HIPAA AND PRIVATE CAUSES OF ACTION

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Every healthcare law attorney has fielded a variation of this telephone call: "I think we might have a breach. My medical assistant learned that her brother's girlfriend was diagnosed with an STD and immediately sent the brother a text message attaching a photograph of the lab result." With a tap of the send button, the patient's complete name, date of birth and diagnosis have now entered cyberspace – and the brother's unencrypted hard drive on his electronic device. Unauthorized disclosure of personal healthcare information is old hat, and applying the Breach Analysis is done by rote. However, somewhere amid the investigation, notification and reporting, it may be advisable to prepare your client for the possibility that the brother's girlfriend will file a lawsuit arising out of the impermissible disclosure.

It is well established that the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA)[1] does not create a private cause of action.[2] However, there exists an expanding body of case law endorsing the assertion of state law tort claims based on evidence of a breach of privacy under HIPAA.

One such case bears study. In *R.K. v. St. Mary's Medical Center*, a 2012 case out of West Virginia, the court's ruling demonstrates that healthcare providers who breach HIPAA have more to worry about than the Office of Civil Rights' (OCR's) enforcement efforts.[3] These breaching health care providers are also vulnerable to a suit for damages from the private sector. In *R.K. v. St. Mary's*, a patient's private physiological health history was revealed to his estranged wife and her divorce attorney by employees of St. Mary's, without the patient's authorization. The patient filed suit, asserting a range of claims including

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negligence, emotional distress, breach of confidentiality, invasion of privacy and punitive damages. Notably, there was no claim for "Breach of HIPAA."

The lower court granted the hospital's motion to dismiss based on a finding that the plaintiff's claims were preempted by HIPAA.[4] The Supreme Court of Appeals of West Virginia reversed the decision of the lower court. In its reasoning, the court noted that the goals of enacting HIPAA included the need to improve efficiency and to "ensure the integrity and confidentiality of [individuals' health] information [and protect against] … unauthorized uses or disclosure of the information."[5] The preemption argument was rejected: "We conclude that state common-law claims for the wrongful disclosure of medial or personal health information are not inconsistent with HIPAA. Rather … such state-law claims compliment HIPAA by enhancing the penalties for its violation and thereby encouraging HIPAA compliance. Accordingly, we now hold that common-law tort claims based upon wrongful disclosure of medical or personal health information are not preempted by the Health Insurance Portability and Accountability Act of 1996."[6]

The claimants' arguments in the *St. Mary's* case were focused on preemption principles and the application of the state's Medical Practitioners Liability Act. However, the court offered an analysis that enlarged the discussion to include a line of cases establishing the rule of law that wrongful disclosure of confidential medical information can support a tort claim, without the need for a private cause of action embedded in the HIPAA regulations. The court specifically cited cases where courts permitted evidence of a violation of HIPAA to be used to establish either negligence per se or to establish the standard of care.

In Nevada, there is no significant guidance in this area,[7] at least as it pertains directly to HIPAA. Trying to discern the Nevada Supreme Court's leaning is difficult. The scant case law discussing issues under HIPAA – all of which is unpublished – leads one to conclude that the high court has not had the opportunity to fully cut its teeth on these complex issues. Still, it is not difficult to see the writing on the wall. With decisions such as that issued by the *St. Mary's* court in West Virginia, a path has been forged for the use of HIPAA violations in a way that, arguably, was never intended by federal law makers. Given the legal doctrine of negligence per se and its application in Nevada, plaintiffs in the Silver State are apt to find fertile ground for this expanding area of law. Plaintiffs may assert violation of statutes and ordinances as negligence per se, alleviating the plaintiff of the burden of proving duty and breach. It has been consistently held that violation of a statute may be used as evidence of negligence. "Nevada negligence jurisprudence has long-since recognized that the standard of conduct required of a reasonable man may be prescribed by legislative enactment. When a statute provides that under certain circumstances particular acts shall or shall not be done, it may be interpreted as fixing a standard for all members of the community, from which it is negligence to deviate."[8]

This rule of law has been applied in cases involving reporting statutes (*Doe v. State*, 356 F. Supp. 2d 1123 (2004)), building codes (*Vega v. Eastern Courtyard Associates, Inc.*, 117 Nev. 436, 24 P.3d 219 (2001)) and municipal codes (*Del Piero v. Phillips*, 105 Nev. 48, 769 P.2d 53 (1989)). It follows that a plaintiff could assert a claim for negligence based on the duties imposed by the HIPAA regulations. If the Nevada Supreme Court followed the lead of the *St. Mary's* court in West Virginia, such a plaintiff would prevail on preemption arguments and be left to litigate the two questions:

1. Does the plaintiff belong to the class of persons HIPAA was intended to protect; and
2. Is the injury suffered the type of injury HIPAA was intended to prevent. (See standard for establishing negligence set forth in *Vega v. Eastern Courtyard Associates, Inc.*, 117 Nev. 436, 24 P.3d 219 (2001)).

A discussion of how this two-fold inquiry would apply to HIPAA regulations is beyond the scope of this article, but bears some thought.

And while thinking, one must wonder – is this much ado about nothing? While it stimulates a certain amount of intellectual curiosity, it is hard to see the real win for plaintiffs. The scope of damages from these prospective causes of action is likely to have less bite than the enforcement efforts of the Office of Civil Rights within the Health and Human Services Division.

In summary, the absence of a private cause of action embedded in the HIPPA regulations is not a bar to using evidence of a privacy breach under HIPAA to support a state law tort claim. In Nevada, courts recognize the use of a violation of statute as proof of negligence per se. It is unlikely that asserting such a claim would do much to augment whatever existing claims a plaintiff whose private healthcare information has been disclosed may already be asserting. ■

1. 42 USC § 1320d (1996).
2. See *Acara v. Bans* 470 F.3d 569, 571 (5th Cir. 2006); *Valentin-Munoz v. Island Fin. Corp.*, 364 F. Supp. 2d 131, 136 (D. Puerto Rico 2005); *Univ. of Co. Hosp. Auth v. Denver Publ'g Co.*, 340 F. Supp. 2d 1142, 1145-46 (D. Colo. 2004).

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3. *R. K. v. St. Mary's Medical Center, Inc.*, Case No. 11-0924 (WV S.Ct., Nov. 15, 2012).
4. Hospital also argued for dismissal on the grounds that the plaintiff's complaint failed to conform to requirements under state law requiring a screening and certificate of merit in cases alleging medical negligence. *R. K. v. St. Mary's Medical Center, Inc.*, Case No. 11-0924 (WV S.Ct., Nov. 15, 2012), 20.
5. *R. K. v. St. Mary's Medical Center, Inc.*, Case No. 11-0924 (WV S.Ct., Nov. 15, 2012), at 8 citing 42 USC § 1320d-2 (1996).
6. *R. K. v. St. Mary's Medical Center, Inc.*, Case No. 11-0924 (WV S.Ct., Nov. 15, 2012), 19.
7. The three Nevada cases that reference violations of HIPAA regulations are all unpublished, and largely devoid of any guidance as to how this federal regulation could be used in a state tort claim. Robeck v. Lunas Construction Clean-up, Inc., No. 53576, 2011 Nev. LEXIS 979 (Nev. May 27, 2011). (court held that under Nevada's privilege laws, medical records were not privileged where used to support a claim or defense.): *Wolverton v. Daniel Carvalho and Rogers, No. 58181, 2013 Nev. LEXIS 444 (Nev. Mar. 28, 2013).* (Plaintiff claimed opposing counsel forged an outdated authorization for the release of medical records in violation of HIPAA; court held that facts as presented could support a separate cause of action for fraud, versus an allegation of a discovery violation in the pending case.); *State v. Vallani (Ayala, Real Party in interest), No. 60468, Nev. LEXIS 1056 (Nev. Jul. 26, 2012).* (court held that where there was no evidence demonstrating how HIPAA protected testing data used by expert psychologist, such testing data was subject to disclosure under the discovery rules).
8. *Doe v. State*, 356 F. Supp. 2d 1123, 6 (2004) citing *Southern Pac. Co. v. Watkins*, 83 Nev. 471, 492, 435 P.2d 498, 511 (Nev. 1967).

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