

## Supreme Court forgoes review on standing in data breach case

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**Last Monday**, the Supreme Court denied CareFirst, Inc.'s writ of certiorari in a class action lawsuit filed by policyholders in the wake of an alleged data breach in June 2014. Had it been granted, [\*Attias v. CareFirst, Inc.\*, 2018 U.S. LEXIS 1356 \(U.S., Feb. 20, 2018\)](#) would have been the first time the Court addressed whether an increased risk of future identity theft constitutes a cognizable injury under Article III of the U.S. Constitution in a data breach case.

**The Breach.** The health insurer was the victim of a cyberattack in June 2014 when hackers gained access to a server containing the names, subscriber identification numbers, account usernames, email addresses, and birth dates of over 1 million policyholders in Maryland, Virginia, and D.C. The company discovered the breach in April 2015 and notified its customers the following month.

**The lawsuit.** On June 1, 2015, plaintiffs filed a class action claiming CareFirst failed to respond in a manner that would allow them to take immediate protective action and properly maintain their information in accordance with its own privacy policy and industry standards.

**Whether the future threat of identity theft is enough for standing.** Federal courts must have subject matter jurisdiction over a plaintiff's claim. This includes demonstrating he or she suffered a viable injury for which the court can grant relief. In data breach cases, district and circuit courts have created a hodgepodge of decisions regarding whether the mere risk of identity theft and financial fraud is sufficient alone to meet this standard. This was the issue in [\*Attias v. CareFirst, Inc.\*](#)

The U.S. District Court held the risk of identity theft was not a viable injury; this was reversed on appeal by the Sixth Circuit who said it was, in addition to the costs associated with post-breach mitigation efforts (purchasing credit and identity theft monitoring services). CareFirst filed a writ of certiorari asking the Supreme Court to reverse the Sixth Circuit's ruling and uphold its dismissal. Instead, the Court denied to review the matter thereby keeping the suit in play.

**What does this mean?** Simply put, [\*Attias\*](#) is the latest evidence of a deepening challenge for defendants seeking dismissal at the outset of litigation. Early on, many courts dismissed claims like those made by the [\*Attias\*](#) plaintiffs on the basis that they were too attenuated to warrant legal relief. However, over the last decade, there has been a trend towards keeping these claims alive. As such and where able, defendants likely stand the best chance of dismissal where they can show no or little risk exists for future identity theft.

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**About the author.** Steven is an attorney in our Lafayette office. A Certified Information Privacy Professional/United States, his practice focuses on representing companies of all shapes and sizes in a variety of areas, including data security-related litigation and corporate planning matters.

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