Liability for the Loss of Clients 'Personal Data'

The advancement of today's technology has contributed to bringing the world closer together like a small community despite of the distances. It brought with it the convenience of efficient and rapid communication and transportation of data through tiny handheld devices that are equipped with huge capacity to hold and transfer massive data technically with a click of a button. Such luxuries are not risk free as they can be more easily stolen with the potential risk of obtaining and accessing sensitive data that could compromise individuals' safety and businesses performance.

Businesses' run the risk of compromising their client's information practically every day, which makes them more vulnerable to potential lawsuits. That imminent risk of losing a laptop or a handheld device that contains a wealth of individuals' personal data became a reality for ING Life Insurance.

- **Randolph v. ING Life Insurance and Annuity Co.:**

In this case an ING employee's laptop, which was not protected by encryption or password protection, was stolen following a home burglary and it contained personal and financial information of approximately 13,000 people who have participated in an employee deferred compensation plan administered by ING for the District of Columbia whereby ING provides record keeping, administrative services and investment advice.

On or about June 19, 2006, ING reacted by alerting the District of Columbia of the theft and contacting affected participants individually to offer them a complimentary credit monitoring service with enrollment instructions that was fully paid for by ING.

Unsatisfied with the incident, on June 27, 2006, seven affected individuals filed their original complaint in the Superior Court suing ING for compensation and injunctive relief on behalf of the other employees. They claimed, *inter alia*, that as a result of ING allowing this information to be removed from otherwise secured facilities and instead storing it on an employee's computer they have failed "to establish and enforce appropriate safeguards to ensure the confidentiality and security of the records". [1] Hence the plaintiffs' claims were based on negligence, gross negligence and invasion of privacy.

The plaintiffs alleged that their personal information stored on the stolen computer could be disclosed making them more vulnerable to identity theft with few plaintiffs who were police officers expressing concern for their safety as such information could be used to locate their homes and could potentially subject them to possible threats or violence. Though none of the plaintiffs specifically alleged that their identities have actually been stolen or used nor anyone of the police officers alleged that their locations had been actually tracked or that they had been threatened.

The defendant reacted by taking the complaint to the United States District Court filing a motion to dismiss based on failure to state a claim , lack of standing and mootness.

- **Holding:**

  On February 20, 2007, the District Judge Honorable Coleen Kollar-Kotelly concluded that Plaintiffs had failed to establish Article III standing citing the following reasons.

- **Reasoning:**

(1) Potential Risk or Fear of Harm Does not Constitute s Legally Cognizable Injury:

The "fear of future harm" does not constitute a concrete injury that establishes standing and that the most the plaintiffs could claim was that they were "worried that these harmful events may occur".[1]

A similar case would be *Bell v.Acxiom Corp.* (2006) that was also dismissed for lack of standing. [2]

(2) Credit Monitoring Expenses Not a Basis for Recovery in 'Lost Data' Cases:

The Plaintiff's claim that they "have incurred or will incur" certain expenses is vague and indefinite as they refer to the possibility that they will incur damages for credit monitoring services a claim that is also insufficient to confer standing.

The judge, quoting *Forbes v. Wells Fargo Bank, N.A(* 2006) [3] judgment based on no injury-in-fact, proceeds:

“An argument that the time and money spent monitoring a plaintiff’s credit suffices to establish an injury ‘overlook[s] the fact that their expenditure of time and money was not the result of any present injury, but rather the anticipation of future injury that has not materialized.” [1]

The Plaintiffs position was weakened further when they have failed to have cited any cases to the contrary, and the court has found none.

The district judge’s decision was to remand the case to the Superior Court, pursuant to 28 U.S.C. § 1447(c) therefore denying the Defendant’s motion to dismiss without prejudice.

- **Court of Appeal:**

Subsequently the plaintiffs' appealed to the District of Columbia Court of Appeals filing their First Amended Complaint, which alleged the previously stated facts with the added claims of breach of confidential relationship or fiduciary duty and the invasion of privacy was changed to willful violation of the right of privacy (according to two sections of the District of Columbia Code §§ 1-626.13 and 1-741 regarding the responsibility of trustees and fiduciaries of retirement plans).

ING insists that the court should dismiss the First Amended Complaint due to the fact that the Plaintiffs have failed to allege that they have suffered or will suffer an injury-in-fact, and that their fear regarding the possible injuries that they could suffer from as a result of the theft of their identity in the future does not constitute sufficient basis on which to claim standing to sue.

As an alternative, and only if the court refuses to dismiss for lack of standing, ING asserts that Plaintiffs have failed to state a claim to be granted relief as there was no injury and that it would be moot as ING had voluntarily offered relief.

The court concluded and affirmed that the plaintiffs had not stated a claim under a negligence and gross negligence theory as they were required to allege more than speculative harm based on the possibility that their identities may be stolen or used.

A subsequent case that received the same judgment based on the same reasoning was *Shafran v. Harley-Davidson* (2008). [4]

(3) Claims for Willful and Intentional Conduct Requires Injury-in-Fact:

As for the invasion of privacy claim, an intentional tort recognized in the District of Columbia, the court's analysis and conclusion was that the plaintiffs failure to state a claim was due to their failure to plead a willful and intentional conduct as they claimed that ING failed to "establish safeguards to protect employee records", however they failed to prove that the stolen data were accessed, disclosed or misused. The court noted that "public disclosure of private information can constitute an intrusion that is highly offensive to any reasonable person", however they emphasized that "the tort [of invasion of privacy] cannot be committed by unintended conduct amounting merely to lack of due care".[1]

The same conclusion was reached in the *Heard v. Johnson* (2002) [5] and *Bailer v. Erie Ins. Exch*.(1997) cases. [6]

(4) Claims for Breach of Fiduciary Duty or Confidential Relationship Requires Injury-in-Fact:

Furthermore, the court refused the Plaintiffs claim for breach of fiduciary duty as the tort requires proof of the breach of the fiduciary relationship as well as proof of a legally cognizable injury which have not been alleged by the Plaintiff.

The same reasoning was used in the final judgment of the *Nicola v. Washington Times Corp*.(2008) case [7] by quoting *Kerrigan v. Britches of Georgetowne, Inc*.(1997).[8]

In summary the court asserts that in order for a Plaintiff to have standing, he "must have [1] suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical, [2] must demonstrate a causal connection between the injury and the conduct of which the party complains and (3) redressability, *i.e.*, that it is likely that a favorable decision will redress the injury." The court was quoting the judgment in the *Lujan v. Defenders of Wildlife* (1992) case [9] and the same judgment was reached in the subsequent case of the *Riverside Hosp. v. District of Columbia Dep't of Health* (2008).[10]

The court goes further to reiterate that for Plaintiffs who decided to bring action on behalf of others who are in the same situation, "before one may sue for damages on behalf of others, whether the 'others' are members of an organization or a class of consumers, he must show injury to himself." The court was quoting the judgment in both of the *Consumer Federation of America v. Up John Co.* (1975) [11] and the *Simon v. Eastern Ky. Welfare Rights Org*. (1976) cases. [12]

Therefore, the court agreed with the Defendant that the complaint must be dismissed for lack of standing without reaching the Defendant's alternative grounds for dismissal.

- **Conclusion:**

Randolph and the subsequent similar cases such as *Kahle v. Litton Loan Servicing LP* (2007) [13], which was also dismissed based on no injury-in-fact, are not meant to protect businesses that operate in an environment that is increasingly sensitive to data privacy and identity theft concerns against allegations of the potential disclosure and use of stolen personal information. However the court emphasizes that businesses, exposure to legal liability and claims for damages should be limited to situations in which true and concrete harm has occurred and affected the individuals rather than speculative fear claims. The court's decision would ultimately help to ensure that unfounded fears and unrealized threats of harm do not become the general basis for legal action.

- **References:**

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[3]-*Forbes v. Wells Fargo Bank, N.A.*, 420 F. Supp. 2d 1018, 1021 (D. Minn. 2006).
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[5]-*Heard v. Johnson*,810 A.2d 871, 881 n. 5 (D.C.2002). http://caselaw.findlaw.com/dc-court-of-appeals/1384508.html

[6]-*Bailer v. Erie Ins. Exch.*,344 Md. 515, 687 A.2d 1375, 1381 (1997). http://caselaw.findlaw.com/md-court-of-appeals/1412414.html

[7]-*Nicola v. Washington Times Corp.*,947 A.2d 1164, 1176 n. 9 (D.C.2008). http://caselaw.findlaw.com/dc-court-of-appeals/1356496.html

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[11]-*Consumer Federation of America v. Up John Co.*, 346 A.2d 725, 729 n.11 (D.C. 1975). http://scholar.google.com/scholar_case?case=6957421260619800792&hl=en&as_sdt=2&as_vis=1&oi=scholarr

[12]-*Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976). http://supreme.justia.com/cases/federal/us/426/26/case.html

[13]-*Kahle v. Litton Loan Servicing LP*, No. 1:05cv756, 2007 U.S. Dist. LEXIS 35845, at *19-21 (S.D. Ohio May 16, 2007). http://www.goodwinprocter.com/Files/CFSA/07/rm_07_Kahle.pdf