

## Lack Of ID Theft Dooms Medical Data Breach Suit, Judge Says

By Allison Grande

*Law360 (February 3, 2022, 10:05 PM EST)* -- A New York magistrate judge on Wednesday recommended axing a putative class action over a data breach at medical management company Practicefirst, finding that the plaintiffs' allegations that their information had been exposed but not yet misused failed to clear the injury bar set by the U.S. Supreme Court's recent TransUnion ruling.

The lawsuit arose after Professional Business Systems, which does business as Practicefirst Medical Management Solutions and PBS Medcode Corp., disclosed a data breach in December 2020 that exposed the personal information of more than 1.2 million patients of medical providers who used the company's billing, credentialing, tax preparation and other services.

The four plaintiffs leading the suit claimed that they had Article III standing to press their negligence, breach of contract and declaratory and injunctive relief claims in federal court because they had spent "valuable time" reviewing their accounts for fraud after being informed of the breach and had lost value in their data as a result of the incident.

But in a Wednesday ruling recommending that the court grant Practicefirst's motion to dismiss the dispute, U.S. Magistrate Judge Michael J. Roemer concluded that the plaintiffs could not "manufacture standing by incurring costs in anticipation of non-imminent harm" and that a showing of the misuse of the compromised data was necessary to establish standing.

"Indeed, numerous circuit and district courts have declined to grant standing based on an imminent risk of future identify theft where plaintiffs, like plaintiffs here, were unable to show that either their data, or the data of other victims of a data breach or cyberattack, was actually misused," Judge Roemer wrote. "The court is in agreement with their reasoning and finds these cases to be analogous to the matter at hand."

The other court decisions cited by Judge Roemer in support of his ruling included the Supreme Court's June ruling in *TransUnion v. Ramirez*. In that case, the justices ruled 5-4 that only those members of the certified class who had alleged that TransUnion provided misleading credit reports on them to third parties had demonstrated the concrete reputational harm necessary to press forward with their claims and seek damages under the Fair Credit Reporting Act, while those who hadn't alleged such disclosures were barred from proceeding.

In his ruling Wednesday, Judge Roemer noted that the TransUnion decision "further narrowed Article III standing requirements" established in prior Supreme Court decisions such as *Clapper v. Amnesty*

International in 2013 "by holding that a plaintiff cannot establish an injury-in-fact, for the purposes of standing, by relying entirely on a risk of future harm."

"The Supreme Court has made clear that allegations of a concrete harm that are tied to speculative or possible future injury are insufficient because plaintiffs 'cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending,'" the judge wrote.

The plaintiffs suing Practicefirst over its data breach have done just that, according to Judge Roemer, since they've failed to plausibly allege that the December 2020 incident — which consisted of both the exfiltration of personal data from the company's computer system as well as a subsequent ransomware attack that was launched in connection with the breach — was "the type of cyberattack targeted to obtain confidential information for purposes of identity theft, as opposed to garden-variety ransomware attack."

"Indeed, over a year has passed since the data breach, and there is no indication that plaintiffs or any of the other potential class members for that matter, have had their identities stolen," Judge Roemer ruled. "In fact, the complaint is devoid of allegations that class members have experienced any type of fraud because of the breach, or even that attempts have been made to use their personal information for nefarious purposes."

The judge also refused to entertain the plaintiffs' argument that they had suffered a concrete injury because the value of their personal information and private health data had been diminished as a result of the data breach. He found that the plaintiffs had included in their consolidated class action complaint only "general and conclusory allegations" that their data was a "valuable commodity" on the black market and that they hadn't alleged that they had been forced to accept a decreased price for their data or how their own information had specifically been devalued.

Additionally, Judge Roemer rejected the plaintiffs' attempt to establish standing based on an alleged "violation of their privacy rights," concluding that the theory didn't hold weight because the complaint didn't allege that Practicefirst had "directly disclosed plaintiffs' confidential data to the public at large" or that anyone was harmed by the data exposure.

Brian H. Myers of Beckage PLLC, who represents Practicefirst, told Law360 that a "key takeaway" from Wednesday's decision, as well as the several other Article III standing decisions that are cited in it, "is that federal courts are taking a closer look at the issues of injury and standing in data breach litigation, especially after the U.S. Supreme Court's TransUnion decision."

"The mere allegation that a data breach occurred does not necessarily mean that plaintiffs have a cause of action in a federal court," Myers said. "To establish standing, it is not enough for plaintiffs to allege that they have been exposed to some increased risk of harm occurring at some indefinite point in the future. Rather, plaintiffs need to show something more, such as actual instances of attempted identity theft following a data breach as an example."

Counsel for the plaintiffs could not be reached for comment on the magistrate judge's recommendation, which the parties have 14 days to file objections to with the district court.

The plaintiffs are represented by Gary S. Graifman of Kantrowitz Goldhamer & Graifman PC, Gary E. Mason and David K. Lietz of Mason Lietz & Klinger LLP, Gayle M. Blatt of Casey Gerry Schenk Francavilla

Blatt & Penfield LLP, and Todd S. Garber of Finkelstein Blankinship Frei-Pearson & Garber LLP.

Practicefirst is represented by Brian H. Myers, Myriah V. Jaworski and Chirag H. Patel of Beckage PLLC.

The case is Tassmer et al. v. Professional Business Systems, case number 1:21-cv-00790, in the U.S. District Court for the Western District of New York.

--Editing by Michael Watanabe.

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