

PRACTICE FOCUS / CYBERSECURITY

Fla. Courts Require Actual Injury to Demonstrate Standing in Data Breach Cases

Commentary by
Nicole Rekant and
Stevan Pardo

The proliferation of data breach cases in Florida courts has focused on Article III standing. To meet the pleading standard under Article III, a plaintiff must allege sufficient facts to show the injury-in-fact is concrete, particularized, actual, and imminent, not conjectural or hypothetical. An allegation of imminent injury may suffice if the threatened injury is "certainly impending" or there is a "substantial risk" harm will occur, as in *Clapper v. Amnesty International USA*, 568 U.S. 398, 414 n.5 (2013). The injury alleged also must be "fairly traceable to the challenged action of the defendant," see *Resnick v. ArMed*, 693 F.3d 1317 (11th Cir. 2012).

A showing that a plaintiff's injury is indirectly caused by a defendant's actions satisfies the fairly traceable requirement under *Resnick*. However, allegations of possible future injury are not sufficient. Eleventh Circuit data breach cases such as *Resnick* established the legal principle that a plaintiff who alleges only speculative, not actual, identity theft will not have standing.

Florida cases continue to maintain this threshold for standing. In *Stapleton*



SHUTTERSTOCK

on behalf of *C.P. v. Tampa Bay Surgery Center*, 2017 WL 3732102 (M.D. Fla. Aug. 30, 2017), a hacker breached a surgery center's database and published 142,000 patients' sensitive information online. The plaintiffs did not allege that any of the sensitive information was used. Instead, they alleged they were at an increased risk of having their identity stolen and

were forced to incur credit monitoring/identity theft protection costs. After the data breach, the center provided free identity protection services to the plaintiffs and other potentially affected patients.

The court found that the plaintiffs' allegations were insufficient to show an injury was certainly impending or that they had a substantial risk of imminent injury. First, the plaintiffs were unable to identify a single patient whose sensitive information was misused as a result of the data breach. Second, the center lessened the plaintiffs' risks of imminent injury by providing free credit monitoring to all potentially affected persons. Third, the court concluded that the plaintiffs' allegations relied on a chain of inferences that were too attenuated to constitute imminent harm. The plaintiffs asked the court to find that their sensitive information was viewed online, that someone downloaded that information and would use it, and that the center's protections would not prevent the misuse. The court did not find an injury was impending and dismissed the amended complaint.

Brush v. Miami Beach Healthcare Group, 238 F.Supp.3d 1359 (S.D. Fla. 2017), found that the plaintiff had standing under Article III where a concrete injury was shown and the stolen data was actually misused. In *Brush*, a hospital employee accessed patients' sensitive information. The employee disclosed and/or sold the plaintiff's information to a third party who used the plaintiff-patient's personal data to steal her identity and file a fraudulent tax return using her name and social security number. Thereafter, the plaintiff spent time and resources remedying the harm. Prior to her visit to the defendants' hospital, the plaintiff's identity had never been stolen and she took considerable precautions to protect her private data.

The *Brush* court followed the findings of two district courts in the Eleventh Circuit that held that the theft of personal information accompanied by the filing of an unauthorized tax return constitutes an injury-in-fact, even if no monetary damages are incurred. See *Smith v. Triad of Alabama*, 2015 WL 5793318, at *8-11

(M.D. Ala. Sept. 29, 2015) (Watkins, C.J.) and *Burrows v. Purchasing Power*, 2012 WL 9391827, at *2 (S.D. Fla. Oct. 18, 2012) (Ungaro, J.). *Burrows* explained: "The clear implication taken from this distinction [between plaintiffs who allege actual identity theft and those who allege speculative identity theft] is that a plaintiff who alleges actual identity theft without economic harm has an injury for standing purposes under *Resnick*, whereas a plaintiff who alleges only speculative harm would not have standing under that case."

Although in *Smith* and *Burrows* the plaintiffs alleged they had suffered quantifiable monetary losses, such as costs associated with credit monitoring and the denial of a tax refund, respectively, *Burrows* stated that actual identity theft is an injury-in-fact even without monetary damages. Both *Smith* and *Burrows* further held that the injury was fairly traceable to the defendants' data breaches if the plaintiffs had previously guarded their sensitive personal data and had never suffered identity theft before. *Brush* concluded that the plaintiff had standing because she had articulated an actual, concrete injury that was fairly traceable to the defendant's alleged malfeasance.

Not all circuits agree with the Eleventh Circuit's standard. The Sixth, Seventh, Ninth and D.C. Circuits hold that data breach victims have standing because they are at a substantial risk of injury. For example, in *Attias v. Carefirst*, 2017 WL 3254941, at *6 (D.C. Cir. Aug. 1, 2017), the court held that "no long sequence of uncertain contingencies involving multiple independent actors has to occur before the plaintiffs in this case will suffer any harm; a substantial risk of harm exists already, simply by virtue of the hack and the nature of the data that the plaintiffs allege was taken."

The court in *Galaria v. Nationwide Mutual Insurance*, 663 Fed. Appx. 384, 387-89, 2016 WL 4728027, at *3 (6th Cir. Sept. 12, 2016), concluded that the plaintiff-customers' increased risk of future identity theft theory established an injury-in-fact after hackers breached the defendant's computers and stole their personal information, because "there is no need for speculation where Plaintiffs allege that their data has already been stolen and is now in the hands of ill-intentioned criminals."

In *Remijas v. Neiman Marcus Group*, 794 F.3d 688, 692, 694-95 (7th Cir. 2015), the court found "certainly impending" injury-in-fact and "substantial risk of harm" after hackers stole credit card numbers from Neiman Marcus because "presumably, the purpose of the hack is, sooner or later, to make fraudulent charges or assume those consumers' identities."

The First, Second, Third and Fourth Circuits align with the Eleventh Circuit. Victims of data breach cases and their counsel should be mindful of Article III standing thresholds in the jurisdiction in which they file as those thresholds will ultimately determine whether a court will allow data breach victims to seek redress for their injuries.

Nicole Rekant is an attorney and Stevan Pardo is a partner at Pardo Jackson Gainsburg in Miami. The litigators represent clients on a wide range of matters including complex litigation and class actions before federal and state courts.

BOARD OF CONTRIBUTORS



There's a public hearing to decide if

your property taxes are going up 50%.

Wouldn't you want to know?

Did you know?

Local governments advertise notices of public hearings for proposed budgets and taxes in newspapers.

Be Informed!

Read the public notices in this newspaper and at FloridaPublicNotices.com to know what's going on in your community.



FloridaPublicNotices.com