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Cancer Center Co. Can't Dodge Breach Claims, Court Told

By **Shayna Posses**

Law360, New York (April 24, 2017, 2:03 PM EDT) -- Cancer treatment center operator 21st Century Oncology can't shake claims over a data breach that affected more than 2.2 million patients' personal information, a group leading multidistrict litigation told a Florida federal court Friday, contending that they have standing and have sufficiently pled their claims.

The patients challenged 21st Century's bid to escape their consolidated class action complaint, blasting the cancer treatment center operator for trying to skirt responsibility for the 2015 breach by "arguing in shotgun fashion that some plaintiffs have not suffered Article III injury in fact, and that plaintiffs have failed to state claims."

Neither of those contentions are true, the patients argued, saying 21st Century itself acknowledges that seven of the plaintiffs have standing and in any case, all of them allege actual injuries as a result of the breach, namely that a database containing their information was accessed by unauthorized parties.

"Moreover, all plaintiffs also allege imminent injuries, in that they are at substantial risk of identity theft, fraud, and other harm because of the data breach — including the risk of bodily harm or death because of misdiagnosis or mistreatment as a result of medical identity theft or fraud," the patients said.

The company's challenges to the sufficiency of the patients' claims should also be rejected, the plaintiffs argued.

For one, the patients challenge the applicability of Federal Rule of Civil Procedure 9(b), which says that in alleging fraud or a mistake, a party must state with particularity the circumstances that constitute fraud or a mistake. But to the extent the rule does apply, the plaintiffs said they have alleged claims including statutory consumer protection allegations and common-law negligent misrepresentation with the required particularity.

"Assuming arguendo that Rule 9(b) applies, plaintiffs specifically and sufficiently set forth the who, what, when, where, why, and how of 21st Century's misrepresentations and omissions," the patients said. "Plaintiffs allege that 21st Century made misrepresentations in its Notice of Privacy Practices by representing that it was 'required by law to maintain the privacy of [plaintiffs'] protected health information' and 'to notify any affected individuals following a [data] breach,' and that it would 'abide by the[se] terms.'"

The patients have adequately alleged causation as well, they argued, saying the facts they've pled clearly indicate a relationship between the breach and the injuries they have suffered.

The Fort Myers, Florida-based company was hit with a number of suits after an October 2015 data breach, all of which turned on whether the various cancer centers in the network were legally culpable for the alleged incident, according to court filings.

The company — which operates cancer treatment centers in 17 states, along with 36 centers in Latin America — allegedly violated the Fair Credit Reporting Act and Florida Deceptive and Unfair

Trade Practices Act when it failed to detect the breach until it was alerted to it by the Federal Bureau of Investigation six weeks later and then withheld the information from patients for another four months, according to one of the complaints filed in March in Florida.

The information allegedly accessed includes names, Social Security numbers, physicians' names, diagnoses, treatment information and insurance information.

In July, 21st Century **moved to consolidate** more than a dozen actions stemming from the breach in the Middle District of Florida, saying all the cases raise similar or identical issues on behalf of identical or overlapping proposed classes.

The U.S. Judicial Panel on Multidistrict Litigation **agreed in October**, holding that benefits for efficiency in discovery, consistency in rulings and conservation of judicial resources outweighed objections from plaintiffs in three cases pending in California.

The patients offered a 134-page amended complaint including 22 separate causes of actions in January, and 21st Century moved for dismissal the next month. First of all, the company said, half the plaintiffs don't claim to have suffered any form of identity fraud or other misuse of their information following the cyberattack, relying only on the possibility of future harm, which doesn't represent an injury-in-fact sufficient to establish Article III standing.

Plus, the allegations all fail to state a claim, 21st Century argued. The company pointed to a number of supposed deficiencies, including the fact that claims like negligence and gross negligence don't hold up because plaintiffs haven't sufficiently alleged causation.

The company said, "they have not alleged facts to plausibly support the conclusion that the security incident or any delay in notifying them about it caused their claimed injuries, if any."

But the patients fought back Friday, pointing to specific injuries the plaintiffs claim to have suffered. For example, four patients alleged that they were the victims of fraudulent attempts to open credit card accounts while another plaintiff claimed medical identity theft leading to the temporary cancellation of insurance, out-of-pocket costs and potential tax penalties, they noted.

Representatives for the parties didn't immediately return requests for comment Monday.

The plaintiffs are represented by attorneys from Keller Rohrback LLP, Robinson Calcagnie Inc., Motley Rice LLC, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, The Whittemore Law Group PA, Kaplan Fox & Kilsheimer LLP, Gilman Law LLP, Girard Gibbs LLP, Girardi | Keese, Keller Grover LLP and Colson Hicks Eidson PA.

21st Century is represented by Casie D. Collignon, Paul G. Karlsgodt, Zachariah J. DeMeola and Jerry R. Linscott of BakerHostetler.

The suit is In re: 21st Century Oncology Customer Data Security Breach Litigation, suit number 8:16-md-02737, in the U.S. District Court for the Middle District of Florida.

--Additional reporting by Nathan Hale and Kat Sieniuc. Editing by Kelly Duncan.