers of PHI that may arise as PHI is transferred across state lines and subsequently used or disclosed.

First, Liabilities could be eliminated by providing immunity in the providing state for specified conduct in the requesting state. In other words, a requesting person who follows his or her own state laws on use and disclosure of PHI would incur no Liability in any state that is part of the compact [and the transferor to such person would incur no Liability if the transfer was in accordance with the provisions of the compact]. A variation of absolute immunity might be qualified immunity, such as protecting “good faith” behavior, or limited liability such as damage caps, with or without a mandated dispute resolution process such as arbitration before an interstate compact commission tribunal. State courts, however, are split on the constitutionality of damage caps.

A second approach would be to provide indemnification, whereby either the party in the Requesting State or the party in the Responding State [or both] agrees to defend and hold the other party harmless for any breach of [their home] state's laws regarding the exchange or disclosure of PHI. This right of indemnification could also arise as a matter of law rather than express agreement. A variation might be to limit indemnification, such as by amount (similar to a schedule of damages) and mandated dispute resolution or approval process before an interstate compact commission tribunal.

A third approach is to address liability through insurance. Under this approach, insurance coverage would be available to the parties for expenses incurred from Liabilities. Several alternatives may be available to fund the insurance coverage – by private parties through mandatory requirements for coverage (like auto insurance), a state-funded pool (like malpractice insurer guaranty coverage), or experience-based like worker's compensation or a combination of the above.

A variation of the insurance approach might be to limit coverage such as state-funded pools commonly do, or to mandate private parties carry specified amounts of liability insurance such as the \$1-million limit that hospitals commonly require physicians to carry, with or without an explicit concomitant right of the injured party to seek additional compensation from the responsible party (tortfeasor).

#### **4. Implications, Pros/Cons, Benefits/Risks of Each Approach:**

(a) immunity: This would have the potential of avoiding most, if not all of the litigation since it would preclude, or in cases of qualified immunity limit, recovery. The negative would be that persons harmed (whose PHI was disclosed) might not be compensated and this might encourage less care by persons handling the PHI. As a result, it seems likely that immunity would be more narrow than indemnification or insurance. In addition, immunity can be absolute or qualified/limited, and that states may have different views of immunity. Immunity provisions appear throughout the ORC, and assumedly as frequently in other states, and the courts generally permit them. Some interstate compacts provide immunity but do not apply broadly to private parties.

(b) indemnification: Although persons harmed would be compensated, it might encourage litigation because of the possibility of recovery. Limiting the amount of indemnification and mandating an ADR-like process before the interstate compact commission may reduce litigation.

(c) insurance: As in the case of indemnification, an insurance mechanism might encourage litigation, although that potential may be reduced if the amount of mandated insurance is limited and an ADR-like process before the interstate compact commission is required. Another negative is the cost that either private insurance or a state pool would add to health information exchange.

### **5. Potential Challenges and Analysis of Feasibility of Each Approach:**

(a) immunity: The key challenge would be determining who and under what circumstances immunity would be granted. Absolute versus qualified immunity must be evaluated in terms of value, and whether full or limited immunity face unfavorable state constitutional law precedent in any of the compact states.

(b) indemnification: The key challenge would be determining who bears the cost of indemnification. Do judicial precedents in each of the compact states permit indemnification to be limited in amount, or constrained by process such as mandating ADR before the interstate compact commission? Another issue is the identification of the indemnifying party. Many states do not themselves indemnify as a matter of law, at least Ohio does not for matters not budgeted for in the state's biennial budget.

(c) insurance: The key challenge would be funding and then administering the insurance coverage. Do judicial precedents in each of the compact states permit insurance mandates, recovery beyond mandated insurance minimums, and-or mandated use of dispute resolution processes such as required use of an interstate compact commission tribunal? The State of Ohio for the most part is self-insured. It may be difficult to convince the legislature to take on this potential liability and pay for or contribute to insurance to cover privacy breaches.

### **6. Comments:**

Before addressing solutions to liability exposure from state to state, it should be determined if there are liability exposures because of differing PHI and HIE provisions or judicial precedent, and if any such differences can be eliminated by inclusion in the interstate compact provisions of standardized liability and related statutes.

Federal preemption (or, at the very least, leadership) may be the only viable solution to the states differing public policies causing them to enact different privacy laws and the resulting problems associated with attempting compliance with the differing state laws.

### **7. References:**

R.C. 3747.01 – Midwest interstate compact and commission on low-level radioactive waste.

\* Sovereign Immunity - Article VII (F): The immunity granted to state employees and agencies is dimensionally different than traditional immunity in Ohio. The statute does not incorporate notions of the Ohio Court of Claims, and appears to make immunity absolute by not recognizing the availability of the court of claims as a venue. Conversely, certain conduct is actionable and not subject to immunity. That actionable conduct is also different than conduct defined in R.C. 109.362. Because it is a different standard, it is unclear how this meshes with traditional state employee immunity; however, as this was enacted by the General Assembly it would be effective for a waiver of immunity.

\* Commission and Commission members immunity – Article III(M): Commission is separate from the party states. Members are not personally liable for actions in official capacity. Liabilities of the commission are not liability to party states.

- \* Indemnification – Article VII(G) Generator indemnity, Article V(F) Pro rata Party State indemnity: If liability is established in spite of the immunity provided then the “generator” must indemnify the employee or state agency. If all else fails and the pools don’t cover the liability, then party states share the expense on a pro rata basis.
- \* Insurance pools - Articles III (P) Remedial Action Fund, and VI(O) Long-term Care Fund: These establish funds a liability or cost avoidance tool.

R.C. 3915.16 Interstate insurance product regulation compact, and

R.C. 5149.21 Interstate compact for adult offender supervision

- \* Each establishes a separate interstate commission. The commission can be sued.
- \* R.C. 3915.16 provides that the commission is solely responsible for its liabilities. R.C. 5149.21 does not contain the same term.
- \* Each has the same structure for qualified immunity, defense and indemnification.

Members, officers, director and employees are immune from suit and liability, personal or official capacity except for damage from intentional or willful and wanton misconduct.

The commission will assist in defense of commissioner (commission member) of/from a compacting state.

The commission will indemnify commissioner of a compacting state except for gross negligence or intentional wrongdoing (or intentional or willful and wanton misconduct).

R.C. 5103.20 Interstate compact for placement of children

- \* Establishes a separate commission.
- \* qualified immunity, defense and indemnification
- \* Commission staff director and employees are immune from suit and liability except for criminal acts or intentional or willful and wanton misconduct.
- \* Liability if established within a state cannot exceed the limits of liability set forth under the laws of the state where act occurred.
- \* The commission will assist in defense of commissioner (commission member) of/from a compacting state.
- \* Employees of the commission will be held harmless for acts within the scope of employment.