

## 11th Circ. Says ID Theft Risk Doesn't Support Data Breach Suit

By **Nathan Hale**

Law360 (February 4, 2021, 7:37 PM EST) -- The Eleventh Circuit on Thursday affirmed the dismissal of a customer's proposed class action against Florida-based fast-food chain PDQ over a data breach, finding that he had not presented a sufficient injury claim as a basis for bringing the suit.

In a 28-page published opinion, the appeals court rejected plaintiff I Tan Tsao's arguments that he had standing to sue based either on the assertion that he and other customers are facing an exposed risk of future identity theft as a result of a hacker gaining access to their credit and debit card information, or that his efforts to mitigate that risk represented a sufficiently concrete injury.

"We hold that Tsao lacks Article III standing because he cannot demonstrate that there is a substantial risk of future identity theft — or that identity theft is certainly impending — and because he cannot manufacture standing by incurring costs in anticipation of non-imminent harm," the three-judge panel said.

Tsao filed his proposed class action within days of a June 2018 announcement in which PDQ owner Captiva MVP Restaurant Partners LLC disclosed that a hacker had breached its point-of-sale system between May 2017 and April 2018 and "may" have accessed customers' names and credit and debit card information, according to the opinion.

Tsao, who had made two purchases at the chain's Pinellas County locations, said he canceled two cards that he had used upon learning this news, but he alleged that PDQ customers had suffered theft of personal financial information, unauthorized charges on their payment cards and losses from missed cashback and other benefits.

He brought claims for negligence, breach of contract, unjust enrichment and violation of the Florida Unfair and Deceptive Trade Practices Act, the opinion said.

But the district court dismissed the case without prejudice, saying that Tsao lacked standing because his evidence of harm was "speculative at best." The court also noted that Tsao did not allege that his cards were misused or his identity was actually stolen and did not identify a single concrete injury that he or any other customer suffered as a result of the breach.

In its analysis, the Eleventh Circuit relied heavily on the U.S. Supreme Court's decision in [Clapper v. Amnesty International USA](#) and its own en banc opinion in [Muransky v. Godiva Chocolatier Inc.](#) Looking at those cases, the judges said they concluded that a plaintiff alleging a hypothetical harm does not have standing unless that harm is either "certainly impending" or represents a "substantial risk" of harm. And if the alleged risk does not rise to those levels, a plaintiff cannot "conjure standing by inflicting some direct harm on itself to mitigate a perceived risk."

The panel also noted a circuit split on the question of whether a plaintiff can establish standing based only on an increased risk of identity theft. The Sixth, Seventh, Ninth and D.C. circuits have recognized standing based on this increased risk, while the Second, Third, Fourth and Eighth have rejected the theory, according to the opinion.

The judges said they found guidance in the Eighth Circuit's decision in [In re SuperValu Inc.](#) and

joined that court in finding that a 2007 Government Accountability Office report, which Tsao and the plaintiff in that case both cited to support the theory of increased identity theft risk as an injury-in-fact, actually showed instead that there is not a substantial risk of identity theft in credit card data breach cases where other pieces of personal information — such as birthdates and Social Security numbers — were not compromised.

The panel said that it would have reached the same conclusion without considering SuperValu, noting that the Muransky decision settled that Tsao's allegations of "continuing increased risk" is "simply not enough" to confer standing.

The judges also found that Tsao offered only "vague, conclusory allegations" that members of the proposed class suffered any actual misuse of their personal data, while his immediate cancellation of his own cards meant that the risk he faced was not substantial.

The panel said it agreed with other circuits that actual misuse is not absolutely necessary to establish standing in a data breach case, but it explained that "without specific evidence of some misuse of class members' data, a named plaintiff's burden to plausibly plead factual allegations sufficient to show that the threatened harm of future identity theft was 'certainly impending' — or that there was a 'substantial risk' of such harm — will be difficult to meet."

Addressing Tsao's claim that he suffered actual injury through his efforts to mitigate his risk of identity theft, the panel said the mitigation costs he cited — a loss of cashback or rewards points, lost time spent addressing the data breach issues and restricted access to his preferred card accounts — are inextricably tied to his perception of the risk of identity theft.

"Tsao cannot conjure standing here by inflicting injuries on himself to avoid an insubstantial, non-imminent risk of identity theft. To hold otherwise would allow 'an enterprising plaintiff ... to secure a lower standard for Article III standing simply by making an expenditure based on a nonparanoid fear,'" the panel said, quoting from Clapper.

Counsel for PDQ praised the decision, saying the Eleventh Circuit's ruling will help protect businesses from costly lawsuits by plaintiffs who lack standing to sue.

"We are pleased the Eleventh Circuit has joined many, if not the majority, of its sister circuits in determining that plaintiffs bringing claims in the data breach context must allege 'actual' misuse or access to personal data in order to satisfy Article III standing requirements," Marie A. Borland of Hill Ward Henderson PA told Law360. "Merely alleging an 'increased risk of future identity theft' is not enough. The court's determination that conclusory allegations of injury are not enough is consistent with governing Supreme Court authority."

Counsel for Tsao did not immediately respond to a request for comment Thursday.

Circuit Judges Adalberto Jordan, Gerald Bard Tjoflat and William B. Traxler sat on the panel for the Eleventh Circuit.

Tsao is represented by Francis J. Flynn Jr. of The Law Office of Francis J. Flynn Jr., James J. Rosemergy of Carey Danis & Lowe and Steven William Teppler of Mandelbaum Salsburg PC.

PDQ is represented by Marie A. Borland and Robert A. Shimberg of Hill Ward Henderson PA.

The case is Tsao v. Captiva MVP Restaurant Partners LLC, case number 18-14959, in the U.S. Court of Appeals for the Eleventh Circuit.

--Editing by Steven Edelstone.