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21 HLR 136

Privacy

Minnesota Sues Hospitals' Debt Collection Business Associate Over Laptop Data Breach

By Mary Anne Pazanowski

Minnesota Attorney General Lori Swanson (D) Jan. 19 filed a federal court complaint alleging that a debt collection agency that is part of a New York private equity fund conglomerate violated state and federal law by failing to protect private patient health information gained through its contracts with two Minnesota hospital systems (*Minnesota v. Accretive Health Inc.*, D. Minn., No. 12-cv-145, filed 1/19/12).

Additionally, the state claimed that defendant Accretive Health Inc. improperly failed to disclose to Minnesota consumers its use of such information to “monetize portions of the revenue and health care delivery systems of some nonprofit hospitals for Wall Street investors,” Swanson said in a press release. Patients “have the right to know how their information is being used and to have it kept confidential,” Swanson said.

The state is seeking relief for alleged violations of the federal Health Insurance Portability and Accountability Act (HIPAA), as amended by the Health Information Technology for Economic and Clinical Health (HITECH) Act, as well as for alleged violations of state consumer protection and debt collection practices laws.

First State AG Business Associate Suit?

The Minnesota lawsuit marks the “beginning of a trend,” Marcy Wilder, of Hogan Lovells LLP, Washington, told Bloomberg BNA Jan. 23, noting that Connecticut and Vermont also have filed enforcement actions in the context of data breaches.

In January 2010, then Connecticut AG Richard Blumenthal (D) sued Health Net of Connecticut Inc. for alleged HIPAA violations related to the breach of health information on some 1.5 million individuals (19 HLR 98, 1/21/10), becoming the first state attorney general to file such a claim since state AGs were authorized to do so by the HITECH Act signed by President Obama in February 2009 (18 HLR 308, 3/5/09).

The Minnesota lawsuit marks the “beginning of a trend,” said Marcy Wilder, Hogan Lovells LLP, Washington.

Vermont also filed suit against Health Net, which in a consent decree approved in January 2011 agreed to pay \$55,000 to the state to settle its HIPAA violation charges (20 HLR 179, 2/3/11).

“The authority of AGs to enforce HIPAA is relatively new and has been used sparingly,” Wilder said, adding that the Minnesota case is the first she has heard of in which the state brought a HIPAA action directly against a business associate.

Laptop Stolen

Minnesota’s lawsuit claims that Accretive—as a business associate of Fairview Health Services and North Memorial Health Care—obtained access to individually identifiable health information on the providers’ patients. Some of that information was downloaded to a laptop computer that was stolen from an employee’s car in July 2011. Contrary to announced Accretive policy, the information on the laptop was not encrypted.

According to the complaint filed in the U.S. District Court for the District of Minnesota, Accretive estimated that the laptop contained data on about 14,000 Fairview patients and 3,000 North Memorial patients—although the actual number of individuals affected was closer to 23,500, the state said. The data on the laptop included the names, addresses, birth dates, Social Security numbers, clinical information, and financial information for those individuals.

Following notification of the data breach, patients learned that the laptop also contained a data sheet on each person that listed chronic conditions suffered by the patient, including HIV, schizophrenia, depression, and bipolar disorder.

Data on stolen laptop contained personal information and a data sheet on patients' chronic conditions, including HIV, schizophrenia, depression, and bipolar disorder.

The state alleged that Accretive violated both HIPAA and the state medical records act by failing to use appropriate safeguards to keep the protected health information private.

Use of Data Questioned

Additionally, Minnesota alleged that Accretive violated the state's consumer fraud and deceptive trade practices acts by failing to disclose to patients the extent of its involvement in their health care and its use of private information to encourage investment in the private equity fund of which it is a part.

According to the complaint, Accretive makes most of its money through "Revenue Cycle Operations" contracts with hospitals. Through these contracts, the company takes control of the scheduling, registration, admissions, billing, and collection and payment functions of the hospital. It takes over the management of hospital employees who perform these functions and adds its own employees to hospital staffs. It has not, however, revealed the extent of its involvement in hospital management to patients, the state said.

Accretive and Fairview also had a "Quality and Total Cost of Care" contract through which Accretive managed the hospital's "care coordination process." At a conference in 2010, Accretive representatives told investors that the QTCC contracts would increase hospital savings through an "intense focus" on "reducing avoidable hospital admissions" and by identifying the "sickest and most impactable patients" for "proactive management." Again, patients were left unaware of Accretive's actions and that it received incentive payments based on the amount of the hospital's savings, the state said.

In the press release, Swanson said "patients should have at least the same amount of information about Accretive's extensive role in their care that Wall Street investors do."

Accretive's failure to disclose, in communications sent to patients in its management capacity, that it also is the debt collection agency for the hospitals, violates federal and state debt collection practice laws, the state added.

Accretive spokeswoman Francesca Luthi provided Bloomberg BNA with the company's Jan. 19 response to Swanson's announcement. The statement said Accretive intends to cooperate with the state to resolve the matter and has already "enhanced its security procedures to ensure that all patient information is protected and secure."

Accretive also said there is no evidence that the laptop data have been improperly accessed or that any individual patient has been harmed by the data breach.

Only Modest Penalties Available

Wilder said that because the damages available to state AGs in HIPAA actions are relatively modest—\$25,000 per year—compared with penalties of up to \$1.25 million that the federal government can impose, some state AGs may be reluctant to "jump on the bandwagon."

On the other hand, the publicity generated by such actions can be good, she said. Consumers are worried about data breaches and about whether their private information is, in fact, being kept private. "AGs want to show they're doing something" to address consumers' concerns, she said.

Also, Wilder said, "states typically combine HIPAA claims with consumer protection and related state privacy actions just as the Minnesota AG did, which increases the potential financial penalties," she said.

Wilder added that she expects to “see more business associate focused activity at both the state and federal level throughout the year.”

For More Information

Minnesota's complaint is available at <http://op.bna.com/hl.nsf/r?Open=mapi-8qpthr>.

Contact us at <http://www.bna.com/contact/index.html> or call 1-800-372-1033

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