Pinero v. Jackson Hewitt Tax Service Inc. et al Doc. 43 Att. 2

Unpublished Opinions Referenced in Reply Memorandum

Dockets.Justia.com

Only the Westlaw citation is currently available.
United States District Court,D. New Jersey.
Lois GIORDANO, Plaintiff,
v.
WACHOVIA SECURITIES, LLC et al., Defendants.
Civil No. 06-476 (JBS).

July 31, 2006.

Mark R. Cuker, Esq., Alan H. Sklarsky, Esq., Williams, Cuker & Berezofsky, Cherry Hill, NJ, for Plaintiff.
Mark S. Melodia, Esq., Paul J. Bond, Esq., Reed Smith, LLP, Princeton, NJ, for Defendant Wachovia Securities, LLC.

OPINION

SIMANDLE, District Judge.
*1 This case presents the interesting issue of whether a case, having been removed from State court to Federal court, in which the plaintiff lacks Article III standing to pursue her claim, should be dismissed in Federal court or remanded to State court. This matter, which was removed by Defendant from the Superior Court of New Jersey to this Court, is before the Court upon a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) filed on behalf of Defendant Wachovia Securities, LLC ("Wachovia"). This motion relates to Plaintiff Lois Giordano's four-count complaint (the "Complaint") alleging (1) negligence, (2) invasion of privacy, (3) breach of the duty of confidentiality, and (4) conversion stemming from the loss of Plaintiff's personal and financial information. In short, the Court finds, as alleged by Defendant itself, that Plaintiff has failed to allege that she suffered an injury-in-fact and therefore has not met the Constitutional requirements for standing in Federal court under Article III.[FN1] Having determined that Plaintiff did not fulfill the minimal constitutional requirements for Federal court standing, this Court lacks subject matter jurisdiction and cannot address the merits and, under 28 U.S.C. § 1447(c), this Court shall (1) deny Wachovia's motion to dismiss and (2) remand the case back to State court.

FN1. In finding that Plaintiff lacks standing to bring any claim against Wachovia, this Court need not address the other arguments raised by Wachovia in its motion to dismiss.

I. *BACKGROUND*

Plaintiff is Lois Giordano, a customer of Wachovia Securities, LLC. (Complaint at ¶¶ 1-2.) As part of opening an individual retirement account with Wachovia in June of 2004, Plaintiff signed a New Account Application which stated that she agreed that the account would be governed by Wachovia's "Customer Agreement." [FN2] In connection with her account, Plaintiff provided Wachovia with certain information about her-including her name, address, and Social Security Number. (Compl. at ¶ 1.) In connection with the maintenance of Plaintiff's account, Wachovia generated an account number for Plaintiff's funds and kept track of her account balance. (*Id.*)

FN2. The Customer Agreement includes, among other things, a choice of law provision selecting Virginia's substantive law, a limitation of liability for acts of simple negligence by Defendant, and an exemption from liability for extraordinary events such as failure of the mails or theft. (Certification of Mark S. Melodia ¶ 2, Ex. A.)

Approximately ten months after Plaintiff opened her account, Wachovia printed a report which contained financial information about Plaintiff and tens of thousands of other Wachovia customers. (*Id.* at ¶ 10, 13.)On March 28, 2005, Wachovia mailed the report, via the United Parcel Service ("UPS"), to Wachovia's New Jersey branch office. *(Id.)* The package was never received.(*Id.*) In response to the loss of this package, Wachovia sent Plaintiff (and others) a letter informing her of the loss of her information and stating that Wachovia and UPS have "conduct[ed] a thorough and extensive investigation to locate the package, including interviewing all individuals who may have handled the missing packages and carefully

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

reviewing the carrier's procedures and internal reports."(Melodia Cert. ¶ 4, Ex. C.) The letter continued, stating that Wachovia "believe[s] the package was damaged during shipment and, pursuant to the carrier's procedures, was destroyed ... [and that] [t]here is no evidence of theft of the report or your information ... [or] that the report has been obtained by a third party."*(Id.)* In the same letter, Wachovia offered to pay for a year of credit monitoring services, which Plaintiff accepted. *(Id.)*

*2 With Plaintiff's year of free credit monitoring services ending in July of 2006, Plaintiff filed a putative class action suit against Wachovia and UPS in New Jersey Superior Court (Atlantic County) on December 16, 2005. [Docket Item No. 1.] The Complaint alleges claims of negligence (Count I), invasion of privacy (Count II), breach of the duty of confidentiality (Count III) and conversion (Count IV). (Compl.¶ 18-36.) The Complaint seeks, among other remedies, that this Court order Wachovia to establish a credit monitoring program, at Wachovia's expense, "to ensure timely detection of any and all persons who attempt to use Plaintiff's information as a result of the carelessness and reckless conduct of [Wachovia]" or that Wachovia reimburse Plaintiff for such services. (Compl. at 9.)

On February 1, 2006, the case was removed from the Superior Court of New Jersey, Law Division, Atlantic County, to this Court. [Docket Item No. 1.] On February 21, 2006, Wachovia and UPS filed separate motions to dismiss Plaintiff's Complaint. [Docket Item Nos. 11 and 14, respectively.] [FN3] Plaintiff filed opposition to Wachovia's motion on April 7, 2006 [Docket Item No. 23.] to which Wachovia timely replied on April 14, 2006. [Docket Item No. 23.] The Court heard oral argument on May 26, 2006.

> FN3. On May 24, 2006, Plaintiff and UPS entered into and filed a Stipulation of Dismissal in which Plaintiff agreed to voluntarily dismiss all claims against UPS, rendering the UPS dismissal motion moot. [Docket Item No. 24.]

II. *DISCUSSION*

Wachovia makes three main arguments in support of its motion to dismiss. First, Wachovia argues that Plaintiff lacks the constitutional standing to bring this action and therefore, the action must be dismissed under Fed.R.Civ.P. 12(b)(1). Second, Wachovia argues that Plaintiff is precluded from these claims under the limitation of liability provision of the Customer Agreement. Finally, Wachovia argues that Plaintiff's claims of negligence, invasion of privacy, breach of confidentiality and conversion all fail because each claim lacks at least one essential element of the cause of action.

Because every litigant in the federal courts must have standing to bring a claim sufficient to satisfy the "case or controversy" requirement within the meaning of Article III of the Constitution of the United States, this Court will first address the issue of Plaintiff's standing. A conclusion that Plaintiff lacks standing moots the other arguments raised by Wachovia and requires this Court to deny Wachovia's motion to dismiss and remand this case back to the state court from which it was removed.

A. *Standard of Review under Fed R. Civ. P. 12(b)(1)*

A motion to dismiss made pursuant to Federal Rule of Civil Procedure 12(b)(1) seeks dismissal due to the lack of subject matter jurisdiction. *See*Fed.R.Civ.P. 12(b)(1). Before a federal court can consider the merits of a legal claim, "the person seeking to invoke the jurisdiction of the court must establish the requisite standing to sue." *Whitmore v. Arkansas,* 495 U.S. 149, 154 (1990); *see also Petroleos Mexicanos Refinancion v. M/T KING, A (Ex-Tbilisi),* 377 F.3d 329, 224 (3d Cir.2004) ("standing is a question of subject matter jurisdiction.") Article III of the Constitution limits the judicial power of federal courts to "cases or controversies" between parties.U.S. CONST. art. III, § 2. To satisfy Article III's standing requirements, a plaintiff must allege:

> *3 (1) [an] injury in fact, which is an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of; and (3) [that] it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Danvers Motor Co., Inc. v. Ford Motor Co., 432 F.3d 286, 290-91 (3d Cir.2005) (citing *Lujan v.*

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). To establish an "injury in fact," a plaintiff must show that he has "sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.' " *City of Los Angeles v. Lyons,* 461 U.S. 95, 101-02 (1983) (citations and internal quotation marks omitted); *see also Danvers Motor Co.,* 432 F.3d at 291.

The plaintiff bears the burden of establishing standing. *See Storino v. Borough of Point Pleasant Beach,* 322 F.3d 293, 296 (3d Cir.2003). The plaintiff must "clearly and specifically set forth facts sufficient to satisfy these Article III standing requirements" in the Complaint, insofar as a federal court "is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Whitmore,* 495 U.S. at 155-56. In determining standing, the Court must consider "the specific ... constitutional claims that a party presents" and examine "a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *International Primate Prot. League v. Administrators of the Tulane Ed. Fund,* 500 U.S. 72, 77 (1991).

B. ***Analysis***

Wachovia argues that Plaintiff does not allege any actual or imminent injury-in-fact. Rather, Plaintiff merely claims that she "will incur financial loss including the costs of obtaining credit and identity theft protection services in order to prevent" identity theft. (Compl.¶ 1.) Wachovia argues that Plaintiff can only recoup money she voluntarily chooses to spend to prevent identity theft in the event that the threat of identity theft is "so imminent as to be 'certainly impending.' " *Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.,* 123 F.3d 111, 122 (3d Cir.1997). According to Wachovia, because (1) there is no evidence that Plaintiff's confidential financial information had been stolen or that (2) a third-party intends to make unauthorized use of such information, theft of her identity (and thus, Plaintiff's injury) is not "certainly impending." (Def.'s Br. at 9-10.)

Plaintiff contends that Wachovia's argument overlooks important considerations and construes the injury-in-fact requirement under Article III too narrowly. (Pl.'s Opp. Br. at 5.) Indirect economic injury, according to Plaintiff, is "clearly a sufficient basis for standing." *San Diego County Gun Rights Comm'n v. Reno,* 98 F.3d 1121, 1130 (9th Cir.2005); *The Pitt News v. Fisher,* 215 F.3d 354 (3d Cir.2000) (student newspaper has standing to challenge a statute prohibiting businesses from running liquor ads in educational publication resulting in alleged loss of revenue to the newspaper). Second, Plaintiff argues that a plaintiff need only plead that she has suffered "some concrete form of harm" to overcome a motion to dismiss. (Pl.'s Opp. Br. at 5.) Specifically, "[a]t the pleading stage, general factual allegations of injury resulting from defendant's conduct may suffice...."*(Id.* citing *Lujan,* 504 U.S. at 561.) Indeed, according to Plaintiff, the alleged harm need not be substantial, as a "trifle" of injury will suffice to satisfy the requirement of an injury-in-fact. *See Danvers Motor Co.,* 432 F.3d at 294. Against this background, Plaintiff contends, she has alleged sufficient facts to meet the injury-in-fact requirement. According to Plaintiff, her injury-the likelihood that she will become a victim of identity theft-is concrete and economic *(i.e.,* the cost to protect against the long-term risks of harm created by Wachovia's conduct in permitting her personal identity and account information to be disbursed in an unsecured setting) and not speculative or abstract.[FN4] *(Id.)*

FN4. Plaintiff also argues that New Jersey law recognizes the type of relief Plaintiff is seeking-compensation for credit monitoring services-because the New Jersey Supreme Court recognized compensability of medical monitoring services in *Ayers v. Jackson Township,* 106 N.J. 557 (1987). New Jersey law, according to Plaintiff, has recognized such a cause of action for medical monitoring in the face of the same argument as Wachovia makes here-namely, that the probability that plaintiffs will actually become ill from their exposure to chemicals is too remote to warrant compensation under the principles of tort law. *Id.* at 591.

This Court finds Plaintiff's analogy of medical monitoring to credit monitoring inapt. In order to have a cause of action for medical monitoring even before the advent of any physical symptoms,

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

> Plaintiff must allege exposure to a carcinogen, not the *potential* exposure. *See* id. at 599-607;*see also* Theer v. Philip Carey Co., 133 N.J. 610, 627 (N.J.1993). Here, Plaintiff merely alleges the potential of identity theft, not that her identify was actually stolen and misused.

*4 The Court concludes that Plaintiff lacks Constitutional standing to bring this action because Plaintiff has failed to allege that she suffered an injury-in-fact that was either "actual or imminent." Plaintiff's allegations that, as a result of Wachovia's actions, she will incur costs associated with obtaining credit monitoring services in order to prevent identity theft simply does not rise to the level of creating a concrete and particularized injury. Plaintiff's claims, at best, are speculative and hypothetical future injuries. A complaint alleging the mere potential for an injury does not satisfy Plaintiff's burden to prove standing. Instead, a plaintiff must allege an actual injury or that an injury is "so imminent as to be 'certainly impending.' " *Magnesium Elektron, Inc.,* 132 F.3d at 122 ("The imminence requirement ensures that courts do not entertain suits based on speculative or hypothetical harms.") Plaintiff has failed to do so here.

The mere possibility of future harm fails to satisfy the standing requirements of the Supreme Court and Third Circuit Court of Appeals. For example, in O'Shea v. Littleton, 414 U.S. 488, 493-97 (1974) the plaintiffs alleged a pattern and practice by local officials of racial discrimination through higher bonds and harsher sentences for minorities and sought injunctive relief against the continuation of such practices. The Supreme Court held that, although the plaintiffs belonged to the discriminated-against class, "[n]one of the named plaintiffs [was] identified as himself having suffered any injury in the manner specified." Id. at 495.The Court held that the possibility that county officials would act illegally in the future, and the further possibility that the named plaintiffs would be among the victims of such illegal action, were simply not enough to grant the plaintiffs Constitutional standing. *See* id. at 497.Like the plaintiffs in *O'Shea,* Plaintiff's allegations here, if true, create only the *possibility* that Plaintiff will be harmed at some future date by the loss of Plaintiff's information or through identity theft.

In addition, in City of Los Angeles v. Lyons, 461 U.S. 95, 97 (1983), the plaintiff sought injunctive relief after claiming to have been stopped by city police officers for a traffic violation, put in a chokehold and injured. The *Lyons* plaintiff alleged that he "justifiably feared that any future contact he might have with police officers might again result in his being choked without provocation" and asked the court to bar the use of such tactics by the city's police. *Id.* The Supreme Court, overturning the injunction granted by the lower court, held that the plaintiff had no standing to sue and that the Court could not agree that the "odds" that the plaintiff will be subjected to a chokehold without provocation are sufficient to make out a federal case for equitable relief. *Id.* at 108.In the present case, Plaintiff's claims, like those of the plaintiff in *Lyons* are based on nothing more than the chance-or "odds"-that she will be the victim of wrongdoing at some unidentified point in the indefinite future.

*5 Finally, in *Luis v. Dennis,* 751 F.2d 604, 608 (3d Cir.1984), the Third Circuit held that federal courts had no subject-matter jurisdiction to exercise judicial review based on the mere possibility that a challenged law would make (as-yet hypothetical) executive appointments more difficult. In such cases, the "requisite immediacy and reality are lacking...."*Id.*There are numerous parallels between the plaintiff's case in *Luis* and Plaintiff's case here-as Plaintiff only alleges a potential injury (identity theft) that is contingent on (1) Plaintiff's information falling into the hands of an unauthorized person and (2) that person using such information for unlawful purposes to Plaintiff's detriment. As in *Luis,* the indefinite and conjectural nature of Plaintiff's alleged injury precludes this Court from finding Article III standing.

The Court's decision is also in line with three recent district court decisions involving claims of negligence and breach of confidentiality brought in response to a third-party stealing or unlawfully accessing personal or financial information from a financial institution. *See* *Forbes v. Wells Fargo Bank, N.A.,* 420 F.Supp.2d 1018 (D.Minn.2006); *Guin v. Brazos Higher Educ. Serv. Corp., Inc.,* 2006 WL 288483 (D.Minn. Feb. 7, 2006); *Stollenwerk v. Tri-West Healthcare Alliance,* 2005 WL 2465906 (D.Ariz. Sept. 6, 2005). In all three cases, the district courts rejected a plaintiff's argument that he or she was entitled to reimbursement for credit monitoring

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

services or for the time and money he or she spent monitoring his credit. *Id.* In all three cases, the district courts has held that, because the plaintiff's injuries were solely the result of a perceived risk of future injury, plaintiff had failed to show a present injury or reasonably certain future injury to support damages for any alleged increased risk of harm.[FN5] *Id.*

> FN5. In *Forbes,* the court held that a plaintiff could not recover for loss of time spent monitoring his credit (in order to prevent damage from identity theft), but only lost earning capacity and wages because the plaintiffs' "expenditure of time and money was not the result of any present injury, but rather the anticipation of future injury that has not materialized." 420 F.Supp.2d at 1021. Thus, "plaintiffs' injuries [lost time and wages] are solely the result of a perceived risk of future harm ... [and] hav[ing] shown no present injury or reasonably certain future injury to support damages for any alleged increased risk of harm ... plaintiffs have failed to establish the essential element of damages."*Id.*

In this case, the risk is even more hypothetical than those of the plaintiffs in *Forbes, Guin* or *Stollenwerk.*Here Plaintiff failed to allege even that her financial information was stolen or ended up in the possession of someone who might potentially misuse it. (Compl.¶¶ 13-14.) Instead, Plaintiff's Complaint merely alleges that a version of her personal financial information was lost and conceded at oral argument that there is no evidence that the information was stolen. (Transcript of Oral Argument, dated 5/26/06 at 16.) As such, this Court will follow these recent district court decisions in holding that Plaintiff lacks Constitutional standing to bring this action.

III. *CONCLUSION*

Having found that Plaintiff has failed to prove that she suffered an injury-in-fact, this Court concludes that Plaintiff lacks Constitutional standing to bring a claim against Wachovia.[FN6]This Court's conclusion that Plaintiff lacks Constitutional standing does not require the Court to dismiss the case, however, "for a determination that there is no standing 'does not extinguish a removed state court case.' " *Wheeler v. Travelers Ins. Co.,* 22 F.3d 534, 540 (3d Cir.1994) (quoting *Bradgate Assocs., Inc. v. Fellows, Reed & Assocs., Inc.,* 999 F.2d 745, 751 (3d Cir.1993)). Rather, having found lack of standing-and thus lack of subject matter jurisdiction-this Court must remand this case to state court .[FN7]*See Wheeler,* 22 F.3d at 537 ("If a district court finds that a Plaintiff in a removed case does not have standing, it will remand the case to the state court.") Ordering a remand in this case is not a discretionary decision on the part of this Court but is mandatory under 28 U.S.C. § 1447(c) even if remanding the case to state court may be futile.[FN8]*See Bromwell v. Michigan Mutual Ins. Co.,* 115 F.3d 208, 213 (3d Cir.1997) (citing 28 U.S.C. § 1447(c).) The accompanying Order for Remand will be entered.

> FN6. In finding that Plaintiff lacks standing to bring any claim against Wachovia, this Court need not discuss the other arguments raised by Wachovia in its motion to dismiss. These issues are now moot.

> FN7. In *Racher v. GMAC Mortgage Corp. of Pa.,* 1996 U.S. Dist. LEXIS 7187, * 11 (D.N.J. May 9, 1996), our sister court in the District of New Jersey, addressing a very similar set of facts and procedural posture, noted that "[i]t is somewhat ironic that defendant, having removed this case in the first instance, now argues that plaintiff lacks standing."

> FN8. The Third Circuit held that:
>
> Upon a determination that a federal court lacks subject matter jurisdiction over a particular action, the plain language of 28 U.S.C. § 1447(c) mandates that the matter be remanded to the state court from which it was removed....Section 1447(c) states: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."The language of this section is mandatory-once the federal court determines that it lacks jurisdiction, it must remand the case back to the appropriate state court.
>
> *Bromwell,* 115 F.3d at 213 (citing

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

International Primate Protection League v. Administrators of Tulane Educ. Fund, 500 U.S. 72, 87 (1991); *Maine Assoc. of Interdependent Neighborhoods v. Commissioner, Maine Dep't of Human Srvs.,* 876 F.2d 1051, 1054 (1st Cir.1989) (Breyer, J.))

D.N.J.,2006.
Giordano v. Wachovia Securitites, LLC
Not Reported in F.Supp.2d, 2006 WL 2177036 (D.N.J.)

END OF DOCUMENT

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

Only the Westlaw citation is currently available.
United States District Court,E.D. Arkansas,Western Division.
April BELL, on behalf of herself and others similarly situated, Plaintiff
v.
ACXIOM CORPORATION, Defendant.
No. 4:06CV00485-WRW.

Oct. 3, 2006.

George L. McWilliams, James Clark Wyly, Sean Fletcher Rommel, Jack Thomas Patterson, II, Patton, Roberts, McWilliams & Capshaw, Little Rock, AR, John G. Emerson, Houston, TX, Scott E. Poynter, Emerson Poynter LLP, Little Rock, AR, for Plaintiff. Amy Lee Stewart, Rose Law Firm, Little Rock, AR, David Kramer, Douglas J. Clark, Gerard Stegmaier, Wilson, Sonsini, Goodrich & Rosati, Reston, VA, for Defendant.

ORDER

WM. R. WILSON, JR., District Judge.
***1** Defendant Acxiom Corporation ("Acxiom") stores personal, financial, and other company data for its corporate clients. In 2003, Acxiom's computer bank was hacked and client files were compromised. Plaintiff filed this class action seeking damages and injunctive relief alleging that Acxiom's lax security jeopardized her privacy and left her at a risk of receiving junk mail and of becoming a victim of identify theft. Defendant moved for dismissal (Doc. No. 5). Plaintiff has responded (Doc. No. 16). For the reasons stated below, Defendant's Motion to Dismiss is GRANTED.

I. History

Acxiom is a data bank that stores marketing information about its clients' customers. Acxiom takes this information and "match[es] names with lifestyles and demographic information from other sources ... [to] give ... [its] client a clear picture of the people buying its products and services."[FN1]

FN1. *Acxiom Corp. v. Axiom, Inc.,* 27 F.Supp.2d 478, 482 (D.Del .1998).

In order for its clients to reach their information, Acxiom maintains a File Transfer Protocol ("FTP") site. To access this site, the client must have a username and password, assigned by Acxiom. Between November 2001 and the summer of 2003, Scott Levine, an Acxiom client, exploited a hole in Acxiom's security system, accessed the Acxiom FTP server, and downloaded other client's databases. Levine sold some of the information to a marketing company in Georgia, who then used the names and addresses to advertise via direct mail. Levine has since been convicted for these illegal activities.[FN2]

FN2. *United States v. Scott Levine,* 4:04CR00175 (E.D.Ark.2006).

After Levine's conviction, the Plaintiff, April Bell, filed suit against Acxiom on behalf of herself and all others similarly situated. She alleged that Acxiom failed to protect its clients' data. Plaintiff also alleged that she is at a higher risk of receiving junk mail and of being an identity theft victim.

II. Standard of Review

The standard for a motion to dismiss under Fed. R. Civ. P 12(b)(1) and 12(b)(6) is that the court must construe the facts alleged in the complaint in the most favorable light towards the plaintiffs.[FN3]The court should not dismiss the complaint unless it appears that there are no set of facts which would entitle the plaintiffs to relief.[FN4]The court is "free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations."[FN5]Finally, on a motion to dismiss (as opposed to a motion for summary judgment) the court should assume that general factual allegations embrace the specific facts necessary to support the plaintiff's claim.[FN6]

FN3. *In re Stafmark, Inc. Securities Litigation,* 123 F.Supp.2d 1160, 1162-1163 (E.D.Ark.2000).

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

FN4. *Id.*

FN5. *Wiles v. Capitol Indemnity Corp.*, 280 F.3d 868, 870 (8th Cir.2002).

FN6. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990)(*citing* *U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973)).

III. Analysis

In its motion to dismiss, Acxiom contends that Plaintiff does not have standing, and in the alternative, that she has not stated a claim upon which relief can be granted. In order to have standing, a plaintiff must meet three requirements.[FN7] First, a plaintiff must demonstrate that she has suffered an injury in fact which is actual, concrete, and particularized.[FN8] Second, the plaintiff must show a causal connection between the conduct complained of and the injury.[FN9] Third, the plaintiff must establish that the injury will be redressed by a favorable decision.[FN10] The plaintiff has the burden of establishing each of these three requirements.[FN11]

FN7. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

FN8. *Id. See also,* *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983); *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)(city residents did not have standing to sue USDA over construction of two sewage ponds in the 100 year flood plain, because although there was a possibility that the flood would occur while the residents owned or occupied land in proximity to the ponds, it was a matter of 'sheer speculation' that there would be a flood and that if a flood happened, it would damage the plaintiffs' properties.).

FN9. *Id. See also,* *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 41 (1976).

FN10. *Id.*

FN11. *Shain v. Veneman*, 376 F.3d 815, 817 (8th Cir.2004), *cert denied*, 543 U.S. 1090 (2005).

*2 The burden to show standing is not a mere pleading requirement, but "an indispensable part of the plaintiff's case."[FN12] "Each and every element of the standing requirements 'must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.' " [FN13] Strict compliance with this jurisdictional standing requirement is mandated.[FN14] Assertions of potential future injury do not satisfy the injury-in-fact test. "A threatened injury must be certainly impending to constitute injury in fact." [FN15]

FN12. *Delorme v. U.S.*, 354 F.3d 810, 815 (8th Cir.2004) (*quoting* *Lujan*, 504 U.S. at 561).

FN13. *Id.*

FN14. *Johnson v. Missouri*, 142 F.3d 1087, 1088 (8th Cir.1998) (internal citation omitted).

FN15. *Sierra Club v. Robertson*, 28 F.3d 753, 758 (8th Cir.1994)("assertions of potential future injury do not satisfy the 'injury-in-fact' test"); *see also* *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990).

In *Lujan*, environmental groups challenged governmental regulations concerning the Endangered Species Act.[FN16] The groups contended that they had traveled abroad to view endangered species in the past and intended to do so in the future, and that the regulations would negatively affect their ability to do so.[FN17] Reasoning that the groups did not show that one or more of their members would be directly affected by the regulations and that intentions to view endangered species at some "indefinite future time" did not demonstrate an imminent injury, the Supreme Court ruled that the groups failed to show an injury in fact, and thus did not have standing to contest the regulations.[FN18]

FN16. *Lujan*, 504 U.S. at 563-64.

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

FN17.*Id.*

FN18.*Id.* at 556.

In this case, Plaintiff alleged that she suffered an increased risk of both receiving unsolicited mailing advertisements and of identity theft. In response, Defendant argues that both Plaintiff's alleged injuries are speculative-Plaintiff has not plead that she has received a single marketing mailer or had her identity stolen. Moreover, several courts have held that the receipt of unsolicited and unwanted mail does not constitute actual harm.[FN19] Additionally, while there have been several lawsuits alleging an increased risk of identity theft, no court has considered the risk itself to be damage.[FN20]Only where the plaintiff has actually suffered identity theft has the court found that there were damages.[FN21]

FN19. *Smith v. Chase Manhattan Bank,* 293 A.D.2d 598, 599-600 (N.Y.App.2002)(finding that where bank had sold names, addresses and financial data to marketing company, the receipt of unwanted marketing solicitations was not an actual harm); *Shibley v. Time, Inc.,* 341 N.E.2d 337, 339-40 (Ohio App.1975)(finding that the "right of privacy does not extend to the mailbox" and finding that under Ohio law, sale of 'personality profiles' does not constitute an invasion of privacy); *Lamont v. Commissioner of Motor Vehicles,* 269 F.Supp. 880, 883 (S.D.N.Y.1967)("The mail box, however noxious its advertising contents often seem to judges as well as other people, is hardly the kind of enclave that requires constitutional defense to protect 'the privacies of life.' The short, though regular, journey from mail box to trash can ... is an acceptable burden, at least so far as the Constitution is concerned.").

FN20. *Walters v. DHL Express,* 2006 WL 1314132 at 5 (C.D.Ill. May 12, 2006)(dismissing claim for damages of increased risk of identity theft under 49 U.S.C. § 14706*et seq.* The court reasoned that damages for risk of identity theft would be based on speculation, as opposed to actual loss.); *Guin v. Brazos Higher Education Service Corp., Inc.,* 2006 WL 288483 at 5 (D.Minn. Feb. 7, 2006)(rejecting that an increased risk of identity theft constituted damages where a laptop containing sensitive data was stolen and there was no evidence that any party whose information could have been on the laptop had experienced identity theft as a result.); *Stollenwerk v. Tri-West Healthcare Alliance,* 2005 WL 2465906 at 4 (D.Ariz. Sept. 6, 2005)(dismissing case where hard drives containing personal information were stolen from defendant's facility, reasoning that plaintiffs must, at a minimum, establish "1) significant exposure of sensitive personal information, 2) a significantly increased risk of identity fraud as a result of that exposure and 3) the necessity and effectiveness of credit monitoring in detecting, treating and/or preventing identity fraud.").

FN21.*Remsburg v. Docusearch, Inc.,* 816 A.2d 100, 1007-8 (N.H.2003)(holding an private investigatory firm liable where they had sold information, including the social security number and work address of plaintiff's daughter, to a man who had been stalking and then killed plaintiff's daughter. The court reasoned that a private investigator owed a duty to exercise reasonable care to not subject a third party to an increased risk of criminal misconduct, including stalking and identity theft.).

Furthermore, Plaintiff does not know whether her name and information were contained within the databases stolen by Levine. More than three years after the theft, Plaintiff has not alleged that she has suffered anything greater than an increased risk of identity theft.[FN22]Because Plaintiff has not alleged that she has suffered any concrete damages, she does not have standing under the case-or-controversy requirement.

FN22. 76% of all identity theft is discovered before 24 months after the theft. Only 12 % is discovered more than 48 months after the theft. *Federal Trade Commission Identity Theft Victim Complaint Data 2005,* p. 11,

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

http://w
ww.consumer.gov/idtheft/pdf/clearinghouse
_2005.pdf.

Alternatively, Plaintiff argues that she satisfies the 'identifiable trifle' doctrine found in *U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP).*[FN23] In this case, the Court held that SCRAP had standing because their use of area parks and nature areas would be affected. The Court held, "[t]he basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation."[FN24]However, the 'identifiable trifles' that the Court was referring to were, respectively, a fraction of a vote, a $5 fine and costs, and a $1.50 poll tax.[FN25]In this case, the plaintiff is not trying to protect something as concrete as her political right to be free of fines and taxes-she is asking for protection against a harm that is speculative. Because "assertions of potential future injury do not satisfy the injury-in-fact test,"[FN26] Plaintiff's claims must be dismissed for lack of standing.

FN23. 412 U.S. 669, 690 n. 14 (1973).

FN24. *Id.*

FN25. *Id.*

FN26. *Sierra Club,* 28 F.3d at 758.

IV. Conclusion

***3** For the above reasons Defendant's Motion to Dismiss is GRANTED.

IT IS SO ORDERED this 3rd day of October, 2006.

E.D.Ark.,2006.
Bell v. Acxiom Corp.
Slip Copy, 2006 WL 2850042 (E.D.Ark.)

END OF DOCUMENT

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

Only the Westlaw citation is currently available.
United States District Court,D. Arizona.
Michael STOLLENWERK and Andrea DeGatica, husband and wife; Mark William Brandt; et al., Plaintiffs,
v.
TRI-WEST HEALTHCARE ALLIANCE, Defendant.
No. Civ. 03-0185PHXSRB.

Sept. 6, 2005.

Barry Lawrence Bellovin, Matthew David Karnas, Siegel Bellovin & Karnas PC, Tucson, AZ, Henry T. Dart, Henry T. Dart Law Office, Covington, LA, Joel Grant Woods, Law Offices of Grant Woods, Kenneth Sean Countryman, Kenneth S. Countryman PC, Phoenix, AZ, for Plaintiffs.
Andrew Foster Halaby, Barry D. Halpern, Shane De Gosdis, Snell & Wilmer LLP, Phoenix, AZ, for Defendant.

OPINION AND ORDER

BOLTON, J.
*1 This matter arises out of the burglary of Defendant TriWest Healthcare Alliance's ("Triwest") corporate office on December 14, 2002. During this burglary, computer hard drives containing the personal information of Plaintiffs Michael Stollenwerk, Andrea DeGatica, and Mark Brandt were stolen, leading Plaintiffs to file a class action lawsuit alleging negligence under Arizona law as well as other violations that have since been dismissed by this Court. Pursuant to Fed.R.Civ.P. 56, Defendant now seeks summary judgment on the remaining negligence claim (Doc. 77).

I. BACKGROUND

Defendant TriWest, a contractor and agent of the federal government, manages the local region of the U.S. Department of Defense's health insurance program and, as a result, possessed the personal information, including names, addresses, birth dates, and social security numbers, of the beneficiaries of that program. Plaintiffs, current and former members of the U.S. military and their dependents, are several such beneficiaries whose data was stored in computerized and hard copy form at Defendant's facility in Phoenix, Arizona.

In May 2001, Defendant experienced a security breach wherein unauthorized personnel entered the Phoenix facility. Defendant reported the incident to the Phoenix Police Department, but Plaintiffs allege that no other action was taken to ensure the security of the facility despite its apparent vulnerabilities. On December 14, 2002, unidentified individuals again breached security and proceeded to burglarize the Phoenix facility, removing computer hard drives containing Plaintiffs' personal information and other items.

Beginning on January 28, 2003, Plaintiff Brandt's personal data was used on six occasions to open or to attempt to open unauthorized credit accounts in Plaintiff Brandt's name. Unknown individuals successfully opened at least two credit accounts and generated more than $7,000 in unauthorized charges to these accounts. Plaintiffs Stollenwerk and DeGatica allege a different form of injury; following the theft of their data, both have obtained both credit monitoring services and identity theft insurance.

On January 28, 2003, Plaintiffs Stollenwerk and DeGatica filed their original complaint in this action, alleging violations of the Privacy Act, the Ninth Amendment, and Arizona tort and contract law.[FN1] Plaintiff Brandt later joined the lawsuit and Plaintiffs filed and served their First Amended Complaint in May 2003. The First Amended Complaint asserted claims for negligence, "gross negligence," "negligence per se," "res ipsa loquitur," breach of the implied bailment contract, and violations of the Privacy Act, the Ninth Amendment, and the Arizona Consumer Fraud Act. Defendant moved to dismiss the First Amended Complaint pursuant to Rule 12(b)(6), and at oral argument of the motion on October 20, 2003, the Court granted the motion to dismiss with leave to amend the Complaint as to only the negligence, Arizona Consumer Fraud Act, and Privacy Act claims.

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

FN1. The original complaint was never served on Defendant.

*2 Plaintiffs filed their Second Amended Complaint on October 30, 2003. The Second Amended Complaint alleged two counts of Privacy Act violations, one count of negligence, one count of consumer fraud under the Arizona Consumer Fraud Act, and one count of breach of a contract intended to benefit Plaintiffs. On September 30, 2004, this Court granted Defendant's second motion to dismiss as to all counts but the negligence claim. Defendant now moves for summary judgment on the remaining negligence claim pursuant to Rule 56 of the Federal Rules of Civil Procedure. The Court heard argument on Defendant's motion on June 6, 2005.

II. LEGAL STANDARDS AND ANALYSIS

The standard for summary judgment is set forth in Rule 56(c) of the Federal Rules of Civil Procedure. Under this rule, summary judgment is properly granted when: (1) no genuine issues of material fact remain; and (2) after viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed.R.Civ.P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986); *Eisenberg v. Ins. Co. of N. Am.*, 815 F.2d 1285, 1288-89 (9th Cir.1987).

In considering a motion for summary judgment, the Court must regard as true the non-moving party's evidence if it is supported by affidavits or other evidentiary material. *Celotex*, 477 U.S. at 324, 106 S.Ct. at 2548; *Eisenberg*, 815 F.2d at 1289. However, the non-moving party may not merely rest on its pleadings, he must produce some significant probative evidence tending to contradict the moving party's allegations, thereby creating a material question of fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57, 106 S.Ct. 2505, 2513-14, 91 L.Ed.2d 202 (1986) (holding that the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment); *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 289, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968).

Defendant argues that summary judgment is appropriate because Plaintiffs Stollenwerk and DeGatica have not come forward with evidence legally sufficient to show that they incurred injury and because Plaintiff Brandt has not provided significant probative evidence of a causal connection between the theft of his personal information from Defendant and the fraudulent use of his personal information. Plaintiffs dispute these contentions.

A. Plaintiffs Stollenwerk and DeGatica

Plaintiffs Stollenwerk and DeGatica maintain that the exposure of their sensitive personal information at the hands of Defendant necessitated the purchase of credit-monitoring services and that the cost of these services constitutes injury within the meaning of the law. In its Order of September 30, 2004, this Court found, for the purposes of deciding a motion to dismiss, that "an exposure of personal information likely to result in the unauthorized use of one's identity is sufficiently similar [to exposure to toxic chemicals or asbestos likely to result in disease] so as to justify the maintenance of a cause of action for recovery of the cost of credit monitoring services."(Sept. 30, 2004 Order at 8.) Plaintiffs contend that the Court is prevented from revisiting this position under the law of the case doctrine, and that even if the Court were to readdress its prior finding, caselaw concerning latent injury would require the Court to reach the identical conclusion.

*3 Generally, the law of the case doctrine precludes a court "from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case." *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir.1997). Where a district court has never relinquished jurisdiction over a case, however, the law of the case doctrine is inapplicable and the Court is free to revisit its earlier decisions. *United States v. Smith*, 389 F.3d 944, 948-49 (9th Cir.2004). Because the Court never entered judgment in this matter nor otherwise relinquished jurisdiction over the case, the law of the case doctrine is "wholly inapposite," *id.*, (quoting *City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 888 (9th Cir.2001)), and the Court is free to revisit its determinations made within the context of a motion to dismiss.

With the intent of permitting the parties to explore fully the issue of credit monitoring as adequate injury in a negligence action, in deciding Defendant's Motion to Dismiss the Court found itself unable to

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

say that a cause of action could never be maintained on such a basis. Having more fully considered the issue upon further briefing by the parties and after Plaintiffs had the opportunity to obtain discovery, the Court finds that summary judgment in Defendant's favor nevertheless is appropriate as to the negligence claims of Plaintiffs Stollenwerk and DeGatica. Defendant argues that credit monitoring costs should not be viewed as injury sufficient to establish the tort of negligence for several reasons: (1) unlike toxic tort or products liability cases, cases involving the exposure of sensitive personal information do not involve a latent injury at the time of exposure-the only injury occurs at the time the information is misused; (2) the interest in preserving public health, which merits awards for medical monitoring, does not exist with respect to claims for credit monitoring; and (3) any injury resulting from identity theft can be compensated with monetary damages after the fact, eliminating the need for preventive monitoring. Defendant further argues that credit monitoring should not suffice as injury in this case, even if it might be adequate in other instances.

The Court is not convinced that the negligent exposure of confidential personal information is entirely dissimilar from negligent exposure to toxic substances or unsafe products. In both circumstances the individual may manifest more obvious injury, such as identity fraud or disease, after some period of time, and in neither instance is the later manifestation of patent injury guaranteed, although the certainty with which such a development may be anticipated may be greater for toxic torts. It is unnecessary for the Court to determine whether the timing and manifestation of the injuries are sufficiently analogous where credit monitoring and medical monitoring are sought, however, as another reason for granting summary judgment in Defendant's favor is apparent.

*4 The Court must acknowledge the important distinction between toxic tort and products liability cases, which necessarily and directly involve human health and safety, and credit monitoring cases, which do not. Arizona recognizes the importance of preserving public health and " 'fostering access to medical testing for individuals whose exposure to toxic chemicals creates an enhanced risk of disease. The value of early diagnosis and treatment for cancer patients is well documented." ' *Burns v. Jaquays Mining Corp.,* 156 Ariz. 375, 752 P.2d 28, 33 (Ariz.Ct.App.1988), *quoting Ayers v. Township of Jackson,* 106 N.J. 557, 525 A.2d 287, 311 (N.J.1987). It is, in large part, this public health interest that justifies departure from the general rule that enhanced future risk of injury cannot form the sole basis for a negligence action. *See Amfac Distrib. Corp. v. Miller,* 138 Ariz. 152, 673 P.2d 792, 793-94 (Ariz.1983) (requiring actual injury to sustain cause of action in negligence); *Commercial Union Ins. Co. v. Lewis & Roca,* 183 Ariz. 250, 902 P.2d 1354, 1358 (Ariz.Ct.App.1995) (noting that a threat of future harm is insufficient). Notwithstanding the intimation in *Doe v. Chao,* 540 U.S. 614, 626 n. 10, 124 S.Ct. 1204, 1211 n. 10, 157 L.Ed.2d 1122 (2004), that "fees associated with running a credit report" might qualify as actual damages in the context of an action under the Privacy Act, the Court has been unable to identify a single instance where damages for the cost of monitoring were awarded absent increased risk of injury to human health or well-being. Although a victim of identity theft and/or fraud, like the victims in other negligence actions where present actual injury is required, may experience nonmonetary harm, the primary injury does not present a serious health risk. Thus, despite findings that identity theft results in more than purely pecuniary damages, including psychological or emotional distress, inconvenience, and harm to his credit rating or reputation, *see United States v. Williams,* 355 F.3d 893, 898 (6th Cir.2003); *United States v. Karro,* 257 F.3d 112, 121 (2d Cir.2001), as a matter of law identity theft and credit monitoring must still be differentiated from toxic torts and medical monitoring.

Defendants also maintain that even if credit monitoring costs were sufficient injury to state a cause of action for negligence in some circumstances, the evidence here is inadequate to maintain such an action. In medical monitoring cases, a plaintiff must meet several criteria before recovery is permitted. Proof must be offered to satisfy at least the following elements: (1) significant exposure to a toxic substance; (2) a significantly increased likelihood of developing a serious disease as a proximate result of exposure; (3) the reasonable necessity of periodic diagnostic testing; and (4) the existence of monitoring and testing procedures that facilitate the early detection and treatment of disease. *See Burns,* 752 P.2d at 33,*quoting Ayers,* 525 A.2d at 312; *Miranda v. Shell Oil Co.,* 17 Cal.App.4th 1651,

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

1657-58, 26 Cal.Rptr.2d 655 (Cal.Ct.App.1993), *quoting* Ayers, 525 A.2d at 312;*see also* DeStories v. City of Phoenix, 154 Ariz. 604, 744 P.2d 705, 711 (Ariz.Ct.App.1987) (implicitly requiring proof that the "frequency, cost or intensity of plaintiffs' need for periodic medical examinations [exceeded] what would normally have been prudent for them"); *In re Marine Asbestos Cases,* 265 F.3d 861, 866 (9th Cir.2001), *citing* *In re Paoli R.R. Yard PCB Litigation,* 916 F.2d 829, 852 (3d Cir.1990). Applying these factors to identity theft cases, a plaintiff would be required to establish, at a minimum: (1) significant exposure of sensitive personal information; (2) a significantly increased risk of identity fraud as a result of that exposure; and (3) the necessity and effectiveness of credit monitoring in detecting, treating, and/or preventing identity fraud.

*5 Defendant challenges Plaintiffs' ability to establish these criteria, and the Court agrees that Plaintiffs are unable to provide evidence sufficient to prevent summary judgment in Defendant's favor. Plaintiffs have not brought forward evidence that the personal information on the stolen computers was ever exposed to the thieves involved. Unlike a case involving pure data theft, there is nothing in the record here to suggest that the data, rather than the hardware on which the data was stored, formed the thieves' target. Absent evidence that the data was targeted or actually accessed, there is no basis for a reasonable jury to determine that sensitive personal information was significantly exposed.

Furthermore, the affidavit of Plaintiffs' expert conclusorily posits that Plaintiffs' risk of identity fraud is significantly increased without quantifying this risk.[FN2] Defining "significant" for the purpose of awarding credit monitoring is a matter of law for the Court, however, and mere allegations that an increase is significant do not constitute evidence.[FN3] Similarly, although Plaintiff's expert opines that credit monitoring will "substantially" reduce the risk of identity fraud, he fails to quantify the reduction of risk in objective terms. Because the Court finds that there is no evidence in the record before it that Plaintiffs' personal information itself endured significant exposure, that Plaintiffs' risk of identity fraud is significantly increased, or that credit monitoring will reduce the risk of identity fraud to the necessary degree, Defendant's motion for summary judgment must be granted as to this case even if credit monitoring were available in other circumstances.

FN2. Plaintiffs' expert opines that Plaintiffs are at an increased risk of experiencing identity fraud for the next seven years, but fails to indicate the mathematical degree to which the risk is increased despite stating that his conclusions were arrived at as a matter of scientific probability.

FN3. Defendant also argues that summary judgment is appropriate because Plaintiffs were aware of the risk of identity fraud, yet failed to utilize free measures for reducing this risk and did not obtain credit monitoring insurance until nearly a year after learning of the burglary. These facts are relevant only to demonstrating that any increased risk of fraud may not be solely attributable to Defendant's behavior and must be taken into account by experts when determining the portion of the increased risk attributable to Defendant.

B. Plaintiff Brandt

Defendant also seeks summary judgment as to the negligence claims of Plaintiff Brandt. Although Plaintiff Brandt's personal information was used to open or attempt to open unauthorized credit accounts in his name at various retailers, Defendant disputes Plaintiff Brandt's contention that these incidents of identity fraud can be causally connected to the burglary of Defendant's facility.

In order to maintain a cause of action for negligence, a plaintiff must prove causation; that is, that the defendant's act or omission, "in a natural and continuous sequence, unbroken by any efficient intervening cause, produce[d] an injury, and without which the injury would not have occurred." *Roberston v. Sixpence Inns of Am.,* 163 Ariz. 539, 789 P.2d 1040, 1047 (Ariz.1990)."[W]hen damage may have resulted from one of several causes, and ... it is as probable that it may have been a cause for which defendant was not responsible as one for which it was, a plaintiff may not recover." *Salt River Valley Water Users' Ass'n v. Blake,* 53 Ariz. 498, 90 P.2d 1004, 1007 (Ariz.1939); *see also* *Butler v.*

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

Wong, 117 Ariz. 395, 573 P.2d 86, 87 (Ariz.Ct.App.1977) ("It is not sufficient in an action for damages that plaintiff show a certain injury might have been caused by the negligence of defendant. It is necessary to establish that the injuries have been so caused."). A plaintiff must show that causation by the defendant's act or omission is reasonably likely, not merely possible. *See* Purcell v. Zimbelman, 18 Ariz.App. 75, 500 P.2d 335, 342 (Ariz.Ct.App.1972).

*6 In the summary judgment context, a plaintiff must provide evidence from which a reasonable jury could conclude that Plaintiff Brandt's injuries were the result of the burglary rather than other causes. *See* *Taft v. Ball, Ball & Brosamer, Inc.*, 169 Ariz. 173, 818 P.2d 158, 162 (Ariz.Ct.App.1991). This evidence may be either direct or circumstantial. *Mason v. Ariz. Public Serv. Co.*, 127 Ariz. 546, 622 P.2d 493, 500 (Ariz.Ct.App.1980); *see also* Robertson, 789 P.2d at 1047 ("Plaintiff need only present probable facts from which the causal relationship reasonably may be inferred."); *cf.* *Clausen v. M/V New Carissa*, 339 F.3d 1049, 1059 (9th Cir.2003). Where evidence is circumstantial, it must permit a jury to draw reasonable inferences, not merely speculate or conjecture. *Sunward Corp. v. Dun & Bradstreet, Inc.*, 811 F.2d 511, 521 (10th Cir.1987); *Dreijer v. Girod Motor Co.*, 294 F.2d 549, 554 (5th Cir.1961).

Plaintiff Brandt's evidence primarily consists of information about six occasions after the burglary on which an unknown person(s) successfully or unsuccessfully attempted to open credit accounts in his name. The first of these incidents occurred on January 28, 2003, when an unidentified individual attempted to open a Home Depot account in his name. Additional incidents occurred on March 20, 2003 (an account opened via Citifinancial Retail Services at Rex Electronics in Uniontown, Pennsylvania), on March 31, 2003 (an account opened with T-Mobile Cellular in Youngstown, Ohio, an account opened with Sears in Youngstown, Ohio, and an attempted account opening with Kaufmann's in West Virginia) and in Spring 2003 (an attempted account opening via GE Credit Services at Walmart). The account with Rex Electronics allegedly was opened using a false address in Dover, Delaware, a city where Plaintiff Brandt was stationed while serving in the Air Force. Plaintiff Brandt also offers his own statements that he has never transmitted his personal information over the internet and shreds all mail he receives in relation to credit applications, approvals, and pre-approvals, but admits that he provided his sensitive personal information to individuals or organizations other than Defendant.

The Court notes Defendant's objections to Plaintiff Brandt's evidence as inadmissible hearsay drawn from conversations between Plaintiff Brandt and the involved businesses. Although the mere occurrence of unauthorized transactions is within Plaintiff Brandt's personal knowledge, any additional information about the circumstances surrounding these transactions is outside his personal knowledge and therefore hearsay inadmissible to prove the truth of the matter asserted. Fed.R.Evid. 602. Thus, Plaintiff Brandt's evidence that the Rex Electronics credit account was opened using a Dover, Delaware address, or any other evidence about the information used in these fraudulent acts, is inadmissible because it is only what he was told by others. Inadmissible evidence cannot create a genuine issue of material fact. *Urbina v. Gilfilen*, 411 F.2d 546, 547-58 (9th Cir.1969).

*7 Absent evidence that the Rex Electronics account was opened using an address similar to one of Plaintiff Brandt's addresses listed among the information contained on the equipment stolen from Defendant, the only evidence before the Court is that Plaintiff's information was used to fraudulently open or attempt to open accounts beginning approximately six weeks after the burglary of Defendant's facility. Although "a temporal relationship between exposure to a substance and the onset of a disease ... can provide compelling evidence of causation," Clausen, 339 F.3d at 1059,*quoting* *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 265 (4th Cir.1999), it is not dispositive of the causation issue. To the contrary, to determine that one event caused another merely because the first preceded the second is a classic example of *post hoc ergo propter hoc* ("after this, therefore because of this"), a logical fallacy. *See* *Choe v. Immigration & Naturalization Serv.*, 11 F.3d 925, 938 (9th Cir.1993); *Sunward Corp.*, 811 F.2d at 521 n. 8; *Dreijer*, 294 F.2d at 555. Standing alone, Plaintiff Brandt's evidence that the burglary preceded the incidents of identity fraud does not allow a reasonable jury to infer that the burglary caused the incidents of identity fraud. Such a conclusion would be the result of speculation and conjecture, not a

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

reasonable inference. See Sunward Corp., 811 F.2d at 521 n. 8 (citing cases that held that *post hoc ergo propter hoc* equates to speculation and conjecture, not reasonable inference).

Although the Court has determined that Plaintiff Brandt's evidence concerning the type of information used in opening the unauthorized accounts is inadmissible, in the interest of fully resolving the matter the Court will also discuss the impact of this evidence in the event that it could be offered in a form that would comply with the Federal Rules of Evidence. In short, it has no effect on Defendant's entitlement to summary judgment. Plaintiff Brandt's Dover, Delaware address and other information, including his social security number, was disclosed to others on multiple occasions. The mere use of such information in the course of acts of identity fraud, therefore, does not permit a finder of fact to draw the reasonable inference that the unidentified identity thieves obtained it from Defendant. Summary judgment is appropriate regardless of the admissibility of Plaintiff Brandt's evidence concerning information used by the identity fraud perpetrators.

IT IS ORDERED granting Defendant's Motion for Summary Judgment (Doc. 77).

IT IS FURTHER ORDERED directing the Clerk of the Court to enter judgment in favor of Defendant and dismissing Plaintiffs' claims.

D.Ariz.,2005.
Stollenwerk v. Tri-West Healthcare Alliance
Not Reported in F.Supp.2d, 2005 WL 2465906 (D.Ariz.)

END OF DOCUMENT

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

Only the Westlaw citation is currently available.
United States District Court,E.D. Louisiana.
UPTOWN GARDEN CENTER
v.
AMERICA FIRST INSURANCE, et al.
Civil Action No. 07-6660.

Sept. 9, 2008.

Regina O. Matthews, Scott R. Bickford, Lawrence J. Centola, III, Martzell & Bickford, New Orleans, LA, for Plaintiff.
Winston Edward Rice, Winston Edw. Rice LLC, Covington, LA, for Defendants.

ORDER AND REASONS

SARAH S. VANCE, District Judge.
***1** Before the Court is defendant Team One Adjusting Services and defendant Partners Restoration and Construction's motion to dismiss for failure to state a claim. For the following reasons, the Court GRANTS the defendants' motion.

I. Background

Plaintiff Uptown Garden Center is the owner of several properties that were insured by America First Insurance Company. The properties were damaged by Hurricane Katrina in August of 2005, and Uptown subsequently notified America First of its intent to claim insurance benefits. According to Uptown, America First retained defendant Team One to adjust Uptown's claim and Team One retained defendant Partners to provide estimates of the covered damage.[FN1] Uptown claims that the defendants failed to resolve Uptown's insurance claim in good faith and in a timely manner.

FN1. Defendants argue that Team One did not act as the insurance adjuster for Uptown's claim. For the purposes of this motion, the Court will assume that Team One did act as the adjuster on Uptown's claim.

On August 29, 2007, Uptown commenced an action in Louisiana state court against America First, Team One, and Partners alleging negligence and breach of contract. The defendants then removed the matter to this Court. In June or July of 2008, Uptown and America First reached a settlement, leaving Uptown's claims against Team One and Partners as the only remaining claims. Team One and Partners have now moved to dismiss Uptown's claims against them under FED.R.CIV.P. 12(b)(6) and, alternatively, for summary judgment under FED.R.CIV.P. 56.

II. Legal Standard

In considering a motion to dismiss, a court must accept all well-pleaded facts as true and must draw all reasonable inferences in favor of the plaintiff. *Baker v. Putnal,* 75 F.3d 190, 196 (5th Cir.1996). To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly,* --- U.S. ----, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007); *In re Katrina Canal Breaches Litigation,* 495 F.3d 191, 205 (5th Cir.2007) (recognizing a change in the standard of review)."Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all allegations in the complaint are true (even if doubtful in fact)." *Twombly,* 127 S.Ct. at 1965 (quotation marks, citations, and footnote omitted).

III. Discussion

Uptown argues that the defendants breached various tort duties during the claims adjusting process.[FN2]Under Louisiana law, an insurance adjuster generally owes no legal duties to an insurance claimant. *See* *Ballay v. State Farm Fire & Cas. Co.,* 2007 WL 734414 at *2 (E.D.La.2007); *Rosinia v. Lexington Ins. Co.,* 2006 WL 3141247 at *1-*2 (E.D.La.2006); *see also* *Pellerin v. Cash Pharmacy,* 396 So.2d 371, 373 (La.App.1981). Several Louisiana courts of appeals have suggested that an adjuster may, under certain circumstances, assume legal duties and become liable to the claimant. *See* *Alarcon v. Aetna Cas. and Sur. Co.,* 538 So.2d 696, 699 (La.App.1989); *Pellerin,* 396

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

So.2d at 373. Though the Louisiana courts have not fully elaborated how this process works, the leading decision, *Pellerin v. Cash Pharmacy,* lists several specific instances in which an adjuster may be liable to the claimant: when the claimant is significantly less educated than the adjuster; when the adjuster makes promises, claims, or misrepresentations with actual or apparent authority; and when the adjuster engages in fraud. *See id.*

FN2. In its opposition, Uptown alludes to a conspiracy between the adjusters and the insurer but does not cite any statute or case establishing a cause of action for conspiracy against an insurance adjuster. Indeed, there does not appear to be any such cause of action in Louisiana. *See Marketfare Annunciation, LLC v. United Fire & Cas. Co.,* 2007 WL 837202 at *1 (E.D.La.2007).

*2 Here, Uptown has pleaded no facts that might support a conclusion that the defendants assumed legal duties. Uptown has pointed to no allegations in the petition relating to the circumstances mentioned in *Pellerin.*Unlike the plaintiff in *Dillon v. Lincoln General Ins. Co.,* 2006 WL 3469554 (E.D.La.2006), for example, Uptown has not recited any facts indicating fraud or misrepresentation. *Compare Dillon,* 2006 WL 3469554 at *1. Uptown has pleaded only facts suggesting that the defendants' performance was deficient in various ways. (*See* R. Doc. 1-2 at ¶¶ 23, 25 (alleging, *inter alia,* that defendants failed to "include all damages in scope of loss/damages estimate," failed to "bring in qualified ... engineering professionals," and overly depreciated the value of the property).)

None of the alleged facts indicates that the defendants assumed a duty to Uptown. Uptown did not allege that the difference in education levels between Uptown and the defendants caused Uptown to rely on the defendants; that the defendants made promises, claims, or misrepresentations with actual or apparent authority; that the defendants engaged in fraud; or that the defendants otherwise caused Uptown to rely on them. *Cf. Pellerin,* 396 So.2d at 373; *Dillon,* 2006 WL 3469554 at *3 n. 2 (distinguishing three cases where "the courts did not find that the plaintiffs had alleged any facts upon which it could be said that the adjuster assumed a duty to them."); *Rich v. Bud's Boat Rentals, Inc.,* 1997 WL 785668 at *1, *3 (E.D.La.1997) (finding that claimant did not state a claim when he alleged that the adjuster, *inter alia,*"[f]ail[ed] to properly investigate the facts of this accident; [f] ail[ed] to properly report the information obtained by it to the insured and/or insurer; ... [and] [f] ail[ed] to keep [claimant] advised as to the coverage issues involved in the claim").

Uptown argues that because it alleged in its petition that defendants assumed various legal duties, "the alleged duties must be accepted as true."[FN3](R. Doc. 22 at 6; *see also id.* at 5 (alleging that the defendants assumed various "duties of the insurer," including the duty to fairly and adequately adjust the claim and the duty to adequately depreciate the value of the property). This argument misunderstands the nature of a motion to dismiss under Rule 12(b)(6). The relaxed standard of pleading under the Federal Rules of Civil Procedure does not relieve the plaintiff of the burden of pleading "enough *facts* to state a claim to relief that is plausible on its face." *Twombly,* 127 S.Ct. at 1974 (emphasis added). The mere statement of the desired legal conclusion, without any supporting facts at all, is insufficient to survive a motion to dismiss. *See id.* at 1965 n. 3 (noting that the Federal Rules "still require[ ] a 'showing,' rather than a blanket assertion, of entitlement to relief."); *see also id.* at 1966 (finding, in the context of a claim for conspiracy under the Sherman Act, that "a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality"). Because Uptown has failed to plead any facts that suggest that the defendants assumed legal duties, let alone facts that "raise a right to relief above the speculative level," *id.* at 1965, the defendants' motion to dismiss must be granted.

FN3. The Court notes that Uptown's petition did not actually allege that the defendants assumed any duties. Rather, it described different ways in which the defendants' performance was allegedly inadequate. (See R. Doc. 1-2 at ¶¶ 23, 25.)

IV. Conclusion

*3 For the foregoing reasons, the defendants' motion to dismiss is GRANTED.

E.D.La.,2008.

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

Uptown Garden Center v. America First Ins.
Slip Copy, 2008 WL 4186861 (E.D.La.)

END OF DOCUMENT

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

Only the Westlaw citation is currently available.
United States District Court, E.D. Louisiana.
Pamela B. HALTER, et al.
v.
ALLMERICA FINANCIAL LIFE INSURANCE & ANNUITY CO., et al.
No. Civ.A. 98-0718.

Aug. 19, 1998.

ORDER AND REASONS GRANTING DEFENDANTS MOTION TO DISMISS

VANCE, J.

*1 The Court is in receipt of a motion to dismiss filed by defendants Allmerica Financial Life Insurance and Annuity Company and Robert D. Liebkemann. After reviewing the record, the parties' memoranda, and the applicable law, the Court concludes that the plaintiffs' various claims are either not viable under Louisiana law or are prescribed. Accordingly, defendants' motion to dismiss is hereby GRANTED.

I. BACKGROUND

Plaintiffs Pamela and Harold Halter filed this state court action against defendants Allmerica Financial and Liebkemann on January 20, 1998 alleging various types of misconduct by the defendants in the sale and subsequent handling of a 1984 insurance policy. The defendants removed plaintiffs' state court action on March 4, 1998 based on this Court's diversity jurisdiction. *See*28 U.S.C. §§ 1332 & 1441.

Plaintiffs allege that in December of 1984, Liebkemann, a licensed life insurance agent who sold insurance policies for Allmerica Financial and its predecessor SMA Life Assurance Company (Petition at ¶ III), persuaded them to convert a $1,000,000 life insurance policy into a SMA/Allmerica "Universal Life" policy. (*Id.* at ¶ V.) Plaintiffs claim that they relied on Liebkemann's assurances that the policy's premiums would remain constant while its value increased. They assert that these assurances were false, deceptive and "perhaps" fraudulent. (*Id.* at ¶ XI.) Plaintiffs further claim that in September 1986 when they made a loan against the policy, Liebkemann failed to advise them of the alternative of making a withdrawal against the policy, which would not have adversely affected its performance. (*Id.* at ¶ XIII.) Plaintiffs therefore conclude that Liebkemann violated his fiduciary obligations to them.

Plaintiffs also accuse Allmerica Financial of concealing and misrepresenting policy information. They claim that Allmerica failed to adequately supervise Liebkemann as required by Louisiana Revised Statutes sections 22:1161, *et seq.* Finally, plaintiffs allege that defendants breached their duty of good faith dealing and committed unfair trade practices in violation of La. R.S. §§ 22:1214 and 22:1220. Plaintiffs request a refund of excess premium payments, compensatory damages, as well as penalties, interest, and attorney fees. (Petition at ¶ XXIII.)

II. STANDARD OF REVIEW

In a motion to dismiss for failure to state a claim upon which relief may be granted, the Court must accept all well-pleaded facts as true and view the facts in the light most favorable to plaintiffs. *Campbell v. City of San Antonio,* 43 F.3d 973, 975 (5th Cir.1995); *American Waste & Pollution Control Co. v. Browning-Ferris, Inc.,* 949 F.2d 1384, 1386 (5th Cir.1991). Dismissal is warranted if "it appears certain that the plaintiff[s] cannot prove any set of facts in support of [their] claim that would entitle [them] to relief." *Piotrowski v. City of Houston,* 51 F.3d 512, 514 (5th Cir.1995) (*quoting* *Leffall v. Dallas Indep. Sch. Dist.,* 28 F.3d 521, 524 (5th Cir.1994); *see also,* *Green v. State Bar of Tex.,* 27 F.3d 1083, 1086 (5th Cir.1994) ("A dismissal will not be affirmed if the allegations support relief on any possible theory.").

III. ANALYSIS

*2 Defendants argue that plaintiffs have failed to state a claim upon which relief can be granted since their allegations are not recognized under Louisiana law and/or prescribed. Specifically, defendants claim

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

that plaintiffs' claims under La. R.S. §§ 22:1220(A) and 22:1214 must be dismissed since La. R.S. § 22:1220 does not apply when plaintiffs are not asserting a claim under the policy, and La. R.S. § 22:1214 does not provide a private right of action. Defendants further maintain that plaintiffs' fiduciary duty claim against Liebkemann must be dismissed since he did not have a fiduciary relationship with plaintiffs. They argue that the Court should also dismiss plaintiffs' La. R.S. § 22:1161 claim since this provision does not provide a cause of action. Finally, defendants argue that the Court must dismiss all of plaintiffs remaining tort based claims against Liebkemann as prescribed.

In their opposition memoranda, plaintiffs concede that they do not have viable claims under La. R.S. § 22:1220(A) and La. R.S. § 22:1214. While plaintiffs fail to address the majority of defendants' arguments, they maintain that Liebkemann breached his fiduciary obligations to them and that defendants are liable for breach of contract. In addition, plaintiffs' allege a new claim in their opposition memorandum that Allmerica Financial breached its fiduciary responsibilities to them. They assert that these fiduciary and contractual claims are timely under the ten-year prescriptive period of Louisiana Civil Code article 3499.

A. Plaintiffs' Tort Claims.

Defendants argue that plaintiffs' claims for negligence, misrepresentation and failure to supervise are prescribed. Plaintiffs' claims against Liebkemann arise from his alleged misrepresentations, omissions and negligence in the sale and service of plaintiffs' insurance policy. La. R.S. § 9:5606(A) provides a prescriptive and preemptive period for tort and contract claims against insurance agents.[FN1] However, the Louisiana Supreme Court has held that this statute is inapplicable to causes of action that arose before its 1991 enactment. *Roger v. Dufrene*, 613 So.2d 947, 950 (La.1993) (refusing to apply La. R.S. § 9:5606 to a cause of action that arose before the effective date of the statute); *Oxley v. Sabine River Auth.*, 664 So.2d 493, 495 n. 1 (La.Ct.App.1995) ("[T]he statute is inapplicable to this case because the cause of action arose before its effective date."); *Duncan v. Equitable Life Assurance Soc'y*, No. CIV.A.96-2119, 1996 WL 736988, at *5 (E.D.La. Dec. 18, 1996) (recognizing *Dufrene's* bar against La. R.S. § 9:9606's retroactive application). In *Roger*, the Louisiana Supreme Court held that an action against an insurance agent by his customers is a delictual action governed by a one-year prescriptive period. 613 So.2d at 949 (reasoning that claims against an insurance agent are comparable to other professional malpractice claims); *see also* *Oxley*, 664 So.2d at 495. Plaintiffs therefore had one year from the time of Liebkemann's allegedly wrongful conduct to file this action.

FN1. La. R.S. § 9:5606(A) established a one-year prescriptive and three-year peremptive period. It provides that:

> No action for damages against any insurance agent ... whether based upon tort, or breach of contract, or otherwise, arising out of an engagement to provide insurance services shall be brought unless filed ... within one year from the date of the alleged act, omission, or neglect, or within one year from the date that the alleged act, omission, or neglect is discovered or should have been discovered. However, even as to actions filed within one year from the date of such discovery, in all events such actions shall be filed at the latest within three years from the date of the alleged act, omission, or neglect.
>
> La. R.S. § 9:5606(A).

*3 Plaintiffs' claims against Liebkemann for misrepresentations, omissions and negligence are delictual in nature and subject to a one-year prescriptive period. The same is true with respect to the failure to supervise "claim" against the insurer. A prescriptive period, however, does not begin to run against potential plaintiffs until they have knowledge of sufficient facts upon which their cause of action is based, provided that their ignorance is not willful, negligent, or unreasonable. *See* *Griffin v. Kinberger*, 507 So.2d 821, 823 (La.1987). Thus the prescription begins to run when the injured party obtains either actual or constructive knowledge of facts that would reasonably indicate that he is a tort victim. "Constructive knowledge is notice sufficient to excite attention and put the injured party on guard and call for inquiry." *Northwestern Mut. Life Ins. Co. v. Hart*,

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

No. CIV.A.95-1042, 1996 WL 419804, at *2 (E.D.La. July 25, 1996). Mere apprehension, however, is insufficient to initiate the prescriptive clock. *Griffin,* 507 So.2d at 823.

Plaintiffs allege that they converted Mr. Halter's $1,000,000 life insurance policy into Allmerica Financial/SMA's "Universal Life" insurance policy on or about December 21, 1984. The petition states that plaintiffs acquired the Universal Life policy because they believed that the premiums would remain relatively constant as the policy's value increased. (Petition at ¶ VI.) Plaintiffs claim, however, that the policy's premiums have steadily increased since they acquired it. (*Id.* at ¶¶ VI & XI.) They state that premiums were assessed monthly. Plaintiffs further allege that in September of 1986, they acquired a loan drawn against the value of the insurance policy. Plaintiffs allege that this loan's accrued interest caused the policy's premiums to continue to rise. (*Id.* at ¶ XIII.) Plaintiffs were aware of the policy's increasing premiums. Plaintiffs were therefore on notice from the beginning that the policy premiums were increasing so that the policy was not performing as they desired. Plaintiffs, however, failed to file this action until over thirteen years after they purchased the policy and over eleven years after they acquired a loan against its value. Plaintiffs' unexcused failure to pursue their claim in a timely fashion bars their suit now. Accordingly, the delictual claims must be dismissed.

B. Liebkemann's Fiduciary Duties.

Defendants maintain that plaintiffs have failed to state a viable claim for breach of fiduciary duty against Liebkemann. Plaintiffs assert that Liebkemann breached his fiduciary obligations by failing to advise them accurately that premiums under the converted policy would continue to rise and apparently by failing to advise them of a withdrawal option as an alternative to a loan against the policy. Generally, an insurance agent is deemed the representative of the insurer, and he therefore does not have a fiduciary relationship with the insured. *See* *Smason v. Celtic Life Ins. Co.,* 615 So.2d 1079, 1087 (La.Ct.App.1993) ("Generally, an insurance agent's duty is to the insurer and he will not be held to owe any fiduciary duty to the insured."); La. R.S. § 22:1112 (defining an insurance agent as "a person appointed in writing by an insurer to solicit applications for a policy of insurance or to negotiate a policy of insurance on its behalf"). An insurance broker, on the other hand, represents the insured to whom he owes a fiduciary duty. *Smason,* 615 So.2d at 1086-87 (insurance code creates presumption that broker, who solicits from the public generally and under no employment by a specific insurer, is the representative of the insured). However, in certain factual situations, an agent or broker may be deemed a representative of both insurer and the insured and thus have a fiduciary duty to both parties. *See* *Smason,* 615 So.2d at 1087 ("Clearly, the Supreme Court recognized that there exist factual situations which take the broker or agent outside of their normal capacities as representatives of only one party and make them the representatives of both parties."); *Tiner v. Aetna Life Ins. Co.,* 291 So.2d 774 (La.1974) (holding that an insurance broker may be deemed an agent of insurer). In their petition, plaintiffs state that Liebkemann was a duly licensed life insurance agent acting for and on behalf of his principal, SMA Life Assurance and its successor, Allmerica Financial. (Petition at ¶ III.) The petition lacks any allegations that Liebkemann acted as plaintiffs' broker. However, in their opposition memorandum, plaintiffs allege that Liebkemann "is in fact an insurance agent and/or broker and in this particular instance was acting for both the Defendant insurer and the Plaintiffs."(Memorandum Opp'n at 2-3.) [FN2]If Liebkemann acted not only as Allmerica Financial's agent but also as plaintiffs' broker, then he would have had a fiduciary obligation to plaintiffs. Whether an agent in any particular transaction acts as broker of the insured depends upon the particular circumstances of the case. *See* *Tiner,* 291 So.2d at 778; *Smason,* 615 So.2d at 1083-84. Since the Court must view all unknown facts in plaintiff's favor, the Court assumes for purposes of this motion that Liebkemann acted as plaintiffs' broker and thus owed them fiduciary obligations.

FN2. In deciding a Rule 12(b)(6) motion to dismiss, the Court may consider additional facts alleged in the plaintiffs' opposition memorandum if those facts are consistent with the complaint's allegations. *See* *Albiero v. City of Kankakee,* 122 F.3d 417, 419 (7th Cir.1997) ("[A] plaintiff may supplement the complaint with factual narration in an affidavit or brief. If the extra assertions make out a claim, then the complaint stands."); *Sterling v.*

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

> *Kazmierczak,* 983 F.Supp. 1186, 1189 (N.D.Ill.1997) (court may consider consistent clarifying facts in opposition brief). The assertion in their brief that Liebkemann acted as broker for plaintiffs and as insurance agent for SMA Life Assurance is not necessarily inconsistent with the complaint read as a whole.

*4 Nonetheless plaintiffs' claim that Liebkemann breached his fiduciary duties must also be dismissed as prescribed. Plaintiffs argue that their breach of fiduciary duty claim against Liebkemann is governed by the ten-year prescriptive period of Louisiana Civil Code article 3499, which states that "[u]nless otherwise provided by legislation, a personal action is subject to a liberative prescription of ten years."La. Civ.Code art. 3499; *see also* *Gerdes v. Estate of Cush,* 953 F.2d 201 (5th Cir.1992) (ten-year prescriptive period governed client's claim against attorney for breach of fiduciary duty). However, Liebkemann's allegedly wrongful conduct in connection with the conversion of the policy in 1984 and the loan in 1986 occurred more than ten years before plaintiffs filed suit. Further, the continuing escalation of the premiums was apparent more than ten years before plaintiffs sued because the premiums were charged on a monthly basis. Accordingly, plaintiffs' breach of fiduciary duty claim against Liebkemann must also be dismissed.

C. Plaintiffs' Claim Under La. R.S. § 22:1161.

Finally, the Court concurs with defendants' assertion that plaintiffs failed to state a cause of action against the defendants under La. R.S. § 22:1161.[FN3] This statute, which has been repealed, established definitions for insurance agents, brokers, and solicitors under Louisiana's insurance qualification and licensing statute. *See*La. R.S. § 22:1161, *repealed by* Acts 1993, No. 952, § 5, eff. Jan. 1, 1994. The provision did not establish a cause of action against these persons. Accordingly, plaintiffs' claim under La. R.S. § 22:1161 must be dismissed.

> FN3. Plaintiffs failed to respond to defendants' assertion that plaintiffs did not state a cause of action pursuant to La. R.S. § 22:1161 in their opposition memorandum.

D. Plaintiffs' Remaining Claims.

Plaintiffs' memorandum in opposition further asserts that Allmerica Financial breached fiduciary duties owed to them. However, plaintiffs' petition failed to include this allegation in the petition. While the Court may consider new, consistent factual allegations contained in plaintiffs' opposition brief, the Court should not consider claims raised for the first time in plaintiffs' responsive memorandum. *See* *Sterling v. Kazmierczak,* 983 F.Supp. 1186, 1189 (N.D.Ill.1997) ("[T]he court should not consider newly alleged claims that are not raised in the complaint or facts that are not consistent with the complaint's allegations.")."[I]t is axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss." *Morgan Distrib. Co. v. Unidynamic Corp.,* 868 F.2d 992, 995 (8th Cir.1989) (quoting *Car Carriers, Inc. v. Ford Motor Co.,* 745 F.2d 1101, 1107 (7th Cir.1984)).*See also* *Beanal v. Freeport-McMoran, Inc.,* 969 F.Supp. 362, 367 (E.D.La.1997). In any case, under Louisiana law, an insurer-insured relationship is contractual and does not give rise to a fiduciary duty. *E.g.,* *Nat'l Union Fire Ins. Co. v. Cagle,* 68 F.3d 905, 910 (5th Cir.1995); *Miller v. Lumbermens Mut. Casualty Co.,* 488 So.2d 273, 278 (La.Ct.App.1986), *writ denied,* 493 So.2d 637 (La.1986); *Legendre v. Rodrigue,* 358 So.2d 665, 668 (La.Ct.App.1978). Further, for the reasons stated with respect to the fiduciary duty claim against Liebkemann, any fiduciary duty claim against Allmerica Financial would be time-barred.

*5 Plaintiffs also rely on a breach of contract theory against defendants, which they correctly assert is subject to a ten-year prescriptive period.La. Civil Code art. 3499. However, the gravamen of plaintiffs' claim is failure to disclose the escalating nature of the premiums when the policy was converted in 1984 and when they borrowed against it in 1986. Since plaintiffs were charged premiums on a monthly basis, they knew or should have known of the existence of these claims more than ten years before they filed suit in 1998. Hence, any contractual claims have prescribed.

IV. CONCLUSION

Plaintiffs' claims under Sections 22:1214 and 22:1161 of Louisiana's Revised Statutes must be dismissed since they do not provide a private right of

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

action. Plaintiffs' La. R.S. § 22:1220(A) claim is dismissed because the statute does not apply here. Finally, plaintiff's misrepresentation, negligence, fiduciary duty, and contract claims against defendants are dismissed as untimely. Accordingly,

IT IS HEREBY ORDERED that defendants' motion to dismiss is GRANTED. Plaintiffs' complaint is therefore DISMISSED.

E.D.La.,1998.
Halter v. Allmerica Financial Life Ins. & Annuity Co.
Not Reported in F.Supp.2d, 1998 WL 516109 (E.D.La.)

END OF DOCUMENT

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.