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Class Action Alert

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Recent Federal Court Decision Bolsters Growing Line of Cases Dismissing Class Action Claims for Alleged "Identity Theft"

As public concern about "identity theft" continues to increase, institutions such as lenders, banks, and credit card companies find themselves facing a growing number of lawsuits arising out of alleged breaches of corporate security. Because claims involving identity theft may involve multiple plaintiffs located throughout the country, the potential for class action lawsuits on either a statewide or nationwide level is growing as well.

Yet a number of federal courts have taken a pragmatic approach to assessing the validity of identity-theft claims. Most recently, the Southern District of Ohio decided a case that may limit class action liability for institutions that electronically store consumer personal information. In *Kahle v. Litton Loan Servicing LP*,[1] plaintiff Patricia Kahle ("Kahle") sued defendant Litton Loan Servicing LP ("Litton") following the theft from a Litton facility of password-protected hard drives containing some consumer personal information. Kahle attempted to articulate theories of identity theft and identity exposure on behalf of a putative nationwide class. The court, however, dismissed the lawsuit in its entirety, ruling that such claims cannot withstand summary judgment where the only injury arguably suffered is the mere fear of future identity theft. *Kahle* bolsters a growing line of federal court identity-theft and identity-exposure cases holding that the increased risk of future injury from identity exposure is insufficient to support an actionable injury or to establish damages.[2]

Kahle's Class Claims

Kahle's claims arose from an August 2005 theft in which a person or persons unknown smashed their way into a locked and alarmed facility belonging to Litton and tore out computer hard drives—among other more expensive equipment—containing some consumer personal information.[3] The computer hard drives contained several layers of electronic security, including extensive password protection.

After the break-in, Litton provided written notice to each person whose information was contained on the hard drives and recommended that those persons place a fraud alert on their credit files. Kahle chose not to do so but instead, brought suit on behalf of a putative nationwide class under a theory of negligence.[4] Specifically, Kahle claimed that the members of the class would incur emotional distress, costs of credit monitoring, and loss of identity as a result of the theft of the hard drives.[5]

During discovery, Kahle acknowledged that since the theft of the hard drives, no unauthorized use of her personal information had ever occurred, nor did she have any knowledge as to whether any of her personal information from the hard drives had even been accessed in an unauthorized manner.[6] The only harm that Kahle claimed to have suffered was the cost incurred in purchasing credit-monitoring services.[7]

Court Rejects Kahle's Theory of Injury

On a motion for summary judgment, Litton successfully argued that Kahle's claim must fail "as a matter of law because Plaintiff cannot establish injury or causation."[8] The court found that any injury Kahle may have suffered was "purely speculative" because she admitted no knowledge of any unauthorized use or access of her personal information, and there was no evidence that the personal information contained on the hard drives was even the target of the theft.[9]

In particular, the court rejected Kahle's assertion that time and money spent monitoring credit establishes a cognizable injury.[10] Rather, the court held that Kahle's argument overlooks the fact that such expenditure of time and money was not the result of any present injury, but rather the anticipation of future injury.[11] Because such expenditures are the result of a perceived risk of future harm and not any present or reasonably certain future injury, they do not constitute compensable injury as a matter of law.[12]

The court was not persuaded by Kahle's attempt to analogize identity-exposure cases to toxic-substance-exposure cases. Kahle argued that the court must require Litton to pay for credit monitoring costs in the same way that some defendants in toxic-substance-exposure cases are required to pay for medical-monitoring costs.[13] The court found, however, that:

> Although a victim of identity theft and/or fraud, like the victims in other negligence actions where present actual injury is required, may experience nonmonetary harm, the primary injury does not present a serious health risk. Thus, despite findings that identity theft results in more than purely pecuniary damages, including psychological or emotional distress, inconvenience, and harm to his credit rating or reputation, *as a matter of law identity theft and credit monitoring must still be differentiated from toxic torts and medical monitoring*.[14]

Thus, the court declined to extend the criteria used in medical-monitoring cases to identity-exposures cases. "[W]ithout direct evidence that the information was accessed or specific evidence of identity fraud this Court can not find the cost of obtaining credit monitoring to amount to damages in a negligence claim."[15]

The *Kahle* decision is significant in the defense of class action lawsuits because if the named plaintiff cannot introduce some evidence of actual, versus merely speculative, injury as the result of the alleged data theft, judgment must be entered against that named plaintiff.[16] It is not enough for the named plaintiff to allege that an injury has been "suffered by other, unidentified members of the class" that the named plaintiff purports to represent.[17] "If a named member purporting to represent a class does not have standing, she may not seek relief on behalf of herself or any other member of the class."[18]

Federal case law holds that standing is an essential element in determining class certification.[19] To satisfy the typicality and adequacy requirements for a class action under Rule 23(a) of the Federal Rules of Civil Procedure, the named plaintiff must show that her injury arises from or is directly related to the alleged wrong to the putative class.[20] It would follow that because Kahle had not suffered a cognizable injury,[21] she could not adequately represent the putative class, nor was she a typical member of a sustainable class.

Kahle Could Not Prove Proximate Causation

Proximate causation presents another significant barrier for a named plaintiff in litigating an identity-theft class action lawsuit. For each cause of action, the named plaintiff must establish that the defendant's alleged actions were the proximate cause of any complained-of injury.[22] Thus, even if Kahle had established that the unauthorized use of her personal information had occurred following the theft (which she did not do), her claims would have failed because she could not have established that Litton's alleged actions were the proximate cause of the unauthorized use of information.

Like many consumers, Kahle disclosed her personal information to third parties on a regular basis. In particular, Kahle's driver's license, which she used as a form of identification, contained her name, address, social security number, and birth date. Any persons

to whom Kahle gave her driver's license as a form of identification would have had ample opportunity to record her personal information and could have used that information at any time in the future. Those opportunities constituted potential intervening causes sufficient to break the chain of causation between the theft of the hard drives and any unauthorized use of Kahle's personal information that might occur in the future.[23]

Conclusion

The *Kahle* decision may have significant implications for financial institutions. The decision suggests that even amidst the growing concern over information privacy, courts will likely continue to hold named plaintiffs in identity-theft class actions to the traditional standards for proving injury and causation. Before such plaintiffs can represent a class, they must point to some evidence of actual injury to themselves and to proximate causation. Thus, the *Kahle* decision helps undermine the incentive for bringing identity-theft class action lawsuits against institutions that provide adequate electronic protection for consumer personal information. As the *Kahle* court recognized, a growing consensus has arisen among courts that an alleged increase in the risk of future injury is simply not an "actual or imminent" injury sufficient to sustain a class action or to withstand a defendant's motion for summary judgment. Where a plaintiff's claims are based on nothing more than a speculation that he or she will be a victim of wrongdoing at some unidentified point in the indefinite future, the plaintiff does not have a viable cause of action and cannot maintain a class action.

R. Bruce Allensworth, Andrew C. Glass, Ryan M. Tosi, and David D. Christensen of K&L Gates in Boston, Massachusetts, represented Litton Loan Servicing LP.

Endnotes

1 486 F. Supp. 2d 705, 706-07 (S.D. Ohio 2007).

2 *Id.* at 710 (citing *Key v. DSW, Inc.*, 454 F. Supp. 2d 684, 690 (S.D. Ohio 2006); *Giordano v. Wachovia Sec.*, 2006 WL 2177036, at *1 (D.N.J. July 31, 2006); *Forbes v. Wells Fargo Bank N.A.*, 420 F. Supp. 2d 1018, 1021 (D. Minn. 2006); and *Guin v. Brazos Higher Educ. Serv. Corp.*, 2006 WL 288483, at *5-6 (D. Minn. Feb. 7, 2006)); *see also Stollenwerk v. Tri-West Healthcare Alliance*, 2005 WL 2465906, at *5 (D. Ariz. Sept. 6, 2005).

3 *Kahle*, 486 F. Supp. 2d at 706-07.

4 *Id.* at 707, 708.

5 *Id.* at 709, n.3.

6 *Id.* at 707.

7 *Id.* at 709.

8 *Id.*

9 *Id.* at 712-13. Indeed, in another identity-theft case brought in the Southern District of Ohio, the court dismissed the plaintiff's claim on the basis that "potential injury [was] contingent upon [the plaintiff's] information being obtained and then used by an unauthorized person for an unlawful purpose," which the court found lacking. *Key*, 454 F. Supp. 2d at 690.

10 *Kahle*, 486 F. Supp. 2d at 711 (citing *Giordano*, 2006 WL 2177036, at *5 & n.5; *Stollenwerk*, 2005 WL 2465906, at *1; *Guin*, 2006 WL 288483, at *3; and *Forbes*, 420 F. Supp. 2d at 1020-21).

11 *Id.* at *710; *see also Forbes*, 420 F. Supp. 2d at 1021.

12 *Kahle*, 486 F. Supp. 2d at 711; *Forbes*, 420 F. Supp. 2d at 1021; *see also Key*, 454 F. Supp. 2d at 690.

13 *Kahle*, 486 F. Supp. 2d at 712.

14 *Id.* (emphasis in original) (citing *Stollenwerk*, 2005 WL 2465906, at *4).

15 *Id.* at 713.

16 *Id.* at 709 (citing *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976)); *see also Key*, 454 F. Supp. 2d at 687.

17 *Kahle*, 486 F. Supp. 2d at 709.

18 *Key*, 454 F. Supp. 2d at 687; *see also Kahle*, 486 F. Supp. 2d at 709.

19 *See Warth v. Seldin*, 422 U.S. 490, 502 (1975) (class representative plaintiffs "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent"); *Simon*, 426 U.S at 40, n.20 ("[t]hat a suit may be a class action … adds nothing to the question of standing"); *see also Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 318 (5th Cir. 2002) (standing is an inherent prerequisite to the class certification inquiry); *Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 301 F.3d 329, 332-33 (5th Cir. 2002) (same).

[20] *See Bacon v. Honda of Am. Mfg.*, 370 F.3d 565, 572 (6th Cir. 2004); *Lichoff v. CSX Transp., Inc.*, 218 F.R.D. 564, 575 (N.D. Ohio 2003) ("it is obvious that the named plaintiff cannot adequately represent a proposed class that does not share common issues and for which their claims are not typical").

[21] *Kahle*, 486 F. Supp. 2d at 713.

[22] *Id.* at 708.

[23] *See Tolton v. Am. Biodyne, Inc.*, 48 F.3d 937, 944 (6th Cir. 1995) (a plaintiff's own actions can constitute an intervening cause sufficient to break the chain of causation).