

How to Avoid Getting Sued by Your Cyber Risk Insurer

David G. Schoolcraft
dschoolcraft@omwlaw.com

Lee W. Kuo
lkuo@omwlaw.com

OGDEN
MURPHY
WALLACE
ATTORNEYS

Agenda

I. The Cottage Health System story

II. The rise of data breach risks in healthcare

III. Cyber risk insurance -- what you need to know

IV. Strategies for avoiding common pitfalls

Learning Objectives

- Summarize lessons to be learned from the Columbia Casualty Company vs. Cottage Health System case
- Explain key components of a cyber risk insurance application and related policy provisions
- Identify methods to evaluate available coverage and ongoing operational requirements
- Illustrate common pitfalls that may void coverage
- Prepare attendees to develop an action plan to mitigate risks associated with data breach and cyber insurance



The Good News



- Cyber Risk Policy in place
- Insurer funds \$4.125 million settlement

The Bad News

- Insurer sues Hospital for \$4.125 million plus attorneys' fees
- Alleges that hospital failed to take reasonable steps to protect data

1 Matthew T. Walsh, Esq. (Bar No. 208169)
2 CARROLL, McNULTY & KULL LLC
3 100 North Riverside Plaza, Suite 2100
4 Chicago, Illinois 60606
5 Telephone: (312) 800-5000
6 Facsimile: (312) 800-5010
7 Email: mwash@cmk.com

8 Attorneys for Plaintiff COLUMBIA CASUALTY COMPANY

9 UNITED STATES DISTRICT COURT
10 FOR THE CENTRAL DISTRICT OF CALIFORNIA

11 COLUMBIA CASUALTY COMPANY 12 Plaintiff, 13 v. 14 COTTAGE HEALTH SYSTEM 15 Defendant.	16 Case No.: 2:15-cv-03432 17 COMPLAINT FOR 18 DECLARATORY 19 JUDGMENT AND REIMBURSEMENT 20 OF DEFENSE AND SETTLEMENT 21 PAYMENTS
---	--

22 Plaintiff COLUMBIA CASUALTY COMPANY (hereinafter "Columbia") by and
23 through its attorneys, as and for Complaint against Defendant, hereby allege as follows:

24 **INTRODUCTION**

25 1. This is a Complaint for Declaratory Judgment pursuant to 28 U.S.C. § 2201 and
26 for Reimbursement of Defense and Settlement Payments made by Columbia on behalf of its
27 insured.

28 2. This matter arises out of a data breach that resulted in the release of electronic
private healthcare patient information stored on network servers owned, maintained and/or
utilized by defendant COTTAGE HEALTH SYSTEM ("Cottage").

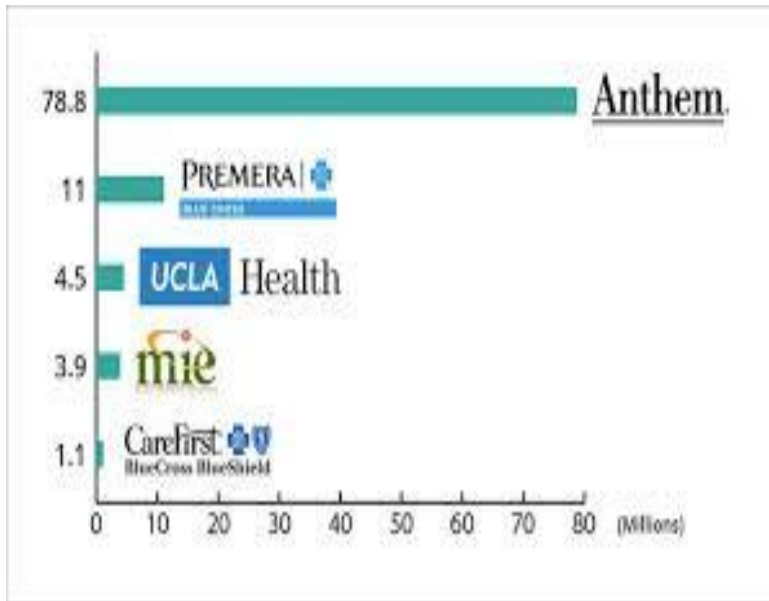
3. Cottage operates a network of hospitals located in Southern California,
including Santa Barbara Cottage Hospital, Goleta Valley Cottage Hospital and Santa Ynez
Valley Cottage Hospital (collectively, the "Hospitals.")

COMPLAINT FOR DECLARATORY JUDGMENT AND REIMBURSEMENT

Et tu, Brute?



Data Breach Risks



Source: ObserveIT, 2015

- Pace of data breaches in health care is accelerating
- No such thing as 100% data security
- Not a question of “if” but “when” will a breach occur

Risk Management Strategies

1. Prepare

2. Reserve

3. Insure

As Cyber Concerns Broaden, Insurance Purchases Rise

November 18, 2015

Tom Reagan

Cyber Practice leader, Financial and Professional Products Specialty Practice at Marsh



- Emerging market
- Forms not standardized
- Premiums and coverage variable
- Brokers – range of understanding

SHARE THIS
ARTICLE



Cyber attacks are escalating in their frequency and intensity and pose a growing threat to the business community as well as the national security of countries. High-profile cyber incidents in 2014 reflected the expanding spectrum of cyber threats, from point-of-sale (POS) breaches against customer accounts to targeted denial-of-service (DoS) attacks meant to disable a company's network. Businesses in ever-greater numbers sought financial protection through insurance, buying coverage for losses from data breaches and business outages.

Analysts at the National
Cybersecurity &
Communications
Integration Center
(NCCIC) present for
Cyber Storm III, a
national-level
cybersecurity exercise.
marsh.com/news/AMP
/get/image

The Cottage Health System Case

The screenshot shows a webpage from HealthIT Security. The header includes the logo and navigation links for HIPAA and Compliance, EHR Security, HIE Security, Mobile Security, Data Breaches, and Cloud. The main article title is "Cottage Health System alerts 32,755 patients of data breach" by Patrick Ouellette on December 16, 2013. The article text states that Cottage Health System of California notified 32,755 patients via mail that their data may have been inadvertently exposed on Google after a third-party vendor removed electronic security protections from one of its servers. A "RELATED ARTICLES" section lists several other security-related articles. A quote from Steve Fellows, executive vice president at Cottage, expresses regret and commitment to safeguarding health information. The article is tagged with various security and compliance terms.

HealthIT Security
News and Resources for HealthIT Security Pros

Home

HIPAA and Compliance EHR Security HIE Security Mobile Security Data Breaches Cloud

Cottage Health System alerts 32,755 patients of data breach

By Patrick Ouellette on December 16, 2013

Cottage Health System of California recently notified 32,755 patients via mail that their data may have been inadvertently exposed on Google after a third-party vendor removed electronic security protections from one of its servers.

RELATED ARTICLES

- Medical Device Security, Health Data Security Top 2016 Issues
- IU Health Arnett Healthcare Data Breach Affects 30K Patients
- Oregon Data Breach Notification Law Goes Into Effect
- FAS Discusses Federal and State Data Breach, Security Laws
- Potential PHI Data Breach for Child Welfare Agency

According to noozhawk.com, patients treated at Goleta Valley Cottage Hospital, Santa Ynez Valley Cottage Hospital and Santa Barbara Cottage Hospital between Sept. 29, 2009, and Dec. 2, 2013 may have been affected by the breach. Compromised data included patient names, addresses, dates of birth and very limited protected health information for some patients related to diagnosis, lab results and procedures performed. The file did not include any Social Security numbers, driver's license numbers, health insurance numbers, bank account numbers or any other financial information.

The Cottage Health announcement stated that it quickly removed the server from service and conducted a review of all servers to ensure that appropriate security measures are in place. To avoid reoccurrence, it's conducting a security protocol audit and implementing additional measures. The organization has offered affected patients a toll-free phone number and identity management services through ID Experts.

"We deeply regret this incident. Cottage takes its obligation to protect health information very seriously and is taking aggressive steps to safeguard against this type of incident in the future," said Steve Fellows, executive vice president, chief operating officer and chief compliance officer at Cottage, according to the statement. "We want to assure our patients that we are doing a thorough review and have systems in place to address their concerns. We understand that the security vulnerability by our vendor was unintentional and we have no reason to suspect that the limited data exposed might be misused."

Tagged Technical Safeguards, Physical Safeguards, PHI, HIPAA, Health Data Security, Health Data Encryption, Health Data Breach, Administrative Safeguards

- Cottage hired a vendor to handle certain data including PHI
- Vendor placed data on unprotected servers accessible online
- Incident resulted in breach notifications sent to 32,755 patients
- Class action lawsuit against Cottage followed

Insurer invokes the “Mistake Exclusion”



- Failure to maintain adequate security safeguards
- Case of first impression for cyber risk policies
- Insurer asserts the “Misrepresentation Defense”
 - Omissions or misrepresentations in the application render the policy null and void

Lessons Learned



Review and negotiate policy terms

Lessons Learned



Respond to policy application questions with great care

Lessons Learned



Maintain industry standard security practices and demand the same of your vendors



David G. Schoolcraft

dschoolcraft@omwlaw.com

[@hitech_lawyer](#)

Lee W. Kuo

lkuo@omwlaw.com

OGDEN
MURPHY
WALLACE
ATTORNEYS

omwhealthlaw.com