

Court Rejects Class Action for Health Information Security Breach

by Allan D. Jergesen & Rachael Maxwell-Jolly



Hanson Bridgett Health Care Practice Group

HANSONBRIDGETT.COM



A California appellate court recently ruled that a hospital was not liable for a patient information security breach where it could not be shown that any medical information actually had been disclosed. *Eisenhower Medical Center v. Superior Court* involved the theft of an unencrypted computer containing an index of more than 500,000 persons to whom the hospital had assigned a medical record number [226 Cal. App. 4th 430 (2014)]. The plaintiffs brought a class action on behalf of all of the persons whose names appeared on the index, alleging that the hospital had violated the California Confidentiality of Medical Information Act (CMIA) by maintaining their medical information in a negligent manner. Under CMIA, a person whose medical information is improperly disclosed can recover nominal damages of \$1,000, even if he or she suffers no actual harm. Under this theory, the hospital was liable to the class for \$500 million in total damages.

The court dismissed the case on the ground that the breach did not involve medical information as defined by the CMIA. Under CMIA, "medical information" is information in individually identifiable form regarding a person's "medical history, mental, or physical condition, or treatment." Here, the computer contained only the person's name, medical record number, age, date of birth, and the last four digits of the Social Security number. Although the information was individually identifiable, it did not include elements like the person's medical history, mental, or physical condition, or treatment. Therefore, there was no violation of CMIA and no right to recover damages of any kind under it.

The *Eisenhower* case is one of a number of class actions that recently have been brought under CMIA for health information security breaches. Each case has involved the theft or loss of patient information in electronic form covering a large number of individuals. In each instance, class actions have been brought for nominal damages of \$1,000 for each person involved. Given the multiplier effect, this can result in claims in the millions of dollars for what can be minor disclosures. *Eisenhower* was preceded by another appellate court opinion in *Regents of University of California v. Superior Court* [220 Cal. App. 4th 549 (2013)]. There, the court rejected a class action

claim on the ground that the plaintiffs could not demonstrate that the medical information on a stolen notebook computer had actually been viewed by anyone.

The two decisions suggest that the courts are hesitant to impose massive damages on providers who at worst are guilty of security breaches causing minimal or no harm. Nonetheless, the risk to providers remains great. The public is increasingly concerned with the improper disclosure of personal information maintained electronically in large amounts. Plaintiffs' attorneys are available to provide redress to those who have been harmed. The nominal damage provision in CMIA provides the means. Plaintiffs who can show that a mass of electronic medical information was actually viewed in an improper manner may well succeed in collecting large sums under CMIA from a negligent provider.

The class action phenomenon suggests that providers should be especially careful when dealing with electronic media containing health information about large numbers of patients. Such media should be encrypted when stored and transmitted, with the encryption code kept completely separate. Providers that discover security breaches should take immediate steps to recover the information, if possible, in order to prevent its widespread disclosure. They should document any success in this area and should make it clear in their patient notifications if there is no indication that the information actually was viewed. Providers also should review their insurance policies to make certain that they include coverage for damages and defense costs in such instances.

For more info, please contact:



Allan D. Jergesen
Partner
 ajergesen@hansonbridgett.com



Rachael Maxwell-Jolly
Associate
 rmaxwell-jolly@hansonbridgett.com

SAN FRANCISCO

425 Market Street, 26th floor
 San Francisco, CA 94105
 TEL 415-777-3200
 FAX 415-541-9366

NORTH BAY

Wood Island
 80 E. Sir Francis Drake Blvd., Ste. 3E
 Larkspur, CA 94939
 TEL 415-925-8400
 TEL 707-546-9000
 FAX 415-925-8409

SACRAMENTO

500 Capitol Mall, Ste. 1500
 Sacramento, CA 95814
 TEL 916-442-3333
 FAX 916-442-2348

EAST BAY

1676 N. California Blvd., Ste. 620
 Walnut Creek, CA 94596
 TEL 925-746-8460
 FAX 925-746-8490