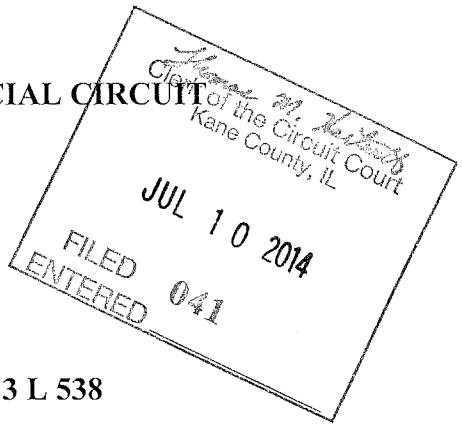
THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS



MATIAS MAGLIO, et al.,	)	
Plaintiffs,	)	
	)	
v.	)	**Gen. No. 13 L 538**
	)	
ADVOCATE HEALTH AND HOSPITALS	)	
CORPORATION, et al.,	)	
Defendants.	)	

ORDER

On defendant's motion to dismiss plaintiffs' Complaint, and plaintiffs' responses thereto, the court having reviewed the pleadings, briefs and arguments of counsel and being fully advised in the premises;

FINDS AND ORDERS AS FOLLOWS:

I. BACKGROUND

1. Plaintiffs bring claims of negligence, violation of Illinois Personal Information Protection Act (IPIPA), violation of Illinois Consumer Fraud Act (ICFA), and invasion of privacy, against defendant for allowing plaintiffs' personal information to be compromised when an unknown third party burglarized defendant and stole 4 computers containing the information in unencrypted form.

2. Plaintiffs have not alleged that the information contained on the computers has been accessed or disseminated by the unknown third parties, or that plaintiffs have been actual victims of identity theft because of the misuse of the information.

3. Defendants move to dismiss on the following grounds:

a. that plaintiffs do not have standing to sue, because they have not pled nor will they be able to prove actual injury. [§2-619 (a) (9)].

b. there are no allegations of present injury sufficient to sustain the negligence and ICFA claims. [§2-615].

c. that there are insufficient allegations of intentional conduct to state a cause of action for invasion of privacy. [§2-615]

d. that the economic loss rule bars plaintiffs' negligence claim. [§2-615]

e. that there are prior actions pending between the same parties for the same cause. [2-619 (a) (3)].

4. Plaintiffs allege that defendant has a statutory duty (via PIPA, MPRA, and HIPAA) to securely maintain patients' personal information, and that the failure to encrypt the information resulted in injury-in-fact or that the increased risk of harm to plaintiffs is itself injury-in-fact. Plaintiffs argue that because they have alleged injury-in-fact or increased risk of harm they have standing and have stated sufficient causes of action.

II. STANDING

5. The parties cite numerous cases, some from Illinois and other state courts, and some federal district, appellate, and U.S. Supreme Court opinions regarding the standing question. Both parties cited additional recent case authorities to supplement their original briefs. The question comes down to whether the increased risk of future harm is enough to confer standing under the case authorities cited.

6. For example, plaintiffs' supplemental case from the West Virginia Supreme Court in *Tabata v. Charleston Area Med. Ctr.*, supports plaintiffs' argument that patients have a concrete, particularized, and actual legal interest in keeping their medical information confidential, and for that court, the breach of confidentiality is enough to confer standing.

7. While the West Virginia case may be an example of how a court could confer standing to plaintiffs or a class of litigants who have suffered no actual damages, but who are found to have suffered loss to a legally protected interest, i.e. their interest in keeping their private information private, the Illinois line of cases on standing (including, inter alia, *Glisson, Greer,* and *Chicago Teachers Union*) and federal cases such as *Reilly* more persuasively analyze whether litigants have a real interest to be adjudicated.

8. The claimed injury in this case is just not (1) "distinct and palpable,", even though the threatened injury may be (2) "fairly traceable to defendant's conduct; and even though it could be (3) "prevented or redressed by the grant of the requested relief." (factors listed in *Greer* and other Illinois cases).

9. The facts herein are similar to those in the *Reilly* and *Cooney* cases, in that there has been no injury in fact and no change in the status quo. Yes, there is an increased risk of harm because it is unknown if, and when, the theft of the computers would transmute or ripen into identity theft. Such a transmutation would depend on the thieves actively disclosing, selling to other criminals, or otherwise misusing the data on the computers. No such allegation has been made. There is no actual or impending certainty of identity theft.

III. DAMAGES ELEMENT OF NEGLIGENCE AND IFCA CLAIMS

10. Plaintiffs cite *Dillon v. Evanston Hospital* and *In re Michaels Stores* as cases in which increased risk of harm may be available as damages. Both *Dillon* and *In re Michaels* are distinguishable. In *Dillon*, the increased risk of harm was accompanied by an actual present injury, and in *In re Michaels*, there had been actual monetary losses.

11. Plaintiffs citations of *Pisciotta* and *Krottner* cases are similarly distinguishable, and those cases, as well as *Cooney* actually support the dismissal of the negligence and ICFA claims as insufficient because only an increased risk of possible, future identity theft is alleged rather than any present harm that the law is prepared to remedy.

IV. INVASION OF PRIVACY CLAIM

12. Based on the facts alleged, there is no claim for invasion of privacy by intrusion upon seclusion, due to the lack of intentional conduct. At most, defendant was negligent in not encrypting the personal information on the computers. In addition, the *Dwyer v Am. Express* case holds that an intrusion claim cannot lie where a plaintiff has voluntarily given defendant the private information at issue.

13. Plaintiffs also argued that facts of the invasion of privacy claim may also fit under a theory of public disclosure of private facts. The facts do not support proof of two crucial elements of such a claim: that the defendant publicized the information or that the information was publicized at all.

V. ECONOMIC LOSS RULE

14. *In re Michaels* and cases cited therein hold that the economic loss rule applies to bar plaintiffs in data breach cases from recovering for purely economic loss under a tort theory of negligence. Cases cited by plaintiffs are inapplicable to avail plaintiffs of an exception to the rule.

VI. PRIOR PENDING CASES

15. Since the court is dismissing the case on lack of standing and failure to state a cause of action grounds, there is no need to decide the prior pending action part of the motion.

BASED ON THE FOREGOING FINDINGS AND CONCLUSIONS, IT IS HEREBY ORDERED:

Defendant's motion to dismiss is granted and the Complaint is dismissed with prejudice.

DATE: JUL 10 2014 **ENTER:** JAMES R. MURPHY

JUDGE