

# Defendant Prevails in Privacy Case Where Data Theft Results in No Injury To Plaintiffs

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*The recent “data breach” case of Randolph v. ING Life Insurance and Annuity Company limits prospective liability where a loss or theft of personal data presents no more than a speculative threat of invasion of privacy, identify theft, or fraud. The case, which was resolved on motion to dismiss, reflects the trend in U.S. case law that data controllers will not necessarily face liability for losing control of personal information if the loss did not cause concrete harm to the affected individuals.*

In *Randolph v. ING Life Insurance and Annuity Company*, several employees of the District of Columbia who participated in a deferred compensation program administered by ING brought suit (as a purported class action) against the company after a laptop computer containing D.C. employees’ personal information was stolen from the home of an ING representative. Following removal from D.C. Superior Court, the U.S. District Court for the District of Columbia held — at the motion to dismiss stage — that the plaintiffs lacked Article III standing due to their

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failure to allege an actual injury resulting from the theft, and remanded the case to the Superior Court of the District of Columbia.<sup>1</sup> The federal court (Judge Kollar Kotelly) concluded that remand, rather than outright dismissal, was required by the removal statute once the federal court concluded it did not have subject matter jurisdiction.

On remand, the D.C. Superior Court (Judge Weisberg) issued an opinion in which it independently concluded that the plaintiffs had failed to plead a legally cognizable injury. The Superior Court thus dismissed the complaint for lack of standing in that non-federal forum as well.<sup>2</sup> The courts' reasoning in *Randolph* follows that of analogous cases and affirms the important tenet that, to be cognizable, a legal claim must allege more than a merely speculative injury. Significantly, the court ruled on the basis of a motion to dismiss, before any discovery was conducted.

## **INCREASED RISK OR FEAR OF HARM DOES NOT CONSTITUTE A LEGALLY COGNIZABLE INJURY**

In *Randolph*, the plaintiffs asserted claims against ING for invasion of privacy, negligence, and breach of fiduciary duty or of a confidential relationship. To support these claims, the plaintiffs alleged that an ING representative copied company files containing personal information onto a home computer that was subsequently stolen during a routine residential burglary. The plaintiffs sought to recover on the grounds that the theft allegedly caused them concern, created a risk of future harm, and prompted or may prompt them to purchase credit monitoring services. Following a line of similar cases, the *Randolph* courts found these allegations insufficient to amount to an injury-in-fact. The Superior court noted that while “[t]he local courts of the District of Columbia are not established under Article III of the Constitution...they, like their Article III counterparts, exercise jurisdiction only over actual cases and controversies and insist on the prudential prerequisites of standing.”

Thus, basic principles of justiciability limit the extent to which companies who handle consumer information may be held liable in federal or state court for security incidents that do no more than heighten the risk that personal data will be misused. The reasoning in both *Randolph* decisions rests

upon the constitutional imperative that a plaintiff must suffer a “concrete and particularized” or “imminent” injury in order to successfully maintain a claim. Where a real harm does not materialize, there is no actual injury, and a plaintiff consequently is prevented from recovering. As both *Randolph* decisions observed, courts therefore have consistently held that claims involving lost data must fail where no true injury occurs. As noted by Judge Kotelly, the so-called “lost data” line of cases makes clear that “an allegation of increased risk of identity theft due to lost or stolen personal data, without more, is insufficient to demonstrate a cognizable injury.”

Significantly, as with most data breaches, the *Randolph* plaintiffs did not claim that the theft of the ING representative’s computer was carried out with the specific objective of accessing their personal information, or that their information was in fact exposed or used. Rather, the complaint simply professed a fear that harm may result from the incident in the future. As the D.C. Superior Court explained, “These allegations are insufficient to confer standing. Fear of future harm, even if reasonable, is simply not the kind of concrete and particularized injury, or imminent future injury, courts will recognize as a basis on which to bring an action for compensatory or injunctive relief.”

## **CREDIT MONITORING EXPENSES NOT A BASIS FOR RECOVERY IN “LOST DATA” CASES**

Attempts to obtain damages for credit monitoring activities must likewise fail in such cases, as these expenditures result not from a concrete, present injury, but from the anticipation of a speculative future injury. Thus, as the D.C. District Court noted in reviewing the plaintiffs’ allegations concerning their credit monitoring expenses, the “lost data” cases “clearly reject the theory that a plaintiff is entitled to reimbursement for credit monitoring services or for time and money spent monitoring his or her credit.” Since the *Randolph* plaintiffs failed to plead an actual injury arising from credit monitoring expenses or any other source, they were prevented from proceeding on grounds that they lacked standing. As the D.C. Superior Court emphasized, claims that ING had breached a fiduciary duty or a confidential relationship could not alter this conclusion.

The Superior Court provided the following useful discussion rejecting fear of future harms as a basis to establish actionable injury:

No Plaintiff alleges that his or her identity has in fact been stolen or used, and no police officer Plaintiff alleges that his or her residence has been revealed or threatened in any way. The most Plaintiffs can claim is that they are worried that these harmful events may occur and that they “have incurred or will incur actual damages” to protect their credit or to repair any damage if it occurs. These allegations are insufficient to confer standing. Fear of future harm, even if reasonable, is simply not the kind of concrete and particularized injury, or imminent future injury, courts will recognize as a basis on which to bring an action for compensatory or injunctive relief. The claim that Plaintiffs “have incurred or will incur” certain expenses is vague and indefinite, but even if it were more specific and accepted as true, it does not suffice to confer standing. On this point, the court agrees with Judge Kotelly’s analysis in her remand order:

... [E]ven if individual Plaintiffs have purchased and paid for credit monitoring services, the “lost data” cases cited by ING clearly reject the theory that a plaintiff is entitled to reimbursement for credit monitoring services or for time and money spent monitoring his or her credit. As [one] court explained, 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.” [citations and footnotes omitted]

## **CLAIMS FOR BREACH OF FIDUCIARY DUTY OR CONFIDENTIAL RELATIONSHIP REQUIRE INJURY-IN-FACT**

The plaintiffs’ effort to cast ING in the role of a fiduciary by claiming a breach of fiduciary duty or of a confidential relationship failed to

cure the deficiencies in their suit. As with the plaintiffs' other claims, these theories of recovery require an actual injury in order to properly invoke a court's jurisdiction. The Superior Court therefore rejected the plaintiffs' fiduciary-based claims without deciding the issue of whether ING acted in a fiduciary capacity with respect to D.C. employees.

The court in dicta did strongly suggest that the relationship between ING and the plaintiffs could not be construed as "confidential" in nature, however, as earlier cases have recognized such relationships only between patients and physicians or hospitals. In addition, the court noted that the type of data allegedly stolen under the facts of *Randolph* was not akin to the private medical information at issue in confidential relationship cases. Finally, the court stated that neither the theft of the data nor the company's actions in sharing personal data with its employees could be characterized as an actionable form of disclosure. Ultimately, regardless of the theory under which the plaintiffs sought to advance their claims, the "allegations that they face a heightened risk of identity theft and that they 'have incurred or will incur' unspecified damages to prevent identity theft or to repair stolen credit do not plead the kind of actual or imminent injuries that will confer standing to sue."

In addition, "[t]he court notes that in a case like this, standing and failure to state a claim are first cousins. Without a cognizable injury-in-fact, Plaintiffs lack standing to sue and, for the same reason, have arguably not stated a claim for relief under any of the various tort theories alleged in the First Amended Complaint." Thus, even if the court had concluded that plaintiffs had legal standing to file suit, their complaint would nonetheless fail to state actionable claims due to the inability to satisfy the damages element of the relevant causes of action.

## RECENT "LOST DATA" CASE FOLLOWS *RANDOLPH*

*Randolph* and analogous "lost data" cases serve as persuasive authority for courts adjudicating what appears to be a growing number of privacy cases related to thefts involving consumers' personal data. For example, the court in *Kahle v. Litton Loan Servicing LP*,<sup>3</sup> a recent federal action in Ohio, relied on *Randolph* in granting a motion for summary

judgment in favor of a mortgage loan service provider who faced a negligence claim following a theft of hard drives containing bank customers' personal information. Drawing a comparison with *Randolph*, the *Kahle* court emphasized the lack of evidence in the Ohio case that the information in question had been targeted by the theft or used unlawfully after the incident. Adopting the conclusion of the D.C. District Court in *Randolph*, the court determined that "Plaintiffs' allegations therefore amount to mere speculation that at some unspecified point in the indefinite future they will be the victims of identity theft."<sup>4</sup> The *Kahle* court also rejected the plaintiff's attempt to recover for credit monitoring expenses. Echoing *Randolph*, the court held that "without direct evidence that the information was accessed or specific evidence of identity fraud" it could not find credit monitoring costs to entitle the plaintiff to damages in a negligence suit.

The court ultimately held that the case lacked proof of an injury sufficient to create a genuine issue of material fact as to the plaintiff's negligence claim, and dismissed the suit. Cases such as *Randolph* and *Kahle* recognize the important principle that, in the data privacy context as much as in other contexts, exposure to legal liability should be limited to situations in which true harm has occurred. In an environment that is increasingly sensitive to data privacy and identity theft concerns, courts' decisions to adhere to basic principles of justiciability protect defendants from highly speculative claims, helping to ensure that ultimately unfounded fears and unrealized threats of harm do not become a basis for legal action.

## NOTES

<sup>1</sup> *Randolph v. ING Life Insur. and Annuity Co.*, No. 06-1228 (D.D.C. Feb. 20, 2007).

<sup>2</sup> *Randolph v. ING Life Insur. and Annuity Co.*, No. 06 CA 4932 (D.C. Super. Ct. June 13, 2007).

<sup>3</sup> No. 1:05cv756 (S.D. Ohio May 16, 2007).

<sup>4</sup> *Id.* slip op. at 9 (quoting *Randolph*, No. 06-1228, slip op. at 11).