Appeals Court Absolves Sutter Health in Data Breach Case

Scott Graham, The Recorder

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SAN FRANCISCO — Sutter Medical Foundation did not violate California's medical confidentiality act, and expose itself to potentially $4 billion in statutory damages, when a thief stole a computer containing 4 million patients' medical records, the Third District Court of Appeal ruled Monday.

The state's medical privacy statute was not triggered because there's no evidence the thief or anyone else actually looked at the records, Justice George Nicholson wrote for a unanimous panel. "The legislation at issue is the 'Confidentiality of Medical Information Act,' not the Possession of Medical Information Act," he wrote.

It's the second appellate decision in the last year to absolve a health-care center of liability for losing control of patient medical records. *Sutter Health v. Superior Court* reaches the same outcome as the Second District did in a case where a UCLA physician's hard drive was stolen from his home, but the reasoning was slightly different.

In that case, UCLA conceded that patients had adequately pleaded violation of Section 56.101 of the Confidentiality of Medical Information Act, which requires medical facilities to "maintain and store medical information in a manner that preserves the confidentiality of that information." But the Second District ruled that the UCLA plaintiffs didn't meet the damages provision of the statute because no actual breach of confidentiality was shown.

"We agree with this conclusion, but we arrive at the conclusion differently from the *Regents* court," Nicholson wrote, finding no violation of either the liability or damages prongs of the law.

The case is being closely watched by California's health-care industry, which is facing at least nine class actions tied to claims that hospitals and medical groups disclosed patient data in violation of the confidentiality act. The California Hospitals Association, the UC Regents and Consumer Attorneys of California are among those filing amicus curiae briefs.

Suits were filed after somebody broke into Sutter Medical Foundation's administrative offices during the weekend of Oct. 15, 2011, and stole a personal computer with a hard drive containing confidential information for 4 million patients. The data was password-protected but not encrypted. It included health records for about 1 million patients; for the rest it was limited to names, addresses, birthdays and medical record numbers.

Plaintiffs, led by C. Brooks Cutter of Sacramento's Kershaw, Cutter & Ratinoff, contend that the theft caused actual injury by robbing patients of their peace of mind. While there may not be solid evidence that anyone has cracked into the data yet, it can be difficult to trace the source of identity theft, he has argued. And the Confidentiality of Medical Information Act provides $1,000 in statutory damages per violation for the negligent release of medical information, without any showing of actual damages.

Robert Bunzel of Bartko, Zankel, Bunzel & Miller argued to the Third District last month that nobody's privacy was violated. "The history and purpose of the [confidentiality] statute is all about privacy," Bunzel told the court.

The Third District agreed. The liability portion of the statute explicitly refers to handling records "in a manner that preserves the confidentiality of the information contained therein," Nicholson wrote. "Therefore, it cannot be said that section 56.101 imposes liability if the health care provider simply loses possession of the medical records. Something more is necessary—that is, breach of confidentiality."

The court ordered Sacramento Superior Court Judge David DeAlba to sustain Sutter's demurrer and further instructed that plaintiffs be denied leave to amend their complaint, saying there's no reasonable possibility they can allege actual injury.

Bunzel referred a call to Sutter. A spokesman said the company is "pleased that the judicial process resulted in a ruling that will end litigation, which, if it had continued, would have diverted resources better spent on patient care, and would have increased the likelihood that private patient records would be used in litigation, even though no injury to patient confidentiality ever resulted from the theft."

Cutter did not immediately respond to a request for comment. But Brian Kabateck of Kabateck Brown Kellner, who litigated the Second District case and represented amicus Consumer Attorneys, said the courts are imposing a burden on plaintiffs that the Legislature didn't intend. "There is a disconnect between the *Regents* case, this case and the statute that will mandate Supreme Court review and clarification," he said.

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