

NFL Player Must Tackle Common Privacy Pratfall In ESPN Suit

By Allison Grande

Law360, New York (February 26, 2016, 11:02 PM ET) -- New York Giants defensive end Jason Pierre-Paul will attempt to use a broad Florida medical disclosure law to hold ESPN and one of its reporters liable for tweeting a photo of his medical records, but he must clear a hurdle that commonly trips up plaintiffs in privacy fights: proving that the disclosure of his personal information caused him any measurable harm.

In his suit filed in Florida state court Wednesday, the National Football League player alleged that ESPN reporter Adam Schefter improperly obtained his medical records reflecting the amputation of his right index finger that he underwent after injuring his hand in a fireworks accident on July 4. He said Schefter blasted the records to his nearly 4 million Twitter followers "out of a selfish desire to 'break news'" and to prove the accuracy of his report that Pierre-Paul had undergone surgery.

Pierre-Paul claims that Schefter — and by extension, his employer ESPN — invaded his privacy rights under state common law and violated Florida Statute 456.057, which prohibits the disclosure of a patient's medical records to anyone other than the patient or the patient's attorney or doctors without the express written consent of the patient.

But while Pierre-Paul is armed with a state statute that covers a broader scope than federal health privacy laws, which only extend to health care providers and their immediate business associates, the athlete still must show that he suffered some type of concrete loss due to the tweet, a task that has long stymied plaintiffs attempting to hold companies liable for data breaches and novel data-collection practices.

"It's not clear what damages Pierre-Paul has suffered," said Al Saikali, co-chair of Shook Hardy & Bacon LLP's data security and privacy practice. "He concedes that news of the amputation was of legitimate public concern, but then says his biggest issue is with the release of the chart, but the chart merely states that he had an amputation of the right index finger. If the chart contained other information, that might make his argument a little stronger."

Even if he can prove harm, Pierre-Paul faces the additional hurdle that celebrities and others confront when they take on the press: the First Amendment.

"ESPN is a member of the press, and the press is always afforded broader protection in privacy cases because of the First Amendment," Saikali said.

But while the freedom of speech and freedom of the press bars set by the First Amendment may be

high, Pierre-Paul could find help by looking to the nature of what was reported, according to Bradley S. Shear, the managing partner of Shear Law LLC.

"It's one thing to report about a medical record; it's another to take a picture and post it online for millions to see," Shear said. "I'm a big believer of the First Amendment and in giving the media wide latitude to do their job, but this is something where the reporter's actions seem to have crossed a line."

How far the media can go in covering those who have fallen into the public spotlight has long been debated. In a famous case from 1973, the Second Circuit upheld an injunction prohibiting freelance photographer Ronald Galella from coming into close proximity with former first lady Jackie Kennedy Onassis. Galella had argued that the injunction violated First Amendment rights, but the appellate court held that the constitutional shield does not give journalists license to act criminally or tortuously in the course of the news-gathering.

"Even though Jackie O. was a public figure and arguably one of the most famous people in the world during that time, the court still found that she had a right to privacy and that the media doesn't have carte blanche to impede upon her life in a manner that violated the law," Shear said.

While the Pierre-Paul case doesn't involve a physical intrusion into the athlete's personal space, it does follow in the same vein of exposing details that the target specially sought to keep private.

"Pierre-Paul wasn't tweeting about it himself and went out of his way to try to stay out of the media, so it may be difficult for ESPN and Schefter to say he voluntarily gave up his right to privacy," Shear said. "Even celebrities have an expectation that their private medical records won't end up online, and releasing that publicly is something that not many would think is fair game."

That position has certainly won support in the court of public opinion. In the hours after Schefter's July 8 tweet went live, dozens of his followers posted comments accusing him of "crossing a line" by sharing private medical records and diagnosing, a violation of the Health Insurance Portability and Accountability Act.

While HIPAA is the first statute that jumps to mind when private medical records are seemingly disseminated, the federal statute covers only health care providers and covered entities such as health care clearinghouses, insurers and medical service providers.

According to the lawsuit, Pierre-Paul has already settled with Jackson Memorial Hospital in Miami, which disclosed the records to Schefter, for an undisclosed amount.

With Pierre-Paul unable to wield HIPAA against an entity such as ESPN, the athlete turned to the portion of the Florida code that regulates the health care profession.

Under Section 456.057, third parties to whom medical information is disclosed are prohibited from further disclosing any information in the record without the express written consent of the patient.

"The statute seems to give Pierre-Paul some ammunition to say that regardless of whether or not you are a member of the media, you violated this statute," Shear said.

However, the ability of the statute to thrive in these circumstances is far from a sure thing. While the language of the code seems to support Pierre-Paul, the section doesn't appear to create a private right

of action against the third party that receives and later shares medical records, according to Saikali.

"Violation of the statute could result in a sanction against the violating entity by a regulatory board, and such a sanction could include revocation of a license," he said. "The board doesn't regulate the third party, such as a reporter, however."

While Pierre-Paul could try to use the alleged statutory violation as evidence of negligence, the plaintiff didn't raise a negligent claim, and "the negligence count would face the same problems as the other common law claim — lack of damages and freedom of the press defenses," Saikali noted.

Given the uncertainties inherent in applying the Florida code to the athlete's claims, and the potential for the suit to set important precedent for the media industry, many attorneys believe the dispute may ultimately be resolved by a settlement rather than a court decision.

"This may be a situation where the media and ESPN in particular wouldn't want to have case law out there that says this is the baseline for this type of claim," Shear said.

Saikali agreed that a settlement may be the most likely outcome in the Pierre-Paul suit.

"My gut feeling is that this lawsuit is being filed primarily because ESPN is a deep pocket and a potential target for a quick settlement," he said.

The resolution of pending cases involving Gawker Media LLC's publication of a Hulk Hogan sex tape and the secret recording of sports reporter Erin Andrews in a Nashville, Tennessee, hotel room could also influence the way the football player's case pans out, Shear added.

"If there's a large set of damages, or if it's found that there's no expectation of privacy for Hogan and Gawker had the right to post the video, that could impact this case," he said. "While the situations are different, the celebrities had an expectation of privacy in the same way that you expect that when you're in a hospital, your records won't be leaked to a third party and posted online."

Regardless of how the suit ends up, attorneys say that the situation should serve as a reminder to media companies and others to be careful about what they post online.

"One wrong tweet or post, whether it's an image or video or words, could create potentially millions of dollars in legal liability for not only the poster, but for those around them as well," Shear said. "That's why it's very important to think before you hit send if posting this is really a good idea."

Pierre-Paul is represented by Mitchell Schuster and Kevin Fritz of Meister Seelig & Fein LLP and John C. Lukacs Sr. of Hinshaw & Culbertson LLP.

Counsel information for ESPN was not immediately available.

The case is Jason Pierre-Paul v. ESPN Inc. et al., in the Circuit Court of the Eleventh Judicial Circuit for Miami-Dade County, Florida. The case number was not immediately available.

--Editing by Katherine Rautenberg and Philip Shea.
