

Sued for ransomware attack? Hacked health system hit with class action claim

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Effective Jan 26, 2023
Published Jan 30, 2023
Last Reviewed Jan 26, 2023

Health IT

A patient has brought a class action suit against a health system, claiming its negligence led to the breach of privacy and potential harm for which the plaintiff seeks damages — an ominous sign for practices in a time of rising ransomware attacks ([PBN 1/23/23](#)).

On Dec. 29, 2022, Leeroy Perkins filed a jury trial demand in the District Court of Northern Illinois against CommonSpirit Health, a system from which he'd received care via Virginia Mason Franciscan Health in Washington state. The system suffered a ransomware attack between Sept. 16 and Oct. 3, 2022, during which an "unauthorized third party may have gained access to certain files, including files that contained personal information" of patients of Virginia Mason's 12 hospitals, according to CommonSpirit's own admission. Overall the breach involved more than 620,000 patients.

Perkins' suit alleges negligence and seeks damages and injunctive relief, claiming that the breach "occurred as a direct result of Defendant's failure to implement and follow basic security procedures, and its failure to follow its own policies, in order to protect its patients' PII [personal identifiable information] and PHI [protected health information]." Co-litigants are not named.

No private right under HIPAA, but ...

While Perkins mentions HIPAA and CommonSpirit's HIPAA obligations in his suit, his claim is not a HIPAA claim; it is well established in law that there is no private right of action under HIPAA. However, sometimes claims involving PHI can be made on other grounds.

For example, in *Byrne v. Avery Center for Obstetrics and Gynecology*, a plaintiff sought and received damages because her provider had surrendered her PHI to an attorney in violation of state law. The Connecticut Supreme Court overturned the judgment on the grounds that federal HIPAA, which does not allow private action, preempted the state law, which did. The Court later overruled itself, deciding that would be true only if the state law were in direct conflict with HIPAA law, and that it was not ([PBN 1/28/19](#)).

"When you have a statute like HIPAA that doesn't provide for a private cause of actions, sometimes plaintiffs will cite the statute just as a general standard of care by which you could [allege] a breach of duty, so they don't have to rely on the [more] general allegation that the defendant had a duty to protect personal information," says Avery A. Dial, co-deputy chair of the Data Privacy & Cybersecurity Practice Group at Kaufman Dolowich Voluck in Fort Lauderdale, Fla.

Weak negligence claim?

Even reenforced by HIPAA, that negligence claim may be hard to put over. Chenxi Wang, founder and general partner at venture capital firm Rain Capital, says "it is difficult to prove negligence unless you have actual, operational proof," Wang says.

"The suit alleges that CommonSpirit 'employed inadequate data security measures to protect and secure the PII and PHI,' but never actually provides any proof that this was indeed the case," Wang says. "CommonSpirit is covered by HIPAA, but even if CommonSpirit has implemented adequate protection measures in the eyes of HIPAA, they may still experience a successful breach because there could be unknown vulnerabilities in their systems or applications."

In this case negligence would "mean [CommonSpirit] intentionally didn't do the right thing [against] an unforeseeable event," Wang says.

Dial suggests that will require more than what's in the complaint. "They can't go into court and just say the defendant failed to implement and follow basic security procedures, because then the response is, 'well, how?'" he says.

Also, Perkins' complaint is mainly about what could happen to him and the other plaintiffs, apart from the time and effort the breach has cost them as they monitor medical statements, bills, records and credit and financial accounts and update personal account information. Wang suggests that proof of actual harm will be more convincing than a claim of potential harm.

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That doesn't mean CommonSpirit is out of the woods, though. "Just because the damages don't appear on the face of the complaint, that doesn't mean they can't come out in discovery," Dial says.

While it's not evident from the complaint that actual harm has been caused, "if a breached credential is used to steal the user's identity and financial damages occur, that would be actual harm," Dial adds.

Also, the plaintiff won't be the only one investigating. "The OCR [HHS Office for Civil Rights] will conduct its own investigation, which may result in a fine to the company," Wang says. "If the OCR finds CommonSpirit at fault in adherence to HIPAA regulations, that could be strong ammunition for the plaintiff in this case."

Dial and Wang agree that a settlement may be in the offing in any case. In recent years courts seem to have become more sympathetic to those who suffer data breaches.

"A 623,000 person class, with the amount of documentation and time and the discovery and forensic analysis involved, is really disruptive to a business," Dial says. "So, I could see settlement as a possibility." — *Roy Edroso* (redroso@decisionhealth.com) ■

Resources

- "CommonSpirit Health Provides Cyberattack Update and Notification of Data Breach Involving Virginia Mason Franciscan Health in Washington state," Dec. 1, 2022: www.commonspirit.org/update/notice-of-data-security-incident
- JD Supra / Quinn Emanuel Urquhart & Sullivan, LLP, "Private Data Breach Litigation Comes of Age," Oct. 14, 2022: www.jdsupra.com/legalnews/private-data-breach-litigation-comes-of-2442552/



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