



Privacy

Andrews Litigation Reporter 

VOLUME 6 ★ ISSUE 6 ★ FEBRUARY 2009

Expert Analysis

Identity Theft: When the Only Fear Is Fear Itself

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Incidents involving disclosures of personal information have certainly been in the news lately, from the theft of laptop computers containing personal information,¹ to computer hacking,² to the theft of confidential paper documents.³

In addition, each of the major credit bureaus now offers services designed to, at significant cost, protect consumers from the risks of identity theft.⁴ In fact, many insurance companies now offer some form of identity theft insurance, for an additional fee, as part of a homeowners policy.⁵

Always looking for the next golden goose, the plaintiffs' bar has, over the past few years, attempted to turn all of this worry about identity theft into big money.

In claims filed in courts around the country, plaintiffs allege that their worries and fears about the potential of future identity theft entitle them to bring actions for damages, often in the form of putative class actions. These claims have sounded in negligence, contract, conversion, invasion of privacy and myriad other causes of action.

However, in response to these claims, a solid body of case law has developed establishing that, however a claim is styled, a plaintiff's speculative fear of a potentially increased risk of identity theft does not constitute "actual damages" under the law, and thus courts have been consistently rejecting such lawsuits.⁶

The Loss of Personal Information

The types of cases that have been brought thus far have varying background facts but contain several common elements. In each case, the plaintiff provided personal information to a party, and at some point that party allegedly lost exclusive control over the information, exposed it to potential third parties or even voluntarily shared it with potential third parties.

In some cases, the data security incident arose from allegedly improper information retention methods, such as storing unencrypted data on a laptop, selling data to an unauthorized third party, or printing information on a document that subsequently is lost in the mail.⁷

In other cases, the incident occurred because a company laptop or hard drive containing the personal information was stolen or because the company's system was illegally accessed through physical burglary or hacking.⁸

The wide variety of defendants and scenarios forming the foundation for the complaints highlights the expansive universe of companies that are potential targets for suits of this nature. Some of these entities are themselves the victims of criminal activity yet wind up targets of plaintiffs nonetheless.

The Nature of the Damage Allegations

Typically, suits of this nature allege some combination of emotional, preventive and nuisance damages. Emotional-distress damages typically involve the plaintiffs' alleged reactions upon learning of the potential for identity theft, such as fear, apprehension of fraud and anxiety.⁹

Preventive damages cover the economic costs that plaintiffs claim to have undertaken to protect themselves after learning of the breach. Such damages include the costs of subscribing to credit monitoring services and obtaining credit reports, loss of time to investigate and monitor their credit, and canceling and reopening allegedly compromised accounts.¹⁰

Nuisance damages typically stem from allegations that, as a result of the breach, the plaintiff has received an increased amount of junk mail.¹¹

No Cognizable Damages Theory

Much to the dismay of plaintiffs and their attorneys alike, companies faced with these lawsuits have been overwhelmingly successful at obtaining dismissals, either at the pleading stage or after discovery on summary judgment. This emerging body of case law, covering a variety of causes of action, has almost uniformly held that, absent actual evidence that the breach of information caused identity theft, the mere fear or cost to prevent identity theft is insufficient to establish recoverable damages.

In most of the lawsuits, "actual damage" is an essential element of a claim that must be pleaded and proven.

Negligence is the most common cause of action brought in fear-of-identity-theft cases; most cases involve allegations that the defendants failed to take adequate steps to secure personal information.¹² While the requirements for a negligence claim vary by state,

a negligence claim typically involves some allegation that the plaintiff has sustained "actual damages."

But in case after case, courts have found that the types of damages described above simply do not satisfy this requirement.¹³

One such example is *Ponder v. Pfizer Inc.*, 522 F. Supp. 2d 793 (M.D. La. 2007). The plaintiffs filed a claim for negligence and violation of a Louisiana data breach notification statute arising from a defendant's loss of personal information on a computer hard drive, alleging that the named plaintiff and the putative class suffered:

fear and apprehension of fraud, loss of money, and identity theft; the burden and the cost of credit monitoring; the burden and the cost of closing compromised credit accounts and opening new accounts; the burden of scrutinizing credit card statements and other statements for unauthorized transactions; damage to their credit; loss of privacy and other economic damages.

The *Ponder* court dismissed the negligence claim for failure to allege actual damages, holding that "if the defendant's conduct is merely negligent and causes only mental disturbance, without accompanying physical injury, illness or other physical consequences, the defendant is not liable for such emotional disturbance."

Furthermore, the court said the plaintiffs' alleged burden of monitoring their credit, scrutinizing account statements, and closing and opening accounts could not constitute actual damages because "injury accrues when the compromised data are actually used by a third party to steal someone's identity."

Similarly, contract-based claims are difficult to maintain in risk-of-identity-theft cases because:

- A contractual relationship between the parties must be established; and
- Actions under contractual theories, in many jurisdictions, will not allow for the recovery of nonpecuniary (emotional) damages without an adequate showing that the agreement carried a significant non-pecuniary purpose.¹⁴

In cases such as these, where emotional gratification was not considered at the point of agreement, courts have been unwilling to award emotional-distress damages related to the fear of identity theft.

For example, in *Smith v. Chase Manhattan Bank* a New York appeals court held that emotional-distress

damages were insufficient to state a cause of action for breach of contract and therefore dismissed the claim on its pleadings.¹⁵ Some courts have even rejected economic damages for credit monitoring as being too speculative to permit recovery of “actual damages.”¹⁶

While the courts analyzing these issues are doing so under state law, it is apparent that courts are very much aware of and considering the case law from across the country, and some are expressing skepticism about whether these types of speculative damages are viable under any tort or contract theory. Indeed, some courts have even rejected damages claims based on other theories of recovery, such as breach of fiduciary duty, fraud, conversion and invasion of privacy.¹⁷

Comparisons to Medical Monitoring Claims Are Not Apt

Some plaintiffs have attempted to escape this bind by analogizing credit monitoring to medical monitoring, which some courts have accepted in the context of toxic torts.¹⁸

In jurisdictions where medical monitoring claims have been sustained, plaintiffs have sometimes been allowed to recover for damages for monitoring costs even before the manifestation of full-blown disease.

However, the courts that have considered this comparison have found to be inapt. In one of the most recent decisions discussing these types of suits, *Caudle v. Towers, Perrin, Forster & Crosby*, the court applied New York law and drew an important distinction between medical monitoring claims and speculation about a potentially increased risk of identity theft:

An exposure which, after a latency period, results in a serious disease is not fully remedied by a damage award to the victim. But an individual who fears that his personal information may be misused can be provided with a monetary remedy when and if the information is actually misused.¹⁹

The court in *Stollenwerk v. Tri-West Healthcare Alliance*, applying Arizona law, held similarly, ruling that while an identity theft victim might experience a non-pecuniary harm, “the primary injury does not present a serious health risk,” and therefore “as a matter of law identity theft and credit monitoring must still be differentiated from toxic torts and medical monitoring.”²⁰

A Failure to Allege ‘Injury in Fact’ Leads to a Lack of Standing in Some Federal Courts

When federal courts have considered these claims, some have concluded that allegations of an increased risk of identity theft, without the actual occurrence of it, is simply insufficient to establish an “injury in fact” for standing purposes under Article III and that accordingly federal courts even lack jurisdiction to hear such claims.

Those courts have concluded that such allegations of future speculative harm fail to meet the constitutional minimum of an injury-in-fact as it is neither actual or imminent but instead is conjectural or hypothetical.²¹ However, other courts, including the 7th U.S. Circuit Court of Appeals in *Pisciotta v. Old National Bancorp*, have found that, for standing purposes, the injury-in-fact test can be satisfied by a threat of future harm.²²

However, even in those cases where the courts accepted standing for Article III purposes at the pleading stage, they have nonetheless held that plaintiffs have been unable to sustain their burden to show “actual damages” on the merits.²³

Conclusion

With respect to lawsuits involving alleged data security breaches, the theories are constantly evolving. It is certainly too early to suggest that this prospective “golden goose” for the plaintiffs’ bar has been cooked.

By the time you finish this article, no doubt some enterprising class-action lawyer will file a claim that will plead a different cause of action than the ones discussed herein and will allege a slightly different theory of damages than earlier cases have.

Notes

- ¹ Ellen Nakashima & Rick Weiss, *Patients’ Data on Stolen Laptop*, WASH. POST, Mar. 24, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/23/AR2008032301753.html>.
- ² *Justice: Hackers Steal 40 Million Credit Card Numbers*, CNN, Aug. 5, 2008, available at <http://www.cnn.com/2008/CRIME/08/05/card.fraud.charges/index.html>.
- ³ Julia Preston, *Illegal Worker, Troubled Citizen and Stolen Name*, N.Y. TIMES, March 22, 2007, available at <http://www.nytimes.com/2007/03/22/us/22raids.html>.
- ⁴ *Costly Credit-Monitoring Services Offer Limited Fraud Protection*, CONSUMER REPORTS, April 2007, available at http://www.consumerreports.org/cro/money/credit-loan/costly-credit-monitoring-services-offer-limited-fraud-protection-4-07/overview/0704_costly-credit-monitoring-services-offer-limited-fraud-protection_ov.htm.

- ⁵ Sandra Block, *More Uneasy Consumers Purchase Identity Theft Insurance*, USA Today, May 5, 2003, available at http://www.usatoday.com/money/perfi/columnist/block/2003-05-05-ym_x.htm.
- ⁶ It is worth noting, however, that Federal Trade Commission enforcement actions are not similarly constrained by a requirement of "actual damages." See, e.g., *FTC v. Navone*, No. 08-01842, complaint filed (D. Nev. Dec. 30, 2008); D. Reed Freeman & Alysa Z. Hutnik, *FTC Files Data Security Complaint Against Mortgage Broker; Reminder of Increased Regulatory Scrutiny Of Businesses' Data Security Practices*, Jan. 23, 2009, available at http://www.kelleydrye.com/resource_center/client_advisories/0408. Accordingly, while defendants may escape liability in this type of litigation, the same factual allegations can form the basis for a state or federal government investigation or enforcement action.
- ⁷ *Melancon v. La. Office of Student Fin. Assistance*, 567 F. Supp. 2d 873 (E.D. La. 2008) (alleging that defendants lost electronic media containing personal information); *Shafraan v. Harley-Davidson Inc.*, 2008 WL 763177 (S.D.N.Y. 2008) (alleging that defendants failed to secure a lost laptop containing customers' personal information); *Ponder v. Pfizer Inc.*, 522 F. Supp. 2d 793 (M.D. La. 2007) (alleging that defendant exposed electronically stored personal information to unknown third parties, who accessed and copied data); *Randolph v. ING Life Ins. & Annuity Co.*, 486 F. Supp. 2d 1 (D.D.C. 2007) (alleging that defendant's employee improperly copied plaintiff's personal information onto a personal laptop, which was later stolen in a home burglary); *Key v. DSW Inc.*, 454 F. Supp. 2d 684 (S.D. Ohio 2006) (alleging that defendant failed to secure its customers' personal information, and as a result unauthorized people accessed the information of 96,000 customers); *Giordano v. Wachovia Sec.*, 2006 WL 2177036 (D.N.J. 2006) (alleging that defendant improperly printed and mailed a report with plaintiffs' account information, which was later lost in the mail, thus compromising the security of tens of thousands of Wachovia customers); *Smith v. Chase Manhattan Bank*, 741 N.Y.S.2d 100 (N.Y. App. Div., 2d Dep't 2002) (alleging that defendant sold personal information to third-party vendors in violation of its representations to customers).
- ⁸ *Caudle v. Towers, Perrin, Forster & Crosby*, 580 F. Supp. 2d 273 (S.D.N.Y. 2008) (alleging that defendants negligently allowed the theft of a company laptop that contained plaintiff's personal information); *Kahle v. Litton Loan Servicing*, 486 F. Supp. 2d 705 (S.D. Ohio 2007) (alleging that computers containing personal information were stolen); *Pisciotta v. Old Nat'l Bancorp.*, 499 F.3d 629 (7th Cir. 2007) (alleging that defendant failed to secure its customers' personal information, and as a result a "hacker" had obtained access to tens of thousands of customers' personal information); *Bell v. Acxiom Corp.*, 2006 WL 2850042 (E.D. Ark. 2006) (alleging that defendant failed to secure its customers' personal information, and as a result unauthorized persons accessed the information of its customers); *Forbes v. Wells Fargo Bank*, 420 F. Supp. 2d 1018 (D. Minn. 2006) (alleging that defendant's computers containing customers' unencrypted personal information were stolen); *Guin v. Brazos Higher Educ. Servs. Corp.*, 2006 WL 288483 at *6 (D. Minn. 2006) (alleging that defendant negligently allowed an employee to keep unencrypted nonpublic customer data on a laptop computer that was stolen from the employee's home during a burglary); *Stollenwerk v. Tri-West Healthcare Alliance*, 2005 WL 2465906 at *5, (D. Ariz. 2005) (unpublished) (alleging that computer hard drives

- were stolen containing the personal information of beneficiaries of the Defense Department's health insurance program).
- ⁹ See *Melancon*, 567 F. Supp. 2d at 874 (seeking damages for "fear of identity theft, ... anxiety [and] emotional distress," together with an increased risk of future identity theft); *Ponder*, 522 F. Supp. 2d at 795 ("fear and apprehension of fraud" along with cost of credit monitoring and closing accounts); *Guin*, 2006 WL 288483 at * 3 (seeking damages for "emotional damages, fear and anxiety" as well as out-of-pocket loss); *Pisciotta*, 499 F.3d at 632 (seeking economic and emotional damages).
- ¹⁰ See *Pisciotta*, 499 F.3d 629 (seeking damages for the cost of credit monitoring services); *Shafraan*, 2008 WL 763177 (seeking damages for protective measures including costs for credit monitoring, communication with defendant and efforts to monitor credit activity); *Randolph*, 486 F. Supp. 2d 1 (seeking damages for costs associated with purchasing credit reports and monitoring identity and credit for the indefinite future); *Kahle*, 486 F. Supp. 2d 705 (seeking damages for cost of credit monitoring services); *Forbes*, 420 F. Supp. 2d 1018 (seeking damages for time and money spent monitoring credit); *Stollenwerk*, 2005 WL 2465906 (seeking damages for the cost of credit monitoring services).
- ¹¹ See *Smith*, 741 N.Y.S.2d 100 (plaintiff alleged increased risk of receiving junk mail); see also *Bell*, 2006 WL 2850042 (plaintiff alleged increased receipt of junk mail).
- ¹² See, e.g., *Caudle*, 580 F. Supp. 2d 273; *Ponder*, 522 F. Supp. 2d 793; *Guin*, 2006 WL 288483; *Stollenwerk*, 2005 WL 2465906.
- ¹³ See, e.g., *Ponder*, 522 F. Supp. 2d 793; *Melancon*, 567 F. Supp. 2d 873; *Bell*, 2006 WL 2850042; *Key*, 454 F. Supp. 2d 684; *Giordano*, 2006 WL 2177036; *Shafraan*, 2008 WL 763177; *Forbes*, 420 F. Supp. 2d 1018.
- ¹⁴ See, e.g., *Young v. Ford Motor Co.*, 595 So. 2d 1123, 1134 (La. 1992) (holding that, to recover emotional-distress damages in a breach-of-contract claim under Louisiana law, the buyer must show that the contract intended to gratify both pecuniary and non-pecuniary interests).
- ¹⁵ See *Smith*, 741 N.Y.S.2d at 103; see also *Forbes*, 420 F. Supp. 2d at 1021 (holding that, even where plaintiffs expended time and money to monitor their credit, these expenses were "solely the result of a perceived risk of future harm" and accordingly insufficient to sustain a breach-of-contract action); *Pinero v. Jackson Hewitt Tax Serv.*, 2009 WL 43098 (E.D. La. 2009) (rejecting negligence and breach-of-contract claims in the "fear of identity theft" context.)
- ¹⁶ See *Pisciotta*, 499 F.3d 629; *Forbes*, 420 F. Supp. 2d 1018.
- ¹⁷ See, e.g., *Shafraan*, 2008 WL 763177 at * 2 (holding that fear of future identity theft could not constitute damages for purposes of claim of negligence, breach of warranty, unjust enrichment, breach of fiduciary duty, deceptive trade practice law, false advertising, fraud or breach of contract under New York law); *Giordano*, 2006 WL 2177036 at *4 (dismissing claims alleging invasion of privacy, breach of the duty of confidentiality and conversion for a failure to allege more than "speculative and hypothetical future injuries").
- ¹⁸ Note that not all jurisdictions even accept medical monitoring claims as sufficient to constitute "actual damages." See, e.g., *Hendricks v. DSW Shoe Warehouse*, 444 F. Supp. 2d 775, 783 (W.D. Mich. 2006) (holding that cause of action to recover costs of credit monitoring was unlikely to be supported under Michigan law since the state did not recognize medical monitoring)

(citing *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 692 [Mich. 2005] [rejecting medical monitoring cause of action]); *Pisciotta*, 499 F.3d at 639 (holding that, as Indiana law does not allow for medical monitoring damages without proof of actual illness or disease, therefore, by analogy, a credit monitoring claim cannot be viable until identity theft occurs) [citing to *AlliedSignal Inc. v. Ott*, 785 N.E.2d 1068 [Ind. 2003]].

¹⁹ *Caudle*, 580 F. Supp. 2d at 281-2.

²⁰ *Stollenwerk*, 2005 WL 2465906at *4. See also *Melancon*, 567 F. Supp. 2d at *3-4 (rejecting comparisons to medical monitoring claims under Louisiana law); *Kahle*, 486 F. Supp. 2d at 712 (holding that "'identity exposure' cases are not analogous to medical monitoring cases").

²¹ See *Giordano*, 2006 WL 2177036 at *5 (remanding to state court after finding a lack of standing); *Bell*, 2006 WL 2850042at *2 (dismissing after finding a lack of standing); *Randolph*, 486 F. Supp. 2d at 10 (citing to *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 [1992] (holding that, to satisfy the standing requirement of Article III of the Constitution, there must be, among other things, the "irreducible constitutional minimum of an injury-in-fact, the asserted injury must be concrete and particularized as well as actual and imminent, not conjectural or hypothetical").

²² See *Pisciotta*, 499 F.3d at 634 (finding standing under injury-in-fact test in risk-of-identity-theft case by drawing comparison to toxic substance and medical monitoring cases from 2nd, 4th, 6th and 9th Circuits); see also *Caudle*, 580 F. Supp. 2d at 279, 284 (adopting position expressed in *Pisciotta* in fear-of-identity-theft case by finding that plaintiff had alleged an adequate injury-in-fact for standing purposes, but ultimately dismissing claim on summary judgment after finding that plaintiff failed to show that he has yet to suffer any damage caused by a breach of fiduciary duty or negligence; *Ruiz v. Gap Inc.*, 540 F. Supp. 2d 1121 (N.D.

Cal. 2008) (finding sufficient allegations of injury for standing and for a negligence claim to survive motion to dismiss).

²³ See *Pisciotta*, 499 F.3d at 639-40 (holding that, while the allegations of future harm can satisfy the injury-in-fact requirement for standing purposes, the court was correct to grant judgment on the pleadings to the defendant in a credit monitoring case); see also *Ruiz*, 540 F. Supp. 2d at 1126 (finding sufficient allegations of injury for standing to survive motion under Rule 12(c) at a preliminary stage, but cautioning that "[s]hould it become apparent that [plaintiff Joel] Ruiz's alleged injury is in fact too speculative or hypothetical, the court will conclude, as it must, that Ruiz lacks standing").

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