Unclaimed Property Challenges in the Health Care Industry

Kendall Houghton and Matt Hedstrom, Alston & Bird LLP

A multistate unclaimed property audit campaign affecting both health care providers and health insurance companies across the country is well underway. Those audits are targeting large national health care providers and insurance companies as well as regional health care providers. While each audit will ultimately be unique, the audits all raise some common issues that the health care industry should be aware of both from the perspective of the audits and as a matter of general accounting/business practices. Notably, the audits raise issues concerning: (1) the intersection of data privacy and security regulations with state unclaimed property departments' alleged need for sensitive personal data, (2) the intersection of state insurance recoupment laws and state unclaimed property laws, (3) the proper general ledger accounting for complicated health care transactions, and (4) the extent to which federal law may preempt a state's ability to assert its custodial unclaimed property jurisdiction over property held by a health care provider or insurer that is also subject to federal regulation (either of its business, or of transactions, or of how it accounts for such transactions).

Data Privacy and Security

HIPAA

In the context of health care, data privacy and security are paramount. At the surface, there is a potential for state unclaimed property audits to involve a review of a vast amount of personal information, for example, name and address information of the insured and patients. Some of this information could constitute information protected under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and regulations promulgated under that act. By providing state auditors and contract audit firms with files containing patients' names, dates of birth, and addresses, HIPAA experts have advised that a provider or insurer under audit would be disclosing protected health information (PHI) as defined by HIPAA, even in the absence of information relating to the actual health care that was provided to such patients. It is also possible that providing a patient's Social Security Number (SSN) without any other identifying information would be considered PHI. To the extent audit firms follow historical audit practices, one audit technique will be to utilize SSNs and other PHI, at least for those patients with an address in the participating states, to make certain determinations about what property may be presumed abandoned, including use of the Social Security Administration's Death Master File to identify deceased owners.[1]

Three possible exceptions *may* permit such data to be provided to auditors under HIPAA: (a) a disclosure required by law;[2] (b) a disclosure for a law enforcement purpose to a law enforcement official;[3] and (c) a disclosure to a health oversight agency for oversight activities authorized by law,[4] including unclaimed property audits. However, it is worth noting that these exceptions have not been addressed by a court or regulatory agency in the specific context of an unclaimed property audit.

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- ***Required by law.*** HIPAA permits disclosure of PHI where required by law: "A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law."[5] The state unclaimed property laws certainly authorize states to conduct audits, and many laws expressly allow the state to utilize a third-party auditor. However, it is less clear whether each state's law *mandates* cooperation with the audit and, more specifically, no state statute authorizing unclaimed property audits specifically addresses or requires the disclosure of PHI to the state/auditor, though many states provide for the state's issuance of subpoenas to parties under an unclaimed property audit. If a state law merely permits a disclosure, it is likely not "required by law" under HIPAA; and if state law authorizes an unclaimed property audit of a health care provider or insurer, but does not expressly require disclosure of PHI, it is not clear that such disclosure is "required by law" under HIPAA, especially if the audit might be conducted in another manner that would not require disclosure of PHI.
- ***Law enforcement purpose.*** This exception has historically been understood as allowing a hospital to disclose information to a law enforcement agency when the patient is the subject of the investigation (not the hospital). This obviously does not fit neatly within the context of an unclaimed property audit. It is highly questionable whether a contingent fee audit firm would meet the HIPAA definition of a law enforcement official; moreover, there is no language in the exception allowing the law enforcement official to contract with a *third party*.
- ***Health oversight agency.*** It is at best arguable whether the state unclaimed property departments or administrators would be considered a "health oversight agency." That term is defined as "an agency or authority of the United States, a State, a territory, a political subdivision of a State or territory, or an Indian tribe, *or a person or entity acting under a grant of authority from or contract with such public agency*, including the employees or agents of such public agency *or its contractors or persons or entities to whom it has granted authority, that is authorized by law to oversee* the health care system (whether public or private) or *government programs in which health information is necessary to determine eligibility or compliance*, or to enforce civil rights laws for which health information is relevant."[6] The U.S. Department of Health and Human Services is the most obvious example of a health oversight agency, as are the various state equivalents (such as the N.Y. State Department of Health). It is unclear whether the state unclaimed property administrators are "authorized by law to oversee the health care system . . . or government programs in which health information is necessary to determine eligibility or compliance."

In summary, the ability of a company to disclose PHI to an audit firm, a third party, in compliance with HIPAA is not entirely clear, and audit firms and their state clients may not have a sophisticated grasp on the issue. Companies have several options for proceeding, including:

- Confirm that the company's internal legal and compliance teams are comfortable that one of the HIPAA exceptions is applicable and seek certifications to this effect from the auditor.
- Request that each state's attorney general provide an opinion regarding why the state believes that the company is permitted to disclose PHI under HIPAA.
- Attempt to design an alternative approach whereby the company avoids providing PHI to the audit firm, for example, by producing financial/accounting data related to patient accounts that is de-identified (i.e., without any PHI included).

These issues should be discussed by internal legal counsel with HIPAA compliance oversight.

California's New Data Privacy Law

The recent adoption of privacy laws by both the European Union (EU) and California[7] heighten the concerns with proper handling/transmission of personal data in connection with unclaimed property audits. While implementation of the EU's General Data Protection Regulation 2016/679 (GDPR) occurred in May 2018, and the California Consumer Privacy Act of 2018 (CCPA) does not become effective until January 1, 2020,

a holder that is subject to these laws must develop policies, procedures, and infrastructure to come into compliance with the law's rules for the collection, use, and disclosure of personal information. A wide range of issues to consider with clients pertaining to the GDPR and CCPA, include:

- Which entities will be impacted—for example, GDPR is aimed at protecting European citizens, but if a company based in the United States collects or processes personal data of EU residents, the consensus appears to be that it is covered by the new rules. A similar analysis is required with respect to the California law.
- How this law could impact what is disclosed to contract audit firms conducting unclaimed property exams (e.g., must existing nondisclosure agreements be reviewed and potentially revised?), and how the CCPA will impact data transmission practices in general.
- Whether the new California law's private right of action for security breaches resulting from a business' failure to implement and maintain reasonable security measures could apply when a business discloses covered information to a state auditor, which then has a security breach.

Application of Unclaimed Property Laws to Payment Discrepancies

As an initial matter, it is critical to understand the accounting behind credit balances. Unclaimed property issues are uniquely prone to being driven by how a company accounts for a particular type of liability. The contracts between providers and insurance companies generally spell out how much the provider will be reimbursed by the insurance company for health care services rendered based on (1) the coverage provided by the contract between the patient and the insurance company, and (2) the nature of the service provided by the provider to the patient.

Frequently, the amount paid by an insurance company does not perfectly align with the amount the provider expected to receive under the contract and initially recorded on the provider's books as an estimated receivable. Such payment may either be greater than (i.e., an apparent overpayment) or less than (i.e., an apparent underpayment) the amount the provider expected to receive. Such payment discrepancies may arise for a number of reasons, including: (a) the payment is one for which the provider cannot locate a corresponding patient account; (b) an insurance company pays based on a plan that is different from the patient's plan; (c) an insurance company pays for a patient that does not have insurance coverage with the insurance company; (d) an insurance company pays for services that are not covered under the patient's insurance plan; (e) the insurance company or provider improperly interprets the amount due to be paid under the contract; or (f) the insurance company simply pays the wrong amount because of a clerical error (e.g., the insurance company pays the same claim twice, or the amount paid is incorrect—either over or under the expected amount—due to keying errors by the insurance company, etc.).

To summarize, payment discrepancies (both overpayments and underpayments) may result from errors by the provider in its interpretation of the insurance contract and calculation of the amount it expects to be paid; or they may result from errors by the insurance company in calculating the amount due the provider under their contract. But, not all overpayments represent potential unclaimed property and many overpayments are "estimated" or "contingent" accounting entries or otherwise merely "apparent." A thorough review of the pertinent facts and circumstances must be conducted in this regard; for example, (1) what are the health care provider's accounting and billing practices—are the providers recording estimates, or are these true overpayments? (2) is there a process to research overpayments? (3) the existing contractual agreements and controlling provisions between insurers and the providers; and (4) the historical treatment of overpayments and underpayments (e.g., netting practices).

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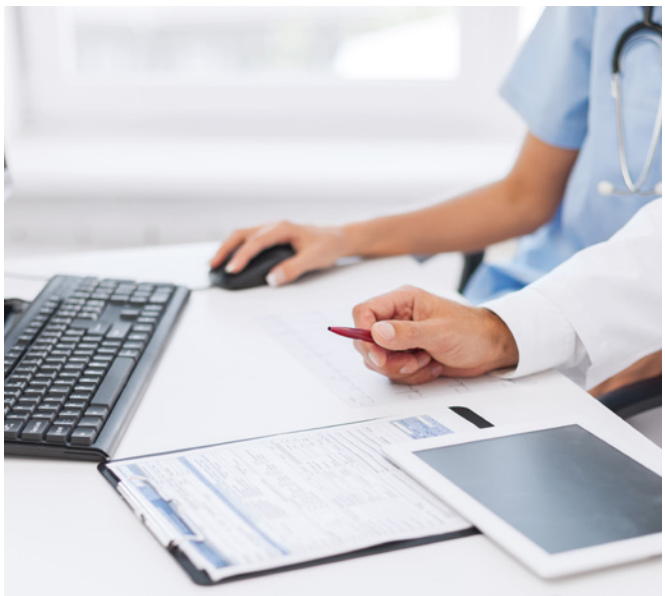

Another issue of particular relevance to the health care industry's defense of state unclaimed property audits is the extent to which state unclaimed property laws are, in fact, subject to federal preemption.

The books and records of providers may periodically reflect apparent and/or overpayments made by insurance companies. Many of these same principles also may serve as defenses regarding apparent credit balances on the books and records of an insurance company as it relates to payables (potentially) owed to health care providers. In particular, an insurance company may find itself in a situation where it has paid a provider less than the applicable contract dictates, calling into question whether the delta constitutes potential unclaimed property.

Companies must consider the applicability of state unclaimed and abandoned property laws to these overpayments, specifically given that many states have enacted laws preventing an insurance company from recovering such an overpayment after a specified period of time (known as recoupment laws or recoupment statutes), which implicates the derivative rights doctrine. The derivative rights doctrine provides that a state's custodial rights to property are derivative to those of the owner; hence, where property rights of the alleged owner have not yet vested, or conditions have not been satisfied by the owner, there is no property interest to which the unclaimed property laws can attach. Similarly, the fact that a payable or credit balance is recorded in a health care industry holder's general ledger will not be dispositive (though many state laws provide that such a record constitutes prima facie evidence of the holder's obligation and shifts the burden to rebut the existence of an obligation to the holder).

While these recoupment laws vary significantly, there are critical threshold legal considerations involved in determining whether these laws apply. In particular, companies should ensure that the procedural requirements imposed by the recoupment law are satisfied and that no exceptions apply. Also, it is critical to determine whether those laws apply in the first instance. Most state recoupment laws are included within the title/chapter of the state's statutes (or administrative code) regulating insurance companies licensed to do business in the state and are part of a general scheme governing insurance companies' payment and claim adjudication practices (i.e., prompt payment acts). Separate and apart from the application of the state recoupment statutes, providers have other defenses to escheatment or exemptions with respect to commercial credit balances.

Federal Preemption

Another issue of particular relevance to the health care industry's defense of state unclaimed property audits is the extent to which state unclaimed property laws are, in fact, subject to federal preemption. Federal law may either expressly preempt state unclaimed property laws (a relatively rare occurrence) or impliedly preempt those laws (e.g., federal law can "occupy the field" if such laws are sweeping in their effect and do not leave room for further regulation by a state agency; similarly, if a party cannot simultaneously satisfy a federal and a state law, federal law trumps state law).[8] An easy-to-understand example of express preemption is found in the Employee Retirement Income Security Act (ERISA), which preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."[9] Courts have held that ERISA preemption applies to unclaimed property laws when they directly affect the assets of an ERISA plan, as well as the administration of the plan when the state is attempting to substitute itself for the plan in holding the unclaimed amounts on behalf of their owners.[10]

In the health care industry, the potential for federal preemption defenses to be raised is significant, and both insurers and providers must take care to identify instances of express and implied preemption where the dictates of federal law appear to override or run counter to the policies informing state unclaimed property law. We expect that such opportunities may arise when federal law either establishes or abrogates property rights, claims obligations, and limitations periods, and there may well be additional defenses that are specific to the type of obligation that is under review. For example, we have discussed Medicare subsidies (e.g., retiree drug, low-income) and Affordable Care Act Early Retirement Reimbursement Program payments with clients to vet potential federal preemption defenses where the U.S. Government is the source of funds.

Internal Compliance Review + Strategic Audit Defense + Proactive VDAs = Effective Risk Management

Participants in the health care sector should prepare to undertake a careful review of their business models, accounting practices, contractual provisions, basic multistate unclaimed property compliance program, and issues of related concern in light of the current enforcement landscape. Each of these components interacts with the others to establish an effective set of internal controls for a company, and implementation of changes in accounting policies and procedures, as well as in business models (contracts, customer terms and conditions, and the like), may optimize compliance and mitigate risk.

Employment of a range of audit best practices, beginning with execution of an effective confidentiality and nondisclosure agreement by the company and its audit firm, is critical to optimizing the outcome of an examination, should one be commenced.

Voluntary disclosure agreements (VDAs) are the third leg of the risk management stool, in combination with an internal compliance review and adoption of audit best practices. Numerous states offer voluntary disclosure programs that allow a company that has not yet been contacted by the state for examination purposes to voluntarily come forward and self-identify any liabilities. Payment of such liabilities pursuant to a formal VDA program (i.e., implemented by statute or regulation) or an informal program (negotiated on an ad hoc basis with a willing administrator) should result in a partial or complete waiver of any interest and penalties that might otherwise have been assessed against the value of the past-due property. C

Kendall Houghton and **Matthew Hedstrom** are partners with Alston & Bird LLP, where both practice in the fields of multistate unclaimed property and state and local tax law. Both are co-authors of the Bloomberg BNA treatise on unclaimed property (No. 1600, Multistate Tax Management Portfolios) and are frequent speakers and authors on cutting edge unclaimed property topics.

Thanks go out to the leaders of the Tax and Finance Practice Group for contributing this feature article: **Michael N. Fine**, Wyatt Tarrant & Combs LLP, Louisville, KY (Chair); **Justin Cook**, Bricker & Eckler LLP, Columbus, OH (Vice Chair—Research & Website); **Laurence A. Kraemer**, Northwell Health, New Hyde Park, NY (Vice Chair—Strategic Planning and Special Projects); **Vallerie Propper**, University Hospitals, Shaker Heights, OH (Vice Chair—Publications); **Scott D. Schitter**, Mercy Health, Cincinnati, OH (Vice Chair—Membership); **Joel D. Swider**, Hall Render Killian Heath & Lyman PC, Indianapolis, IN (Vice Chair—Educational Programs); **Sean T. Nakamoto**, Baird Holm LLP, Omaha, NE (Social Media Coordinator).

Endnotes

1 The "DMF" could be used to establish a presumption of abandonment and reportability, or a presumption of returned mail to trigger the running of a dormancy period. This practice has been rife in life insurance audits, both because life insurance contracts condition the payment of proceeds upon death of the insured and because the unclaimed property statutes addressing life insurance specifically address death as a necessary condition to a presumption of abandonment.

2 45 C.F.R. § 164.512(a).

3 45 C.F.R. § 164.512(f).

4 45 C.F.R. § 164.512(e).

5 45 C.F.R. § 164.512(a)(1).

6 45 C.F.R. § 164.501. (Emphasis added.)

7 *See* David C. Keating and David Caplan, *Privacy & Data Security Advisory: Landmark New Privacy Law in California to Challenge Businesses Nationwide* (July 3, 2018), *available at* https://www.alston.com/en/insights/publications/2018/07/landmark-new-privacy and Robert D. Phillips, Jr. and Gillian H. Claw, *An Update on the California Consumer Privacy Act and Its Private Right of Action* (Sept. 12, 2018), *available at* https://www.alston.com/-/media/files/insights/publications/2018/09/california-consumer-privacy-act.pdf.

8 *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990).

9 ERISA Section 514(a).

10 *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983). *See also Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46-47 (1987); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990); *Commonwealth Edison v. Vega*, 174 F.3d 870 (7th Cir. 1999); *Blue Cross & Blue Shield of Fla., Inc. v. Department of Banking & Fin.*, 791 F.2d 1501 (11th Cir.1986); *The Manufacturers Life Ins. Co. v. East Bay Restaurant and Tavern Retirement Plan*, 57 F. Supp. 2d 921 (N.D. Cal. 1999).