

# HIPAA, Data Privacy, and National Trends in Data-Breach Litigation

By Jason Zimmerman and Brock Magruder

The Ninth Judicial Circuit's Complex Business Litigation Court recently dismissed with prejudice a class-action data-breach lawsuit against a hospital based on alleged violations of the Health Insurance Portability and Accountability Act (HIPAA) and state law contract claims. In 2011, the hospital fired three employees who improperly accessed patient files to send contact information to a third-party chiropractor. A criminal prosecution followed, and pursuant to HIPAA, the hospital notified its patients whose private information was potentially disclosed. Nevertheless, two patients brought a class action lawsuit asserting various breaches of legal and contractual duties despite the fact that no identity theft or other harm occurred. The hospital successfully dismissed the claims as the plaintiffs were not actual victims of identity theft, and the complaint improperly attempted to enforce HIPAA through a private right of action.

These creatively plead data-breach cases are increasingly common in today's technology driven economy, which dramatically increases exposure to highly-regulated and data-rich sectors like the health care industry. Recent federal cases out of the Seventh and Ninth Circuit have even recognized standing for plaintiffs who have not yet suffered damages related to lost or stolen data. See *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688 (7th Cir. 2015) and *In re Adobe Sys., Inc. Privacy Litig.*, 66 F. Supp. 3d 1197 (N.D. Cal. 2014). Those cases acknowledged a data-breach victim's standing to pursue a lawsuit absent allegations of actual damages in the form of identity theft or financial fraud – a novel premise for the recovery of damages in data-breach cases. Of course, these federal-standing cases do not affect Florida's common-law pleading requirements, hence the above-referenced hospital's success in Florida state court. Moreover, the Eleventh Circuit has not yet ruled on the issue, and Florida law still generally requires a showing of actual damages to sustain a claim in data-breach cases.

With the ever increasing danger of accidental data breaches and targeted hacking, hospitals and other custodians of regulated private information would do well to keep their data protection policies up to date, and educate their employees on the importance of data security.



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