

Are HIPAA Violations Covered Under EPLI Policies?

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I. INTRODUCTION

The Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) has had a tremendous impact on the insurance industry since it was passed by the U.S. Congress. In theory, these regulations may have a dramatic impact on both insurers and their insureds. One such potential impact is the possibility of claims by employees against their employers seeking money damages for violations of HIPAA. This article examines the initial question of whether such a “private right of action” exists under HIPAA. If so, the potential exists for EPLI claims.

II. THE PURPOSE OF HIPAA

HIPAA was designed to streamline all areas of the health care industry and to provide additional rights and protection to participants in health plans.² To improve the efficiency and effectiveness of the health care system, HIPAA includes administrative simplification provisions that require the U.S. Department of Health and Human Services (“HHS”) to adopt national standards for electronic health care transactions.

The HIPAA privacy regulations went into effect on April 14, 2003.³ The privacy regulations set national standards for the protection of health information, as applied to the three types of covered entities: health plans, health care clearinghouses, and health care providers who conduct certain health care transactions electronically. The privacy regulations provide for the first time, a foundation of federal protections for the privacy of protected health information. These regulations give individuals a fundamental new right to be informed of the privacy practices of their health plans and of most of their health care providers, as well as to be informed of their privacy rights with respect to their personal health information.⁴ They do not, however, replace federal, state, or local

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² Blue Cross Blue Shield of Montana, HIPAA TITLE II BLUE BOOK, “Health Insurance Portability and Accountability Act of 1996.”

³ 45 C.F.R. § 164.534(a).

⁴ 45 C.F.R. § 164.520.

laws that grant individuals even greater privacy protections, and covered entities are free to retain or adopt more protective policies or practices.

HIPAA establishes certain penalties for violations of its provisions. The general penalty for failure to comply with the requirements and standards mandated in the Act is a fine of \$100 for each violation, except that the total amount imposed upon the person for identical violations may not exceed \$25,000 per year. The penalties for the wrongful disclosure of individually identifiable health information include monetary penalties and/or imprisonment. The maximum penalties listed under the Act are a \$250,000 fine and/or imprisonment of not more than 10 years when a person intends to sell, transfer, or use individually identifiable health information for commercial advantage, personal gain, or malicious harm. These fines, however, are payable to HHS, and not to the employee whose rights are violated.

III. NO PRIVATE RIGHT OF ACTION CURRENTLY EXISTS UNDER HIPAA

What might be most important to those in the insurance industry is that HIPAA by its terms does not grant a private right of action for plaintiffs to sue for money damages when their protected health information was wrongfully disclosed. This fact, however, has not prevented plaintiffs from attempting to create such a “private right of action” through litigation. Despite these attempts, the federal courts which have considered the issue have to date consistently adhered to the traditional rule of statutory interpretation that where Congress has not specifically created a private right of action, no such cause of action exists and courts may not create one.⁵

The U.S. Department of Health and Human Services Secretary, Donna E. Shalala, in explaining the Act, admitted that Congress had deliberately omitted a private right of action from the statute:

Only if we put the force of law behind the rhetoric can we expect people to have confidence that their health information is protected, and ensure that those holding information will take their responsibilities seriously. In HIPAA, Congress did not provide such enforcement authority. There is no private right of action for individuals to enforce their rights, and we are concerned that the penalty structure does not reflect the importance of these privacy protections and the need to maintain individuals’ trust in the system.⁶

⁵ See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 286-87, 149 L. Ed. 517, 121 S. Ct. 275 (2001); *Massachusetts Mut. Life. Ins. Co. v. Russel*, 473 U.S. 134, 145, 87 L. Ed. 2d 96, 105 S. Ct. 3085 (1985); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 23, 62 L. Ed. 146, 100 S. Ct. 242 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76, 61 L. Ed. 2d 82, 99 S. Ct. 2479 (1979).

⁶ Huchenski, Jackie and Linda Abdel-Malek, *HIPAA’s lack of Private Right to Sue Not a Total Bar*, THE NATIONAL LAW JOURNAL, June 19, 2000, at 1 (citing 64 Fed. Reg. at 59924).

A. *The U.S. Supreme Court on “A Private Right of Action”*

The U.S. Supreme Court has firmly held that a private right of action to enforce a federal law must be created by Congress.⁷ It is the task of the federal courts to interpret congressional intent when creating a statute to determine whether it displays an intent to create not just a private right but also a private remedy.⁸ Where the intent of Congress to create a private right of action does not exist, “courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.”⁹

Plaintiffs have also attempted to find a private right of action in a statute not expressly providing for one by arguing that such a remedy is implicit in the statute. The Supreme Court has addressed this issue, and has offered guidance for determining whether a private right of action may be implicit in a statute. In Massachusetts Mutual,¹⁰ the Court listed several factors that may be important in determining whether a private right of action is implicit in a statute:

- (1) Whether the plaintiff is “one of the class for whose especial benefit the statute was enacted”¹¹;
- (2) Whether there is any legislative intent, explicit or implicit, either to create such a remedy or to deny one¹²;
- (3) Whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff¹³; and
- (4) Whether the cause of action is one traditionally regulated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law.¹⁴

Given these standards, it is not surprising that few plaintiffs succeed in arguing that a private right of action is implicitly granted by a statute where such language is not expressly stated.

B. *District Courts Finding No “Private Right of Action” Under HIPAA*

Since the relatively recent passage of HIPAA in 1996, the issue of whether the Act creates a private right of action has been litigated in several cases. Although the theories which plaintiffs utilize differ, the district courts’ decisions are consistent. As of yet, no federal court has allowed a plaintiff to maintain a private right of action for money damages against an employer based on the provisions of HIPAA.

⁷ Alexander, 532 U.S. at 286 (citing *Touche Ross & Co.*, 442 U.S. at 578).

⁸ Alexander, 532 U.S. at 286; *Transamerica Mortgage Advisors, Inc. v. Lewis*, 441 U.S. 11, 15, 62 L. Ed. 2d 146, 100 S. Ct. 242 (1979).

⁹ Alexander, 532 U.S. at 286-87.

¹⁰ *Massachusetts Mut. Life Ins. Co.*, 473 U.S. at 145.

¹¹ *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 39 (1916).

¹² *National Railroad Passenger Corp. v. National Assn. Of Railroad Passengers*, 414 U.S. 453, 458 (1974).

¹³ *Cort v. Ash*, 422 U.S. 66, 78, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (1975).

¹⁴ *Cort*, 422 U.S. at 78.

In three cases decided shortly after the passage of HIPAA, district courts in Texas, Alabama, and Mississippi ruled that HIPAA does not create a private right of action.¹⁵ In each of these cases the plaintiffs brought suit in state court, the defendants sought to remove the cases to federal court based on federal question jurisdiction under HIPAA, and the district courts remanded the actions back to their state courts for lack of jurisdiction.

In reaching its conclusion, the Means court stated: "...HIPAA provides for no federal cause of action; instead, the HIPAA provides for an enforcement mechanism for the Secretary of Health and Human Services. Furthermore, the Defendants have failed to point to any, and the court finds no, evidence of congressional intent to create a private right of action under HIPAA."¹⁶

Also, in Brock, the Northern District of Texas denied federal jurisdiction under HIPAA, reasoning that: "[T]he presence of a federal remedy in a statute is a minimum threshold requirement to determine whether Congress intended for federal courts to adjudicate state-court actions. Following controlling Fifth Circuit jurisprudence, "we begin with the minimum requirement that the federal statutes involved provide a private, federal remedy...no private remedy exists. That is the end of the issue, and has been since the Supreme Court decided Merrell Dow."¹⁷

Finally, in deciding that a plaintiff's state law claim was not completely preempted, and comparing HIPAA to the Employment Retirement Security Act of 1974 ("ERISA") and the Labor Management Relations Act ("LMRA"), the District Court for the Northern District of Mississippi stated in Wright that:

In HIPAA, the undersigned cannot find any "manifest congressional intent" to create a new federal cause of action which is removable to federal court.¹⁸

In 2001, the District Court for the District of Wyoming was faced with this issue and ruled in unison with the district courts cited above.¹⁹ In O'Donnell, the plaintiff sued her health insurer for breach of contract, estoppel, false misrepresentation, breach of the implied covenant of good faith and fair dealing, and a violation of HIPAA. The court concluded that a private right of action did not exist under HIPAA because the Act did not expressly provide for such a right.²⁰ Moreover, the court held that there was no implied right of action because Congress did not intend such a right. Citing the enforcement provision of the Act, the court stated: "Review of HIPAA's enforcement

¹⁵ See Brock v. Provident America Insurance Co., 144 F. Supp. 2d 652 (N.D. Tex. 2001); Means v. Independent Life & Accident Insurance Co., 963 F. Supp. 1131 (M.D. Ala. 1997); Wright v. Combined Insurance Co. of America, 959 F. Supp. 356 (N.D. Miss. 1997).

¹⁶ Quoting Means v. Independent Life & Accident Insurance Co., 963 F. Supp. 1131, 1134 (M.D. Ala. 1997).

¹⁷ Merrell Dow Pharmaceuticals v. Thompson, 478 U.S. 804 (1987).

¹⁸ Wright v. Combined Insurance Company of America, 959 F. Supp. 356, 363 (N.D. Miss. 1997).

¹⁹ O'Donnell v. Blue Cross Blue Shield of Wyoming, 173 F. Supp. 2d 1176 (2001).

²⁰ O'Donnell, 173 F. Supp. 2d at 1179.

provisions reveals no congressional intent to create a private right or remedy. In fact, HIPAA appears to specifically limit enforcement actions to be brought only by the respective states or the Secretary of Health and Human Services. . . . There are no provisions made in the statute for private enforcement when neither the state, nor the Secretary undertake enforcement action.”²¹

In Swift, the District Court for the Northern District of Illinois considered a claim alleging that the defendant was liable for violations of ERISA and HIPAA by denying insurance coverage.²² The court dismissed each of the counts in Swift’s complaint, finding that that she was not entitled to coverage under any of the policies at issue because she was not employed at the time at issue.²³ Significantly, the court denied Swift’s HIPAA claim, reasoning that “[n]o federal court reviewing the matter has ever found that Congress intended HIPAA to create a private right of action.”²⁴

Healthtek is the most recent case on which a court has addressed whether HIPAA creates a private right of action for plaintiffs.²⁵ The District Court for the Eastern District of Virginia first noted that HIPAA is an amendment to and part of ERISA.²⁶ Next, the court suggested that while HIPAA does not explicitly create a private right of action, such a right might be conferred upon certain enumerated entities through ERISA.²⁷ The court cited the Mulcahey test, which provides that federal question jurisdiction is proper only if: (1) the federal statute cited in the complaint provides for a private right of action, and (2) the plaintiff is not barred from utilizing the private right of action.²⁸ Relying on this test, the court denied Healthtek’s argument for a private right of action, reasoning that Congress has limited the private right of action provided by HIPAA through ERISA to “the Secretary of Labor, participants, beneficiaries, and fiduciaries.”²⁹ The court concluded that Healthtek did not meet any of the enumerated statutory definitions that have been held to be necessary for a private right of action under ERISA, so was barred from utilizing HIPAA’s civil enforcement mechanism through lack of standing.³⁰ To date, our research has not located any case in which a court adopted this “piggy-back” argument for using ERISA enforcement provisions to create a private right of action under HIPAA.

IV. CONCLUSION

²¹ Id. at 1180.

²² Swift v. Lake Park High School District 108, No. 03 C 5003, 2003 U.S. Dist. LEXIS 18684 (N.D. Ill. Oct. 20, 2003).

²³ Swift, at *8-10.

²⁴ Id. at 9.

²⁵ Healthtek Solutions, Inc. v. Forts Benefits Insurance Co., 274 F. Supp. 2d 767 (E.D. Vir. 2003).

²⁶ Healthtek, 274 F. Supp. 2d at 774.

²⁷ Id.

²⁸ Id. (citing Mulcahey v. Columbia Organic Chemicals Co., 29 F.3d 148 (4th Cir. 1994)).

²⁹ Id. at 774-75 (citing 29 U.S.C. § 1132).

³⁰ Id. at 776.

Since no federal court to date has recognized a private right of action for money damages based on an employer's violations of HIPAA, and the fines and penalties which can be assessed under the statute are payable to the Department of Health & Human Services rather than to the wronged employee, the issue of insurance coverage under employment practices liability insurance ("EPLI") policies has not yet arisen. However, creative plaintiff's attorneys can be expected to continue their efforts to create such a cause of action. Thus, EPLI carriers and their insureds will be keeping an eye on this developing area.