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Two Courts Dismiss Data Privacy Cases for Lack of Standing

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Recent years have seen an explosion of "breach of privacy" cases, as plaintiffs and the courts continue to grapple with the problem of translating evolving standards of privacy protection into viable private causes of action. Bank of America recently prevailed in two novel cases, which plaintiffs contended they were injured, based on unfounded speculation that their private financial information had been accessed by U.S. and foreign governments when that information was allegedly transferred to overseas data and consumer service telephone centers. The courts in these actions ruled that plaintiffs who contend they were injured by a violation of their rights under privacy statutes such as the Right to Financial Privacy Act must offer something more than a subjective belief that a violation has occurred to have standing to assert a claim under Article III of the United States Constitution. The decisions in *Floyd v. Bank of America*, Case No. 2011 CA 8011 B (D.C. Sup. Ct., Apr. 27, 2012) and *Stein v. Bank of America*. Civil Action No. 11-1400 (RBW) (D.D.C., Aug. 28, 2012) confirm that Article III bars suits by plaintiffs who offer the mere suspicion that they were injured, unsupported by any facts. Morrison & Foerster represented Bank of America in both cases.

FACTS

Plaintiffs in *Stein* and *Floyd* are Bank of America customers who claimed that by transmitting customers' financial data to overseas call centers, the Bank exposes customers' financial information to unbridled surveillance by the U.S. government, which, plaintiffs alleged, covertly intercepts "all" or "substantially all" electronic transmissions outside U.S. borders. The *Stein* plaintiffs argued, on behalf of a nationwide class of Bank customers, that transmitting their financial information to overseas call centers amounted to "providing" their financial data to the government in violation of the Right to Financial Privacy Act ("RFPA"), as well as an involuntary forfeiture of privacy rights they contended they had under the Fourth Amendment, the Foreign Intelligence Surveillance Act, and other laws. Plaintiffs in *Floyd* argued that Bank of America did not notify them that these alleged "waivers" had occurred, thereby violating the District of Columbia Consumer Protection Procedures Act ("CPPA"). No plaintiff in either case alleged any facts suggesting he or she (or any Bank customer) had been the object of active government surveillance. Plaintiffs offered only the "belief" that each had received customer service from a foreign national.

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BOTH ACTIONS DISMISSED FOR LACK OF STANDING

Adopting arguments asserted by the Bank in its motions to dismiss, both courts held that plaintiffs had suffered no legally cognizable injury supporting standing under Article III and dismissed the complaints in their entirety.

Although plaintiffs in *Floyd* complained that Bank of America had invaded their right to be free of deceptive practices under the CPPA, Judge Laura A. Cordero observed—relying on recent precedent from the D.C. Court of Appeals—that plaintiffs still must allege "a distinct and palpable injury to [themselves']" to have standing. It was not enough, the court said, for plaintiffs to subjectively believe that their financial information had been disclosed to the government. To support Article III standing, the claimed injury "must be based on something more than just [Plaintiffs'] belief. It cannot be hypothetical." Because plaintiffs had "not demonstrated that there is a threatened or actual injury that resulted from Defendants' actions by use of foreign call centers," the court dismissed plaintiffs' claims.

In the *Stein* action, Judge Reggie B. Walton noted that the RFPA only creates an injury where a financial institution "provides" or "releases" customer financial information to the government. In dismissing plaintiffs' claims, Judge Walton stressed the "utter failure of the Second Amended Complaint to offer any facts upon which this Court could conclude" that Bank of America had provided the government with plaintiffs' financial records. "The plaintiffs' allegations," the court concluded, "are literally rooted in belief and suspicion, as these two words appear frequently in the Second Amended Complaint. And belief and suspicion are quite far from the 'concrete and particularized,' and 'actual' or 'imminent', not 'conjectural' or 'hypothetical' requirements of [Article III] standing."

Judge Walton also observed that the complaint contained no detail regarding how the plaintiffs were able to discern the nationality of the Bank of America representative who answered their calls. "The irony of the plaintiffs'—two individuals seemingly quite concerned with the protection of individual liberties from unwarranted invasion—'belie[fs],' which were apparently derived from no more than sound of voice, as to the nationality of the Bank of America representatives is not lost on the Court," he noted.

WHAT *STEIN* AND *FLOYD* MEAN

These decisions affirm that plaintiffs asserting a statutory violation as the basis for their injury must plead facts that could constitute an injury under the statute in question to support Article III standing. For instance, the RFPA creates an injury where a financial institution gives a customer's private information to government authorities and fails to follow specified procedures; but the *Stein* plaintiffs offered no facts suggesting that that was the injury they suffered.

The decisions also stand for the proposition that speculation alone cannot support constitutional standing. Even where plaintiffs' injury may be difficult to ascertain, to pursue claims in a court bound by Article III, plaintiffs must allege *some* facts suggesting that they actually or likely suffered the violation of which they complain.

CONCLUSION

Those who oppose the outsourcing of customer service will continue to seek judicial routes to achieve what has not been done legislatively to date: limiting the ability of businesses to provide customer service overseas, or at least imposing strict notice requirements on businesses that choose to do so. The dismissal of the novel claims in *Stein* and *Floyd* remind would-be plaintiffs that courts only have the power to remedy real disputes, and that plaintiffs must offer more than their suspicion of outsourcing to sustain a claim under Article III.

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