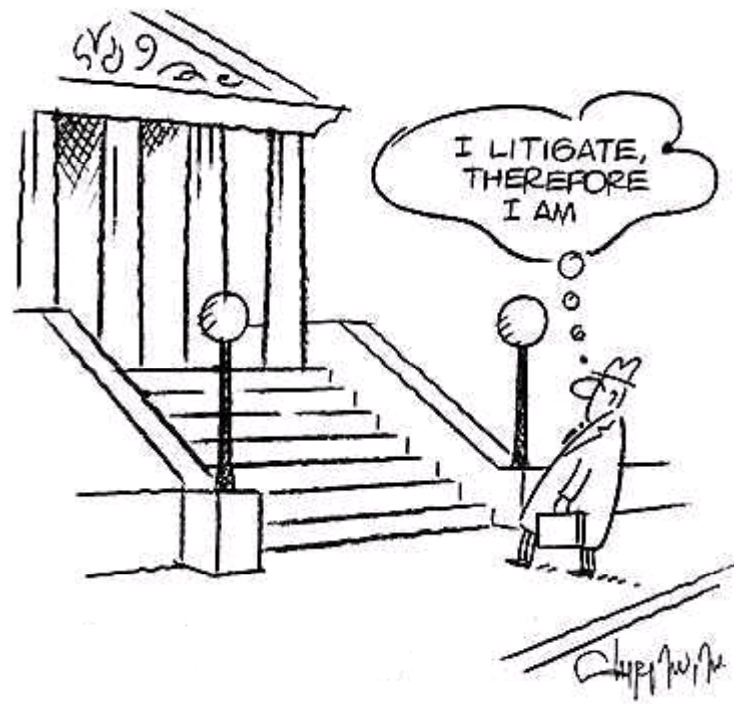


Security Breach Notification: Breaches in the Private Sector: “Harm” in the Litigation Setting

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Common Law Causes of Action for Data Security Breach

Following breaches, Plaintiffs have alleged:

- **Negligence** (breach of a duty to take reasonable precautions – the catch-all)
- **Waste and conversion** (making personal information less private and hence less valuable)
- **Invasion of privacy** (you made me feel less secure or safe because you allowed others to “peep” at me)
- **Breach of contract** (you agreed to keep my information private)
- **Breach of fiduciary duty** (I trusted you to keep my information private)
- **Unjust Enrichment** (you or your agents benefitted from the value inherent in “my information”)

Actual Harm: Identity Theft Victims

- See, e.g., Bell v. Michigan Council 25, 2005 Mich. App LEXIS 353 (Mich. App 2005)
- Non-class, “mass action”
- Finding that Union had a duty to protect the personal information of its members
- Union official’s daughter engaged in identity theft of Union members
- Jury awarded, and panel upheld, \$275,000 for Plaintiffs

Actual Harm: Financial Institutions

- In Re: TJX Companies Retail Security Breach Litigation, 2007 WL 2982994 (D.Mass.), and various other opinions (denying class certification)
- Cost of replacement cards, account numbers
- Estimated to run in the tens of millions for large breaches
- Several States seeking to legislate solution to downstream cost of breaches
- Payment Card Industry Data Security Standards are part of credit card contracts. Violation of standards is actionable.

Without Present Harm, May Courts Hear the Security Breach Case?

- Article III of the U.S. Constitution defines and limits what sort of complaints federal courts can hear
- Generally, a plaintiff needs to allege that she has suffered “actual or imminent” harm before getting into federal court; increased *risk* of harm not enough
- In Giordano, plaintiff tried end run: claimed imminent harm of “needing” to purchase a credit monitoring service as a result of alleged breach
- Judge calls comparison to medical monitoring “inapt”; finds Plaintiff does not present a cognizable case
- Decision at: Giordano, 2006 U.S. Dist. LEXIS 52266 (D.N.J. July 31, 2006).
- Reasoning spreading: Followed by Key and Kahle (S.D. Oh.), Randolph (D.D.C.)
- Disagreed with by: Pisciotta, Ruiz

Searching for “Harm” in Class Action Setting: Credit Monitoring

Some courts have been willing to consider awarding credit monitoring, like medical monitoring in the asbestos context, without any present manifestation of harm.

- **Surface appeal:** Serious harm may accrue at a later date; monitoring can help arrest the harm.
- **No substance:** No life-and-death circumstance, no scientific certainty, no natural process unfolding, many free ways to protect oneself.

Data Security Caselaw: “No Harm, No Case”

- In re: Jet Blue Airways Corp. Privacy Litigation, 379 F.Supp.2d 299 (E.D.N.Y. 2005)
- Bell v. Acxiom Corp., 2006 WL 2850042 (E.D. Ark. 2006)
- Forbes v. Wells Fargo Bank, N.A., 420 F.Supp.2d 1018 (D. Minn. 2006)
- Guin v. Brazos Higher Education Services Corporation, 2006 WL 288438 (D. Minn. 2006)
- Key v. DSW, Inc., 454 F.Supp.2d 684 (S.D. Ohio 2006)
- Hendricks v. DSW, Inc., 444 F.Supp.2d 775 (W.D. Mich. 2006)

Data Security Caselaw (cont.)

- Kahle v. Litton Loan Servicing LP, (S.D. Ohio 2007)
- Pisciotta v. Old National Bancorp, 499 F.3d 629 (7th Cir. 2007)
- Ponder v. Pfizer, Inc., 522 F.Supp.2d 793 (M.D. La. 2007)
- Randolph v. ING Life Insurance & Annuity Co., 486 F. Supp.2d 1 (D.D.C. 2007)
- Levine, et al. v. DSW, Inc., (Ohio Common Pleas 2008)
- Shafran v. Harley-Davidson Inc., 2008 U.S. Dist LEXIS 22494 (S.D.N.Y)
- Pinero v. Jackson Hewitt Tax Service Inc., (E.D. La. 2009)

Statutory “Harm”

- Mainly allegations under the Fair Credit Reporting Act
- Information has to be a “consumer report”
- Defendant has to be a “consumer reporting agency”
- Defendant has to have “furnished” report to third party with no permissible purpose
- Statutory damages of \$100-1,000 *per person* for intentional or willful violations
- Also allegations under California’s Consumer Legal Remedies Act, State insurance and consumer protection laws, federal Computer Fraud and Abuse Act, etc.

Fixing “Harm”: Class Action Settlements

- Jones v. Bank of America
- In re: TJX Retail Data Security Breach Litigation
- Lockwood v. Certegy Check Services
- In re: Veterans Administration Data Security Breach
- In re: Countrywide Financial Corp. Data Security Breach