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Restoring CMIA's Intended Balance

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California's Confidentiality of Medical Information Act (CMIA), Civil Code section 56 *et seq.,* carefully balances obligations to handle and dispose of medical information in a manner preserving confidentiality with patients' CMIA rights of action for nominal or actual damages. Disruption of this balance has recently been threatened by multiple class action lawsuits seeking to dictate privacy procedures and recover millions or, in one case, billions, of dollars from health care providers in response to the theft or loss of electronic databases.

Three Court of Appeals decisions have restored CMIA's intended balance: (1) *Sutter Health v. Superior Court* (*Atkins, et al.*) (2014) 227 Cal.App.4th 1546 (*Sutter*); (2) *Regents of the University of California v. Superior Court (Platter)* (2013) 220 Cal.App.4th 549 (*Regents*) and (3) *Eisenhower Medical Center v. Superior Court (Malanche)* (2014) 226 Cal.App.4th 430 (*Eisenhower*).

Both *Sutter* and *Regents* rejected the assertion that a CMIA cause of action seeking $1,000 in statutory nominal damages per class member could be maintained without pleading and proof that a particular plaintiff's medical information confidentiality had actually been breached. Plaintiffs had argued that pleading loss of possession of the medical information due to a theft purportedly arising from the health care provider's negligence was sufficient. In holding an actual breach of the plaintiff's medical information confidentiality must be alleged and proven, *Sutter* and *Regents* restored CMIA's intended balance by giving all of CMIA's statutory provisions meaning. These provisions include CMIA's express authorization for health care providers to dispose of, or even abandon, medical information — a change in possession — as long as confidentiality was preserved.

The *Sutter* and *Regents* decisions further restored CMIA's intended balance by preserving a broad role for the government and a narrower one for private litigants. Under California's integrated health care laws, government's role includes auditing, requiring preventative measures, obtaining equitable relief and imposing civil or administrative fines.[1] In contrast, a private litigant's role under CMIA is narrow. It is limited to suing for nominal or actual damages in the event that a breach of his or her medical information confidentiality has actually taken place.[2] These distinctions in roles are supported by sound public policy, including expertise and uniformity in enforcement as well as avoiding counterproductive effects arising from private litigation objectives.[3]

The third decision restoring CMIA's balance, *Eisenhower*, addressed the meaning of the phrase "medical information" and specifically analyzed whether medical record numbers (MRNs) constituted "medical information." The *Eisenhower* decision held CMIA "medical information" is individually-identifiable, substantive information that concerns the individual's medical history, condition or treatment. *Eisenhower* rejected the assertion that MRNs maintained by a general hospital are by themselves CMIA "medi-

cal information." *Eisenhower* also ruled that "medical information" under CMIA is distinct from "individually identifiable health information" under federal law. The *Eisenhower* decision restored CMIA's intended balance by holding not all information maintained by a health care provider constitutes CMIA "medical information" and by confirming the critical distinctions between the respective scope of CMIA and federal health information privacy law.

REGENTS OF THE UNIVERSITY OF CALIFORNIA V. SUPERIOR COURT (PLATTER)

In *Regents*, a class action lawsuit sought $1,000 nominal damages for each class member. The operative complaint alleged the theft of an encrypted external hard drive containing personally-identifiable medical information for approximately 16,000 patients.[4] The encryption key, which had been written on an index card, was left near the device and was also missing.[5] None of the items were recovered.[6]

The trial court denied Regents' demurrer to the CMIA cause of action premised on Civil Code § 56.101's obligation to maintain and store medical information so as to preserve confidentiality. The trial court ruled that only the remedy portion of Civil Code § 56.36(b) was incorporated into Civil Code § 56.101 and, therefore, one did not need to plead Civil Code § 56.36(b)'s requirement of an actual "negligent release" of the medical information to establish liability under CMIA.[7]

The *Regents* decision reversed the trial court's ruling, but did so for a reason that was not the focus of the named parties' briefing. *Regents* held that the Legislature intended a plaintiff to have to plead and prove a negligent release of medical information, and found that the plaintiff had sufficiently pleaded the required negligent release.[8] The Court rejected the Regents' contention that "release" and "disclose" were synonymous under CMIA, and concluded that while an "affirmative" act by the provider is required, and that there must be a "communicative" act to trigger liability, the negligent conduct by the provider does not need to be the communicative act itself.[9] The Court also rejected the Regents' contention that CMIA did not cover thefts of medical information.[10] Then, in adopting a position raised in an *amicus curiae* brief by Sutter Health, the Court of Appeal in *Regents* went on to hold that an additional element was required to plead a CMIA cause of action for Civil Code § 56.36(b) relief premised on Civil Code § 56.101:

> What is required is pleading, and ultimately proving, that the confidential nature of the plaintiff's medical information was breached as a result of the health care provider's negligence. Because Platter's complaint failed to include any such allegation, the Regents's demurrer should have been sustained without leave to amend and the case dismissed.[11]

In other words, the CMIA § 56.101 cause of action for Civil Code § 56.36(b) relief required a "breach" of confidentiality to have actually occurred through a third party viewing the medical information, since preservation of confidentiality is at the heart of the statute.

The *Regents* Court of Appeals denied the plaintiff's request for leave to amend her complaint to plead an actual breach of medical information confidentiality based on the plaintiff's claim of having suffered an identity theft attempt. No amendment was allowed because it was a matter of speculation as to whether the identity theft attempt had any relationship to the theft of the hard drive. Plaintiff's factual pleading burden of alleging an actual breach of his or her medical information confidentiality cannot be met by speculative allegations.[12]

SUTTER HEALTH V. SUPERIOR COURT (ATKINS, ET AL.)

In *Sutter*, the operative complaint alleged a thief had stolen a computer containing information for over 4 million individuals, Civil Code §§ 56.10 and 56.101 had been violated, and sought over $4 billion in Civil Code § 56.36(b)(1) nominal damages.[13] Sutter filed a demurrer asserting no CMIA claim had been stated since no factual allegation of an actual breach of medical information confidentiality existed. Sutter also moved to strike the class allegations as well as the prayer for injunctive and equitable relief.[14] In response to the trial court failing to sustain the demurrer, Sutter filed a writ petition.[15] In response to the writ petition, the Court of Appeal issued an alternative writ and stayed the trial court's proceedings.[16]

With regard to CMIA's Civil Code § 56.10's prohibition on unauthorized disclosures, the *Sutter* decision held no claim was stated under the alleged facts. The Court of Appeal defined "disclosure" under CMIA as taking place when the health care provider affirmatively shares medical information with another person or entity.[17] The Court reasoned that, since the computer was stolen by, not given to, an unauthorized person, Sutter did not intend to disclose the medical information to the thief. As a result, there was no affirmative communicative act by Sutter. Consequently, no Civil Code § 56.10 claim was stated.[18]

With regard to Civil Code § 56.101's obligation to maintain records so as to preserve confidentiality, the *Sutter* decision also held no claim was stated since no such actual breach of medical information confidentiality was alleged.[19] The Court of Appeal reached its holding based on: (i) Civil Code § 56.101 allowed for the disposal or abandonment of medical information — a change in possession — provided confidentiality is preserved; (ii) while the theft may have increased the risk of a confidentiality breach, CMIA did not provide a private remedy for increased risk; (iii) the legislation at issue was titled the Confidentiality of Medical Information Act, not the Possession of Medical Information Act; (iv) loss of possession did not necessarily result in a loss of confidentiality; (v) the statutory duty of Civil Code § 56.101 is to preserve confidentiality, a breach of confidentiality is the injury protected against, and without an actual confidentiality breach, there is no injury and therefore no privately actionable negligence; and (vi) Civil Code § 56.36(b)'s wording — concerning a plaintiff not needing to prove actual or threatened damages in order to recover nominal damages — did not change the requirement of an actual breach of confidentiality since no damages of any type were recoverable unless the injury protected against was suffered.[20]

The *Sutter* Court directed the trial court to enter a new order sustaining Sutter's demurrer without leave to amend, which occurred in November 2014.[21]

EISENHOWER MEDICAL CENTER V. SUPERIOR COURT (MALANCHE)

In *Eisenhower*, the operative complaint alleged a computer was stolen from Eisenhower Medical Center (EMC) containing information on over 500,000 persons and sought CMIA nominal damages in the amount of $1,000 per class member.[22] The stolen information included each person's name, MRN, age, date of birth, and last four digits of the person's Social Security number (SSN). It was password protected, but not encrypted.[23]

EMC moved for summary adjudication on the CMIA cause of action based on the theft not resulting in a disclosure of medical information. In support of its motion, EMC submitted evidence that an individual's medical history, condition, or treatment was saved only on EMC's servers located in its data center. The index that was on the stolen computer was a subset of information from EMC master patient index and existed in case of a power outage or network failure to look up the patient's MRN so that a hard copy of the medical records could be located. The MRN was issued sequentially and contained no coded information.[24] The trial court denied the EMC's motion based principally on its belief that the fact that a person had been a patient at the hospital constituted CMIA "medical information."[25]

EMC sought writ relief. Based on its holding that CMIA "medical information" is limited to individually-identifiable, substantive information regarding a patient's medical history, condition or treatment, the Court of Appeal in *Eisenhower* held that summary adjudication in favor of EMC should have been granted.[26] The stolen MRNs did not constitute CMIA medical information since a MRN may be assigned without the individual having received any treatment.[27] Further, even if the assignment of an MRN meant the individual had been a patient at the hospital sometime in the past, the MRN still did not constitute CMIA "medical information" because it did not provide substantive information about the patient's medical history, condition or treatment.[28] In response to the plaintiffs' argument that issuance of a MRN meant hard copies of medical records existed, the Court of Appeal held that confirmation that a person's medical record existed somewhere does not make the MRN itself CMIA "medical information."[29] Finally, based on its finding that "individually identifiable health information" under federal law is different from "medical information" under CMIA, the Court of Appeal held EMC's report of the theft to the federal Department of Health and Human Services as a breach of health information did not constitute an admission that the stolen information constituted CMIA "medical information."[30]

CONCLUSION

The *Regents, Sutter* and *Eisenhower* decisions have in large part restored CMIA's intended balance and are a bulwark against class cases where no breach of confidentiality or loss of medical information is at issue. *Regents* and *Sutter* made clear that an actual breach of medical information confidentiality is the *sine qua non* of a private individual's CMIA cause of action. *Eisenhower* confirmed only individually-identifiable, substantive information regarding a patient's medical history, condition or treatment is CMIA "medical information." *Eisenhower* also made an important distinction concerning CMIA's narrower "medical information" scope when compared to the broader scope of federal health information privacy laws. As a result of these appellate decisions, in many CMIA actions, dismissal at the pleading stage or resolution through summary judgment will now be available.[31]

ABOUT THE AUTHOR

Michael Abraham is a shareholder in the Bartko Zankel Bunzel & Miller law firm. He, along with other members of his firm, were defendants' counsel of record in Sutter and authored amicus curiae briefs that were cited in Regents and Eisenhower. Michael's health care practice focuses on representing providers with regard to privacy litigation, antitrust issues, commercial litigation, and contractual disputes. Michael also handles a wide range of complex commercial litigation, partnership disputes, fiduciary disputes, real estate litigation, and environmental disputes for clients. Michael can be reached at 415-956-1900 or mabraham@bzbm.com.

END NOTES

1 Confidentiality of Medical Information Act (CMIA), Civ. Code §§ 56.36 (c) (d); Health & Safety Code §§ 1278 1280.15.

2 CMIA, Civ. Code §§ 56.35 and 56.36(b).

3 *See Crusader Ins. Co. v. Scottsdale Ins. Co.* (1997) 54 Cal.App.4th 121, 125-126, 134.

4 *Regents of the University of California v. Superior Court (Platter)* (2013) 220 Cal.App.4th 549, 554.

5 *Id.*

6 *Id.* at 554-555.

7 *Id.*

8 *Id.* at 561-563.

9 *Id.* at 564-570.

10 *Id.*

11 *Id.* at 570[footnote omitted]; *see also id.* at 554, 557, 571.

12 *Id.* at 570-571, and fn.12.

13 *Sutter Health v. Superior Court* (*Atkins, et al.*) (2014) 227 Cal.App.4th 1546, 1550, 1552-1553.

14 *Id.* at 1532-1553. The trial court struck the prayer for injunctive relief, denied the motion to strike the class allegations as more appropriately addressed at the class certification stage, and did not sustain the demurrer.

15 *Id.* at 1533.

16 *Id.*

17 *Id.* at 1556.

18 *Id.*

19 *Id.* at 1553, 1556-1559.

20 *Id.* at 1556-1559.

21 *Id.* at 1559.

22 *Eisenhower Medical Center v. Superior Court (Malanche)* (2014) 226 Cal.App.4th 430, 432.

23 *Id.*

24 *Id.* at 432-433.

25 *Id.* at 433.

26 *Id.* at 434 – 436; *see also* Civil Code § 56.05(j).

27 *Id.* at 435-436.

28 *Id.* at 436; *see also id.* at 434-435.

29 *Id.* at 436.

30 *Id.*

31 *See e.g., Falkenberg v. Alere Home Monitoring, Inc.*, Case No. 13-cv-00341-JST (No. Dist. Calif. Oct. 7, 2014) (dismissing CMIA complaint at the pleading stage)

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