Unpublished Opinions Referenced in Reply Memorandum

Only the Westlaw citation is currently available.
United States District Court, E.D. Louisiana.
Florence F. FOX, et al.
v.
Walter REED, et al.
No. CIV A 99-3094.

March 16, 2000.

ORDER AND REASONS

VANCE, J.
***1** Defendants, Walter Reed, District Attorney for the Parish of St. Tammany, Louisiana and Richard P. Ieyoub, Attorney General of the State of Louisiana move the Court to dismiss this action pursuant to Federal Rule of Civil Procedure 12(b) for lack of subject matter jurisdiction and, alternatively, failure to state a claim upon which relief can be granted. For the following reasons, defendants' motion is GRANTED.

I. BACKGROUND

This is an action for declaratory and injunctive relief brought by Florence F. Fox, Bruce Connelly, Carolyn J. Frederick, and Ronald R. Scelson. Fox, Connelly, and Frederick own Fox, Inc., which does business as "A1E Services" and "Over Nite Letter Type." All of the plaintiffs are engaged in the "business of transmitting bulk electronic mail and communications in the same or substantially similar form to more than one thousand recipients via computer networks."(Compl.¶ I.)

On October 12, 1999, plaintiffs filed suit in this Court against Walter Reed, District Attorney for the Parish of St. Tammany, Louisiana, Richard P. Ieyoub, Attorney General of the State of Louisiana, and the State of Louisiana. The suit facially challenges the constitutionality of Act 1180, a criminal statute enacted by the Louisiana legislature during its 1999 regular session. The Act, which took effect on August 15, 1999, amends La.Rev.Stat. Ann. § 14:73.1 (West 2000) and newly enacts La.Rev.Stat. Ann. § 14:73.6, in order to expand the definition of computer-related crime to include certain acts involving "unsolicited bulk electronic mail." *See* 1999 La. Acts 1180 § 1. In addition to defining relevant terms, the Act prohibits the transmission of unsolicited bulk electronic mail, when the transmission is in contravention of the authority granted by, or in violation of the policies set by, the electronic mail service provider. *See id.*; La.Rev.Stat. Ann. §§ 14:73.1, 14:73.6(A). The Act also makes it unlawful for any person to falsify routing information in conjunction with the transmission of unsolicited bulk electronic mail or to distribute or possess computer software designed to facilitate the falsification of such routing information. *See id.*; La.Rev.Stat. Ann. § 14:73.6(B).

Plaintiffs allege that the Act violates the Fourth and Fourteenth Amendments as vague and overbroad (*See* Compl. ¶ V(1)); infringes their First Amendment rights of free speech and communication (*See id.* ¶ V(2)); and violates the Commerce Clause of the United States Constitution by unconstitutionally attempting to directly regulate, interfere with, and place an undue burden on interstate commerce. (*See id.* ¶ V(4).) Plaintiffs further assert that prospective criminal prosecution or enforcement of the Act would violate their rights under 42 U.S.C. § 1983. (*See id.* V(3).) Plaintiffs ask this Court to declare the Act unconstitutional and to enjoin its enforcement pursuant to 28 U.S.C. § 2201. Jurisdiction in this court is premised on 28 U.S.C. § 1331 and § 1343(3).

***2** On February 3, 2000, the Court granted plaintiffs' unopposed motion to dismiss the State of Louisiana with prejudice. The remaining defendants now move to dismiss the claims against them on several grounds. First, defendants assert that this Court lacks subject matter jurisdiction over the claims against the Attorney General of the State of Louisiana because the Attorney General is entitled to immunity from suit in federal court under the Eleventh Amendment. Second, defendants argue that subject matter jurisdiction does not exist over this case because it does not present a justiciable "case or controversy" as required by Article III of the United States Constitution. Finally, defendants contend that the complaint fails to state a claim on which relief can be granted.

II. DISCUSSION

A. Legal Standard

Federal Rule of Civil Procedure 12(b)(1) governs challenges to a court's subject matter jurisdiction. A district court may dismiss an action for lack of subject matter jurisdiction by reference to any one of the following: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *See* Williamson v. Tucker, 645 F.2d 404, 413 (5th Cir.1981); *see also* Robinson v. TCI/US West Communications Inc., 117 F.3d 900, 904 (5th Cir.1997) (citations omitted). Defendants raise a "facial attack" on the complaint. Accordingly, the Court must examine whether plaintiffs have sufficiently alleged a basis for subject matter jurisdiction, taking all of their allegations in the complaint as true. *See* Menchaca v. Chrysler Credit Corp., 613 F.2d 507, 510 (5th Cir.1980) (*citing* Mortensen v. First Federal Savings & Loan, 549 F.2d 884, 891 (3rd Cir.1977)).

The court properly grants a motion to dismiss for lack of subject matter jurisdiction when it lacks the statutory or constitutional power to adjudicate the case. *See* Home Builders Ass'n of Miss., Inc., v. City of Madison, 143 F.3d 1006, 1010 (5th Cir.1998) (*quoting* Nowak v. Ironworkers Local 6 Pension Fund, 81 F.3d 1182, 1187 (2d Cir.1996)). When, as is the case here, grounds for dismissal may exist under both Rule 12(b)(1) and Rule 12(b)(6), the Court should dismiss only under the former without reaching the question of failure to state a claim. *See* Hitt v. Pasadena, 561 F.2d 606, 608 (5th Cir.1977). The court's dismissal of a case for lack of subject matter jurisdiction is not a decision on the merits and does not prevent the plaintiff from pursuing the claim in a court that has proper jurisdiction. *See id.* Because this Court finds that plaintiffs' claims must be dismissed under Rule 12(b)(1), it does not address the legal standard for dismissal under Rule 12(b)(6).

B. *Ex Parte Young* and the Eleventh Amendment

Defendants contend that plaintiffs' claims against Attorney General Ieyoub must be dismissed for lack of subject matter jurisdiction because he is shielded by Eleventh Amendment immunity. The Eleventh Amendment precludes actions brought against a state in federal court by its own citizens or citizens of another state, absent consent, waiver, or abrogation of the state's sovereign immunity. *See* U.S. Const. amend. XI; *Edelman v. Jordan*, 415 U.S. 651, 663, 94 S.Ct. 1347 (1974); *Hans v. Louisiana*, 134 U.S. 1, 13-15, 10 S.Ct. 504 (1890). The Eleventh Amendment also prohibits suits against state officials when the state is the real party in interest. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101, 104 S.Ct. 900, 908 (1984). However, the Supreme Court has carved out an exception to Eleventh Amendment immunity for suits seeking declaratory or injunctive relief against state officials who violate federal law. *See Ex Parte* Young, 209 U.S. 123, 159-60, 28 S.Ct. 441, 454 (1908).

*3 In *Ex Parte Young*, the Court held that the Eleventh Amendment did not bar a suit in federal court against the Minnesota Attorney General to enjoin his enforcement of an allegedly unconstitutional state statute regulating railway rates. *See id.* at 161, 28 S.Ct. at 454. The *Ex Parte Young* "fiction" provides that a state official who violates the United States Constitution in enforcing a statute is "stripped of his official or representative character" and is therefore not permitted to share the state's Eleventh Amendment immunity from suit. *See id.* at 159-60, 28 S.Ct. at 454. The Court nevertheless recognized the danger of reading this immunity exception too broadly to permit plaintiffs to test the constitutionality of statutes against state attorneys general and governors merely because of their status as state officers. *See id.* at 157, 28 S.Ct. at 453. Rather, in order to make a state official a party defendant in a suit to enjoin the enforcement of an allegedly unconstitutional statute, "it is plain that such officer must have *some connection* with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party." *Id.* (emphasis added). The state official's connection with the enforcement of a challenged act can arise out of the statute at issue or out of his general duties. *See id.*; Allied Artists Pictures Corp. v. Rhodes, 473 F.Supp. 560, 565 (S.D.Ohio 1979), *aff'd* 679 F.2d 656 (6th Cir.1982).

The only Fifth Circuit case to analyze *Ex Parte Young's* "some connection" requirement was

recently vacated pending rehearing *en banc* and therefore lacks precedential value. *See* Okpalobi v. Foster, 190 F.3d 337 (5th Cir.1999) (Jolly, J. dissenting), *reh'g en banc granted,* 201 F.3d 353 (5th Cir.2000) .[FN1] This Court therefore looks to caselaw from other circuits, including the authorities referred to in *Okpalobi,* to illuminate this standard. Federal courts have construed *Ex Parte Young* narrowly and have held that the requisite connection exists only when the state official has the authority to enforce the challenged statute and has shown an intention to enforce it. *See, e.g.,* Summit Medical Assocs., P.C. v. Pryor, 180 F.3d 1326, 1342 (11th Cir.1999), *cert. denied,*-S.Ct.-, 2000 WL 245310 (Mar. 6, 2000) (refusing to apply *Ex Parte Young* when husband or maternal grandparent, not Governor, Attorney General, or District Attorney, had authority to enforce challenged statute); Long v. Van de Kamp, 961 F.2d 151, 152 (9th Cir.1992) ("under *Ex Parte Young,* there must be a connection between the official sued and enforcement of the allegedly unconstitutional statute, and there must be a threat of enforcement"); *Allied,* 473 F.Supp. at 568 ("to satisfy the *Young* fiction ..., not only must there be a state officer who has a connection with the enforcement of the challenged statute, but there must also be a real, not ephemeral, likelihood or realistic potential that the connection will be employed against plaintiffs' interests"). In *Children's Healthcare Is a Legal Duty, Inc. v. Deters,* the Sixth Circuit held that the Ohio Attorney General did not have a sufficient connection to the enforcement of allegedly unconstitutional state statutes when Ohio law delegated the enforcement of the challenged statutes to local prosecutors, not the Attorney General. 92 F.3d 1412, 1416-17 (6th Cir.1996). Likewise, the Seventh Circuit held on similar facts that the *Ex Parte Young* exception did not apply to a suit against the Illinois Attorney General because he had never threatened plaintiffs with prosecution and had no authority to do so because "States' Attorneys, elected in each county, are the public prosecutors in Illinois." Sherman v. Community Consol. Sch. Dist. 21 of Wheeling Tp., 980 F.2d 437, 441 (7th Cir.1992).*Compare* Southern Pacific Transp. Co. v. Brown, 651 F.2d 613, 614 (9th Cir.1980) (Oregon Attorney General's power to direct and advise district attorneys in criminal matters insufficient connection with enforcement to satisfy *Ex Parte Young*), *with Ex Parte Young,* 209 U.S. at 160-61, 28 S.Ct. at 454 (no Eleventh Amendment immunity when Minnesota Attorney General had general obligation to enforce all laws of state and specific statutory duties to institute suit against corporations which violate state laws and to prosecute all actions deemed necessary to State Railroad Commission). The *Sherman* court held that the Attorney General must be dismissed from the case, observing that "plaintiffs apparently named the office of the Attorney General in an effort to obtain a judgment binding the State of Illinois as an entity, a step that ... the eleventh amendment does not permit in the absence of such authorization." 980 F.2d at 441 (*citing* Fitzpatrick v. Bitzer, 427 U.S. 445, 96 S.Ct. 2666 (1976)).

> FN1. The panel in *Opkalobi* held that the Louisiana Attorney General's constitutional authority to "institute, prosecute, or intervene in any civil action or proceeding" to protect the rights or interests of the state provided a sufficient connection between the Attorney General and the challenged civil statute to satisfy *Ex Parte Young.* 190 F.3d at 346.

***4** Plaintiffs are Louisiana residents who have sued the Louisiana Attorney General, seeking to obtain a declaration that Act 1180 violates the United States Constitution and to enjoin its future enforcement. The Court must determine whether the Attorney General has a sufficient connection with the enforcement of Act 1180 to make him a proper party defendant.

Act 1180 does not specifically create any duty of enforcement. Accordingly, the Court looks to the general law governing the enforcement powers of the Attorney General of the State of Louisiana. The Louisiana Attorney General's powers and duties are set forth in Article IV, Section 8 of the Louisiana Constitution of 1974, which provides in pertinent part:

As necessary for the assertion or protection of any right or interest of the state, the attorney general shall have authority (1) to institute, prosecute, or intervene in any civil action or proceeding; (2) upon the written request of a district attorney, to advise and assist in the prosecution of any criminal case; and (3) for cause, when authorized by the court which would have original jurisdiction and subject to judicial review, (a) to institute, prosecute, or intervene in any criminal action or proceeding, or (b) to supersede any attorney representing the state in any civil or criminal

action.

The attorney general shall exercise other powers and perform other duties authorized by this constitution or by law.

Defendants correctly observe that although Louisiana law delegates significant authority to the Attorney General to institute and prosecute *civil* actions, the Attorney General does not enjoy similar discretion in *criminal* matters. *Compare* Guidry v. Roberts, 331 So.2d 44, 52-53 (La.App. 1 st Cir.1976), *aff'd in part and rev'd in part on other grounds,* 335 So.2d 438 (La.1976) ("It is clear that a district attorney has the sole authority to determine when and against whom a criminal charge shall be instituted subject only to the power vested in the attorney general to supercede that authority upon a showing of cause."), *with* In re Louisiana Riverboat Gaming Comm'n, 659 So.2d 775, 783 (La.App. 1 st Cir.1995) (Attorney General, not district attorney, had authority to institute declaratory judgment action to obtain judicial determination of validity of rules promulgated by Louisiana Riverboat Gaming Commission). The Attorney General may intervene in a criminal action only if (1) the district attorney in charge of the case provides prior written approval, or (2) a court of competent jurisdiction authorizes the intervention "for cause," namely, upon a showing that the district attorney is not adequately asserting some right or interest of the state. *See* Plaquemines Parish Comm'n Council v. Perez, 379 So.2d 1373, 1377 (La.1980) (*citing* Hargrave, *The Judiciary Article of the Louisiana Constitution of 1974,* 37 LA. L.REV. 765, 835 (1977));*see also* State v. Neyrey, 341 So.2d 319, 321-22 (La.1976) (recognizing definite intent of Constitutional Convention delegates to restrict Attorney General's power to institute criminal proceedings).Article V, section 26(B) of the Louisiana Constitution affirms this delegation of prosecutorial authority to local district attorneys in criminal cases: "Except as otherwise provided by this constitution, a district attorney, or his designated assistant, shall have charge of every criminal prosecution by the state in his district...."

***5** Under Louisiana law, the Attorney General may not bring a criminal prosecution solely on his authority. The Louisiana Constitution vests that authority in the first instance in local district attorneys. In this respect, Louisiana law is similar to the Ohio provisions in *Deter,* on which the Sixth Circuit relied in holding that *Ex Parte Young* did not apply when state law delegated the prosecution of the challenged statute to local prosecutors, not the state Attorney General. In Ohio, like Louisiana, the Attorney General's authority to prosecute criminal offenses was conditional. *See*OHIO REV.CODE ANN. § 109.02 (West 1999) (conditioning Attorney General's power to prosecute any person indicted for a crime on the written request of the governor). In Louisiana, the district attorneys and the courts control whether the Attorney General may prosecute plaintiffs for violating La.Rev.Stat. Ann. § 14:73.6, as amended and newly enacted by Act 1180. Plaintiffs do not allege that either of the two predicates to the Attorney General's authority to prosecute such a criminal action has occurred. Moreover, while the Governor of Louisiana has general duties to enforce state law, the Attorney General does not have any general duty to enforce all of the laws of the State. *See*La. Const. art. 4, § 5. *See generally* Allied, 473 F.Supp. at 567 (holding governor's general duty in state constitution to take care that state laws are faithfully executed is sufficient "enforcement" power to invoke *Young* fiction against governor) (*citing* Federal Nat'l Mortgage Ass'n v. Lefkowitz, 383 F.Supp. 1294 (S.D.N.Y.1974)); *accord* National Ass'n for Advancement of Colored People v. State of Cal., 511 F.Supp. 1244, 1256 (E.D.Cal.1981), *aff'd,* 711 F.2d 121 (9 th Cir.1981) ("a general obligation to enforce or execute state laws is sufficient to meet the connection with enforcement requirement set forth in *Ex Parte Young"*). For the foregoing reasons, the Court finds that the connection between Attorney General Ieyoub and the enforcement of Act 1180 is too attenuated to invoke the *Ex Parte Young* exception. This conclusion is buttressed by the lack of any stated intention by the Attorney General to enforce the statute against plaintiffs or anyone else. *See* discussion *infra* Section B. The Eleventh Amendment therefore bars plaintiffs' claims against the Attorney General and mandates their dismissal. The Court must now determine whether the plaintiffs may maintain their claims against District Attorney Reed.

B. Justiciability

Defendants also argue that this action presents no justiciable case or controversy because plaintiffs lack

standing and their claims are not yet ripe for judicial resolution. The Declaratory Judgment Act, 28 U.S.C. § 2201, allows a federal court to issue declaratory relief solely "in a case of actual controversy within its jurisdiction."The Act's restriction of federal jurisdiction to actual controversies extends to the "cases and controversies" limit set forth in Article III of the United States Constitution. *See* *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 239, 57 S.Ct. 461, 463 (1937); *Middle South Energy, Inc. v. City of New Orleans*, 800 F.2d 488, 490 (5th Cir.1986). The Fifth Circuit has explained that "[a] controversy, to be justiciable, must be such that it can presently be litigated and decided and not hypothetical, conjectural, conditional or based upon the possibility of a factual situation that may never develop." *Rowan Cos., Inc. v. Griffin*, 876 F.2d 26, 28 (5th Cir.1989) (*quoting* *Brown & Root, Inc. v. Big Rock Corp.*, 383 F.2d 662, 665 (5th Cir.1967)).

*6 The standing doctrine represents an essential part of Article III's "case or controversy" requirement. *See* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136 (1992). The question of standing concerns "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498-99, 95 S.Ct. 2197, 2205 (1975) (*quoting* *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703 (1962)). Standing includes both constitutional and prudential limitations on a federal court's jurisdiction. *See* *id.* at 498, 95 S.Ct. at 2205 (*citing* *Barrows v. Jackson*, 346 U.S. 249, 73 S.Ct. 1031 (1953)); *New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 13 (*quoting* *Valley Forge Christian Coll. v. Americans United for Separation of Church and State*, 454 U.S. 464, 471, 102 S.Ct. 752, 757 (1982); *International Society for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 817 (5th Cir.1979)). To meet the "irreducible constitutional minimum" requirement of standing, a plaintiff must allege the following core elements: (1) he has suffered or is about to suffer an "injury in fact" that is concrete and particularized, and actual or imminent; (2) the injury is fairly traceable to the defendant's conduct; and, (3) a favorable decision is likely to redress the injury. *See* *Lujan*, 504 U.S. at 560-61, 112 S.Ct. at 2136 (citations and footnote omitted); *Valley Forge*, 454 U.S. at 472, 102 S.Ct. at 758.

In the context of a pre-enforcement facial challenge to a criminal statute on First Amendment grounds, as is the case here, the plaintiff does not have to first risk exposing himself to actual arrest or prosecution. *See* *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 2309 (1979) (*quoting* *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 1216 (1974)). Moreover, that the statute has not been enforced does not establish the lack of a case or controversy when the state has not disavowed enforcement. *See* *KVUE, Inc. v. Austin Broadcasting Corp.*, 709 F.2d 922, 930 (5th Cir.1983) (*quoting* *Babbitt*, 442 U.S. at 302, 99 S.Ct. at 2310-11),*aff'd sub nom.* *Texas v. KVUE-TV, Inc.*, 465 U.S. 1092, 104 S.Ct. 1580 (1984). Nevertheless, the plaintiff must, at a minimum, allege an intention to engage in constitutionally protected conduct that is proscribed by the statute and a credible threat of prosecution under the statute. *See* *Babbitt*, 442 U.S. at 298, 99 S.Ct. at 2309. The court must determine whether the threat of prosecution to the plaintiff bringing suit is more than imaginary or speculative. *See id.* at 298 (*quoting* *Younger v. Harris*, 401 U.S. 37, 42, 91 S.Ct. 746, 749 (1971)).*Compare Younger*, (holding plaintiffs who had never been arrested, indicted or threatened with prosecution lacked standing to bring First Amendment challenge to criminal statute because complaint alleged only that they felt "inhibited" by statute), *with* *Gardner*, 99 F.3d at 11, 17 (standing to bring First Amendment facial challenge to state criminal statute when complaint specifically alleged political action committee's intent to exceed statute's expenditure cap and fear of prosecution if it did so) *and* *KVUE*, 709 F.2d at 929 (standing to bring First Amendment facial challenge to state criminal statute when plaintiff alleged desire to violate statute and offered evidence that it lost money by obeying law and has in fact violated statute).

*7 Further, although a plaintiff may establish an actual injury when a statute allegedly "chills" him from exercising his free speech rights or deters his expression in order to avoid prosecution, mere "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 13-14, 92 S.Ct. 2318, 2325-26 (1972).*See also* *Meese v. Keene*, 481 U.S. 465, 473, 107 S.Ct. 1862, 1867 ("If Keene had

merely alleged that the [statute's characterization of films as 'political propaganda'] deterred him by exercising a chilling effect on the exercise of his First Amendment rights, he would not have standing to seek its invalidation."); *Younger*, 401 U.S. at 51, 91 S.Ct. at 754 ("the existence of a 'chilling effect,' even in the area of First Amendment rights has never been considered a sufficient basis, in and of itself, for prohibiting state action"). The plaintiff must offer some objective evidence to show that the challenged law, regulation, or ordinance has deterred him from engaging in constitutionally protected speech. *See Meese*, 481 U.S. at 472-73, 107 S.Ct. 1866-67; *Laird*, 408 U.S. at 13-14, 92 S.Ct. at 2325-26. *See also Gardner*, 99 F.3d at 14 (plaintiff's subjective fear that he will be prosecuted for engaging in expressive activity does not constitute injury under standing analysis unless fear is objectively reasonable).

Here, the complaint suggests the following alleged injuries:

1. The Act creates "uncertainty and confusion among plaintiffs as well as among the vast majority of personal computer users."(Compl.¶ X.)

2. The Act "[u]nlawfully impair[s] such con stitutionally-protected speech as the use of false identification to avoid social ostracism, to prevent discrimination and harassment, or to protect one's privacy."(Compl.¶ XI.)

3. The Act "threatens to inhibit and chill the exercise of the plaintiffs' constitutionally-protected rights of freedom of speech and communication."(Compl.¶ XIV.)

Plaintiffs allege that they intend to remain engaged in the business of transmitting bulk electronic mail and communications. (*See* Compl. ¶ I.) However, plaintiffs do not allege that they intend to engage in any conduct that is proscribed by the Act. They do not assert (1) that they transmit electronic mail in contravention of the policies of electronic mail service providers, or (2) that they falsify the routing information of their transactions. *See*La.Rev.Stat. Ann. § 14:73.6(A) & (B). Nor does the record reveal that plaintiffs have a past history of acting in contravention of the Act's requirements. They therefore do not meet the first prong of the *Babbitt* framework. Further, plaintiffs do not offer objective evidence, or even specific allegations, to substantiate their claim that the Act chills the exercise of their free speech rights by causing them to forego engaging in protected activity. As in *Younger*, plaintiffs' bald assertion that the Act chills their free speech rights is insufficient to establish standing under Article III.

*8 As noted above, the standing doctrine also includes prudential considerations on the exercise of federal court jurisdiction. *See Eaves*, 601 F.2d at 817. Relevant to this case, the Supreme Court has held that a party may generally assert only his own legal rights and not those of third parties not before the court. *See United Food and Commercial Workers v. Brown Group*, 517 U.S. 544, 547 (1996); *Warth*, 422 U.S. at 499, 95 S.Ct. at 2205. Facial challenges are disfavored because they represent an exception to the traditional rule that "the person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court."*Los Angeles Police Dep't v. United Reporting Pub. Co.*,-U.S. -, 120 S.Ct. 483, 488 (1999) (*quoting New York v. Ferber*, 458 U.S. 747, 767, 102 S.Ct. 3348 (1982) (*citing Broadrick v. Oklahoma*, 413 U.S. 601, 610, 93 S.Ct. 2908) (1973))). Although the Court has created a narrow exception to the traditional standing rule in First Amendment cases involving facial overbreadth challenges, *see id.*(citations omitted), this exception does not alter the constitutional requirement that plaintiffs demonstrate an injury-in-fact to invoke a federal court's jurisdiction. *See Bordello*, 922 F.2d at 1061 (*citing Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 958, 104 S.Ct. 2839, 2847 (1984); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-19, at 135 n. 2 (2d ed.1988)).*See also Henschen*, 959 F.2d at 589-90 ("Plaintiffs' ultimate prayer for relief-a declaration that the parade ordinance is overbroad-involves a remedy which we may apply only 'sparingly and as a last resort'.... such action must be reserved for the day when a truly justiciable case is at bar") (*quoting Broadrick*, 413 U.S. at 613, 93 S.Ct. at 2916 (1973)). Accordingly, to the extent that plaintiffs assert claims of third parties, the overbreadth exception to the traditional standing rule cannot help them as they have failed to allege any present or imminent injury attributable to the Act.

The Court also notes that the overbreadth doctrine cannot be used to challenge regulations of commercial speech. *See* *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 497, 102 S.Ct. 1186, 1192 (1982) (*citing* *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 565 n. 8, 100 S.Ct. 2343, 2351 n. 8 (1980); *Tobacco Accessories and Novelty Craftsmen Merchants Ass'n of Louisiana v. Treen*, 681 F.2d 378, 382 (5th Cir.1982).*See also* *Waters v. Churchill*, 511 U.S. 661, 114 S.Ct. 1878, 1885 (1994) ("the possibility that overbroad regulations may chill commercial speech [has not] convinced us to extend the overbreadth doctrine into the commercial speech area"). On its face, Act 1180 applies only to commercial electronic mail transmissions. *See*La.Rev.Stat. § 14:73.6(A) ("noncommercial electronic mail transmissions shall not be deemed to be unsolicited bulk electronic mail"); § 14:73.1(13) (defining "unsolicited bulk electronic mail" as "any electronic message which is developed and distributed in an effort to sell or lease consumer goods or services"). The overbreadth exception therefore does not apply.

*9 Because plaintiffs have not established the minimum constitutional requirements for standing, this action does not present a justiciable case or controversy under Article III and must be dismissed for lack of subject matter jurisdiction. In so concluding, the Court notes the Fifth Circuit's admonition that "[a] litigant may not ... challenge the constitutionality of a state criminal statute merely because he desires to wipe it off the books or even because he may some day wish to act in a fashion that violates it." *KVUE*, 709 F.2d at 927.

III. CONCLUSION

For the foregoing reasons, the Court GRANTS defendants' motion and dismisses this action pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction.

E.D.La.,2000.
Fox v. Reed
Not Reported in F.Supp.2d, 2000 WL 288379 (E.D.La.)

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HOnly the Westlaw citation is currently available.
United States District Court, E.D. Louisiana.
Joseph LADD, et al
v.
EQUICREDIT CORPORATION OF AMERICA
No. CIV. A. 00-2688.

Feb. 21, 2001.

ORDER AND REASONS

CLEMENT, District J.
*1 Before the Court is defendant EquiCredit Corporation of America's Motion to Stay All Class Certification Issues Pending Resolution of its Motion for Summary Judgment. For the following reasons, defendant's motion is GRANTED.

BACKGROUND

In 1998, plaintiff Joseph Ladd ("Ladd") mortgaged his home to defendant EquiCredit Corporation of America ("EquiCredit"). Ladd claims that EquiCredit charged him over $2,000.00 for property inspections that were never performed, and he has filed the instant suit as a putative class action, alleging that EquiCredit committed mail fraud by routinely adding unauthorized charges to its customers' loan accounts.

EquiCredit now moves to stay discovery on all class certification issues pending the resolution of its Motion for Summary Judgment, which is set for hearing on March 7, 2001. EquiCredit does not seek to stay discovery on the issues related to its Motion for Summary Judgment.

LAW AND ANALYSIS

A "trial court has broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined." *Petrus v. Bowen*, 833 F.2d 581, 582 (5th Cir.1987). In the case at bar, defendant EquiCredit has filed a summary judgment motion that may be dispositive of the plaintiff's claims. Since a decision on the merits may render all class certification issues moot, the Court may properly refuse to entertain motions for class certification and related discovery until dispositive motions have been resolved. *See Wade v. Kirkland*, 118 F.3d 667, 670 (9th Cir.1997) (holding that "in some cases, it may be appropriate in the interest of judicial economy to resolve a motion for summary judgment or motion to dismiss prior to ruling on class certification"). Moreover, the merits of a case have no impact on whether a class may be properly maintained, and a court may decide the merits of a case regardless of whether it is certified as a class action. *See, Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 178 (1974); *Floyd v. Bowen*, 833 F.2d 529, 534-35 (5th Cir.1987). Accordingly, because the Court finds that it is in the interests of justice and judicial economy to stay all class certification issues until it is determined whether Ladd has any valid claims against EquiCredit, the defendant's motion is GRANTED.[FN1]

FN1. However, Ladd is entitled to discovery on issues related to EquiCredit's Motion for Summary Judgment.

CONCLUSION

IT IS ORDERED that defendant EquiCredit Corporation of America's Motion to Stay All Class Certification Issues Pending Resolution of its Motion for Summary Judgment is GRANTED.

E.D.La.,2001.
Ladd v. Equicredit Corp. of America
Not Reported in F.Supp.2d, 2001 WL 175236 (E.D.La.)

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United States Court of Appeals,Fifth Circuit.

William Michael FLYNN; Arminta Flynn, Plaintiffs-Appellants

v.

The CIT GROUP, also known as Consumer Finance Inc; John and Jane Does 1 through 100, Personally and in their official capacities, Defendants-Appellees.

No. 07-10847.

Summary Calendar.

Sept. 26, 2008.

William Michael Flynn, Dallas, TX, pro se.
Arminta Flynn, Dallas, TX, pro se.
William Scott Matney, Hunton & Williams LLP, Houston, TX, for Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas, USDC No. 3:06-CV-2280.

Before SMITH, STEWART, and SOUTHWICK, Circuit Judges.

PER CURIAM: FN*

FN* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

*1 William Michael Flynn and Arminta Flynn filed this *pro se* lawsuit against CIT Group/Consumer Finance, Inc. (CIT), and its unknown agents, personally and in their official capacities. The Flynns sought $336,273,000, plus clear title to real property on which CIT holds a mortgage, based on allegations that CIT violated their rights to be treated equally under the United States Constitution. The district court dismissed the Flynns' equal protection and 42 U.S.C. § 1983 constitutional claims against CIT, a private party, for failure to allege state action. The claims against CIT's unknown agents were dismissed because the complaint did not allege any actions by unknown individuals on which to base a right of recovery. The district court granted CIT's second motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), finding that the Flynns' amended complaint failed to comply with the pleading standards set forth in Federal Rule of Civil Procedure 8 and in the court's order for a more definite statement.

The Flynns argue that the district court erred in dismissing their equal protection and Section 1983 claims. They argue that CIT acts under color of law because of its relation with the SEC. They argue that the district court failed to recognize that CIT's relationship with the SEC is essentially symbiotic. The Flynns' legal argument is not tied to an allegation of facts that such a nexus exists between CIT and the SEC as to transform CIT's actions into state action. The district court did not err in dismissing this claim. *See Norris v. Hearst Trust*, 500 F.3d 454, 464 (5th Cir.2007) (*de novo* review); *Bass v. Parkwood Hosp.*, 180 F.3d 234, 241 (5th Cir.1999) (state action requirement).

The Flynns argue that the district court erred in dismissing their claims against the known and unknown agents of CIT. They state that they cannot locate the cases they were relying upon for this issue. Claims not adequately argued in the brief are deemed abandoned on appeal. *Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir.1993). This issue was abandoned.

The Flynns argue that the district court erred in dismissing their breach of contract claim for failure to state a claim. They argue that the district court erred in dismissing the claim on the pleadings. They contend that they did not understand what the district court was expecting them to say in the amended complaint. They argue that the main issue is that the agreement was violated, and they have a right to a remedy. They contend that their complaint gave "enough factual matter to suggest the

allegations."They argue that their short and plain statement of the claim raises a breach of contract issue, and that the exhibits attached to the complaint support the claim that the defendant violated the agreement. They refer us to the former standard "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v.. Gibson*, 355 U.S. 41, 45-46 (1957).

*2 The "no set of facts" standard was recently rejected by the Supreme Court as overly favorable to deficient complaints. *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1968-69 & n. 8 (2007). A Federal Rule of Civil Procedure requires "a short and plain statement of the claim showing that the pleader is entitled to relief."FED.R.CIV.P. 8(a)(2). While a complaint does not need detailed factual allegations to survive a motion to dismiss, factual allegations must support that a right to relief is neither speculative nor merely a conclusion. *Twombly*, 127 S.Ct. at 1964-65.In the "Breach of Contract" section of their amended complaint, the Flynns allege that CIT breached specific provisions of a "Settlement And Release Agreement" between the parties. They do not, however, allege sufficient facts to raise a right to relief above the speculative level. *See id.*Additionally, although the Flynns argue that the exhibits attached to their original complaint support that CIT violated the agreement, they do not allege how those exhibits substantiate their breach of contract claim. The district court did not err in dismissing the complaint for failure to state a claim. *See id.*

AFFIRMED.

C.A.5 (Tex.),2008.
Flynn v. CIT Group
Slip Copy, 2008 WL 4375928 (C.A.5 (Tex.))

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United States District Court,E.D. Louisiana.
In re KATRINA CANAL BREACHES CONSOLIDATED LITIGATION.
Pertains to Robinson C.A. No. 06-2268.
Civil Action No. 05-4182.

Sept. 29, 2008.

Jonathan Beauregard Andry, The Andry Law Firm, David Scott Scalia, Joseph M. Bruno, Bruno & Bruno, New Orleans, LA, Bob F. Wright, James P. Roy, Domengeaux, Wright, Roy & Edwards, Lafayette, LA, Calvin Clifford Fayard, Jr., David Blayne Honeycutt, Fayard & Honeycutt, Denham Springs, LA, Clay Mitchell, Matthew D. Schultz, Levin, Papantonio, Thomas, Mitchell, Echsner & Proctor, PA, Pensacola, FL, Drew A. Ranier, N. Frank Elliot, III, Ranier, Gayle & Elliot, LLC, Lake Charles, LA, J.J. (Jerry) McKernan, John H. Smith, McKernan Law Firm, Baton Rouge, LA, Joseph C. Wilson, Cotchett Pitre & McCarthy, Burlingame, CA, Nina D. Froeschle, Pierce O'Donnell, O'Donnell & Mortimer, LLP, Thomas V. Girardi, Girardi & Keese, Los Angeles, CA, for Norman Robinson, Kent Lattimore, Lattimore & Associates, Tanya Smith, Anthony Franz, Jr., and Lucille Franz.
James F. McConnon, Jr., David Samuel Silverbrand, Jeffrey Paul Ehrlich, Jessica G. Sullivan, John Woodcock, Sarah K. Soja, Taheerah Kalimah El-Amin, U.S. Department of Justice, Daniel Michael Baeza, Jr., U.S. Department of Agriculture, Washington, DC, for United States of America.
Kara K. Miller, Brian E. Bowcut, Damon C. Miller, Keith H. Liddle, Michele S. Greif, Paul Marc Levine, Richard R. Stone, Sr., Theodore L. Hunt, U.S. Department of Justice, Washington, DC, for United States of America and United States Army Corps of Engineers.
James F. Perot, Jr., At&T Services, Inc., New Orleans, LA, for Bellsouth Telecommunications, Inc., Bellsouth Advertising & Publishing Corporation, Bellsouth Long Distance, Inc., Campanile Assurance Line Limited, New Cingular Wireless PCS, LLC, Acadiana Cellular, Houma-Thibodaux Cellular Partnership, Lafayette Msa, Louisiana Rsa No. 7, and Louisiana Rsa No. 8.
Robert Burns Fisher, Jr., Derek Anthony Walker, Ivan Mauricio Rodriguez, Parker Harrison, Chaffe McCall LLP, Daniel Andrew Webb, Sutterfield & Webb, LLC, New Orleans, LA, John Aldock, Mark Raffman, Goodwin Procter, LLP, Washington, DC, for Lafarge North America, Inc.

ORDER AND REASONS

STANWOOD R. DUVAL, JR., District Judge.
*1 Before the Court is the United States of America's Motion to Dismiss Counts Two and Three of the Amended Complaint (Doc. 13653) filed in the *Robinson* matter. The original *Robinson* complaint seeks damages allegedly caused by the design, construction, operation and maintenance of the Mississippi River Gulf Outlet ("MRGO") in the wake of Hurricane Katrina as detailed and discussed in the Court's ruling of May 2, 2008 (Doc. 12946).[FN1] In the First Amended Complaint (Doc. 13529), plaintiffs added Count 2, denominated as one in "Strict Liability" which alleges that the Corps is liable pursuant to La. Civ.Code 2317 based on its "garde" of the MRGO. Count 3 alleges negligent supervision and vicarious liability for activities of a third-party contractor, the Washington International Group, Inc. ("WGI") undertaken in the East Bank Industrial Area ("EBIA") adjacent to the Inner Harbor Navigational Chanel ("IHNC") or the Industrial Canal. This motion seeks to dismiss both counts pursuant to Fed. R. 12(b)(1) and (6).

FN1. The factual background concerning the MRGO is discussed at length in that opinion and is incorporated herein. *In re Katrina Canal Breaches Cons.Litig. (Robinson)*, 2008 WL 1989672 (E.D.La. May 2, 2008).

Background

On August 29, 2005, Hurricane Katrina lashed the Louisiana coast and cause catastrophic damage in the Greater New Orleans area. Much of the damage was caused by the alleged failure of the levees surrounding New Orleans and storm surge allegedly exacerbated by the Mississippi River-Gulf Outlet ("MRGO"). The *Robinson* suit was filed on April 25,

2006, pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671, *et seq.* against the United States of America and the United States Army Corps of Engineers (referred to collectively as "the United States" or "the Corps") by six named plaintiffs [FN2] living in New Orleans East, St. Bernard Parish, and the Lower Ninth Ward. In the initial complaint, these plaintiffs maintained that the negligent design, construction, maintenance and operation of the Mississippi River Gulf Outlet ("MRGO") caused the catastrophic flooding which damaged their property making the United States liable for their damages.

> FN2. Norman Robinson, Kent Lattimore, Lattimore & Associates, Tanya Smith, Anthony Franz, Jr. and Lucille Franz are the named plaintiffs.

As required by 28 U.S.C. § 2675(a) for a suit to be brought pursuant to the FTCA claims, claims denominated as a "Notice of Class Claim Pursuant to the Federal Tort Claims Act" were filed by plaintiffs. (hereinafter "the Notice) (Doc. 13653 Exhibit A).[FN3] In the first paragraph of the Notice, plaintiffs opine that "[a]ll of the damage complained of herein were caused as a direct and proximate result of negligence of the United States Army Corps of Engineers in the design, construction, and maintenance of the Mississippi River Gulf Outlet navigational/shipping structure located in St. Bernard and Orleans Parishes in Louisiana."

> FN3. Apparently, counsel for the *Robinson* plaintiffs contemplated filing a class action; however, this approach was jettisoned as this suit is not brought as a class action. In addition, a traditional "Form 95" which is provided by the United States to make an FTCA claim was attached to the Notice for each plaintiff.

In the section describing the "Representative Claimants," the focus of each claim concerns the effects on the MRGO with respect to the flooding and consequential damages each experienced. The only references made to the Industrial Canal are (1) in the class description which states:

> "[t]he geographic area in which the Class of Claimants' damage occurred, is bordered on the south and southwest by the Mississippi River, on the west by *the Inner Harbor Navigation Canal (IHNC)* and the Industrial Canal ... All of the individuals/entities residing in this area experience extensive property damage, business loss and related mental anguish...."

*2 (Doc. 13653, Exhibit A at 6) (emphasis added), and (2) in the "Statement of the Case" contained in the Notice which states:

> The MRGO originates in Breton Sound and runs in a northwesterly direction to the confluence with it and the Gulf Intercoastal Waterway, where the two bodies of water merge and *flow into the Inner Harbor Navigational Canal/Industrial Canal....* [T]he USACE had negligently maintained the MRGO which has allowed the area to become more than 2000 feet wide which *allows it to carry a tidal surge into the geographic area occupied by the class of claimants....*

(Doc. 13653, Exhibit A. at 6-7). On May 18, 2006, following the filing of the lawsuit, the Corps denied plaintiffs' administrative claims. (Doc. 13653, Exh. "B").

Two years later, in May of 2008, the Court was made aware of the intention of plaintiffs to raise an issue in *Robinson* which they contended was already encompassed in the initial complaint. That claim centers on certain work done by WGI which had been raised in the MRGO class action cases but had not been specifically addressed in the *Robinson* matter. Allegedly, the United States Army Corps of Engineers ("the Corps") had contracted with WGI to clear abandoned industrial facilities and debris from the EBIA in order for the Corps to replace the lock on the IHNC or the Industrial Canal. Plaintiffs contend that the two floodwall failures that occurred on that side of the Industrial Canal are located where certain excavations took place which were deeper than the level to which the floodwalls were in place. Plaintiffs sought to litigate the liability of the Corps for the alleged defalcations arising from the performance of this contract in the *Robinson* trial.

Plaintiffs filed a Motion for Leave to File First Amended Complaint which was set for hearing on May 14, 2008; however, the motion was withdrawn. At a status conference held on June 3, 2008, plaintiffs maintained that there was no need for amendment to

include these allegations in the matters to be tried. The Court then independently reviewed the *Robinson* Complaint under Fed. R. Civ. 8(a)(2), and found, giving the broadest reading to the Complaint possible, that the issue of liability for any damages arising from the EBIA was not raised in the initial Complaint. (Doc. 13438 at 2). The Court then ordered an amended complaint to be filed.

It was in this context that Counts 2 and 3 were added to the *Robinson* complaint. As noted, Count 2 concerns allegations based on La. Civ.Code art. 2317. In Count 3, plaintiffs contend that the United States was negligent "in overseeing and supervising the work of [its] third party contractor" WGI, and consequently failed to prevent WGI, in the course of performing work at the EBIA, from committing negligence that resulted in the flooding of New Orleans East, the Lower Ninth Ward, and St. Bernard Parish. ¶¶ 115-121. In addition, in the Amended Complaint, there are allegations of direct Corps negligence which do not encompass a failure to supervise WGI.

***3** The United States filed the subject motion on June 26, 2008, which the Court will now address.

Standard of Review

Rule 12(b)(1) of the Federal Rules of Civil Procedure provide a method by which a party may challenge the subject matter jurisdiction of the district court to hear a case. The burden of proof for a Rule 12(b)(1) motion is on the party asserting jurisdiction. *Ramming v. United States*, 281 F.3d 158 (5th Cir.2001). As the Fifth Circuit has stated:

> When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits. *Hitt v. City of Pasadena*, 561 F.2d 606, 608 (5th Cir.1977) (per curium). This requirement prevents a court without jurisdiction from prematurely dismissing a case with prejudice. The court's dismissal of a plaintiff's case because the plaintiff lacks subject matter jurisdiction is not a determination of the merits and does not prevent the plaintiff from pursing a claim in a court that does have jurisdiction.

Id. A motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction is analyzed under the same standard as a motion to dismiss under Rule 12(b)(6).*See Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir.1998).

Rule 12(b)(6) of the Federal Rule of Civil Procedure provides that in response "to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim" the pleader may raise by motion the defense of "failure to state a claim upon which relief may be granted."Fed.R.Civ.P. 12(b)(6). In considering a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), the "court accepts 'all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.' " *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464 (5th Cir.2004)(quoting *Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir.1999). "[T]he plaintiff must plead 'enough facts to state a claim to relief **that is plausible on its face**" in order to survive a Rule 12(b)(6) motion to dismiss. *Bell Atl. Corp. v. Twombly*, --- U.S. ----, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007) (emphasis added).[FN4] "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 1965 (quotation marks, citations, and footnote omitted). The Court will first address the Motion to Dismiss as it pertains to Count 2.

> FN4. This Court has previously stated that a district court may not dismiss a complaint under Rule 12(b)(6)"unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *Blackburn v. Marshall*, 42 F.3d 925, 931 (5th Cir.1995). The Supreme Court abrogated the often cited "no set of facts" language in *Conley* commenting that the case has been frequently mischaracterized as setting forth a minimum pleading standard when it was simply "describ[ing] the breadth of opportunity to prove what an adequate complaint claims." *Twombly*, 127 S.Ct. at 1968. In other words, the *Twombly* court reads *Conley* as standing for the proposition that "once a claim has

been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."*Id.* (citing *Sanjuan v. American Bd. of Psychiatry and Neurology*, 40 F.3d 247, 251 (7th Cir.1994)(once a claim for relief has been stated, a plaintiff "receives the benefit of imagination, so long as the hypotheses are consistent with the complaint"). Thus, rejecting the *Conley* "no set of facts" test, the *Twombly* court employs a plausibility standard for scrutinizing the sufficiency of pleadings in the context of Rule 12(b)(6) motion.

Count 2

Under the Federal Tort Claim Act, 28 U.S.C. § 2680(a), ("FTCA"), the defendant maintains that the United States may not be subjected to strict liability. *See Dalehite v. United States*, 346 U.S. 15, 44-45, 73 S.Ct. 956, 97 L.Ed. 1427 (1953) (under FTCA there can be no "liability without fault"); *Laird v. Nelms*, 406 U.S. 797, 799, 92 S.Ct. 1899, 32 L.Ed.2d 499 (1972) ("Regardless of state law characterization, the FTCA precludes liability if there has been no negligence or other form of 'misfeasance or nonfeasance'); *Tindall v. United States*, 901 F.2d 53, 55 n. 3 (5th Cir.1990); *Lively v. United States*, 870 F.2d 296 (5th Cir.1989) (Fifth Circuit rejected Louisiana plaintiffs' attempt to impose strict liability for ultra-hazardous activity).

*4 Plaintiffs respond that while article 2317 historically provided for "strict liability," by virtue of the 1996 amendments to the Code, the article creates in reality a "reasonable care standard" thus imposing a requirement of fault and eliminating "strict liability" turning it into a negligence claim. *Burmaster v. Plaquemines Parish Government*, 982 So.2d 795, 799 n. 1, La.2008). The salient articles provide:

Art. 2317 Acts of others and of thing in custody

We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of things which we have in our custody. This, however, is to be understood with the following modifications.

Art. 2317.1 Damage caused by ruin, vice or defect in things

The owner or custodian of a thing is answerable for damage occasioned by its ruin, vice, or defect, only upon a showing that he knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case.

La. Civ.Code arts. 2317 and 2317.1. Thus, plaintiffs maintain that the motion has no merit in this regard.

The Court finds that plaintiffs' argument correctly states the status of the law of the State of Louisiana, and while the count might be denominated as one in strict liability, plaintiffs in essence have invoked another theory of negligence. Article 2317 and 2317.1 require a finding of fault, and, therefore, can be invoked in the context of an FTCA claims. *Burmaster v. Plaquemines Parish Government*, 982 So.2d 795, 799 n. 1, La.2008). Accordingly, the Court will deny the motion in this regard except to the extent that the words "strict liability" contained therein shall be stricken. The Court will now turn to Count 3.

Count 3

The United States maintains that Count 3 is barred for three reasons. To begin, they contend that plaintiffs never presented a claim based on the alleged EBIA defalcations and thus did not satisfy the administrative claim requirement 28 U.S.C. § 2675(a).*Portillo v. United States* (W.D.Tex.1993), *aff'd* 1994 WL 395174 (5th Cir.1994). In addition, the United States maintains that the claim is barred by the statute of limitations 28 U.S.C. § 2401(b) as the EBIA claims was not presented in writing within two years after such claim accrues. *Ramming v. United States*, 281 F.3d 158, 162 (5th Cir.2001); *Holmes v. Greyhound Lines, Inc.*, 757 F.2d 1563, 1566 (5th Cir.1985). Finally, the United States maintains that the claim is barred by the discretionary function exception 28 U.S.C. § 2680(a).

Plaintiffs respond contending that the claim filed was sufficient to trigger the Corps' responsibility to investigate the EBIA claim. They maintain that they are not required to articulate every conceivable basis of liability-whether based on fact or legal theory. *Rise v. United States*, 630 F.2d 1068, 1071 (5th Cir.1980). Indeed, they argue that a government agency is mandated to investigate not only the theories of liability detailed in the Form 95, but also any other related theories of liability not expressly mentioned. *Adams v. United States*, 615 F.2d 284, 298 (5th Cir.1980), *clarified* 622 F.2d 197 (1980). They also argue that the claim as filed, because it included the above-mentioned descriptions of the Industrial Canal area, was sufficient to satisfy the notice requirement. In addition, they maintain that the EBIA claim relates back pursuant to Fed.R.Civ.P. 15, as that rule is to be liberally construed to permit amendments to pleadings. *William v. United States*, 405 F.2d 234, 236 (5th Cir.1968). Finally, as to the discretionary function exception, they maintain that the Corps exercised sufficient control over the project to defeat the exception. In addition, plaintiffs contend that by virtue of the Corps violating its own guidelines the exception is inapplicable.

Analysis

The Administrative Claim Did Not Provide Adequate Notice of the EBIA Claim

*5 Filing an administrative claim to the agency responsible for the alleged injury is a jurisdictional prerequisite to filing suit under the FTCA. 28 U.S.C. § 2675(a); *Cook v. United States*, 978 F.2d 164, 166 (5th Cir.1992)."A claimant gives proper notice within the meaning of § 2675(a) only when the agency obtains sufficient written information to begin investigating and the claimant places a value on his claim."*Id. citing Transco Leasing Corp. v. United States*, 896 F.2d 1435, 1441,*amended on other grounds*, 905 F.2d 61 (5th Cir.1990). Plaintiffs contend they have satisfied this requirement in that all that is required is that they have made a "claim" for flooding and thus the Government is put on notice to inquire into all possible causes. The statute states:

> (a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim

28 U.S.C.A. § 2675.

In *Portillo v. United States*, 816 F.Supp. 444, 446 (W.D.Tex.1993), *aff'd* 1994 WL 395174, the court found that facts and theories of liability which were never presented to the agency as part of an administrative claim cannot form the basis for a complaint under the Federal Tort Claims act. In that case, the Form 95 centered on medical malpractice arising from the Beaumont nursing staff's alleged negligence in failing to monitor a plaintiff adequately following his surgery. Their delay in his catheterization allegedly caused a chronic urinary tract infection. Plaintiff sought to amend his complaint to allege negligent administration of spinal anesthesia resulting in an injury to his lower spine and assorted other problems. The Court dismissed the anesthesia claim and the Fifth Circuit affirmed:

> In his administrative claim, Portillo apprised the government that he sought compensation for urological injuries allegedly suffered as a result of Beaumont's failure to monitor him after the ankle surgery. Nowhere on the claim form, and not until he sought leave of court to amend his complaint approximately eleven months after instituting suit, did Portillo even allude to the new contention that Beaumont personnel negligently administered his anesthesia resulting in injuries to his lower spine and the onset of diabetes. Because the administrative claim did not give the government notice of any facts that would have led it to investigate the circumstances surrounding the administration of Portillo's anesthesia, the

exhaustion requirement was not satisfied, leaving the district court without jurisdiction to address the claim; its dismissal was not error. *See* Bush v. United States, 703 F.2d 491, 494 (11th Cir.1983) (holding that an administrative claim must specifically delineate facts that put the government on notice of each potential basis for relief).

*6 *Id.* at *4, 29 F.3d 624 (5th Cir.1994). This case is highly analogous to the instant one.

The Notice of a Class Claim that was filed on behalf of plaintiffs did not include sufficient facts to place the Corps on notice that these particular plaintiffs [FN5] sought recovery for the alleged defalcations that occurred at the EBIA. The *Robinson* claim as filed with the Corps focuses on the alleged harm caused and defalcations surrounding MRGO. There is simply no indication that the EBIA, and the work of WGI would be the subject of this lawsuit. Furthermore, with respect to the individual claimant's allegations in the Form 95s included in the Notice, there is not a single mention of WGI, the failure of the Industrial Canal floodwall, the EBIA project or the like. All of the claims are in terms of the detriment caused by the MRGO with flood waters emanating from the MRGO. In addition, in the statement of the case, the only mention of the Inner Harbor Navigational Canal/Industrial Canal is to define the geographical boundaries of the class which is not being pursued in this action or to explain where the terminus of the MRGO occurs.

> FN5. In reality only Lucille Franz and Anthony Franz who were located in the Lower Ninth Ward would have been impacted by the failure of the IHNC floodwall.

Just as the plaintiff in *Portillo* sought compensation for damages caused by the negligence of one agency based on two distinct and different actions, so it is with the instant plaintiffs. While it is beyond cavil that flooding caused plaintiffs' damages, there is a distinct difference between lodging a claim based on the defalcations concerning a navigable waterway-the MRGO and the storm surge it allegedly caused-and a lock replacement project that concerned different contracts and a different waterway-the Industrial Canal. *See* Cook v. United States, 978 F.2d 164 (5th Cir.1992) (failure to provide *specific* information about claim in timely manner so as to allow investigation bars suit); Dynamic Image Technologies v. United States, 221 F.3d 34 (1st Cir.2000) (where claim did not contain "hint" about alleged false arrest, amended claim seeking to add same exceeded scope of the administrative was properly dismissed).

Plaintiffs argue that considering the numbers of claims that have been filed concerning damages caused by the failure of the Industrial Canal floodwall, the agency has received sufficient notice for the claim to be brought by them. The Court is unaware and has not been presented with any case that stands for the proposition that because others have put an agency on notice for damages arising from a common occurrence (flooding), but invoking a different factual basis (in this instance the flooding of the Lower Ninth Ward caused by the failures of the IHNC floodwall), such other notice would vicariously satisfy the notice requirement of § 2675(a) as to these particular plaintiffs. Nor, is this Court prepared to do so. Thus, the Court finds that the United States' motion has merit in this regard.

Count Three is Barred by the Statute of Limitations

Even if plaintiffs' Notice was sufficient to satisfy § 2675(a)'s requirements, the Court finds that the claim would be time barred. The FTCA provides that a tort claim against the United States "shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the ... final denial of the claim by the agency to which it was presented."28 U .S.C. § 2401(b). This statute requires a claimant to file an administrative claim within two years of the accrual and file suit within six months of its denial. Ramming v. United States, 281 F.3d 158, 162 (5th Cir.2001). This suit was filed timely as to the MRGO allegations; however, this amendment was filed almost two years after the initial complaint was filed on April 25, 2006, and the administrative claim was denied on May 18, 2006.

*7 Even if the Court were to find the Notice sufficient, the suit cannot "relate back" under Fed.R.Civ.P. 15(c) which provides that it does so only if the subsequently filed claim "arose out of the conduct, transaction, or occurrence" as set forth in

the original pleading. As noted by the commentators:

> Of course, amendments that go beyond the mere correction or factual modification of the original pleading and significantly alter the claim or defense alleged in that pleading are treated more cautiously by the courts in applying the relation back doctrine. Amendments of this type often have a substantial impact on the merits of the case and may require the opposing part to prepare the case a second time. As is true in a number of other contexts, such as compulsory counterclaims, cross-claims, and certain third-party claims, the search under Rule 15(c) is for a common core of operative facts in the two pleadings.

6A Wright & Miller, *Federal Practice and Procedure* § 1497 at 84.

Thus, when new or distinct conduct, transactions or occurrences are alleged as grounds for recovery, there is no relation back, and recovery under the amended complaint is barred by limitations if it was untimely filed. *Holmes v. Greyhound Lines, Inc.*, 757 F.2d 1563, 1566 (5th Cir.1985). In *Holmes,* a union employee of Greyhound was discharged on December 29, 1981, for driving a bus while having ingested alcohol within eight hours. Grievance procedures were followed under the union rules with the arbitrator upholding the discharge on February 4, 1983. On June 9, 1983, Holmes filed an action in state court seeking to set aside the arbitration award " 'because the arbitrators exceeded their powers, refused to hear evidence pertinent and material to the controversy, rendered an award which is arbitrary and capricious and deprived plaintiff substantial rights by fraud or undue means.' "*Id.* at 1564.Thus, the gravamen of the suit was with respect to the defalcations of the arbitrators. Greyhound removed the suit on June 29, 1983.

On December 9, 1983, Holmes sought to join the Union as a defendant. The amended complaint did not allege any defect in the arbitration or wrongdoing by the arbitrators but alleged that Greyhound had wrongfully discharged him and the Union breached its duty of fair representation in the grievance procedures. Greyhound and the Union moved to dismiss these charges which were barred by the six-month limitation period applicable thereto.

The district court dismissed the amended complaint finding that "the amended complaint did not relate back to the filing of the original complaint pursuant to Fed.R.Civ.P. 15(c) because the breach of the duty of fair representation and wrongful discharge claims did not arise out of the original complaint which was based solely on a charge of misconduct of the arbitrators."*Id.* at 1565.

The Fifth Circuit stated:

> In determining if an amended complaint relates back, this Court regards as "critical" whether the opposing party was put on notice regarding the claim raised therein. *Woods Exploration & Producing Co. v. Aluminum Co. of America,* 438 F.2d 1286, 1299 (5th Cir.1971), *cert. denied,* 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972) (quoting *Williams v. United States,* 405 F.2d 234, 236 (5th Cir.1968)). Holmes urges that he should prevail because this Court applies Rule 15(c) liberally rather than restrictively, *Woods* at 1299.But liberal application cannot cure a failure of the amended complaint to meet the requirement of the rule. The rule provides that the new claim must have arisen "out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading."The claim against the Union alleged in Holmes' amended complaint is based on entirely different facts, transactions, and occurrences.

*8 The original complaint alleged that the arbitration award should be set aside because of the arbitrators' improper conduct. This claim was abandoned completely in the amended complaint. The amended complaint focused entirely upon allegations that the Union breached its duty of fair representation in several respects. Moreover, these events allegedly occurred prior to the date of the arbitration award, and most of them allegedly occurred around the date Holmes was discharged. *See Barnes v. Callaghan & Co.*, 559 F.2d 1102, 1105 (7th Cir.1977); *Rosenberg v. Martin,* 478 F.2d 520, 526 (2d Cir.), *cert. denied,* 414 U.S. 872, 94 S.Ct. 102, 38 L.Ed.2d 90 (1973); *Griggs v. Farmer, supra.*

To recover under the original complaint, Holmes would have had to prove bias, fraud, or prejudice of the arbitrators. *Int'l Union of Electrical, Radio*

and Machine Workers v. Ingram Mfg. Co., 715 F.2d 886, 890 (5th Cir.1983), *cert. denied*, 466 U.S. 928, 104 S.Ct. 1711, 80 L.Ed.2d 184 (1984). In contrast, under the theory advanced in the amended complaint, Holmes would have to prove that the Union engaged in arbitrary or capricious conduct, or acted or failed to act in bad faith. *See Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567, 96 S.Ct. 1048, 1057, 47 L.Ed.2d 231 (1976). That is, Holmes would have to prove that the Union breached its duty of fair representation and by this means removed the arbitration award as a bar. *See Int'l Union v. Ingram*, 715 F.2d at 888 (noting the difference between a suit to set aside an arbitration award and a hybrid § 301 duty of fair representation action). The district court did not abuse its discretion in holding that the amended complaint failed to relate back to the date of the filing of the original complaint.

Id. Thus, the Fifth Circuit does not find a complaint relates back where the untimely claim arises from conduct different than that found in the original complaint. *See In re Coastal Plains*, 179 F.3d 197, 216 (5th Cir.1999) (finding that a tortious interference claim did not arise from the same conduct as a failure to return inventory claim); *McGregor v. La. State Univ. Bd. of Supervisors*, 3 F.3d 850, 864 (5th Cir.1993) (finding that amendment did not relate back because it alleged "new and distinct conduct"); *3 Eagles Aviation, Inc. v. Rousseau*, 2005 WL 236201 (E.D.La. Jan.28, 2005) (Vance, J.) (the same pattern of conduct and some of the same facts need to be present for the complaint to relate back).

This Court has already determined that the issue of liability for any damages arising from the EBIA was not raised in the initial Complaint. (Doc. 13438-3 at 2). This determination was based on the fact that the initial complaint focused entirely on allegations of negligence by the United States in the way it designed, constructed, and maintained the MRGO. The Court concurs in the Government's argument that the EBIA claim is wholly distinct and separate from their MRGO claims in several respects:

*9 1. EBIA involves conduct pertinent to a different waterway from the one at issue in the original complaint;

2. EBIA claim involves a discrete period shortly before Hurricane Katrina-2000 to 2005. The original complaint "concerns conduct that for the most part occurred in the twentieth century;" and

3. EBIA concerns the manner the United State supervised a contractor."Although the MRGO Project, like the Lock Replacement Project, was largely prosecuted by contractors, the original complaint did not challenge the manner in which the United States supervised contractors, but instead focused on decisions by the United States regarding how the project would be prosecuted."Doc. 13653-2 at 12.

Thus, as in *Holmes* where the plaintiff was fired, here plaintiffs here were flooded. But in *Holmes* plaintiff went from arguing that the arbitration process was faulty to contending that the Union breached its duty as concerned the entire activity. Here, while it is the same actor involved-the Corps-the MRGO claim spans 50 years of activity on one waterway, whereas the EBIA claim concerns the failure of the Corps to properly implement another project on a different waterway. It is a different focus altogether. Plaintiffs have added allegations concerning a different project, focusing on a different technique or defalcation occurring at a different time. Thus, the Court finds that the claim contained in Count 2 is time barred as well.

Considering the foregoing, the Court finds no need to address the applicability of the discretionary function exception at this time. Accordingly,

IT IS ORDERED that the United States of America's Motion to Dismiss Counts Two and Three of the Amended Complaint (Doc. 13653) is **DENIED** with respect to Count 2 and **GRANTED** with respect to Count 3.

E.D.La.,2008.
In re Katrina Canal Breaches Consol. Litigation
Slip Copy, 2008 WL 4449970 (E.D.La.)

END OF DOCUMENT

United States District Court,D. Minnesota.
Stacy Lawton GUIN, Plaintiff,
v.
BRAZOS HIGHER EDUCATION SERVICE CORPORATION, INC., Defendant.
No. Civ. 05-668 RHK/JSM.

Feb. 7, 2006.

John H. Goolsby and Thomas J. Lyons Jr., Consumer Justice Center, Little Canada, Minnesota; Thomas J. Lyons, Lyons Law Firm, P.A., Little Canada, Minnesota, for Plaintiff.
Courtney M. Rogers Reid and Matthew E. Johnson, Halleland Lewis Nilan & Johnson P.A., Minneapolis, Minnesota, for Defendant.

MEMORANDUM OPINION AND ORDER

KYLE, J.

INTRODUCTION

***1** Plaintiff Stacy Guin alleges that Defendant Brazos Higher Education Service Corporation, Inc. ("Brazos") negligently allowed an employee to keep unencrypted nonpublic customer data on a laptop computer that was stolen from the employee's home during a burglary on September 24, 2004. This matter comes before the Court on Brazos's Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56. For the reasons set forth below, the Court will grant the Motion.

BACKGROUND

Brazos, a non-profit corporation with headquarters located in Waco, Texas, originates and services student loans. (Villarrial Aff. ¶ 2.) Brazos has approximately 365 employees, including John Wright, who has worked as a financial analyst for the company since November 2003. (Villarrial Aff. ¶ 2; Wright Aff. ¶ 1.) Wright works from an office in his home in Silver Spring, Maryland. (Wright Aff. ¶ 3.) As a financial analyst for Brazos, Wright analyses loan portfolios for a number of transactions, including purchasing portfolios from other lending organizations and selling bonds financed by student loan interest payments. (Wright Aff. ¶ 6.) Prior to performing each new financial analysis, Wright receives an electronic database from Brazos's Finance Department in Texas. (Wright Aff. ¶ 7.) The type of information needed by Wright to perform his analysis depends on the type of transaction anticipated by Brazos. (Wright Aff. ¶¶ 8-11.) When Wright is performing asset-liability management for Brazos, he requires loan-level details, including customer personal information, to complete his work. (Wright Aff. ¶¶ 11.)

On September 24, 2004, Wright's home was burglarized and a number of items were stolen, including the laptop computer issued to Wright by Brazos. (Wright Aff. ¶ 18.) Wright reported the theft to the local police department, but the police were unable to apprehend the burglar or recover the laptop. (Wright Aff. ¶ 19.) After the police concluded their investigation, Brazos hired a private firm, Global Options, Inc., to further investigate the details the burglary. (Villarrial Aff. ¶ 26.) Global Options was unable to regain possession of the computer. (Villarrial Aff. ¶ 26, Ex. 21.)

With the laptop missing, Brazos sought to determine what customer data might have been stored on the hard drive and whether the data was accessible to a third party. Based on internal records, Brazos determined that Wright had received databases containing borrowers' personal information on seven occasions prior to September 24, 2004. (O'Donnell Dep. Tr. at 31-35.) Upon receiving the databases, Wright typically saved the information to his hard drive, depending on the size of the database and the likelihood that he would need to review the information again in the future. (Wright Aff. ¶¶ 14-15.) However, Wright did not keep records of which databases were permanently saved on his hard drive and which databases were eventually deleted, so Brazos was not able to determine with any certainty which individual customers had personal information on Wright's laptop when it was stolen. (Wright Aff. ¶ 16.)

*2 Without the ability to ascertain which specific borrowers might be at risk, Brazos considered whether it should give notice of the theft to all of its customers. In addition to contemplating guidelines recommended by the Federal Trade Commission ("FTC"),[FN1] Brazos learned that it was required by California law to give notice to its customers residing in that State. (Villarrial Aff. ¶¶ 20, 24, Ex. 16.) Brazos ultimately decided to send a notification letter (the "Letter") to all of its approximately 550,000 customers. (Villarrial Aff. Ex. 17.) The Letter advised borrowers that "some personal information associated with your student loan, including your name, address, social security number and loan balance, may have been inappropriately accessed by the third party."(Villarrial Aff. Ex. 17.) The Letter also urged borrowers to place "a free 90-day security alert" on their credit bureau files and review consumer assistance materials published by the FTC. (Villarrial Aff. Ex. 17.) In addition, Brazos established a call center to answer further questions from customers and track any reports of identity theft. (Villarrial Aff. ¶ 26.)

> FN1. The Federal Trade Commission guidelines recommend that when "deciding if notification [to customers of an identity theft threat] is warranted, [a company should] consider the nature of the compromise, the type of information taken, the likelihood of misuse, and the potential damage arising from misuse."(Villarrial Aff. Ex. 16.)

Plaintiff Stacy Guin, who acquired a student loan through Brazos in August 2002, received the Letter. (Villarrial Aff. Ex. 2; Guin Dep. Tr. at 9-10.) Shortly thereafter, Guin contacted the Brazos call center to ask followup questions. (Guin.Dep. Tr. 12-15.) Guin also ordered and reviewed copies of his credit reports from the three credit agencies listed in the Letter. (Guin. Dep. Tr. at 24-26 .) Guin did not find any indication that a third party had accessed his personal information and, to this date, has not experienced any instance of identity theft or any other type of fraud involving his personal information. (Guin Dep. Tr. at 24-26, 31.) To Brazos's knowledge, none of its borrowers has experienced any type of fraud as a result of the theft of Wright's laptop. (Villarrial Aff. ¶ 26 .)

On March 2, 2005, Guin commenced this action asserting three claims: (1) breach of contract, (2) breach of fiduciary duty, and (3) negligence. (Com pl.¶¶ 22-33.) On September 12, 2005, Guin voluntarily dismissed his breach of contract and breach of fiduciary duty claims. Guin brings the remaining negligence claim under Fed.R.Civ.P. 23, on behalf of "all other Brazos customers whose confidential information was inappropriately accessed by a third party...." (Compl.¶ 15.)

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.Fed.R.Civ.P. 56(c). For purposes of summary judgment, a fact is "material" if its resolution will determine the outcome of the case, and an issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *See Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* 475 U.S. 574, 586-87 (1986). Upon a motion for summary judgment, the moving party carries the burden of showing there is no genuine issue of material fact, and all evidence and reasonable inferences must be viewed in a light most favorable to the non-moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

ANALYSIS

*3 In his negligence claim, Guin alleges that "[Brazos] owe[d] him a duty to secure [his] private personal information and not put it in peril of loss, theft, or tampering," and "[Brazos's] delegation or release of [Guin's] personal information to others over whom it lacked adequate control, supervision or authority was a result of [Brazos's] negligence...." (Compl.¶ ¶ 31-32.) As a result of such conduct, Guin allegedly "suffered out-of-pocket loss, emotional distress, fear and anxiety, consequential and incidental damages."(Compl.¶ 33.)

Minnesota courts have defined negligence as the failure to exercise due or reasonable care. *Seim v. Garavalia*, 306 N.W.2d 806, 810 (Minn.1981). In order to prevail on a claim for negligence, a plaintiff must prove four elements: (1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and

(4) the breach of the duty was the proximate cause of the injury. *Elder v. Allstate Ins. Co.*, 341 F.Supp.2d 1095, 1099 (D.Minn.2004), citing *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn.1995). In support of its instant Motion, Brazos advances three arguments: (1) Brazos did not breach any duty owed to Guin, (2) Guin did not sustain an injury, and (3) Guin cannot establish proximate cause. (Mem. in Supp. at 8-19.) The Court will address each in turn.

1. Breach of Duty

In order to prove a claim for negligence, Guin must show that Brazos breached a legal duty owed to him under the circumstances alleged in this case. A legal duty is defined as an obligation under the law to conform to a particular standard of conduct towards another. *See Minneapolis Employees Ret. Fund v. Allison-Williams Co.*, 519 N.W.2d 176, 182 (Minn.1994). The standard for ordinary negligence is "the traditional standard of the reasonable man of ordinary prudence." *Seim*, 306 N.W.2d at 810. In some negligence cases, however, a duty of care may be established by statute. *Anderson v. State*, 693 N.W.2d 181, 189-90 (Minn.2005). In such cases, violation of a statutory-based duty may constitute negligence *per se*. *Id.* at 190.

Guin argues that the Gramm-Leach-Bliley Act (the "GLB Act"), 15 U.S.C. § 6801, establishes a statutory-based duty for Brazos "to protect the security and confidentiality of customers' nonpublic personal information."(Mem. in Opp'n at 8.) For the purposes of this Motion only, Brazos concedes that the GLB Act applies to these circumstances and establishes a duty of care. (Mem. in Supp. at 15 n .2.) The GLB Act was created "to protect against unauthorized access to or use of such records which could result in substantial harm or inconvenience to any customer [of a financial institution]."15 U.S .C. § 6801(b)(3). Under the GLB Act, a financial institution must comply with several objectives, including:

Develop, implement, and maintain a comprehensive written information security program that is written in one or more readily accessible parts and contains administrative, technical, and physical safeguards that are appropriate to your size and complexity, the nature and scope of your activities, and the sensitivity of any customer information at issue;

*4 Identify reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information that could result in the unauthorized disclosure, misuse, alteration, destruction or other compromise of such information, and assess the sufficiency of any safeguards in place to control these risks; and

Design and implement information safeguards to control the risks you identify through risk assessment, and regularly test or otherwise monitor the effectiveness of the safeguards' key controls, systems, and procedures.

16 C.F.R. § 314.4(a)-(c).

Guin argues that Brazos breached the duty imposed by the GLB Act by (1) "providing Wright with [personal information] that he did not need for the task at hand," (2) "permitting Wright to continue keeping [personal information] in an unattended, insecure personal residence," and (3) "allowing Wright to keep [personal information] on his laptop unencrypted."(Mem. in Opp'n at 10.) Brazos counters that Guin does not have sufficient evidence to prove that it breached a duty by failing to comply with the GLB Act. (Mem. in Supp. at 16.)

The Court concludes that Guin has not presented sufficient evidence from which a fact finder could determine that Brazos failed to comply with the GLB Act. In September 2004, when Wright's home was burglarized and the laptop was stolen, Brazos had written security policies, current risk assessment reports, and proper safeguards for its customers' personal information as required by the GLB Act. (Villarrial Aff. Exs. 1, 3-8, 11, 12.) Brazos authorized Wright to have access to customers' personal information because Wright needed the information to analyze loan portfolios as part of Brazos's asset-liability management function for other lenders. (Wright Aff. ¶¶ 6, 11.) Thus, his access to the personal information was within "the nature and scope of [Brazos's] activities."*See*16 C.F.R. § 314.4(a). Furthermore, the GLB Act does not prohibit someone from working with sensitive data on a laptop computer in a home office. Despite Guin's persistent argument that any nonpublic personal information stored on a laptop computer should be encrypted, the GLB Act does not contain any such

requirement.[FN2]Accordingly, Guin has not presented any evidence showing that Brazos violated the GLB Act requirements.

> FN2. While it appears that the FTC routinely cautions businesses to "[p]rovide for secure data transmission" when collecting customer information by encrypting such information "in transit," there is nothing in the GLB Act about this standard, and the FTC does not provide regulations regarding whether data should be encrypted when stored on the hard drive of a computer. (Mem. in Supp. at 17-18; Johnson Aff. Ex. 8.)

In addition, Guin argues that Brazos failed to comply with the self-imposed reasonable duty of care listed in Brazos's privacy policy-that Brazos will "restrict access to nonpublic personal information to authorized persons who need to know such information."(Mem. in Opp'n at 11.) Brazos concedes that under this policy, it owed Guin a duty of reasonable care, but argues that it acted with reasonable care in handling Guin's personal information. (Mem. in Supp. at 14.) The Court agrees. Brazos had policies in place to protect the personal information, trained Wright concerning those policies, and transmitted and used data in accordance with those policies. (Villarrial Aff. Exs. 1, 9-12.) Wright lived in a relatively "safe" neighborhood and took necessary precautions to secure his house from intruders. (Wright Aff. ¶¶ 21-22.) His inability to foresee and deter the specific burglary in September 2004 was not a breach of Brazos's duty of reasonable care. Because Guin has failed to raise a genuine issue of material fact regarding whether Brazos breached its duty of care, summary judgment is appropriate.

*5 Although Guin's failure to show that Brazos breached its duty of care provides sufficient grounds for granting Brazos's Motion for Summary Judgment, the Court will address Brazos's other two arguments.

2. Injury

In order to prove a claim for negligence, Guin must show that he sustained an injury. *See Manion v. Nagin*, 394 F.3d 1062, 1067 (8th Cir.2005) (applying Minnesota law). A plaintiff must suffer some actual loss or damage in order to bring an action for negligence. *Carlson v. Rand*, 146 N.W.2d 190, 193 (Minn.1966)."The threat of future harm, not yet realized, will not satisfy the damage requirement." *Reliance Ins. Co. v. Anderson*, 322 N.W.2d 604, 607 (Minn.1982).

Guin argues that he has been injured by identity theft. (Mem. in Opp'n at 13-14.) Under both federal and Minnesota law, identity theft occurs whenever a person "transfers, possesses, or uses" another person's identity "with the intent to commit, aid, or abet any unlawful activity."18 U.S.C. § 1028(a)(7); Minn.Stat. § 609.527(2). Guin argues that the circumstances of this case fulfill the definition of identity theft because "the burglars [in Wright's home in September 2004] had a criminal intention when they broke in and gained possession of [Guin's] identity information."(Mem. in Opp'n at 14.)

In response, Brazos contends that "any finding that a third party accessed [Guin's] personal information [is] sheer speculation."(Mem. in Supp. at 9.) Brazos points out that the evidentiary record is completely devoid of any disputed facts indicating that Guin's personal information was actually on Wright's laptop at the time it was stolen, or that Guin's personal information is now in the possession of the burglar. (Mem. in Supp. at 8.) Therefore, Brazos argues that Guin cannot show that he has been a victim of identity theft.

The facts of this case are closely analogous to *Stollenwerk v. Tri-West Healthcare Alliance*, No. Civ. 03-0185, 2005 WL 2465906 (D.Ariz. Sept. 6, 2005). In *Stollenwerk*, the defendant's corporate office was burglarized and a number of items stolen, including computer hard drives containing the personal information of defendant's customers. 2005 WL 2465906 at *1. After the burglary, several customers brought suit against the company asserting claims for consumer fraud, invasion of privacy and negligence. *Id.* at *2. In support of their negligence claim, two plaintiffs relied on the opinion of an expert who described their injury as "an increased risk of experiencing identity fraud for the next seven years."*Id.* at *5 n. 2. The district court expressly rejected the expert testimony because "the affidavit of plaintiffs' expert conclusorily posits that plaintiff's risk of identity fraud is significantly increased without quantifying the risk." *Stollenwerk*, 2005 WL 2465906 at *5. In granting summary judgment for the

defendant on the negligence claim, the district court determined that the two plaintiffs had failed to establish an injury for the purpose of proving negligence: "absent evidence that the data was targeted or actually accessed [by the burglars], there is no basis for a reasonable jury to determine that sensitive personal information was significantly exposed."*Id.* at *5.

*6 Like *Stollenwerk,* in this case Guin has failed to present evidence that his personal data was targeted or accessed by the individuals who burglarized Wright's home in September 2004.[FN3]The record shows that Brazos is uncertain whether Guin's personal information was even on the hard drive of Wright's laptop computer at the time it was stolen in September 2004. (Wright Aff. ¶ 16.) To this date, Guin has experienced no instance of identity theft or any other type of fraud involving his personal information. (Guin Dep. Tr. at 24-26, 31.) In fact, to Brazos's knowledge, none of its borrowers has been the subject of any type of fraud as a result of the theft of Wright's laptop computer. (Villarrial Aff. ¶ 26.) Furthermore, Guin has provided no evidence that his identity has been "transferred, possessed, or used" by a third party with "with the intent to commit, aid, or abet any unlawful activity."*See* 18 U.S.C. § 1028(a)(7); Minn.Stat. § 609.527(2). No genuine issue of material fact exists concerning whether Guin has suffered an injury. Accordingly, he cannot sustain a claim for negligence.

> FN3. Also like *Stollenwerk,* this Court rejects the expert affidavit advanced by Guin to support his negligence claim because the expert's opinion is conclusory and is based on generalizations that are not supported by the specific facts of this case. (*See* Hendricks Aff. at 22-26.)

3. Causation

To prevail on his negligence claim, Guin must also show that Brazos's alleged breach of duty was the proximate cause of his alleged injury. *See Lubbers,* 539 N.W.2d at 401-02. Proximate cause is defined as "consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act." *Hilligoss v. Cross Cos.,* 228 N.W.2d 585, 586 (Minn.1975). As a general rule, the criminal act of a third party is "an intervening efficient cause sufficient to break the chain of causation," provided that the criminal act was not foreseeable and there was no special relationship between the parties. *Funchness v.. Cecil Newman Corp.,* 632 N.W.2d 666, 674 (Minn.2001)."The question of foreseeability of an intervening act is normally one for the trial court and should be submitted to a jury only where there might be a reasonable difference of opinion." *Hilligoss,* 228 N.W.2d at 586.

Guin contends that the September 2004 theft of Brazos's laptop from Wright's home was reasonably foreseeable because "allowing confidential information to remain unencrypted on unsecured laptop computers increase[s] the risk of theft."(Mem. in Opp'n at 24.) Guin argues that "the test of foreseeability is whether the defendant was aware of facts indicating [that] the plaintiff was being exposed to [an] unreasonable risk of harm."(Mem. in Opp'n at 23.) Guin points to similar laptop thefts in the financial industry and the increasing problem of widespread identity theft. (Mem. in Opp'n at 24.) Based on this, Guin argues that the theft of Wright's laptop was reasonably foreseeable to Brazos because "a reasonable jury could conclude that the risk of information compromise is common knowledge in the financial industry."(Mem. in Opp'n at 25.)

The Court concludes that the September 2004 theft of Wright's laptop from his home was not reasonably foreseeable to Brazos. In *Hilligoss,* the Minnesota Supreme Court observed that a high crime rate and the commission of similar crimes in a particular area can establish foreseeability of a subsequent criminal attack. 228 N.W.2d at 548. In this case, however, Wright lived in a relatively "safe" neighborhood and took necessary precautions to secure his house from intruders. (Wright Aff. ¶¶ 21-22.) Wright was unaware of any previous burglaries on his block or in his immediate neighborhood. (Wright Aff. ¶ 22.) There is no indication that Wright or Brazos could have possibly foreseen the burglary which took place on September 24, 2004. A reasonable jury could not infer that the burglary caused Guin any alleged injury; such a conclusion would be the result of speculation and conjecture, not a reasonable inference. *See Stollenwerk,* 2005 WL 2465906 at *7. Guin cannot establish proximate cause in this case and therefore, his negligence claim fails.

CONCLUSION

*7 Based on the foregoing, and all of the files, records and proceedings herein, it is ORDERED that Defendant's Motion for Summary Judgment (Doc. No. 20) is GRANTED, and the Complaint (Doc. No. 1) is DISMISSED WITH PREJUDICE.

LET JUDGMENT BE ENTERED ACCORDINGLY.

D.Minn.,2006.
Guin v. Brazos Higher Educ. Service Corp., Inc.
Not Reported in F.Supp.2d, 2006 WL 288483 (D.Minn.)

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