

Identity Theft Litigation Update: Recent Cases Show Trend Toward Dismissal of Speculative Claims

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Several weeks ago, we discussed how [most courts were rejecting lawsuits](#) where the plaintiffs claimed “damages” in the form of an increased risk of identity theft, generally stemming from allegations of an accidental loss or theft of personal confidential information. Since we last blogged on this issue, two recent decisions highlight how that trend is continuing, and that courts increasingly require more than speculation about future harm to sustain a lawsuit over the loss of confidential information.

The first notable decision involved a court which was clearly aware of this growing body of case law. In *Belle Chasse Automotive Care, Inc. v. Advanced Auto Parts, Inc.*, United States District Court Judge Kurt Engelhardt of the Eastern District of Louisiana dismissed a claim stemming from a security breach involving confidential information. The plaintiff in *Belle Chasse* alleged that this breach only had caused an increased risk of identity theft, not an actual identity theft. The court granted defendants’ Rule 12(b)(6) motion, and cited to the growing body of case law from around the nation supporting the position that these allegations amount only to “speculative damages for which [Louisiana] law provides no remedy.” Notably, the Court cited to the *Pinero* decision we referenced in our prior [post](#) and found United States District Court Judge Sarah Vance’s analysis in that case to be “directly on point.”

The second notable decision provides an example of a Court reversing course on this issue, citing this line of cases as authority. The *Ruiz v. Gap, Inc.* case already was notable in that United States District Court Judge Samuel Conti, in March 2008, [had previously ruled](#) that allegations of a potentially increased risk of future identity theft **were sufficient** to make out a viable negligence claim under California law. At that time, Judge Conti denied the defendant’s motion to dismiss under Rule 12(b)(6) and held that the plaintiff had alleged an injury in fact, even though he noted that it was unclear what damages the plaintiff would be able to recover even if the plaintiff were to prevail on the merits. Compared to the many cases holding to the contrary, the *Ruiz* case was generally viewed as an outlier, as one of the few rulings to have held that an allegation of the mere increased risk of identity theft was sufficient to defeat a Rule 12(b)(6) motion.

But just this month, Judge Conti [granted summary judgment](#) to the defendants on this same issue. In doing so, the court held that an increased risk of identity theft did **not** constitute “the level of appreciable harm necessary to assert a negligence claim under California law.” The court expressly rejected parallels to medical monitoring claims in the toxic tort context, and expressly noted similar cases from other jurisdictions – namely Louisiana, Ohio, and Minnesota – none of which were referenced in the court’s 2008 opinion denying the defendants’ motion to dismiss. The decision appears to reflect a reconsideration of sorts by the court – the evidence obtained during depositions

seemed to be no different from what the plaintiff alleged in his Complaint, so if those allegations were adequate to defeat a motion to dismiss, testimony to the same effect should have also been adequate to defeat summary judgment. This is merely our own speculation, but it could be that the court became aware, over the course of the past year, of the growing and substantial body of case law which has been rejecting these types of speculative claims.