

## REGIONAL NEWS

# Class Action Suit Over Aetna's Security Breach Is Dismissed

*Federal Judge Finds  
Only Speculative Injury,  
No Realized Damages*

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Finding there was no more than speculative injury, a federal judge has dismissed a class action suit against Aetna Inc. filed in the wake of news that the insurer's computer database may have been hacked and that personal data of up to 450,000 job applicants were potentially at risk.

In *Allison v. Aetna*, U.S. District Judge Legrome D. Davis added his voice to a growing chorus of judges who have held that such a claim of "increased risk of identity theft" is not enough to confer standing to sue.

"At best, plaintiff has alleged a mere possibility of an increased risk of identity theft, which is insufficient for purposes of standing, and he certainly has not asserted a credible threat of identity theft," Davis wrote.

In his 14-page opinion, Davis surveyed the legal landscape, noting that the case was "part of a burgeoning area of law," and that the courts are divided on whether plaintiffs

in such cases have standing.

The analysis is ultimately a fact-specific one, Davis found, that turns on whether the plaintiff is able to show more than a mere possibility of future harm.

The ruling is a victory for attorneys John M. Elliott, Mark J. Schwemler, Timothy T. Myers and Stewart J. Greenleaf Jr. of Elliott Greenleaf & Siedzikowski in Blue Bell, who argued that the plaintiffs were asking the courts to invent new and novel tort and contract theories.

But the plaintiffs lawyers — Sherrie R. Savett and Michael T. Fantini of Berger & Montague — insisted in court papers that the suit was firmly grounded on actual injury suffered by the lead plaintiff and the class.

"This case is about whether plaintiff and the class can recover for: (i) out-of-pocket costs necessarily incurred as a result of the data breach; (ii) time spent responding to the breach; and (iii) an increased risk of identity theft," the plaintiffs lawyers argued.

According to court papers, Aetna learned in May 2009 that its job application Web site had been hacked when some applicants reported receiving "phishing" e-mails



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purporting to be from Aetna and seeking additional personal information.

The site contained the e-mail addresses of about 450,000 job applicants, as well as the Social Security numbers of 65,000 current and former employees. For a smaller number of applicants who had been offered a job, the site contained even more data, including telephone numbers, addresses and employment histories.

Aetna mailed letters to the 65,000 individuals whose Social Security numbers were at risk. The letter "urged" them to take numerous steps to protect themselves from identity theft, including monitoring their personal accounts — bank statements and credit card bills — for fraud, placing a fraud alert on their credit files, and reviewing their credit reports for accounts they did not open.

The letter also said Aetna was offering free credit monitoring for one year.

But in the suit, plaintiff Cornelius Allison, a former Aetna employee, claimed that Aetna wasn't offering enough to solve his problems. One year of credit monitoring was not enough, his lawyers argued, for an event in which Aetna itself had acknowledged there was a significant risk of identity theft.

Defense lawyers, in their motion to dismiss, argued that Allison's claims are fatally flawed because the entire case is built on a claim that his personal data "might" have

been accessed.

"Based on this pure conjecture," the defense team argued, "plaintiff speculates that maybe, some day, perhaps more than a year from now, he might suffer some kind of harm. As numerous federal courts have already recognized, such allegations of speculative harm do not state a valid or cognizable claim."

Davis agreed, saying "plaintiff's alleged injury of an increased risk of identity theft is far too speculative."

Since Allison never received one of the phishing e-mails, Davis said, the "allegation that his personal information was even accessed is conjecture."

The evidence, Davis said, also hinted that the hackers may have been able to retrieve only e-mail addresses and were therefore using phishing e-mails to access more sensitive data.

The plaintiffs lawyers urged Davis to draw the opposite inference from the phishing e-mails, arguing that such post-hacking conduct revealed the hackers' nefarious purposes.

Davis disagreed and found instead that the more logical conclusion was that the hackers had come up short and were unable to commit any identity theft crimes with the data they had retrieved unless they used trickery to augment it with more valuable information.

*Aetna continues on 10*

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## Aetna

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"It would not be a reasonable inference

for the court to presume that hackers would seek such information, thereby risking exposure of their nefarious activities, if they had already obtained the same through unlawful means. Accordingly, even assuming that the hackers obtained plaintiff's email

address, it is highly speculative that they obtained any other information that would be necessary to commit identity theft," Davis wrote.

Savett and Fantini did not return calls seeking comment.

*(Copies of the 14-page opinion in Allison v. Aetna, PICS No. 10-1433, are available from The Legal Intelligencer. Please call the Pennsylvania Instant Case Service at 800-276-PICS to order or for information. Some cases are not available until 1 p.m.) •*

## Records

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privacy."

"The commonwealth has protected these rights," Wochok said. "It has protected them in divorce proceedings, it has protected them in adoption proceedings."

It only follows, then, that incapacitation proceedings are given similar protection, Wochok argued.

In February 2009, a three-judge panel of the Superior Court supported Wochok's arguments by ruling unanimously that an incapacitation proceeding — and records related to it — is not subject to a presumption of openness.

Rather, wrote Judge Richard B. Klein,

once a record has been properly sealed it is subject to being reopened only upon a showing of good cause. He identified the question of whether a party can open a record that has been properly sealed as one of first impression in Pennsylvania.

"We recognize that confidentiality orders are not the same as an order to seal the records in an incapacitation hearing. However, the standard to acquire a confidentiality order is primarily the same as that to seal a record; therefore, the standard to unseal should also be primarily the same," Klein wrote.

The judge continued: "As a result, we conclude that there is no provision for any 'automatic' opening of the records and if there is some reason to open the records, the person seeking the record must demonstrate good cause and those seeking to maintain the situation of closure do not have to prove the need

over and over again."

Before the state Supreme Court Wednesday, Huling sought to have that decision overturned.

He argued before the court that Pennsylvania has a tradition of allowing public access to judicial records and proceedings and that, since the courts have long been open to the public, it should be presumed that even a sealed record might well be available, also.

In the current case, Huling said, his client had not brought a claim against du Pont's estate, despite believing he has a right to a \$10 million trust. Instead, he claimed that if his attorneys had access to the trust documents, he might be able to establish a claim that he was entitled to a share of the estate.

According to Huling, the Superior Court decision requires a person seeking to open a record show the court there are items in the

sealed record that would make such a request relevant. Such a holding, though, leaves someone like DeHaven in a Catch-22, Huling said.

Huling, then, argued that though proceedings are closed, the documents related to those proceedings are not.

He cited the Legislature's failure to include mention of judicial records in Section 5511 of Title 20 of the Pennsylvania Consolidated Statutes as support for his argument. That section, according to Huling, only involves the "closure" of an incapacitation hearing — not the sealing of records related to it.

It was an argument that drew a sharp response from Justice Max Baer.

"Isn't it enough for them to meet that under the fact that the proceedings are closed?" Baer asked. "Does that make any sense? ... Aren't you slicing with an awfully sharp knife?" •

## Profits

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they said.

Lisa M. Kohut, director of The Law Firm Group at Citi in Philadelphia, said firms have been looking at associate compensation and moving away from lockstep. They are beginning to take that a step further and look at implementing a two-track system of partner-track associates and staff or contract associates who are paid less and work fewer hours, she said.

Equity and non-equity partners are also

it be through changes to associate classes or partner ranks, she said.

Citi and Hildebrandt are predicting partner profits will be somewhere between flat and up 5 percent in 2010 thanks to a combination of slowly increasing demand, continued aggressive expense management and fewer equity partners.

PNC Wealth Management Senior Vice President Jackie Byrne Lessman said Pennsylvania firms historically have avoided long-term debt, giving them more flexibility in tougher times. There are still areas, however, where these firms can reduce expenses, particularly in non-legal functions like marketing. Some of those departments could be

working harder," he said.

Invariably, however, it means fewer people doing the same amount of work. If firms truly dedicated themselves to being as efficient as possible, they could cut a third of their people, he said.

"This is potentially very large," Clay said.

He recently told a group of law school deans that the profession just won't need as many lawyers moving forward.

Clay said 2010 will be a year very similar to 2009, which wasn't as bad as initially predicted in part because of all the reduction in expenses and associate layoffs. There is much more that can be done in the way of expense management and that will work its way up from the younger attorneys through the equity

"Those are the ones that are going to get washed over," he said.

Hildebrandt and Citi had similar sentiments. Firm leaders have to understand the world has changed, they said, and the focus on growth that drove firms prior to 2008 has been replaced with the need for efficiency.

"Those that choose to ignore this fundamental shift in the market and go back to 'business as usual' as the economy begins to recover are likely to find themselves increasingly out of step with their clients' expectations and at a growing competitive disadvantage," the client advisory said.

And perhaps this whole discussion of profits will become irrelevant. Hildebrandt