

## DANIEL R. SCHRAMM, L.L.C.

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Attorney at Law  
121 Chesterfield Business Parkway  
Chesterfield, Missouri 63005  
Phone: (636) 532-2300  
Fax: (636) 532-6002  
Email: daniel@dschrammlaw.com  
Web site: www.dschrammlaw.com

### HIPAA AND PATIENT PRIVACY IN MISSOURI

This article explores the relationship between HIPAA and Missouri tort actions for breach of patient confidentiality. The Missouri Supreme Court first recognized a common law action for the breach of patient confidentiality three years before Congress enacted HIPAA. HIPAA now creates a comprehensive regulatory framework for protecting confidential patient information. But a patient victimized by the wrongful disclosure of such information still has independent tort remedies under Missouri law.

Back in 1993, the Missouri Supreme Court first recognized that a patient may bring a common law damage action against a physician who breaches the fiduciary duty to protect patient confidentiality. This type of claim is based on the physician's fiduciary duty not to disclose information received in connection with the doctor's treatment of the patient. *Brandt v. Medical Defense Associates*, 856 S.W.2d 667, 670-71 (Mo. banc 1993).<sup>1</sup> *Brandt* involved *ex parte* discussions between lawyers and treating physicians in a medical malpractice action. The Court held that the physicians in that case did not conspire to breach any fiduciary duty because the plaintiff waived his right of confidentiality by filing his lawsuit.

Under a more favorable set of facts, the Missouri Court of Appeals for the Eastern District later held that a plaintiff stated a proper cause of action for damages under *Brandt*. See, *Fierstein v. DePaul Health Center*, 949 S.W.2d 90, 92 (Mo. App. E.D. 1997) (*Fierstein I*). The hospital in *Fierstein* wrongfully disclosed the

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<sup>1</sup> But recently, the Supreme Court held that it would not impose a fiduciary duty on a laboratory not to disclose HIV test results when a statute already imposed a duty of confidentiality. *Doe v. Quest Diagnostics, Inc.*, 395 S.W.3d 8, 10 (Mo. 2013), citing §191.656 RSMo (Supp. 2012).

plaintiff's confidential medical records to the opposing counsel in a custody dispute. The hospital mailed records described in a subpoena to the opposing counsel before a scheduled deposition. This action effectively deprived the plaintiff of her right to object to the disclosure of the records under court rules. Unlike in *Brandt*, the plaintiff in *Fierstein* never waived her right of confidentiality in the custody litigation. The Court of Appeals ultimately affirmed a judgment in favor of the plaintiff in *Fierstein v. DePaul Health Center*, 24 S.W.3d 220 (Mo.App. E.D. 2000) (*Fierstein II*).

In 1996 - three years after *Brandt* but one year before *Fierstein I* - Congress created federal patient privacy protections by enacting The Health Insurance Portability and Accountability Act ("HIPAA"), Pub.L. No. 104-191, 110 Stat. 1936 (1996). HIPAA compels healthcare providers covered by the law to provide safeguards for protecting the confidentiality of patient information. The regulatory framework for the law is known as the HIPAA Privacy Rule.

HIPAA creates no private right of action. Instead, a patient aggrieved by an alleged violation of HIPAA may file an administrative complaint with the Secretary of Health and Human Services. 45 CFR §160.306(a). The Office of Civil Rights investigates the complaint on behalf of the Secretary. 45 CFR §160.306(c). If the Secretary is unable to reach an informal resolution of the complaint, she may impose a civil monetary penalty if she determines that the covered entity violated HIPAA. 45 CFR §160.402. Upon receiving notice of the proposed penalty, the covered entity then has a right to an administrative hearing. 45 CFR §160.420.

Since the adoption of HIPAA, two federal district court judges have suggested that a plaintiff seeking damages under Missouri law may have a HIPAA-based claim for negligence per se. See, *I.S. v. The Washington University*, 2011 U.S. Dist. LEXIS 66043 (E.D. Mo. June 14, 2011); see also, *K.V. v. Women's Healthcare Network, LLC*, 2007 U.S. Dist. LEXIS 102654 (W.D. Mo. June 6, 2007). The elements of this tort are: (1) violation of a statute or ordinance; (2) the injured plaintiff was a member of the class of persons intended to be protected by the statute or ordinance; (3) the injury complained of was of the kind the statute or ordinance was designed to prevent; and (4) the violation of the statute or ordinance was the proximate cause of the injury. *I.S. v. The Washington University*, *supra* at \*8. The district court in *I.S.*,

applying Missouri law, concluded that a claim for the wrongful disclosure of confidential medical information to the plaintiff's employer could stand as a claim for negligence per se despite its exclusive reliance on HIPAA. *Id.* at \*5. The court declined to exercise supplemental jurisdiction over the state law claim and remanded the case to state court. *Id.* at \*16. A similar result was reached several years earlier in *K.V. v. Women's Healthcare Network, LLC*, supra at \*2.

Despite this recent federal case law, Missouri healthcare providers still may try to rely on HIPAA preemption to avoid a state tort claim for damages. The Missouri Supreme Court has noted that the HIPAA preemption clause does not apply when, among other things, the state law is more stringent than HIPAA. *State ex rel. Proctor v. Messina*, 320 S.W.3d 145, 149 (Mo. banc 2010); see also, 42 U.S.C. Section 1320d-7.<sup>2</sup> Logically, the HIPAA preemption clause should have no effect on Missouri's damage remedy. Missouri has the flexibility under HIPAA to provide a more stringent approach to the protection of patient confidentiality.

HIPAA should not preempt Missouri tort claims for breach of patient confidentiality. Federal district courts and state courts generally have rejected the argument that HIPAA preempts state causes of action for breach of patient confidentiality.<sup>3</sup> Some of these courts, however, will not permit a claim of negligence per se premised solely on a HIPAA violation.<sup>4</sup> Courts have drawn different conclusions on this issue. The two federal district courts that have confronted this

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<sup>2</sup> *Proctor* addressed the question of whether HIPAA preempts Missouri law on *ex parte* communications between the defendant's lawyer and a plaintiff's treating physician in a medical malpractice case. The Court concluded that HIPAA does not preempt Missouri law on that particular issue. *State ex rel. Proctor v. Messina*, 320 S.W.3d at 157. The Court nonetheless held that the trial judge was prohibited from giving an advisory opinion to non-party medical providers that they were permitted to engage in *ex parte* communications with the defendant's lawyer. *Id.* at 158. *Proctor* does not bar a common law damage action against a physician for breach of patient confidentiality.

<sup>3</sup> See, *Byrne v. Avery Center for Obstetrics and Gynecology, P.C.*, 314 Conn. 433, 455-458 (Conn. 2014); *I.S. v. The Washington University*, 2011 U.S. Dist. LEXIS 66043, at \*5 (E.D. Mo. June 14, 2011); *Harmon v. Maury County*, 2005 U.S. Dist. LEXIS 48094, at \*3 (M.D. Tenn. Aug. 31, 2005); *R.K., St. Mary's Medical Center, Inc.*, 735 S.E.2d 715, 724 (W.Va. 2012); *Yath v. Fairview Clinics, N.P.*, 767 N.W.2d 34, 49-50 (Minn.Ct.App. 2009); *Sorenson v. Barbuto*, 143 P.3d 295, 299-301 (Utah Ct.App. 2006); *Acosta v. Byrum*, 638 S.E.2d 246, 253 (N.C.Ct.App. 2006)

<sup>4</sup> See, *Fanean v. Rite Aid Corporation of Delaware*, 984 A.2d 812, 817-18 (Del. Super. 2009); *Bonney v. Stephens Memorial Hospital*, 17 A.3d 123, 127 (Me. 2011); *Young v. Carran*, 289 S.W.3d 586, 588-89 (Ky.Ct.App. 2008).

issue under Missouri law have recognized the cause of action for negligence per se. But as of the date of this article, no Missouri appellate court has decided the question.

Missouri appellate courts also have not confronted the question of what evidentiary effect HIPAA and its regulations may have on a tort claim. If Missouri courts choose to follow the federal court decisions in *I.S.* and *K.V.*, plaintiffs will be able to introduce evidence of HIPAA violations to support their charge of negligence per se. Under the alternative theory of breach of confidentiality, HIPAA arguably helps to define the standard of care. Many courts now permit the use of HIPAA and the HIPAA Privacy Rule to establish the standard of care in common law actions.<sup>5</sup>

In today's regulatory environment, healthcare providers must develop policies to ensure compliance with HIPAA. So, the HIPAA Privacy Rule arguably provides evidence of how the provider is expected to protect its confidential patient information. A growing body of case law supports this premise. Yet this point technically remains an open question under Missouri law.

In conclusion, a person in Missouri allegedly victimized by the wrongful disclosure of confidential patient information may pursue remedies under federal or state law, or both. The aggrieved person may file a federal complaint with the Secretary of Health and Human Services. Or the person may bring a state court action for damages under theories of breach of fiduciary duty, general negligence or negligence per se. As of now, no reported Missouri appellate court decision has directly confronted the negligence per se theory, or the evidentiary effect of HIPAA on the common law action. But at least two federal district court judges have recognized a HIPAA-based cause of action for negligence per se under Missouri law.

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<sup>5</sup> See, e.g., *Byrne v. Avery Center for Obstetrics and Gynecology, P.C.*, 314 Conn. 433, 459 (Conn. 2014); *Acosta v. Byrum*, 638 S.E.2d 246, 253 (N.C.Ct.App. 2006); *R.K., St. Mary's Medical Center, Inc.*, 735 S.E.2d 715, 723-24 (W.Va. 2012); *Fanean v. Rite Aid Corporation of Delaware*, 984 A.2d 812, 823 (Del. Super. 2009); *Bonney v. Stephens Memorial Hospital*, 17 A.3d 123, 128 (Me. 2011).

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