Data Breach Litigation & Evaluating Standing

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DATA BREACH LITIGATION & EVALUATING STANDING

I. INTRODUCTION

The constitutional requirements for Article III standing present a complicated problem in the evolving area of data breach litigation. When data stored by businesses and individuals has been accessed or has heightened vulnerability to improper access, it is difficult to fulfill standing absent a correlating personal identity theft. The fear that vulnerable data could be used for identity theft presents courts with difficulty in determining Article III standing and when it is successfully met. This challenge is

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1 See U.S. CONST. art. III, § 2 (noting requirements for standing include imminent injury). The requirements for injury and proper Article III standing are explained as:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id. See also Babbitt v. UFW Nat'l Union, 442 U.S. 289, 298-99 (1979) (recognizing parties' contentions must present real, substantial controversies). The difference between abstract questions, and case or controversy, is one of degree rather than a bright line rule. Id.; In re Horizon Healthcare Servs. Data Breach Litig., 846 F.3d 625, 632-33 (3d Cir. 2017) (explaining standard to review motion to dismiss under Rule 12(b)(6) when challenging standing). In determining whether a complaint sufficiently alleges an injury-in-fact, the standard requires a showing of some indicia of injury. Id. at 633; Al-Owhali v. Ashcroft, 279 F. Supp. 2d 13, 20 (D.D.C. 2003) (examining differences between Rule 12(b)(1) dismissals and Rule 12(b)(6) dismissals). Dismissals under Rule 12(b)(1) are a challenge to a court's jurisdiction, while 12(b)(6) dismissals are a ruling on the merits with res judicata effects. Id.; Ernest Schopler, 40 L. Ed. 2d 783 (2nd ed. 2012) (noting federal courts adjudicate only actual cases or controversies). A litigant must have suffered or threatened with facing an imminent injury. Id.


unique to sensitive personal information, since the time of imminent injury is extremely difficult to pinpoint before injury has occurred.4

Article III standing should not be conferred on litigants in class-action data breach lawsuits if the injury is not sufficient to establish orthodox standing.5 Standing will not be found in cases where injury is no more than speculative in nature.6 Furthermore, the discussion will show that expanding Article III standing for online identity theft prior to evidence showing actual injury would be manifestly unfair to potential defendants.7 The dual requirements of proving an injury-in-fact require courts to utilize a bifurcated analysis to ensure they are correctly considering standing before allowing a suit to continue on the merits.8 In conclusion, the determination of Article III standing in class actions for data breach litigation should ensure fairness (highlighting indications of stolen identity will include monitoring bank activity and medical records). The challenge is many of the safeguards and preventative measures seem burdensome when there is no actual identity theft. Id.

4 See Kevin J. O’Brien, Encryption Flaw Makes Phones Possible Accomplices in Theft, NY TIMES (July 21, 2013), http://www.nytimes.com/2013/07/22/technology/encryption-flaw-makes-phones-possible-accomplices-in-theft.html (warning cell phone’s can pick up viruses allowing theft of personal information during mobile purchases). Cell phones used to complete transactions can often be susceptible to viruses that are capable of actively skirting security measures. Id.

5 See Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (acknowledging standing requires injury-in-fact that is concrete and imminent rather than hypothetical). The Lujan Court identified three elements that must be present to establish constitutional standing. Id. “Article III requires, as an irreducible minimum, that a plaintiff allege (1) an injury that is (2) ‘fairly traceable to the defendant’s allegedly unlawful conduct’ and that is (3) ‘likely to be redressed by the requested relief.’” Id. at 590. The Court explained that at the pleading stage, general allegations of the injury caused by the defendants met standing requirements. Id. at 561. In Lujan, environmental groups challenged regulations concerning the Endangered Species Act. Id. at 557-59. The regulations would negatively affect their ability to go abroad and view endangered species. Id. at 562-63. The Court reasoned because the endangered species viewing was at some indefinite future time, it was not an imminent injury. Id. at 564-67. The Supreme Court held the group failed to show an injury-in-fact. Lujan, 504 U.S. at 566-68. Therefore, the plaintiffs did not have standing to contest the regulations. Id. at 566.

6 See id. at 564 (explaining imminence is elastic concept meant to ensure litigant faces impending injury); see also Via Mat Int’l S. Am. Ltd. v. United States, 446 F.3d 1258, 1263 (11th Cir. 2006) (discussing statutory standing requirements).

7 See Lujan, 504 U.S. at 560 (requiring concrete and particularized injury for standing purposes); see also Focus on the Family v. Pinellas Suncoast Transit Auth., 344 F.3d 1263, 1273 (11th Cir. 2003) (explaining traceable injury standard less stringent than showing proximate cause of injury). Indirectly causing the plaintiffs harm satisfies this fairly traceable standard as well. Id.

8 See Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1543 (2016) (holding Ninth Circuit incorrectly applied injury-in-fact requirement). In Spokeo, petitioner operated a people search engine, which generated profiles of individuals. Id. at 1544. Respondent, Thomas Robins, realized his profile contained incorrect information and filed a federal class-action alleging Spokeo intentionally failed to comply with FCRA’s requirements. Id. at 1546. The Ninth Circuit reversed the district court’s dismissal, finding the injury was particularized to affect the plaintiff in an individual way. Id. The Supreme Court found this was improper for testing injury in fact because the Ninth Circuit did not incorporate the independent “concreteness” requirement. Id. at 1549-50. Concreteness is a different requirement than particularized injury. Id.
to defendants who have otherwise not caused the injury of personal identity theft.⁹

As society continues to rely on expanding technology in daily life, the requirements of constitutional standing should be clear for potential class-action lawsuits.¹⁰ As the techniques for hacking become more advanced, the need for clearer guidelines is necessary to help courts maintain uniformity.¹¹ The challenges courts face should be rectified by drawing concise lines when imminent injury arises in instances of vulnerability for potential identity theft.¹²

In 2013, the Supreme Court clarified the application of standing requirements to areas of data breach litigation.¹³ After a discussion on the history of this issue, the analysis will discuss why it is imperative that Article III standing be held to a more stringent requirement, and dismiss cases that do not show imminent injury for lack of standing.¹⁴ It is imperative that courts require a showing of imminent injury in order to ensure that blameless

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⁹ See Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc. 454 U.S. 464, 471 (1982) (noting litigants have always been required to show standing). "[A]n irreducible minimum, Art. III requires the party who invokes the court's authority 'to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant . . . .'" Id. at 472. (citations omitted).

¹⁰ See Joseph Cox, Are Data Breaches Becoming More Common?, VICE (July 28, 2016), http://motherboard.vice.com/read/data-breaches-vigilante-pw (providing reasons for increased data breaches). One indispensable reason for the rising occurrence of data breaches is the growing field of data collection and trade. Id.

¹¹ See Jeannie Warner, Houston, We Have a (Cyber) Problem, WHITEHAT SEC. (Sept. 27, 2016), https://www.whitehatsec.com/blog/houston-we-have-a-cyber-problem/ (noting increased need for cyber security in hospitals and healthcare institutions due to data vulnerability). Healthcare is a particularly vulnerable area for data breach issues given the amount of information stored electronically. Id.

¹² See Remijas v. Neiman Marcus Group, LLC 794 F.3d 688, 693-96 (7th Cir. 2015) (explaining injury requirements); see also When Information Is Lost or Exposed, FED. TRADE COMM’N, https://www.identitytheft.gov/PDFs/Data_Breach.pdf (last visited Nov. 4, 2016) (outlining steps to take when information is accessed online to eliminate chance of identity theft). Based on the particular type of information vulnerable, steps include a credit freeze, monitoring credit reports, changing account passwords and requesting new cards. Id. These steps are suggested to minimize chances of identity theft after personal identifying information has been accessed. Id.

¹³ See Lewis v. Casey, 518 U.S. 343, 358 (1996) (explaining plaintiff must present sufficient evidence of each element of standing). See also Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013) (requiring plaintiff must face an injury that is impending). Where individuals seek to establish standing based on imminent injury, the Court has made clear that the threatened injury must be certainly impending to constitute injury-in-fact and allegations of possible future injury are not sufficient. Id.

¹⁴ See Lujan v.Defs. of Wildlife, 504 U.S. 555, 560 (1992) (highlighting injury must be fairly traceable to injury being challenged). "The party invoking federal jurisdiction has the burden of" showing they meet the elements of standing. Id.
defendants are not liable for speculative data breaches not caused by their conduct.15

II. HISTORY

Article III of the United States Constitution requires that a plaintiff establish three elements in order to have standing to invoke jurisdiction of the federal courts: injury-in-fact, causation and redressibility.16 The main element that will be at focus is injury-in-fact, as it poses the most issues for potential data breach litigation.17 These elements can cause standing to be restrictive in some instances.18 The courts have recognized these standing requirements are constitutionally provided and therefore, absent interpretation differences, the requirements are to be followed by courts regardless of the circumstances in the case at hand.19 Judicially defined standing requirements can be overtly general, sometimes leaving litigants with no reliable way of accurately predicting whether a court will find the standing requirements have been met.20 The standing doctrine has been

15 See Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 39 (1976) (explaining broadening threshold requirement to actual injury is different than abandoning requirement). There is a necessary requirement that the acting party have some personal interest. Id. A federal court cannot disregard this requirement, as that would be overstepping the role of the court. Id.; see also Wuliger v. Mfrs. Life Ins. Co., 567 F.3d 787, 796 (6th Cir. 2009) (holding lower court failed to focus on if defendant caused plaintiff’s injury).


17 See Lujan, 504 U.S. at 561 (clarifying necessity of each element). As the Lujan Court discussed, “each element 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.” Id.


has loftier goals: standing and the other justiciability doctrines relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.

Id.

19 See Whitmore, 495 U.S. 149, 161 (explaining Article III requirements are imposed constitutionally instead of traditional rules of practice). It is not the province of the courts to resolve public policy issues and expand or restrict the constitutional requirements based on the case at hand and the notions of fairness. Id.

criticized for its requirement of an injury-in-fact.21 The actual injury requirement is aligned with Article III’s goal of resolving legal questions conclusively with an understanding of the consequence of judicial action.22

The requirement of standing has facilitated courts in assessing which claims may be adjudicated.23 Although the standing requirement has not been easy to apply, standing is nevertheless required for fairness to defendants.24 The courts have consistently held that speculation will not suffice to invoke the power of courts to adjudicate claims.25 If an injury is indirect, or cannot be directly traced to the conduct of the defendants, it makes it difficult to meet the minimum causation requirement of Article III.26

One criticism of standing has been that the requirement of injury in fact is misleading; this is because an individual genuinely believing she suffered an injury is not sufficient.27 Although scholars have criticized the ambiguously defined standing requirements, there has been no effort by Congress to clarify standing for plaintiffs.28 There have been arguments for

21 See Warth v. Seldin, 422 U.S. 490, 501-02 (1975) (requiring plaintiff suffer “distinct and palpable injury” to establish standing); see also Fletcher, supra note 20, at 229-32 (arguing standing doctrine should not require injury-in-fact). The doctrine mandates that a plaintiff must suffer some injury before a court can provide relief. Id.


23 See Massachusetts v. Mellon, 262 U.S. 447, 487-88 (1923) (explaining injury alleged was burden of taxation in support of unconstitutional regime). The Court determined any injury the plaintiff suffered from the tax burden was “remote, fluctuating and uncertain.” Id. The Court reasoned that any plaintiff must be able to show they specifically suffered a direct injury from the result of an enforcement of a law, rather than demonstrating a statute harmed them as a member of the general public. Id. at 488.

24 See Michael E. Tigar, Judicial Power, the “Political Question Doctrine” and Foreign Relations, 17 UCLA L. REV. 1135, 1138 n. 11 (1970) (acknowledging concept of standing has provided scholars with ‘considerable difficulty’).

25 See Simon v. E. Kentucky Welfare Rights Org., 426 U.S. 26, 44 (1976) (highlighting prior decisions where speculation was found to be insufficient to establish standing); see also Warth, 422 U.S. at 507-08 (holding plaintiff lacked standing because alleged injury not attributable to challenged statute); Linda R.S. v. Richard D., 410 U.S. 614, 618 (1973) (recognizing requested relief would have been speculative at best to redress claim brought).

26 See Warth, 422 U.S. at 505 (noting indirect injury does not deprive plaintiff standing but makes it difficult to meet requirements).

27 See Fletcher, supra note 20, at 233 (mentioning injury-in-fact does not allow recovery for subjective, but speculative, injury).

28 See Sapperstein v. Hager, 188 F.3d 852, 855-56 (7th Cir. 1999) (noting plaintiff required to establish standing with requisite proof); see also Thomas L. Casagrande, The “Dawn Donut Rule”:
limiting congressional power under Article III, understanding that Congress has plenary authority over federal court jurisdiction. In class actions, the standing requirement denotes that the named plaintiff have claims against each defendant. There has been a split on whether courts should rule on the class certification first, then treat the class as relevant for Article III instead of doing a separate inquiry.

Current standing requirements prohibit suits in many areas in which Congress has previously authorized. Congress has some ability to further clarify standing, but it is doubtful they will choose to reform the control the Court exercises over these issues. Scholars have begun looking for alternatives to orthodox standing, and have argued when the executive and legislative branches bring suit, they can lack standing under Article III.

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Still Standing (Article III, That Is) Even With the Rise of The Internet, 90 TRADEMARK REP. 723 (2000) (arguing standing inquiry for the last thirty-five years evaluated complainant’s dispute merits); Elliott, supra note 18, at 163-64 (noting Congress could enact statutes expanding standing by creating legislative findings of standing); Maxwell L. Stearns, Standing Back from the Forest: Justiciability and Social Choice, 83 CAL. L. REV. 1309, 1310 (1995) (contending standing rules ensure fairness by protecting against litigants manipulating system).

29 See Daniel J. Meltzer, The History and Structure of Article III, 138 U. PA. L. REV. 1569, 1569-70 (1990) (noting arguments for limiting congressional power). One limitation mentioned is courts having jurisdiction over all cases within federal judicial power. Id.

30 See Mahon v. Ticor Title Ins. Co., 683 F.3d 59, 64 (2d Cir. 2012) (holding Art. III standing in class action suits requires injury caused by all defendants). The court noted standing is a prerequisite to class certification and must be established prior to any certification. Id. at 65.


32 See Elliott, supra note 18, at 164 (noting critics of standing doctrine label this restrictive standing requirement abuse of judicial discretion). These limits make anti-regulatory challenges difficult to come to the court. Id. at 165.

33 See U.S. CONST. ART. I §§ 1-2 (noting Article III recognizes right to create inferior courts and regulate jurisdiction of federal courts); see also Elliot, supra note 18 at 164 (emphasizing Court’s restrictive view of standing); Brian F. Havel, The Constitution In an Era of Supranational Adjudication, 78 N.C. L. REV. 257, 293-94 (2000) (observing Article III includes permanent professional security of judges and congressional control over judicial system).

34 See Hollingsworth v. Perry, 133 S. Ct. 2652, 2664 (2013) (noting state legislator may satisfy standing requirements despite private party lacking standing); see also Trevor W. Morrison, Private Attorneys General and the First Amendment, 103 MICH. L. REV. 589, 627 (2005) (explaining federal courts adjudicate government actions where private parties would lack injury-in-fact); Tara L. Grove, Standing Outside of Article III, 162 U. PA. L. REV. 1311, 1314 (2014) (explaining standing of executive and legislative branches must have affirmative authority for their actions). The standing for the executive branch and legislature branch must instead be determined by the provisions conferring their power. Id.
III. FACTS

The history of applying Article III requirements to data breach litigation has not been clear, resulting in circuits splits when determining if standing has been shown in data breach cases. A majority of circuits found plaintiffs satisfied the standing requirement after data was accessed for the subsequent potential identity theft. Absent a showing the accessed information was used, courts have difficulty determining when injury is imminent. The Federal Courts of Appeal began attempting to create clear guidelines in determining when data breaches cause identity theft.

The Ninth Circuit Court of Appeals held sufficient injury was found for standing when plaintiffs were at an increased risk of harm, following a theft of a laptop containing information that was subsequently used. Similarly, the Seventh Circuit Court of Appeals found injury was sufficient for standing when the plaintiffs were at an increased risk of data theft after

35 Compare Reilly v. Ceridian Corp., 664 F.3d 38, 43-46 (3d Cir. 2011) (finding no injury-in-fact when unauthorized person accessed but did not misuse plaintiffs' data), with Krottner v. Starbucks Corp., 628 F.3d 1139, 1143 (9th Cir. 2010) (finding injury-in-fact when plaintiffs pled risk of harm following theft of laptop containing personal data). In both of these cases, the plaintiffs' data was accessed by one or more unauthorized third parties. Id.

36 See Pisciotta v. Old Nat'l Bancorp, 499 F.3d 629, 634-35 (7th Cir. 2007) (holding injury-in-fact satisfied after information was accessed by sophisticated hacker). The increased risk of identity theft was sufficient to confer standing, despite the plaintiff's failure to allege any financial loss to their accounts, or that they were the victim of identity theft. Id. The Court found standing due to the injury-in-fact of future harm that would not have occurred absent the defendant's actions. Id. at 634. In reaching these decisions, the Court looked to the Second and Sixth circuits, which addressed increased risk of future medical and environmental injury. Id. at 635.

37 See Resnick v. AvMed Inc., 693 F.3d 1317, 1323-27 (11th Cir. 2012) (noting identity theft resulting from data breach has standing where both plaintiffs' information used). The plaintiffs suffered identity theft and monetary damages, which constituted an injury-in-fact under the law. Id. The defendant failing to secure the plaintiffs' personal information was sufficient to fairly trace their injuries for the purposes of Article III standing. Id. at 1324. Injuries alleged included the sensitive information being used to open bank and financial accounts. Id. at 1326. The court reasoned to prove a data breach caused identity theft, the pleadings must show a nexus between the two instances beyond merely stating the time of the two incidents. Id. at 1327.

38 See Stollenwerk v. Tri-West Healthcare Alliance, 254 F. Appx 664, 667 (9th Cir. 2007) (noting sufficient facts creating link between breach and personal identity injury). A causal relationship between data breach and identity theft is found where "(1) [plaintiff] gave [the defendant] his personal information; (2) the identity fraud incidents began six weeks after the hard drives containing [defendant's] customers' personal information were stolen; and (3) [plaintiff] previously had not suffered any such incidents of identity theft." Id. The court also noted allegations only of both time and sequence are not enough to establish causation: "purely temporal connections are often insufficient to establish causation ... [H]owever, proximate cause is supported not only by the temporal but also by the logical relationship between the two events." Id. at 668.

39 See Krottner v. Starbucks Corp., 628 F.3d 1139, 1143 (9th Cir. 2010) (explaining laptop stolen and its information used).
their information was accessed, but not yet used. In the Seventh Circuit case, an important factor was the investigation revealed the individual who completed the hack was sophisticated and advanced in accessing vulnerable online information, despite the information having not been used. Although the Seventh Circuit held that the plaintiffs had standing, they did not have damages necessary for purposes of their state-law claims. Courts have had to determine if pleadings contain more than evidence of future harm.

Because an increased risk of identity theft involves a future injury, some jurisdictions have decided the plaintiff does not suffer an actual and imminent injury because the identity theft may not happen, thus creating speculation that of what Article III is meant to prohibit. The imminence requirement is intended to ensure the courts do not adjudicate hypothetical

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40 See Pisciotta v. Old Nat’l Bancorp, 499 F.3d 629, 631-33 (7th Cir. 2007) (noting breach found to have accessed information of users and bank subsequently alerted).

41 See id. at 632 (finding scope and manner support finding evidence intrusion sophisticated as opposed to novice). The plaintiffs did not allege they incurred any financial loss to their accounts, nor did anyone in the class claim they had already been the victim of identity theft due to the accessed information. Id. The plaintiffs requested credit monitoring damages to avoid loss and damages from identity theft, and attempts to avoid incurring expenses from potential identity theft. Id. at 632-33; see also Hendricks v. DSW Shoe Warehouse, 444 F. Supp. 2d 775, 783 (2006) (holding no existing state law supports plaintiff’s purchase of credit monitoring devices established cognizable loss).

42 See Pisciotta, 499 F.3d at 634-40 (holding there was no basis for relief and insufficient injury).


44 See Holmes v. Countrywide Fin. Corp., No. 5:08-CV-00205-R, 2012 U.S. Dist. LEXIS 96587 at *10-11 (W.D. Ky. July 12, 2012) (noting “fulcrum upon which these decisions pivot is whether the plaintiffs have expressed an injury sufficient to proceed past a motion to dismiss”); Cf. Lambert v. Hartman, 517 F.3d 433, 435 (6th Cir. 2008) (holding compensatory payment to prevent future identity theft was injury-in-fact). The Sixth Circuit held that the increased risk of identity theft and monitoring satisfied the requirement for constitutional standing. Id. at 438; Brittingham v. Cerasimo, Inc., 621 F. Supp. 2d 646, 649-50 (N.D. Ind. 2009) (noting injury requirement can be satisfied with threat of future harm). The defendant argued that the plaintiffs lacked standing to bring this case because they did not have actual financial injuries, and a violation of Fair and Accurate Credit Transaction Act, (“FACTA”) is not an injury sufficient for standing. Id. at 648. The plaintiffs argued that FACTA is a statute that authorizes lawsuits for violation, and does not require actual proof of injury in the case of a violation. Id. The defendant’s alleged failure to secure the card information means the he failed to limit the risk of identity theft. Id.
injuries. Further, even if the plaintiffs have constitutional standing, the next issue may be finding a basis for relief.

When the risk of future identity theft was disputed in the Eleventh Circuit for the first time, the court determined if the injury is not likely to occur immediately, then prospective relief is not sufficient for standing. If there is no actual injury, and therefore no Article III standing, the court lacks subject matter jurisdiction to hear the merits of the claim. Standing must be based on a concrete injury that is not speculative and is traceable to the defendant. The Eleventh Circuit seemingly drew a distinction that a

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46 See Holmes, 2012 U.S. Dist. LEXIS 96587, at *13-14 (noting even when courts find standing, still must find basis for relief); see also Giordano v. Wachovia Sec., LLC, No. 06-476, 2006 U.S. Dist. LEXIS 52266 at *5 (D. N.J. July 31, 2006) (noting credit monitoring costs resulting from lost financial information did not constitute injury for standing); Bell v. Acxiom Corp., No. 4:06CV00485, 2006 U.S. Dist. LEXIS 72477 at *8-10, (E.D. Ark. Oct. 3, 2006) (stating plaintiff pleads only increased risk of identity theft rather than concrete damage); Shafran v. Harley-Davidson, 07 Civ. 01365, 2008 U.S. Dist. LEXIS 22494 at *7 (S.D.N.Y. Mar. 24, 2008) (stating “Courts have uniformly ruled that the time and expense of credit monitoring to combat an increased risk of future identity is not, in itself, an injury that the law is prepared to remedy.”). Plaintiff failed to show an actual injury that would allow damages to be awarded. Id.

47 See Badish v. RBS Worldpay, Inc., No. 1:09-CV-0033-CAP, 2010 U.S. Dist. LEXIS 145301, *13-14 (N.D. Ga. Feb. 5, 2010) (noting Eleventh Circuit has not determined standing for future identity theft risk and mitigation costs). Importantly, the Eleventh Circuit Court of Appeals held when a plaintiff cannot show immediate injury, the plaintiff does not have standing even if he has suffered a past injury. Id. Several other courts have reviewed data breach, where risk of future injury incurs mitigation costs, and a majority of those courts ruled “alleged damages are not sufficient to constitute an injury-in-fact for purposes of Article III standing.” Id. at 13. A distinguishing factor is the mitigation expenses are sufficient for standing if the complaint alleges that identity theft actually occurred. Id. Here, the court concluded that it lacked subject matter jurisdiction because there was not sufficient injury for standing, just future potential injury. Id. at 16.


49 See Resnick v. AvMed, Inc. 693 F.3d 1317, 1324 (11th Cir. 2012) (noting allegations must be fairly traceable to conduct of defendants). The plaintiffs were victims of identity theft after their unencrypted laptops containing sensitive information were stolen. Id. Despite plaintiffs' efforts to secure their information, the lack of sophisticated security left them vulnerable when the laptops were stolen. Id.
plaintiff who suffers identity theft without economic harm has standing, whereas a plaintiff who alleges future harm would not.\footnote{50}

In \textit{Clapper v. Amnesty Int'l USA},\footnote{51} a landmark decision, the Court analyzed the requirement of standing in cases regarding data breach litigation. The challenge before the Court was finding standing based on a substantial risk that harm will occur, which prompted the plaintiffs to incur costs to mitigate or avoid the harm even where it is not certain the harms they identify will come about.\footnote{52} The plaintiffs argued data breach targets personal information; and therefore a reasonable inference can be drawn that the hackers will use the victims' data for fraudulent purposes.\footnote{53} The Court analyzed the scope of Article III in relation to standing requirements in this instance.\footnote{54}
The Court determined that future information use is too speculative to satisfy the constitutional requirements of injury in order to meet standing. Additionally, the plaintiffs wanted to establish standing because of the cost of protecting the confidentiality of their communications. However, the Court determined that the argument by the respondents failed to show the injury-in-fact was sufficient because of the reasonable likelihood their communications would be intercepted. The argument that communications will be reasonably intercepted cannot be too speculative to establish injury-in-fact.

The respondents' alternative argument of the cost to mitigate damages is also not sufficiently aligned with the Second Circuit's reasonable likelihood requirement. The decision in Clapper determined standing was not found because there was an insufficient demonstration that the fear of future injury was "certainly impending," and that standing cannot be based on speculation to sue. Id. The role of Article III standing is to prevent the judicial process from being used to dilute the powers of the political branches. Id. (quoting Summers v. Earth Island Inst., 555 U.S. 488 (2009)). The standing requirement is pertinent to the case, as scrutiny must be heightened when deciding if an act of another branch of government was unconstitutional. Id.

See Clapper, 568 U.S. at 401-02 (noting future injury is too speculative to suggest threatened injury is impending); see also Whitmore v. Arkansas, 495 U.S. 149, 158 (1990) (noting injury must be impending and concrete enough to be more than hypothetical).

See Clapper v. Amnesty Int'l, 568 U.S. at 401-02 (noting alternative argument surveillance forces them to take protective measures). The court determined the respondents could not create standing by choosing to make costly decisions based on speculative future harm. Id.

See id. at 410 (noting Second Circuit's objectively reasonable likelihood standard inconsistent with certainly impending requirement to constitute injury-in-fact). The chain of contingencies would not allow respondents to show injury-in-fact. Id. Respondents' argument rests on speculation that:

1. the Government will decide to target the communications of non-U.S. persons with whom they communicate; (2) in doing so, the Government will choose to invoke its authority under section 1881(a) rather than utilizing another method of surveillance; (3) the Article III judges who serve on the [Foreign Intelligence Surveillance Court] will conclude that the Government’s proposed surveillance procedures satisfy the section 1881(a)'s many safeguards and are consistent with the Fourth Amendment; (4) the Government will succeed in intercepting the communications of respondents' contacts; and (5) respondents will be parties to the particular communications that the Government intercepts. As discussed below, respondents' theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending.

Id.

See id. at 413-14 (determining speculation does not establish injury is "certainly impending").

See id. (noting Second Circuit's analysis improperly allowed respondents to establish standing by asserting fear of surveillance). This improperly allowed the fundamental requirements of Article III to be more relaxed because the harm is not certainly impending. Id. at 1151. The Court reasoned that it had incentive to engage in many of the countermeasures that it was now taking. Id. at 417.
only on mitigation costs. In dissenting, Justice Breyer reasons that the high likelihood these communications will be intercepted is a result of the plaintiffs' motive to engage in this conversation, as well as the government's motives to conduct surveillance. The dissent also distinguishes the prior phrases the court has used to discuss the imminence concept for standing. This case is considered a landmark decision for distinguishing what is required for standing for data breach cases; future injury is not sufficient for standing if the injury is not necessarily imminent.

Post-Clapper, courts must now determine the speculative nature of the claims, and if the chain of future injury is both imminent and directly related to the defendants' actions. Many courts found the Clapper decision clarified that alleging an increased risk of identity theft does not equate a proper injury. A delay in notifying plaintiffs of a security breach, without

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60 See Clapper, 568 U.S. at 422 (noting respondents' arguments did not successfully establish standing). The dissent argued that the Court recognized there is no precise test, and that the case or controversy is a matter of degree. Id. The dissent held that the considerations, including the record and inferences, show a high likelihood the government would intercept some of these communications under statute 1881(a). Id. at 425-26.

61 See id. at 427-28 (noting government has motive to conduct surveillance of conversations of this kind). The government's past behavior shows that it has the motive and capacity to look at this type of conversation with detainees in Guantanamo and had the capacity to do so. Id. at 429. The dissent argued that the idea the injury is certainly impending has never been the touchstone of standing. Id.

62 See id. at 431-32 (Breyer, J., dissenting) (noting Court has used phrases such as "reasonable probability" or "realistic danger"). These differences tend to show the elastic nature of the imminence concept. Id. The dissent points to other areas of law where the Court has found standing from danger of sustaining direct injury in the future. Id. at 433 (quoting Pennell v. San Jose, 485 U.S. 1,8 (1988)). Probabilistic injuries have been found to be sufficient for standing as well. Id. The dissent also argues the majority's reliance on Whitmore v. Arkansas, 495 U.S. 149 (1990) was misplaced because that case involved a prisoner challenging the validity of another prisoner's death penalty. Id. at 439. This is distinguishable because in the instant case the plaintiffs are directly subjected to the future injury. Id. The word "certainly" contained in "certainly impending" does not require absolute certainty, but rather a reasonable probability. Id. at 439-40.

63 See Galaria v. Nationwide Mut. Ins. Co., 998 F. Supp. 2d 646, 654 (S.D. Ohio 2014) (noting plaintiffs rely on arguments similar to Clapper). The increased risk of identity theft, fraud, or medical fraud is not an injury-in-fact. Id. Although plaintiffs argue they are almost ten times more likely to be victims of fraud or theft, this does not show how likely they are to become victims. Id.

64 See id. (noting speculative nature of injury is evidenced by fact that occurrence depends on independent actors). "The U.S. Supreme Court is reluctant to find standing if the injury-in-fact requires actions of independent decision makers." Id. at 655 (quoting Clapper, 568 U.S. at 413).

more, still does not equate to a proper injury-in-fact. Further, the Supreme Court made clear in Clapper that mitigation costs for future identity theft are not grounds for standing. However, monetary losses stemming from the alleged access of data have are sufficient for standing. These requirements help provide fairness to defendants who have not caused any injury. This requirement protects defendants because it requires an injury be imminent, and directly attributed to their actions.

The issue of standing is simplified when identity theft results in actual injury, such as monetary loss. Further, standing is even less problematic when plaintiffs can show injury is imminent and was caused

66 See In re Barnes & Noble Pin Pad, 2013 U.S. Dist. LEXIS 125730, at *8 (indicating complaint did not indicate plaintiffs suffered impending or substantial risk of injury). Hackers stole credit card information of numerous Barnes & Noble's customers, but only one customer experienced fraudulent charges, which stopped after she contacted her credit card company. Id. at *2-3. Based on that data breach, the Plaintiffs filed a claim for a number of different types of damages including loss of privacy and expenses incurred in efforts to mitigate the increased risk of identity theft or fraud. Id. at *4. The claim of actual injury in the form of a loss of privacy was insufficient to establish standing. Id. at *11. The expenses for mitigating the increased risk of identity theft were also not sufficient for standing. Therefore, those expenses would not qualify as actual injuries under Clapper. Id. at *1.

67 See id. at *12 (noting mitigation expenses are insufficient as actual injuries even despite subjective fear). The court also found increased risk of identity theft was insufficient to establish the plaintiffs standing absent more evidence of imminent injury. Id. The court dismissed the complaint because no claim of relief could be granted. Id. at *6. "In order to have suffered an actual injury, [plaintiff] must have had an unreimbursed charge on her credit card." Id. at *16.

68 See In re Target Corp. Data Sec. Breach Litig., 66 F. Supp. 3d 1154, 1159 (D. Minn. 2014) (standing sufficient for unlawful charges, restricted bank accounts, or inability to pay bills); see also In re Michaels Stores Pin Pad Litig., 830 F. Supp. 2d 518, 527 (N.D. Ill. 2011) (holding plaintiffs' losses from fraudulent account withdrawals were actual injuries).

69 See Lewert v. P.F. Chang's China Bistro, Inc. No. 14-cv-4787, 2014 U.S. Dist. LEXIS 171142, at *9 (N.D. Ill. Dec. 10, 2014) (finding no reason to believe identity theft protection was necessary after plaintiff canceled affected card). Plaintiff did not allege identity theft had occurred; they merely stated because of security breaches it could happen which is a claim too speculative for imminent harm. See id. As a result, the potential for identity theft to occur in future years was not sufficient to find standing in that instance. Id. There was no reason to continue paying for identity theft protection after plaintiff canceled the card because the potential risk was moot. See id. at *10.

70 See In re Zappos.com, 108 F. Supp. 3d 949, 956 (D. Nev. 2015) (explaining probability of impending harm reduces as time passes without alleged future harm occurring). The increased threat of identity theft from the breach did not constitute an injury-in-fact sufficient for standing, because years passed without anyone claiming harm occurred. Id. at 958-59.

directly by the defendant.\textsuperscript{72} A determination of standing in identity theft can be made by using an analysis of the likelihood the hacker would have known to use the information.\textsuperscript{73} Although a complaint may allege a future injury, it must also allege something more concrete in order to show injury is imminent.\textsuperscript{74} An elevated risk of identity theft does not necessarily satisfy the injury-in-fact requirement.\textsuperscript{75} The Ninth Circuit acknowledged that prolonged use of credit monitoring devices may be a significant factor in assessing if an injury exists.\textsuperscript{76}

Cyber technology has become necessary for a business to function in modern society and this has undoubtedly been the primary reason for the increase in recorded data breaches.\textsuperscript{77} Some courts have held loss of electronic data does not amount to a loss of physical or “tangible” property.\textsuperscript{78} Given the increasing rate of reported death breaches in the past ten years, the

\textsuperscript{72} See United States v. De La Cruz, 835 F.3d 1, 10 (1st Cir. 2016) (noting evidence sufficiently established identity theft where defendant used victim’s name and date of birth). Evidence showed the defendant used the victim’s information to obtain unemployment benefits, and it was sufficient to establish identity theft. \textit{id.}

\textsuperscript{73} See Torres v. Wendy’s Co., 195 F. Supp. 3d 1278, 1282 (M.D. Fla. 2016) (noting case turned on when standing is established in data breach cases). The plaintiff did not allege the charges went unreimbursed by his credit union, in connection with any fraudulent charges. \textit{id.} at 1281-82. It was unclear what the out-of-pocket expenses were and if they related to the two charges the plaintiff was exposed to. \textit{id.} at 1284.

\textsuperscript{74} See Cox v. Valley Hope Ass’n, No. 2:16-cv-04127-NKL, 2016 U.S. Dist. LEXIS 119663 at *7-8, (W.D. Mo. Sept. 6, 2016) (noting cases finding standing largely contain evidence or allegations of a breach). The complaint only alleged the laptop which contained personal information was stolen; there was no suggestion the information was ever viewed or utilized. \textit{id.}

\textsuperscript{75} See Moyer, No. 14 C 561 at *14 (noting elevated risk may be too speculative to establish Article III standing). Standing must be established based on non-speculative risk of harm. \textit{id.} at *17, see also Clapper v. Amnesty Int’l, 568 U.S. 398, 415-16 (2013) (holding Article III requirements are not fluid or relaxed under certain factual circumstances). Otherwise, “an enterprising plaintiff would be able to secure a lower standard for Article III standing simply by making an expenditure based on a nonparanoid fear.” \textit{id.}


\textsuperscript{77} See Data Breaches, PRIVACY RIGHTS CLEARINGHOUSE, https://www.privacyrights.org/data-breaches (last viewed Mar. 1, 2018) (noting number of data breaches since 2005 to present is over 10,000,000,000).

\textsuperscript{78} See Am. Online, Inc. v. St. Paul Mercury Ins. Co., 347 F.3d 89 (4th Cir. 2003) (taking “tangible” to mean “capable of being touched”). The court reasoned the drive which contained the information was tangible in nature but the data stored on the hard drive was not. See \textit{id.} at 95. Accordingly, insurance policies that cover liability for physical damage to tangible property cannot be held to cover damage to data and software because they are intangible and therefore unable to be physically damaged. \textit{id.}
number of breaches in the next decade is projected to reach over 1 trillion. An increasing majority of states have enacted legislation that obligates private and government entities to notify individuals whose personal information is compromised by data breaches so they are able to take the appropriate precautionary measures. Data breaches present a pervasive problem, that is increasingly broad in scope, and continuing to evolve as new technology becomes widely utilized.

IV. ANALYSIS

Article III § 2 of the United States Constitution prescribes that regardless of the nature or specific facts of the suit, imminent injury is a necessary requirement for standing to bring an action in federal court. Although imminent injury has proven to be a difficult concept in data breach litigation and uncertain identity theft cases, the courts should not consider waiving the standing requirements to expand the pool of potential plaintiffs. Allowing claims to be heard before there is a concrete injury could create havoc in the courts and unfairly prejudice defendants who have not yet actually caused injury to the plaintiff. The minimal standard for proving injury serves to ensure a defendant could be found to have caused

79 See Anthony R. Zelle & Suzanne M. Whitehead, Cyber Liability: It's Just a Click Away, 33 J. of Ins. Reg. 6, 1 (2014) (discussing data breaches involving sensitive personal information). Insurance companies have noticed the infrastructure weaknesses and responded by creating coverage forms to protect against costs that are incurred in the event of a data breach. Id. at 2-3.

80 See id. at 3 (noting very few states lack security breach legislation). The consequences for violating these statutes vary by state. Id. California was the first state to enact a notification state, requiring businesses to disclose any known breach to any individuals whose information was acquired by an unknown or unauthorized person. Id. California's statute also declares a waiver of notice would contradict public policy and therefore would not be valid or enforceable. Id. Many states modeled their own legislation after that of California, with small variances such as in Illinois' version which requires specific, explicit language in the notification. Id. at 4.

81 See Bill Breakdown: AB 1723 (Identity Theft Resolution Act), PRIVACY RIGHTS CLEARINGHOUSE, (Dec. 7, 2016 9:15 am), https://www.privacyrights.org/blog/bill-breakdown-ab-1723-identity-theft-resolution-act (quoting Bureau of Justice Statistics reporting 17.6 million identity theft victims in 2014). An often-overlooked issue in identity theft cases is the burden of clearing the victim's name and resolving resulting credit issues can extend the negative impacts of the theft far beyond the time it takes to discover identity theft occurred. Id.

82 See U.S. CONST. art. III, § 2 (requiring "case" or "controversy" for sufficient Art. III standing); see also Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (acknowledging standing requires injury-in-fact that is concrete and imminent rather than hypothetical).


harm sufficient to satisfy the constitutional requirements for litigation.\textsuperscript{85} Allowing a suit based on potential, speculative, and invalidated claims of identity theft to proceed would unjustly subject potentially unsophisticated defendants, who do not have the means to improperly use identifying information in any way, to costly litigation.\textsuperscript{86}

The requirements for standing cannot be diminished simply because it is difficulty to prove identity theft after being a potential victim of data breaches.\textsuperscript{87} As the cost of data breach litigation and related damages continues to rise, being named as a defendant in a premature lawsuit for identity theft can result in an insurmountable expense.\textsuperscript{88} A plaintiff may bring a claim once the party can sufficiently allege that the defendant caused an injury-in-fact.\textsuperscript{89} Moreover, enforcing the requirement of standing as a prerequisite for filing a suit in identity theft cases is consistent with other areas of law, despite the difficulties posted by the requirement in the data breach context.\textsuperscript{90} Finally, after an initial determination that information has been visited online, there are steps potential victims can take to minimize the chance of identity theft that an individual could take prior to suffering an actual injury.\textsuperscript{91} To relax the standing requirements simply to account for the difficulty of identifying the injury before it occurs, is beyond the role of the courts and would unjustly burden the defendant.\textsuperscript{92}

The issue of standing is difficult because of the lack of uniform application and uncertainty as to when standing will exist in certain types of

\textsuperscript{85} See \textit{Lujan}, 504 U.S. at 561-63 (noting injury must be concrete and proximately caused by defendant's conduct). These standards ensure that a plaintiff can prove the injury is fairly traceable to the defendant. \textit{Id}.

\textsuperscript{86} See \textit{id.} at 560. (requiring causal connection between defendant's conduct and alleged injury).

\textsuperscript{87} See Whitmore, 495 U.S. at 161 (explaining constitutional requirement of standing principles).

\textsuperscript{88} See Carrie E. Cope & Ian Reynolds, \textit{Coverage Disputes Arising from Cyber Claims}, \textit{AMERICAN BAR ASSOCIATION} (Sept. 26, 2014 11:45 am), http://apps.americanbar.org/litigation/committees/insurance/articles/julyaug2014-cyber-coverage-coverage-disputes.html (noting internet economy generates between two and three trillion dollars annually and is growing rapidly). Cyber crime extracts between fifteen and twenty percent of the total monetary value created by the internet. \textit{Id}. A report by the Ponemon Institute indicates that the United States suffers from among the most costly data breaches in the world, second only to Germany. \textit{Id}. However, only 37\% of all United States data breaches are malicious or criminal in nature. \textit{Id}.

\textsuperscript{89} See \textit{Lujan}, 504 U.S. at 560 (requiring causal connection between injury and conduct traceable to defendant).

\textsuperscript{90} See \textit{FED. TRADE COMM'N}, \textit{supra} note 3 and accompanying text (noting personal information can be monitored for indications of identity theft).

\textsuperscript{91} See \textit{FED. TRADE COMM'N}, \textit{supra} note 12 and accompanying text (suggesting steps to take to reduce possibility of identity theft).

\textsuperscript{92} See \textit{Lujan}, 504 U.S. at 560 (identifying standing as constitutional requirement).
cases, such as data breach and identity theft litigation. Though Congress could assist plaintiffs by creating statutory findings of standing, they have decided not to, thereby clearly indicating all plaintiffs must satisfy the same requirements under Article III. It is currently unclear whether class action certification should occur prior to the determination of actual standing. Congress has previously facilitated plaintiffs in fulfilling the injury-in-fact requirement comes in government actions where private parties lacked the requisite standard for injury.

The constitutional requirements for standing must not be superseded by practical reality that some injuries are more difficult to anticipate. Otherwise, a defendant who has not been connected to the harm complained of could be held responsible for a speculative crime. Allegations by a plaintiff must raise the right to relief above a speculative level, a feat that is simply impossible in the realm of potential identity theft presumed on the fact that personal information was accessed by an unauthorized third party. The policy rationale behind continuing the expansion of the technology industry cannot be used to infringe on a defendant's right not to be burdened with litigating a case that does not hold the required and necessary merits.

Although the standing doctrine has been criticized for being too rigid in requiring an actual injury, the doctrine is necessary for balancing the protection of an individual who is being named as a defendant. Additionally, the actual injury requirement is needed to prevent clogging

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93 See Mellon, 262 U.S. at 487-88 (identifying standing as foundational prerequisite for bringing suit in Art. III federal courts).
94 See Sapperstein, 188 F.3d at 855-56 (noting Congress could statutorily absolve standing issue if it so chose). Congress' decision evidences its intent to abstain from lowering the standing requirements despite the increasing potential for identity theft caused by the technology boom.
95 See id. (noting consistent application of standing requirement); see also Meltzer supra note 29 at 1569-70 (highlighting circuit split regarding order for determining class certification and standing).
96 See Morrison, supra note 34 at 626-27 (discussing standing requirements for executive officials).
97 See Lujan, 504 U.S. at 560 (explaining importance of standing requirement not being broadened or relaxed).
98 See id. (emphasizing expanding definition of standing would impermissibly extend federal judicial power).
99 See supra note 16 (noting plaintiff must meet standing requirements to bring suit). Proximate causation is not required, however the injury must be shown to be concrete and caused by the defendant in order for allegations to rise above the level of speculation. Id.. Without meeting this requirement, allegations are not sufficient to bring a suit. Id.
100 See Whitmore, 495 U.S. at 161 (emphasizing standing requirements are not just policy standards of practice). These standing requirements are founded in the Constitution and cannot be weakened by modern priorities or societal goals. Id.
101 See supra note 20 and accompanying text (explaining reasons why standing has been complicated and unclear issue).
courts with speculative suits brought by uninjured plaintiffs.\textsuperscript{102} Furthermore, without standing, if a potential law inflicted negative effects on a class of people, the entire class would be able to bring a suit based merely on the existence of the law rather than actual infliction of an injury.\textsuperscript{103} The source of the alleged injury must be ascertained after the information has been exposed to an unauthorized third person.\textsuperscript{104}

Specifically pertaining to data-breach litigation, a plaintiff is not found to have suffered an actual injury unless the allegations rise above speculation that their information has been accessed.\textsuperscript{105} The inconsistency in circuit decisions regarding attainment of an injury after information is vulnerable to inspection is hazardous because it incentivizes forum shopping.\textsuperscript{106} In some instances, if there is evidence the accessed information was used for malicious purposes, then it may be a different cognizable injury that correlates to litigation before actual injury.\textsuperscript{107} However, these instances

\begin{itemize}
\item \textsuperscript{102} See supra note 21 and accompanying text (requiring distinct and palpable injury to bring suit); see also supra note 22 and accompanying text (noting Article III requirement embodies policy goals). The individual bringing suit should be more than a mere bystander witnessing injury of another. \textit{Id.} Absent such a standing requirement there would be difficulty in distinguishing bystanders from individuals who actually experienced the complained injury. \textit{Id.}
\item \textsuperscript{103} See \textit{Whitmore}, 485 U.S. at 161 (explaining interpretation of certain statutes may allow frivolous claims by particular class of people). An individual is required to show injury was suffered directly as a result of enforcing a particular law—otherwise there is no injury-in-fact as required by Art. III. \textit{Id.} Such an interpretation of a law could confer standing even though a court may later find no standing to exist. \textit{Id.}
\item \textsuperscript{104} See supra note 24 (expressing concept of standing considerably difficult to determine in certain types of lawsuits).
\item \textsuperscript{105} See cases cited supra note 35 (discussing instances where courts found no injury-in-fact when private data was wrongly accessed). Circuits disagree on whether accessing data, absent improper use, is sufficient to constitute an injury-in-fact. \textit{Id.}
\item \textsuperscript{106} See cases cited supra note 35 and accompanying text (noting inconsistency amongst Ninth and Third Circuit). The Third Circuit found no injury when a person accessed but did not use plaintiffs' data. \textit{Id.} Alternatively, in \textit{Krottner}, the court found injury when plaintiffs merely had an increased risk of harm from laptop theft. \textit{Id.} These two viewpoints exemplify the difference between circuits where an injury-in-fact occurs. \textit{Id.} In both instances, the courts analyzed claims after the information was accessed, but before the injury could be traced or was concrete. \textit{Id.} The opposite outcome of each case suggests an uncertainty amongst circuits in this area of law and a need for further clarity when ordering data breach litigation. See also \textit{Reilly}, 664 F.3d at 43-46. But see \textit{Krottner}, 628 F.3d at 1143.
\item \textsuperscript{107} See \textit{Pisciotta}, 499 F.3d at 634 (identifying Seventh Circuit decision satisfying risk of data theft standard after information accessed). The malicious hacker's sophistication and the evidence showing the hacker obtained the information for malicious purposes, created more of a foreseeable issue. \textit{Id.} at 632. Since the plaintiff had not alleged complete financial loss, the court held it was not an injury-in-fact, nor was it concrete enough under typical standing requirements. \textit{Id.} There was no injury founded unless one assumed the identity theft was going to happen from the data breach. \textit{Id.} at 634. However, the court found standing because the future harm would not have been there absent of the defendant's actions. \textit{Id.} Although the court found standing simply because the future harm could not potentially be foreseen without this initial move, there was no argument an injury occurred at the time the court analyzed the complaint. \textit{Id.} at 638-39.
\end{itemize}
should not give rise to a finding of an injury-in-fact absent a concrete injury because more is required than mere guessing and assessing potential future problems.\textsuperscript{108} Failure to require a concrete injury can result in a charge that will never occur and require a court to estimate the extent of what that damage could potentially occur.\textsuperscript{109} These problems are becoming nonexistent in cases where the plaintiff has suffered an actual injury, as the requirement for showing an injury can be met without estimating what can happen between information being compromised and a possible identity theft.\textsuperscript{110}

Allowing claims to be heard before evaluating necessary standing will not be efficient for courts and prejudice defendants who are innocent of the claim in question.\textsuperscript{111} Defendants should fairly receive protection from proceedings that do not meet the requisite level of standing; or else defendants will have an unfair expectation of defending themselves in a lawsuit where no injury occurred.\textsuperscript{112} A potential factor to consider is if the hacker was malicious or otherwise advanced, as opposed to novice and unsophisticated in accessing the information.\textsuperscript{113} A malicious or advanced hacker more likely show the need for monitoring devices, however, there are

\textsuperscript{108} See Pisciotta, 499 F.3d at 634 (explaining no financial loss or injury when plaintiff filed complaint).

\textsuperscript{109} See Resnick, 693 F.3d at 1323 (noting plaintiffs experiencing identity theft need concrete injury to receive monetary damages). If the plaintiff suffered identity theft, then they will have concrete injuries required under the Article III standing doctrine. \textit{Id.} Furthermore, in \textit{Resnick} the plaintiffs suffered identity theft when the defendant failed to secure the stolen information when fraudulently opening bank accounts and using the information for other subsequent transactions. \textit{Id.}

\textsuperscript{110} See \textit{id.} (highlighting injuries suffered met standing requirement). Courts can redress and give remedy for previously occurring injuries, as they can show the injury's basis is on the actions or failure to secure the plaintiffs information. \textit{Id.} at 1324. Without pleadings showing the connection between the two instances, the only way a plaintiff can show who caused the injury is by evidencing the timing of the two incidents. \textit{Id.} Timing does not show clear intention of standing or the proper and appropriate use of courts for bringing claims in a lawsuit. \textit{Id.}

\textsuperscript{111} See Stollenwerk, 254 F. Appx at 667 (noting time and sequence alone insufficient to warrant identity theft action). In Stollenwerk, the court determined there was a causal relationship because the plaintiff gave the defendant personal information, and the fraudulent transactions began six weeks after the plaintiff's hard drives with were stolen. Stollenwerk v. Tri-West Healthcare Alliance, 254 F. App'x 664, 667 (9th Cir. 2007). Additionally, the court noted if the claim was based on time alone, than the claim would be lacking the explanation of a logical relationship between the two events which would be sufficient enough to create standing. \textit{Id.}

\textsuperscript{112} See supra note 38 and accompanying text (noting, standing is insufficient on timing of circumstances if no logical relationship between events exists).

\textsuperscript{113} See Krottner, 628 F.3d at 1143 (finding investigation produced evidence hack malicious rather than novice). No person in the class claimed they suffered monetary loss, but the investigation showed that their banking information had been accessed in the breach which led to individuals requesting monitoring of their information. \textit{Id.} The court used Hendricks to support that there was no state law that viewed the purchase of a creditor monitoring device as a loss. \textit{Hendricks}, 444 F. Supp. 2d at 783.
still circuits finding these monitoring devices are insufficient for the purposes of constituting a loss. In all instances, the plaintiff must have expressed an injury that is both established and concrete to withstand a motion to dismiss the case, otherwise the injury is simply insufficient to continue with litigation. Despite a court finding sufficient constitutional standing from the defendant’s actions, the court must also find a sufficient basis for relief to ensure they are hearing an appropriate case-in-controversy. Absent immediate injury, it is simply unfair to hold future speculative injury against a defendant when no proximate injury can be found. A court is more likely to hold for measures to prevent the effects of identity theft when actual injuries occur rather than speculative or potential injuries. Future potential injury, even in situations where access of the information occurred, can cause the court to have a lack of subject matter jurisdiction. In fairness, even if the plaintiff did not suffer monetary loss in connection with identity theft, any facts pointing to the occurrence of identity theft will be found sufficient.

Article III is a requirement to ensure that jurisdiction is found in a case or controversy, and not anything more or less unclear than that to reach

114 See Pisciotta v. Old Nat’l Ban Corp., 499 F.3d 629, 630-33 (explaining loss not created by purchasing credit monitoring device). These preventative devices cannot be seen as a loss when they are potentially purchasable. Id.

115 See cases cited supra note 44 and accompanying text (emphasizing to move past dismissal motions must express sufficient injury). In Lambert, the court determined that the theft and monitoring prevention was an injury-in-fact because the plaintiffs faced increased risk of identity theft. 517 F.3d at 435. The circuits have held that a defendant’s inability to secure personal information has created standing on preventative measures because the defendant caused the compromise of sensitive information. Id.

116 See Giordano v. Wachovia Sec., LLC, No. 06-476, 2006 U.S. Dist. LEXIS 52266 at *5 (D.N.J. July 31, 2006) (noting courts still need basis for relief after meeting constitutional needs). Injury for standing is one piece; the subsequent issue is the basis for remedial relief from the court. Id. In Giordano, the court determined that credit monitoring did not constitute an injury necessary for standing. Id. The issue can become null when there is no possibility for relief without a sufficient injury to remedy. Id.

117 See supra note 47 and accompanying text (requiring plaintiffs show immediate injury for satisfying standing requirement). Other courts have held that alleged damages are not sufficient injury-in-fact unless there is a definitive immediate injury. Id.

118 See supra note 47 and accompanying text (noting actual identity theft clear factor in complaint allegations). Including actual injury in the complaint absolves the issue of the court inappropriately, granting a remedy for an injury that will never exist. Id. This is an important factor to prevent compensating a plaintiff that did not suffer harm and reduces the burden placed on a defendant who would be forced to face unfair mitigation expenses. Id.

119 See supra note 47 and accompanying text (explaining courts absent injury court may lack subject matter jurisdiction). Potential injury does not equate to an injury that a court can easily remedy and address, thus, causing an issue of lacking subject matter jurisdiction. Id.

120 See cases cited supra note 50 and accompanying text (noting actual injury without monetary loss still sufficient for standing). Standing can be found without injury but, courts will be face with determining if the claim is cognizable. Id.
the judicial branch before a court can entertain the action. Plaintiffs cannot decide to make costly decisions to monitor credit and personal information online and then use those costs to invoke standing without a concrete injury. Although the case or controversy requirement is a matter of degree, these instances do not constitute an injury-in-fact sufficient for standing because they do not meet the necessary requirements under the standard.

Although data accessed by an unauthorized individual causes a need for concern, this concern cannot create a sliding scale to constitute standing prior to a certain or impending injury. Courts involved in data breach cases must provide deference to potential defendants by not allowing frivolous claims with potential allegations that the plaintiff's data was seen or accessed by the defendant because there is no showing of imminent injury. In those instances, there is nothing that can show the injury is imminent and therefore appropriate to bring suit. Although the dissent in Clapper v. Amnesty International argued that the word "certainly" contained within the phrase "certainly impending" requires a reasonable probability of harm rather than a certainty of injury to the plaintiff, this argument still falls short of the necessary standing requirements. In cases where there is a potential or uncertain access of the plaintiff's information, there is not a reasonable probability that the individual will then use the information in a way to cause the type of harm, which is required to bring a claim. As the majority correctly concluded, alleviating the rigid burden of showing a necessary imminent injury would open the courts to a multitude of baseless claims.

121 See Clapper, 568 U.S. at 407 (explaining standing required to sue under case or controversy requirement). The role of Article III is to prevent diluting standing so the courts do not hear speculation. Clapper v. Amnesty Int'l USA, 568 U.S. 398, 407 (2013).
122 See supra note 56 and accompanying text (highlighting standing insufficient in decisions based on fear of future harm). Imputing these decisions do not create standing unless there is a solid basis for the reasoning behind the preventive measures. Id.
123 See supra note 60 and accompanying text (explaining injury-in-fact matter of degree according to dissent).
124 See supra note 61 and accompanying text (stating injury cannot just be highly likely but must be sufficiently impending). Despite past behavior of the government in Clapper, there must be more than just a potential likelihood for a desire to access material. 568 U.S. at 427-28.
125 See cases cited supra note 62 and accompanying text (discussing dissent and majority view on imminence of injury).
126 See cases cited supra note 62 and accompanying text (emphasizing mandatory requirement injury is impending and not speculative).
127 See Clapper, 568 U.S. at 431-34 (clarifying the certainty requirements).
128 See Clapper, 568 U.S. at 433-49 (discussing language "certainly impending" arguably problematic). This requirement or flexibility allows plaintiffs to allege reasonable probability standing. Clapper, 568 U.S. at 431-32.
129 See Galaria, 998 F. Supp. 2d at 654 (holding requirement of necessary imminence for standing to be sufficient probability to bring claim).
In data breach cases, increased risk of identity fraud or theft must be shown to be clearly imminent to have constitutional standing under Article III, regardless of the sometimes illusive nature of future injury claims. If an allegation of increased risk of identity theft could establish standing, then charging a defendant with a speculative risk of an injury, absent any evidence of actual injury would be unfair. The defendant should not bear the burden of attempting to show they will not cause harm, absent standards to particularize the injury and ensure it is within imminent time. The defendant's protection must be equal to the plaintiff's to ensure fair proceedings throughout the judicial process. The cost for mitigating increased risk of identity theft can be expensive, and if these costs can be seen as an injury, then the defendant can always be charged, so long as the plaintiff took the steps to incur mitigation expenses.

A reasonable requirement will not necessarily contravene plaintiffs from bringing a suit when they have appropriate injury or certain impending injuries from data breaches. If personal information has been used for identity theft or fraudulent conveyances, the plaintiff will still be able to seek remedial measures. Here, the issue is the matter of bringing a claim before

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130 See id. (discussing increased identity theft risk not actual injury-in-fact). This is critical to prevent forced litigation on a defendant who did not cause an actual injury-in-fact, or showing to necessarily be causing an injury-in-fact in the near future. Galaria v. Nationwide Mut. Ins. Co., 998 F. Supp. 2d 646, 654 (S.D. Ohio 2014). Despite the plaintiffs in Galaria being ten times more likely to be fraud victims, it is not the likelihood of injury that will allow a plaintiff to bring a data breach claim. Id. A likelihood of injury does not establish actual injury, nor can it replace the injury requirements. Id. Absent these injuries, standing is not sufficient if only based on future injuries. Id. Otherwise, there would be a rebuttable presumption for standing, burdening the defendant to also provide evidence that there is not enough injury for standing. Id. As the plaintiff is the party seeking remedy in the court, it is understandable they must furnish evidence that standing is proper and therefore their case may continue. Id.

131 See supra note 65 and accompanying text (indicating allegations of future injuries not sufficient unless certain). Requiring an injury-in-fact and showing it to be traceable to the defendants is necessary to establish constitutional standing to bring a claim in front of a court. Books v. City of Ekhart, 235 F.3d 292, 299 (7th Cir. 2000). Absent these injuries, standing is not sufficient if only based on future injuries. Id. Otherwise, there would be a rebuttable presumption for standing, burdening the defendant to also provide evidence that there is not enough injury for standing. Id. As the plaintiff is the party seeking remedy in the court, it is understandable they must furnish evidence that standing is proper and therefore their case may continue. Id.

132 See supra note 65 and accompanying text (stating sufficient standing required for court to have constitutional power to hear).

133 See cases cited supra note 65 and accompanying text (indicating future injury too speculative and is not actual injury for constitutional purposes). Absent these safeguards, a plaintiff could begin litigation on a defendant who has not availed himself or been charged with any injury capable of being noted. Id. The design of standing is to prevent such speculative nature. Id.


135 See Clapper, 568 U.S. at 409-10 (explaining injury will establish standing).

136 See In re Target Corp., 66 F. Supp. 3d at 1159 (explaining standing met when plaintiffs suffered fraudulent charges and restricted bank accounts). In instances of actual injury, the plaintiff will have the ability to seek judicial relief if they suffered monetary losses from fraudulent activity. In re Michaels Stores Pin Pad Litig., 830 F. Supp. 2d 518, 527 (N.D. Ill. 2011).
knowing that an injury will certainly occur, rather than waiting to adjudicate a certain claim on its merits.\textsuperscript{137} Creating standing before injury requires a lot of discretion, such as, choosing different types of mitigation protection, canceling credit cards and using monitoring devices.\textsuperscript{138} Standing exists once an injury has actually occurred, or if there is sufficient evidence to show an injury is certain to happen.\textsuperscript{139} The standing requirements involving an injury simply prohibit claims that have insufficient evidence to bring about a cause of action.\textsuperscript{140} In instances of concrete injury, the standing issue is obsolete and this necessary safeguard for defendants does not hinder a plaintiff who suffered an injury.\textsuperscript{141} Absent requiring sufficient injury, a device allegedly stolen could equate a data breach, so long as there is personal information on the device.\textsuperscript{142}

The Article III requirements are standards that the court must apply uniformly to hold regulatory weight in a judicial procedure.\textsuperscript{143} Article III standing must not be conferred on an unfounded, subject paranoia of potential identity theft, absent required evidence of an actual injury.\textsuperscript{144}

\textbf{V. CONCLUSION}

The defendants in data breach cases must receive protection from lawsuits that are unfair, unreasonable, or otherwise frivolous without further evidence of an injury. The injury must be concrete or imminent for a plaintiff

\textsuperscript{137} See cases cited supra note 68 (reviewing instances where injury-in-fact met, granting plaintiffs sufficient standing).


\textsuperscript{139} See supra note 71 and accompanying text (explaining standing clearly established where plaintiff suffered injury and harm). In instances where the defendant had already alleged theft of funds, then the injury establishes as certainly impending. \textit{Id.}

\textsuperscript{140} See supra note 71 and accompanying text (stating concrete and previously occurring injuries sufficient). These parties may come to court once they have experienced monetary damages from identity theft or have evidence that identity theft occurred. \textit{Id}

\textsuperscript{141} See United States v. De La Cruz, 835 F.3d 1, 10 (1st Cir. 2016) (discussing concrete injury sufficiently establishes claim for standing).

\textsuperscript{142} See Cox v. Valley Hope Ass’n, No. 2:16-cv-04127-NKL, 2016 U.S. Dist. LEXIS 119663 at *7-8 (W.D. Mo. Sept. 6, 2016) (noting stolen laptop absent proof information viewed or used does not show imminent injury). Aside from the stolen laptop, the record had no evidence to establish anything further occurred this far, and there was nothing to indicate that there was a certain impending injury regarding the information stored on the device. \textit{Id.}

\textsuperscript{143} See cases cited supra note 75 and accompanying text (noting Article III does not lower court’s standard).

\textsuperscript{144} See cases cited supra note 75 and accompanying text (explaining unfounded fears should not be found sufficient to create standing).
to fairly bring a claim that is applicable for adjudication. When there is no evidence of an injury occurring or that will occur potential identity theft is not sufficient. Defendants must fairly receive protection from unfair and nonexistent claims.

The requirement of standing ensures courts are not adjudicating claims that would never come to light, and to further ensure that justice is given to both the plaintiff and defendant. Absent a need for showing cause, every potential lost phone or computer containing sensitive information threatens to cause expensive burdens for a defendant. As our technology continues to advance and our dependency on virtually stored information increases, we must ensure defendants meet the justice of injury requirements prior to the enforcement of litigation against a plaintiff. Therefore, the holding in Clapper must stand and be expanded on to allow for more rigid standards of sufficient injury on a plaintiff’s behalf prior to bringing a lawsuit.

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