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NJ Ruling Could Spur Patient Suits Over HIPAA Violations

By **Y. Peter Kang**

Law360, Los Angeles (July 27, 2017, 1:58 PM EDT) -- A New Jersey appellate court's decision to greenlight a suit accusing a doctor of unlawfully disclosing a patient's HIV status could help other patients use invasion of privacy claims to go after providers for alleged violations of the Health Insurance Portability and Accountability Act, which doesn't allow for private lawsuits, experts say.

The state Appellate Division in a **precedential opinion** on July 12 kept alive a suit accusing Dr. Arvind Datla of disclosing a patient's HIV-positive status to another person without consent, affirming a trial court's finding that a two-year statute of limitations governs claims of invasion of privacy, violation of the New Jersey AIDS Assistance Act and medical malpractice.

The appellate court also upheld a trial judge's determination that although the patient, using the pseudonym John Smith, originally alleged a HIPAA violation for Datla's unauthorized disclosure, his amended complaint adequately pleaded and could move forward under a common-law invasion of privacy claim.

Since patients can't sue health care providers for HIPAA violations because the federal statute does not confer a private right of action, the ruling may prompt some to seek civil damages for improper disclosures of medical information under the banner of invasion of privacy, according to Lani Dornfeld, a Roseland-based health attorney and member of Brach Eichler LLC.

"This case is significant because it is a reminder that a breach of a patient's privacy in the medical setting is not just a violation of HIPAA, for which a person cannot bring a private cause of action, but can spur a lawsuit nonetheless based upon allegations that the health care provider breached the common law duty of privacy," Dornfeld told Law360.

Since HIPAA has essentially become the standard of care for patient privacy, Dornfeld said patients who want to sue a health care provider for breach of privacy will look for state law claims that can be asserted with a breach of privacy allegation attached to it.

"This might include, for example, malpractice based on the provider's breach of his/her legal professional duty to the patient, and common-law invasion of privacy," she said. "In this case, the lawsuit was also based on the physician's alleged violation of the New Jersey AIDS Assistance Act."

Dornfeld, who also practices in Florida, noted that such patient suits are not new but seem to be becoming more common.

Seven states have issued court rulings allowing privacy suits against health care providers based on HIPAA violations, including Indiana, Missouri and North Carolina, according to John Zen Jackson, a health care defense partner with McElroy Deutsch Mulvaney & Carpenter LLP in Morristown.

"It's been clear for quite a while that there is no private cause of action under HIPAA, but the conduct that is a HIPAA violation can provide a basis for a common-law tort claim for breach of confidentiality," he said. "[The ruling] certainly puts a light on that type of cause of action. It also should serve as a reminder to health care providers to be careful not to disclose people's private information."

While the decision will cause attorneys on both sides to spend more time thinking about these types of cases, Jackson said, the issue of how much such cases are worth varies widely given each patient's circumstances. For example, a woman beaten by her husband for getting an abortion which was improperly disclosed would probably have a stronger case than others, he said.

"That is a much more compelling case than [the disclosure of] somebody who got their butterfly tattoo dermabraded by the dermatologist," he said.

However, Jackson emphasized that the main thrust of the New Jersey appellate court's decision was that Smith's claims for invasion of privacy and violation of the AIDS Assistance Act were subject to a two-year statute of limitations, which were both issues of first impression for the court. The panel rejected Datla's argument that because it was a verbal disclosure the allegation amounted to slander which falls under New Jersey's one-year time limit for defamation.

"For a breach of medical confidentiality there is a two-year statute of limitation, whether you conceptualize that as a medical malpractice action or as a privacy tort," he said. "The defendant had argued that the one-year defamation statute of limitations should apply, but the court got it right by rejecting that argument because defamation by its very nature is false information, while the information involved here was true information."

The ruling was somewhat expected for Britcher Leone LLC's E. Drew Britcher, an attorney for the New Jersey Association for Justice, which submitted a friend-of-the-court brief in support of Smith, but he said it would have been a surprise had the decision gone the other way.

"To have a physician providing medical services avoid the responsibility of protecting an individual's HIV status by claiming that he was not subject to [the AIDS Assistance] statute would've been a real travesty," he said. "If there is anyone that an HIV-positive patient needs to be able to trust to not reveal his HIV status, it is his physician."

Datla's attempt to categorize Smith's claim as defamation was an inventive yet unsuccessful attempt to get the suit tossed as untimely, according to personal injury attorney Eric Kahn, the managing shareholder of Javerbaum Wurgaft Hicks Kahn Wikstrom & Sinins PC in Springfield.

"I think the defense made a creative argument to try and have this case barred by the statute of limitations but the court was correct in the way it ruled," he said.

The case is John Smith v. Arvind R. Datla, et al., case number A-1339-16T3, in the Superior Court of New Jersey Appellate Division.

--Additional reporting by Kat Sieniuc. Editing by Rebecca Flanagan and Kelly Duncan.