



ST. THOMAS JOURNAL OF COMPLEX LITIGATION

Volume 6

Spring 2020

A CONSUMER'S RECOVERY OF DAMAGES FOR LOST PERSONAL TIME: HAS THE GM IGNITION SWITCH LITIGATION IGNITED A PARADIGM SHIFT?

Michael W. Pinsof

**A CONSUMER'S RECOVERY OF DAMAGES FOR LOST PERSONAL TIME:
HAS THE GM IGNITION SWITCH LITIGATION IGNITED A PARADIGM SHIFT?**

Michael W. Pinsof*

“Lost time is never found again” – Benjamin Franklin¹

Over two centuries ago, Benjamin Franklin recognized the intrinsic and fleeting value of one’s time.² How many countless hours of our precious personal time have we spent reacting to data security breaches, complying with product recalls, rectifying a billing or account statement issue, or enduring the hassles of a flight cancellation? When analyzed within the traditional bounds of contract and tort law, common law has almost uniformly rejected the notion that an aggrieved plaintiff should be awarded compensation for his or her lost personal or leisure time, unless it is directly linked to lost earnings or earning opportunities.³ Succinctly summarizing the prevailing state of the law in the context of a class action, in a 2010 opinion, one state Supreme Court observed that “the time and effort expended by the plaintiffs [in attempting to clear their credit and restore their identity in response to a data breach] represent[s] ‘the ordinary frustrations and inconveniences that everyone confronts in daily life.’”⁴

The response to a 2018 class action articulated an alternative judicial approach. Plaintiffs from a majority of states alleged that General Motors had installed defective ignition switches.⁵ The United States District Court for the Southern District of New York issued an encyclopedic ruling, undertaking to interpret and opine on the law of the forty-seven states represented in the litigation.⁶ The court concluded that under the consumer protection statutes enacted in six of the forty-seven states and the common law of one state, plaintiffs may be entitled to recover for lost free-time for, amongst other time-consuming tasks, taking their vehicles into the dealer for replacement of defective switches.⁷

This article traces the path of decisions and settlements that have followed in the wake of *GM LLC Ignition Switch Litig.*, some involving major data breach class actions against high-profile defendants including Facebook, Barnes & Noble, Sonic, Marriott, Chipotle, and Saks Fifth Avenue/Lord & Taylor.⁸ In these cases, courts have taken a more consumer-friendly approach to

* *Principal of Law Offices of Michael W. Pinsof, P.C., Northfield, Illinois. Adjunct Professor of Paralegal Studies at Roosevelt University, Chicago, Illinois. B.A., University of Iowa, 1976; J.D. DePaul University College of Law, 1979.* I would like to dedicate this comment to my grandchildren, Reya, Jordan, Devin, Benjamin, and Levi, in the hope that they will always be imbued with a thirst for learning.

¹ National Archives, Founders Online, “*Poor Richard, 1747*”, <https://founders.archives.gov/documents/Franklin/01-03-02-0045>.

² *Id.*

³ *See In re GM LLC Ignition Switch Litig.*, 339 F. Supp. 3d 262, 309 (S.D.N.Y. 2018) (observing that forty-one of the forty-seven contested states in the subject class action suit limited lost time damages to lost income or earnings).

⁴ *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 2010 ME 93, ¶ 16, 4 A.3d 492, 497.

⁵ *See generally In re GM LLC Ignition Switch Litig.*, 339 F. Supp. 3d.

⁶ *See id.*

⁷ *See id.* at 275, 329 (exemplifying how the court’s broad construction of the New York General Business Law would support a claim for damages for lost personal time, based primarily upon a state appellate court ruling which held that “a person who traveled to a defendant’s showroom on the basis of a misleading and deceptive ad . . . suffered harm”, and was entitled to recover statutory damages (citing *Beslity v. Manhattan Honda*, 120 Misc. 2d 848, 854, 467 N.Y.S. 2D 471 (NY. App. Term 1983)).

⁸ *See generally In re Marriott Int'l, Inc.*, No. MDL No. 19-md-2879, 2020 U.S. Dist. LEXIS 30435 (D. Md. Feb. 21, 2020) (holding that Marriott allegedly compromised consumers’ personal information); *see also In re Sonic Corp.*

recognizing the legal vitality of claims for lost personal time. Many of these cases have been decided in the context of plaintiffs surviving 12(b)(1) Motions to Dismiss for lack of Article III standing, while other claims for lost personal time have lived to survive a 12(b)(6) Motion to Dismiss for failure to state a claim, under a more stringently-applied pleading standard.⁹ While this dichotomy somewhat blurs the analysis, counsel for class representatives have been more successful in gaining access to federal courts by relying on state consumer protection statutes, rather than traditional common law theories. In the year since *GM LLC Ignition Switch Litig.*, two other jurisdictions have established precedent to join the array of states that would confer standing to seek for damages for lost personal time under their respective consumer protection statutes.¹⁰ It is too early to tell whether the *GM LLC Ignition Switch Litig.* decision has illuminated a path for plaintiffs' counsel to successfully plead standing in pending and nascent class actions, or whether the rapidly evolving outcomes of subsequent judicial opinions in data security breach class actions are merely coincidental.

A more stunning paradigm shift has been evidenced by recent settlements of data breach class actions against behemoth companies such as Equifax, Blue Cross, and Yahoo!, which have enabled aggrieved consumers to file self-attesting claims for lost personal time at a fixed hourly rate.¹¹ While these complex cases continue to work their way through the courts, data breach class actions appear to have opened a narrow niche in which the value of a consumer's personal time is gaining increased legal recognition as a compensable commodity in American jurisprudence.

For this reason, Section I of this note traces the evolution of judicial decisions through most of the first two decades of the 21st century, during which consumers' claims for non-economic damages for lost personal time were almost uniformly denied, and examines legal scholarship questioning the rationale of those cases. Section II suggests a possible crack in the foundation of the prevailing judicial view, delineated by a class action adjudicating the claims of millions of consumers who were compelled to bring their vehicles into a dealership for replacement of a defective part, in which the Court forgoes the application of a common law analysis for state statutory analysis. Next, Section III examines recent case law in which state consumer protection statutes have, in an increasing number of cases, been successfully applied to withstand challenges to standing on claims of lost time damages in data security breach class actions; discusses a parallel line of cases interpreting federal statutes; and notes recent settlements in class actions which allow consumers to submit undocumented claims for lost personal time damages absent any economic harm.

The path forward to clarity and consistency will not be effectively paved if left to federal judges sitting in strategically selected venues applying a patchwork of state consumer protection

Customer Data Sec. Breach Litig., No. 1:17-md-2807, 2019 U.S. Dist. LEXIS 135573 (N.D. Ohio Aug. 12, 2019) (holding that Sonic drive-in restaurant failed to take reasonable precautions to prevent customers' credit card data from being stolen); *see also* Gordon v. Chipotle Mexican Grill Inc., 344 F. Supp. 3d 1231 (D. Colo. 2018).

⁹ *See generally* Pruchnicki v. Envision Healthcare Corp., No. 2:19-CV-1193 JCM (BNW), 2020 U.S. Dist. LEXIS 28713 (D. Nev. Feb. 20, 2020) (articulating the distinction in pleading requirements between a 12(b)(6) Motion to Dismiss for failure to state a claim and a 12(b)(1) Motion to Dismiss for lack of standing, including how some courts have conflated the two).

¹⁰ *See generally* Bass v. Facebook, Inc., 394 F. Supp. 3d 1024 (N.D. Cal. 2019) (applying California statutes); *see also* Rudolph v. Hudson's Bay Co., No. 18-cv-8472 (PKC), 2019 U.S. Dist. LEXIS 77665 (S.D.N.Y. May 7, 2019) (applying California statutes as well); *see also* Gordon, 344 F. Supp. 3d (applying California, Illinois, and Missouri statutes).

¹¹ *See infra*, Section III(C).

statutes in massive data security breach class action litigation. Accordingly, Section IV concludes by urging Congress to expand the applicability of remedies available under existing federal legislation, and to adopt a meaningful administrative framework for enforcing private rights of action to recover the value of lost personal time in responding to data security breaches.

I. Hannaford – A “Benchmark” Decision

As always, there were outliers to the traditional judicial hostility toward awarding lost-time damages. A group of consumers for whom at least one federal district court strained to craft a more liberal remedy was commercial airline passengers.¹² One of the first courts to bend over backwards to recognize the value of, and award damages for, lost personal time, was the Southern District of New York in its 1988 decision in *Lopez v Eastern Airlines*.¹³ In *Lopez*, the plaintiff alleged that he was “bumped” from a domestic flight as a result of overbooking, suffering a delay of only three to four hours.¹⁴ Notwithstanding the relatively short delay, and that the plaintiff, (literally) “got to the church on time” for the wedding he was invited to attend, the court entered judgment in favor of Mr. Lopez for his lost time in the nominal amount of \$450, on a breach of contract theory.¹⁵ In so holding, the court stated, “inconvenience, delay and uncertainty are worth something even in the absence of out of pocket costs . . . (s)uch frustration, pain, and anxiety are real and compensable.”¹⁶

However, judicial reluctance to award such lost time damages did not escape scholarly criticism. In his prescient 2002 article, Professor Leonard E. Gross evaluated the then-current legal landscape, and observed that courts have historically been unwilling to award damages for lost personal time, unless it involves the interference with a property interest.¹⁷ Gross cited sociological evidence suggesting that modern society places a higher value on personal and leisure time than in earlier times.¹⁸ Gross debunked the ineffectively articulated traditional barriers to awarding damages for lost personal time, and offered compelling econo-legal arguments as to why such awards would promote both economic efficiency and justice.¹⁹

¹² See generally *Smith v. Piedmont Aviation*, 567 F.2d 290 (5th Cir. 1978); see also *Daniel v. Virgin Atl. Airways Ltd.*, 59 F. Supp. 2d 986 (N.D. Cal. 1998).

¹³ See generally *Lopez v. East Airlines, Inc.*, 677 F. Supp. 181 (S.D.N.Y. 1988).

¹⁴ *Id.* at 182.

¹⁵ *Id.* at 183.

¹⁶ *Lopez*, 677 F. Supp. at 182-183.

¹⁷ See generally Leonard Gross, *Time and Tide Wait for No Man: Should Lost Personal Time be Compensable?*, 33 RUTGERS L.J. 683 (2002).

¹⁸ *Id.* at 691-92 (supporting this thesis with federal legislation enabling U.S. workers to obtain and enjoy free time, namely the Family Medical Leave Act (26 U.S.C. 2611 (1994)), using studies to show that time spent with one's family is the most important factor in maintaining family cohesion, and explaining that with the advent of Social Security in 1935, society placed a higher priority on planned retirement with dignity).

¹⁹ *Id.* at 692-95 (observing that from an economic perspective, “leisure time has value even though it is not bought or sold.” (citing RICHARD A. PONSER, *ECONOMIC ANALYSIS OF LAW* 17 (5th ed. 1998)), and arguing that, “if compensation and economic efficiency are our primary goals, we should be more willing to award damages for lost personal time because such awards more accurately and directly compensate victims than do awards of damages for pain or emotional distress.”).

The *Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, which originated in 2009 in the District Court of Maine,²⁰ represents a benchmark in the evolution of case law in this area, and forms a solid foundation and rationale for rejecting common law claims for lost personal time.²¹ *Hannaford* involved a security breach in the system of a Maine-based grocery store chain, which resulted in a class action by consumers whose data had become compromised.²² While the consumers did not suffer demonstrable financial harm or out-of-pocket losses, the Plaintiffs alleged that they were entitled to recover damages for their time and effort identifying fraudulent charges and convincing their banks and credit card companies that the charges were fraudulent and should be reversed.²³

The Maine District Court granted the Defendant's Motion to Dismiss, ruling that the plaintiffs were not entitled to recover for the "ordinary frustrations and inconveniences that everyone confronts in their daily life" since there is no way to effectively quantify such a loss.²⁴ The plaintiffs urged the District Court judge to reconsider his ruling, arguing that it was not clear how the state Supreme Court would rule if confronted with the issue of the compensability of lost personal time.²⁵ The judge granted the motion to reconsider and certified the following state common law question to the Maine Supreme Court: "In the absence of physical harm or economic loss or identity theft, do time and effort alone, spent in a reasonable effort to avoid or remediate reasonably foreseeable harm, constitute a cognizable injury for which damages may be recovered under Maine law of negligence and/or implied contract?"²⁶

It is instructive to note that the District Court's narrow framing of the certified question declines to certify the issue of damages for "time and effort" in order to include potential recovery under the Maine Unfair Trade Practices Act.²⁷ Constrained by those parameters, the Maine Supreme Court observed that the common law of negligence does not provide an adequate mechanism for quantifying damages based upon the value of lost time.²⁸ Tort law, the Court opined, provides no recourse "for the typical annoyances or inconveniences that are part of everyday life."²⁹ Contract law provides an even more restrictive vehicle for recovering compensatory damages since it requires that the plaintiff suffer some sort of direct financial loss.³⁰ The Maine Supreme Court unequivocally answered the certified question as "no," and affirmed the legal basis for the District Court's dismissal of the plaintiffs' common law claims.³¹ After *Hannaford*, the incursion of direct financial loss as a prerequisite to the recovery of damages for

²⁰ See generally *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 613 F. Supp. 2d 108 (D. Me. 2009) (describing the lengthy procedural history of *Hannaford* in the District Court of Maine, as it relates to Plaintiffs' claims for lost personal time, begins with the grant of Defendant's Motion to Dismiss).

²¹ See Caroline C. Cease, *Giving Out Your Number: A Closer Look at the Current State of Data Breach Litigation*, 66 ALA. L. REV. 395 (2014) (discussing the entire litany of the *Hannaford* litigation).

²² *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 671 F. Supp. 2d 198, 200 (D. Me. 2009).

²³ *Id.*

²⁴ *In re Hannaford Bros.*, 613 F. Supp. 2d at 134.

²⁵ See generally *In re Hannaford Bros. Co. Customer Data Sec. Breach Lit.*, 660 F. Supp. 2d 94 (D. Me. 2009) (detailing the District Court's decision to certify its rulings to the Maine Supreme Court).

²⁶ *In re Hannaford Bros.*, 671 F. Supp. 2d at 201 (emphasis added) (expanding the District Court's framing of certified questions to include the "negligence and/or implied contract" language).

²⁷ *Id.* at 200.

²⁸ *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 2010 ME 93, ¶ 8, 4 A.3d 492, 495-96.

²⁹ *Id.* at ¶ 9, 496.

³⁰ See *id.* at ¶ 15, 497.

³¹ *In re Hannaford Bros.*, 2010 ME 93, ¶ 16, 4 A.3d at 497-98.

lost personal time under traditional common law theories seemed to be a deeply-entrenched legal principle.³²

In his 2012 comment, Professor David Frisch (“Frisch”) joined the chorus of academic critics, and harshly denounced both the method of analysis and the holding of the Maine Supreme Court decision.³³ Frisch graphically described the Court as essentially adopting the “sh*t happens” approach, and reiterated Gross’s argument that economic theory would be promoted by recognizing the value of lost personal time.³⁴ In support of his thesis, Frisch observed that various federal statutes have acknowledged the value of lost personal time, and notes a tendency to construe federal statutes in favor of its recognition as a viable claim for damages.³⁵ In the same vein, Frisch was quick to point out the practical shortcomings of existing federal legislation in crafting lost personal time as a recoverable element of damages.³⁶ For example, the Identity Theft Enforcement and Restitution Act of 2008 requires convicted identity thieves “to pay ‘an amount equal to the value of time reasonably spent by the victim in an attempt to remediate the intended or actual harm incurred by the victim.’”³⁷ However, further scrutiny reveals a massive and obvious statutory loophole. In the typical real-world scenario, the actual identity thief is either untraceable or judgment-proof, which relegates the ultimate victim – the consumer – to seeking redress solely from the hacked company (who is also a victim to some extent), which is not targeted by the statute.³⁸ This absence of a comprehensive federal statutory scheme for imposing liability on personal data-holding private companies leaves a gaping void in the remedies available to consumers to seek economic or non-economic damages caused by data security breaches.

II. GM LLC Ignition Switch Litigation – A Potentially Groundbreaking Paradigm Shift?

In September 2018, eight years after the Maine Supreme Court handed down *Hannaford*, the Southern District of New York issued an impactful ruling in the course of adjudicating a massive class action involving allegedly defective ignition switches installed in GM vehicles, which allegedly caused dozens of highway deaths.³⁹

In *GM LLC Ignition Switch Litig.*, the court addressed whether the plaintiffs were entitled to recover purely lost-time damages, beyond lost earnings or income (including the value of unpaid

³² See *Forbes v. Wells Fargo Bank, N.A.*, 420 F. Supp. 2d 1018, 1020-21 (D. Minn. 2006) (illustrating this prevailing judicial postulate, the court holds that the plaintiffs’ injuries allegedly caused by their loss of time spent monitoring their credit, “are solely the result of a perceived risk of future harm” and “[f]or these reasons, plaintiffs have failed to establish the essential element of damages.”).

³³ See generally David Frisch, *It’s About Time*, 79 TENN. L. REV. 766-800 (2012).

³⁴ *Id.* at 766 (stating the court’s opinion can be fairly read in a broad sense, as categorizing two distinct sets of harms: those of the “grin and bear it” variety for which no legal recourse is available and those for which there is).

³⁵ See *id.* at 768 (noting that in *Hurry v. Jones*, 784 F.2d 879 (1st. Cir. 1984), the court broadly construed the remedies provision of the Education for all Handicapped Children Act of 1975, so as to affirm the trial court’s award of damages to the parents of a handicapped minor for the “time and effort” they were forced to spend driving their child to and from school).

³⁶ See Frisch, *supra* note 33, at 767.

³⁷ *Id.* (citing 18 U.S.C. § 3663(b)).

³⁸ See *id.* at 767.

³⁹ See Neal E. Boudette, *Supreme Court Rebuffs G.M.’s Bid to Limit Ignition-Switch Lawsuits*, THE NEW YORK TIMES (Apr. 24, 2017), <https://www.nytimes.com/2017/04/24/business/supreme-court-general-motors-ignition-flawsuits.html> (reporting that GM’s faulty ignition switches have led to at least 124 deaths).

housework).⁴⁰ The claims for lost personal time were essentially based upon the time spent by consumers bringing in their vehicles to an authorized dealer and waiting at the dealership for replacement of the allegedly defective part.⁴¹ The court painstakingly analyzed the vitality of the plaintiffs' claims under theories of both common law fraud and breach of implied warranty.⁴² Dismissing these common law claims outright, the court proceeded to evaluate the legal sufficiency of the plaintiffs' damages claims under the consumer-protection statutes of each of the forty-seven states whose resident consumers were represented in the class action.⁴³ The court found that the consumer-protection statutes enacted in six states, namely Colorado, New York, Ohio, Oklahoma, Utah, and Virginia, may allow a plaintiff to recover for either lost free or personal time beyond lost income.⁴⁴ Additionally, in one of those states, Oklahoma, the court found authority (citing a century-old case) indicating that a plaintiff might recover for lost free time under common law as well.⁴⁵

The unique decision in *GM LLC Ignition Switch Litig.* may signal a groundbreaking erosion of traditional judicial hostility shown toward awarding damages for lost personal time, and lay the groundwork for a paradigm shift.⁴⁶ The court gleamed its consumer-protective spotlight on alternate theories of recovery, namely toward state consumer protection statutes, and charted a path for consumers to recover damages for lost personal time based upon well-pleaded violations.⁴⁷ The shift in the court's perspective in the direction of state consumer-protection statutes and away from traditional common law tort and contract theories is noteworthy, to be sure. Courts seem to be more likely to infer a direct financial loss based upon lost personal time when applying a state consumer-protection statute, as opposed to common law tort and contract damage theories of recovery.⁴⁸

⁴⁰ See generally *In re GM LLC Ignition Switch Litig.*, 339 F. Supp. 3d 262 (S.D.N.Y. 2018).

⁴¹ See *id.* at 307.

⁴² See *id.* at 293-306 (examining the common law claims for fraudulent concealment, as well as common law and statutory claims for breach of implied warranty).

⁴³ See *In re GM LLC Ignition Switch Litig.*, 339 F. Supp. 3d at 277-92.

⁴⁴ See Colorado Consumer Protection Act, Colo. Rev. Stat. Ann section 6-1-113; New York General Business Law, sections 349-50; Ohio Consumer Sales Protection Act; Ohio Revised Code Ann. Sec 1345.09(A) and (B); Oklahoma Consumer Protection Act, 15 OK statutes sec. 15-753, et seq.; Utah Consumer Sales Practices Act, Utah Code Ann. 13-11-19(2); Virginia Consumer Protection Act, Va. Code Ann. Sec. 59.1-204(A); see also *In re GM LLC Ignition Switch Litig.*, 339 F. Supp.3d at 342.

⁴⁵ See *In re GM LLC Ignition Switch Litig.*, 339 F. Supp. 3d at 330-31 (citing a wrongful attachment case in which the "Oklahoma Supreme Court held that the [plaintiffs] could recover for the 'loss of time' associated with [attending] three trials," specifically referencing the fact that "the plaintiffs 'were required to travel long distances and appear in court several times'", but expressly notes the opinion was silent on the issue of lost wages or earnings (quoting *Reliable Mut. Hail Ins. Co. v. Rogers*, 160 P. 914, 917 (1916))).

⁴⁶ See *id.* at 307-32 (applying an extensive framework for analysis, and distinguishing between several categories of damages for "lost time," and opines on whether the common law of the forty-seven states represented in the class action at bar recognize each: lost time damages to earnings or income (forty-one states recognize); lost time damages for one's own household services (seventeen states recognize); lost time damages for household work performed by others, e.g., spouse or next of kin (thirty-one states recognize); and purely personal lost time damages separate and apart from earnings or income, which is the category upon which this piece focuses).

⁴⁷ *Id.* at 327.

⁴⁸ See *In re SuperValu, Inc. Customer Data Sec. Breach Litig.*, 925 F.3d 955, 963 (8th Cir. 2019) (finding that under Illinois state law, a retailer does not owe an affirmative legal duty to protect its customers' sensitive personal information from attacks by hackers).

The impact of the court's recognition of viable statutory claims for lost personal time in the six enumerated states is somewhat muddled by a series of puzzling footnotes in the opinion. When the six state consumer protection statutes are cited, footnotes reveal the dispositive fact that in four of those states (Colorado, Ohio, Utah, and Virginia), the statutes specifically state that they are inapplicable to class actions.⁴⁹ In the footnotes, the court “defers to another day” the issue of statutory exclusion of class actions from their scope.⁵⁰ One is left to ponder, was the court signaling for state legislatures to amend their respective statutes to eliminate the expressed restriction on their applicability? A more perplexing query can be raised: why would the court relegate to obscure footnotes the expressed exclusion from applicability of four of the six respective statutes to the case before it, and essentially “punt” this potentially dispositive question for future determination?

III. Navigating the Wake of GM LLC Ignition Switch Litigation

(a) State Consumer-Protection Statute Case Law

The post-*GM LLC Ignition Switch Litig.* damage claims for the value of lost personal time have not reached complete unanimity on the issue of whether such claims should survive a 12(b)(6) motion to dismiss.⁵¹ A more pronounced trend can be inferred, however, toward upholding lost personal time claims in the face of motions to dismiss for lack of standing.⁵² Ironically, subsequent to *Hannaford*, the vast majority of those cases involve class actions alleging damages from security/data breaches.⁵³

Gordon v. Chipotle, decided just days after *GM LLC Ignition Switch Litig.*, involved a security breach of the credit card information of Chipotle customers.⁵⁴ In *Gordon*, the District of Colorado addressed separate claims of plaintiffs for lost personal time,⁵⁵ brought under the California, Illinois, and Missouri state consumer protection statutes.⁵⁶ The defendant in *Gordon*

⁴⁹ *In re GM LLC Ignition Switch Litig.*, 339 F. Supp. 3d at 310 n.38.

⁵⁰ *Id.*

⁵¹ See generally *Dieffenbach v. Barnes & Noble*, 887 F.3d 826 (7th Cir. 2018) (upholding damage claims for lost personal time in the face of a 12(b)(6) Motion to Dismiss); see also *Rudolph v. Hudson's Bay Co.*, No. 18-cv-8472 (PKC), 2019 U.S. Dist. LEXIS 77665 (S.D.N.Y. May 7, 2019) (upholding damage claims for lost personal time in the face of a 12(b)(6) Motion to Dismiss as well); *contra Pruchnicki v. Envision Healthcare Corp.*, No. 2:19-CV-1193 JCM (BNW), 2020 U.S. Dist. LEXIS 28713 (D. Nev. Feb. 20, 2020) (denying damage claims for lost personal time in the face of a 12(b)(6) Motion to Dismiss).

⁵² See generally Maxwell Murray, *Stand or Sit? Article III Standing in Cases of Data Breach: A Uniform Solution*, 5 ST. THOMAS J. COMPLEX LITIG. 46 (2019) (providing a more thorough discussion of the current federal circuit split in authority surrounding Article III standing for data breach class action cases); see also Gregory Gaglione, *The Equifax Data Breach: An Opportunity to Improve Consumer Protection and Cybersecurity Efforts in America*, 67 BUFF. L. REV. 1133 (2019).

⁵³ See Murray, *supra* note 52.

⁵⁴ See generally *Gordon v. Chipotle Mexican Grill Inc.*, 344 F. Supp. 3d 1231 (D. Colo. 2018).

⁵⁵ *Id.* at 1253-54 (stating the plaintiff's claims included a wide range of time-consuming activities, including time spent communicating with their bank; obtaining fraudulent reversals to their charge card; monitoring credit card charges; addressing unauthorized account openings; and obtaining replacement credit cards).

⁵⁶ *Id.* at 1237-38 (listing statutes the claims are being brought under, including the California Customer Records Act, Title 1.81 California Civil Code 1798.80-1798.84; California Consumer Legal Remedies Act, Title 1.5 California Civil Code 1750-1784; Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1-505/12; and

essentially based its 12(b)(6) Motion to Dismiss for failure to state a claim upon the *Hannaford* decision.⁵⁷ Implicitly rejecting the holding in *Hannaford*, the District Court judge upheld the Magistrate's denial of the Motion to Dismiss the claims of all three plaintiffs, finding that the state consumer-protection statutes of each of the three states would allow recovery of the claims for lost personal time.⁵⁸ In upholding the claims of the California plaintiffs, the court relied on the 2018 Seventh Circuit opinion in *Dieffenbach v. Barnes & Noble, Inc.*,⁵⁹ which, in interpreting applicable California statutes, held that courts "have said that significant time and paperwork costs incurred to rectify violations also can qualify as economic losses."⁶⁰

Dieffenbach has carried the water as the primary authority upon which courts applying a more permissive basis for establishing Article III standing have relied. The Court in *Dieffenbach* essentially lumps the value of one's personal time in with other traditional forms of economic damages, and finds that this claim can also support a claim for damages, separate and apart from standing.⁶¹ The Seventh Circuit's clear departure from prior precedent on this issue is marked by the court's dictum that:

The plaintiffs have standing because the data theft may have led them to pay money for credit-monitoring services, because unauthorized withdrawals from their accounts cause a loss (the time value of money) even when banks later restore the principal, and because *the value of one's own time needed to set things straight is a loss from an opportunity-cost perspective*. These injuries can justify money damages just as they support standing.⁶²

In reversing the trial court's dismissal of the Complaint in *Dieffenbach*, it is notable that the Seventh Circuit essentially conflates injury with damages.⁶³ The court found that the federal rules governing pleading do not require plaintiffs to identify items of loss, or to detail of the nature of plaintiff's injury.⁶⁴ This framework of analysis is expressly or implicitly applied by the Colorado District Court in *Gordon*, and by New York and California District Courts in the opinions discussed hereinbelow.

In *Rudolph v. Hudson's Bay Co.*, the Southern District of New York interpreted California state law in a class action suit arising from a security breach of customer payment card data bases in Saks Fifth Avenue and Lord & Taylor stores.⁶⁵ The plaintiff alleged that she suffered injuries based upon the expenditure of time in dealing with the breach and obtaining a new debit card.⁶⁶ The defendant moved to dismiss, based upon both the failure to state a claim, and the plaintiff's

Missouri Merchandising Practices Act, Title XXVI Chapter 407 Missouri Revised Statutes sections 407.010-407.1500).

⁵⁷ *Gordon*, 344 F. Supp. 3d at 1253.

⁵⁸ *Id.* at 1255.

⁵⁹ See generally *Dieffenbach v. Barnes & Noble*, 887 F.3d 826 (7th Cir. 2018).

⁶⁰ *Id.* at 829.

⁶¹ See *id.* at 828.

⁶² *Dieffenbach*, 887 F.3d at 828 (emphasis added).

⁶³ See *id.* (stating "To say that the plaintiffs have standing is to say that they have alleged injury in fact, and if they have suffered an injury in fact, and if they have suffered an injury, then damages are available.").

⁶⁴ *Id.*

⁶⁵ See generally *Rudolph v. Hudson's Bay Co.*, No. 18-cv-8472 (PKC), 2019 U.S. Dist. LEXIS 77665 (S.D.N.Y. May 7, 2019).

⁶⁶ *Id.* at *3.

lack of standing.⁶⁷ Addressing the standing issue, the court held that the plaintiff's allegations were "sufficient to satisfy the 'low threshold' required to allege injury-in-fact and demonstrate Article III standing."⁶⁸ The Court in *Rudolph* also cited *Dieffenbach*, for the proposition quoted hereinabove, that essentially equates the value of one's own time straightening out the effects of a personal data breach, with an economic loss.⁶⁹

On the related issue of whether the allegations sufficiently stated a claim under Rule 12(b) (6), the court in *Rudolph* denied defendant's motion to dismiss and upheld plaintiff's claims based both upon New York common law of negligence,⁷⁰ and the California consumer-protection statutes.⁷¹ In upholding the latter claim, the court cited a previous California District Court opinion for the proposition that "[a]n allegation that a plaintiff has 'lost money and time' as a result of a defendant's [Unfair Competition Law] violation is sufficient to identify injury under the statute."⁷²

Bass v. Facebook, Inc., a class action in which a motion to dismiss was ruled upon just months prior to the publishing of this note, involved a massive data breach of Facebook users' confidential information.⁷³ The defendant moved to dismiss for both lack of standing and failure to state a claim.⁷⁴ One plaintiff alleged, among other elements of damages, that he spent as much as an hour managing the aftermath of the data breach.⁷⁵ Citing *Dieffenbach*, the Northern District of California addressed this particular issue and held that these allegations are sufficient to establish injury in fact for purposes of standing.⁷⁶ The court granted defendant's motion to dismiss for failure to state a claim under the California consumer-protection statute, not based upon the legal insufficiency of plaintiff's lost personal time claim, but rather on the lack of specificity contained in the allegations of his complaint.⁷⁷

In 2019, the Eighth Circuit Court of Appeals decision, *In re SuperValu, Inc. Customer Data Security Breach Litig.*, marked a distinct divergence from the Seventh Circuit's construction of the California consumer protection statute at issue in *Dieffenbach*.⁷⁸ In *SuperValu*, the Court applied a far more stringent standard for pleading standing and a sufficient claim for relief under the Illinois Consumer Fraud and Deceptive Business Practices Act.⁷⁹ Citing *Dieffenbach* for the proposition that the essential requirement for pleading "actual pecuniary loss" as a form of recoverable damages is "not onerous," the court in *SuperValu* held that:

⁶⁷ *Id.* at *3-4.

⁶⁸ *Id.* at *4-5.

⁶⁹ See *Rudolph*, 2019 U.S. Dist. LEXIS 77665 at *20 (citing *Dieffenbach v. Barnes & Noble, Inc.*, 887 F.3d 826, 828-29 (7th Cir. 2018)).

⁷⁰ *Id.* at *28, *30, *46.

⁷¹ *Id.* at *44-46.

⁷² *Id.* at *45 (citing *Hameed-Bolden v. Forever 21 Retail, Inc.*, No. CV-18-03019-SJO, 2018 WL 6802818, at 4 (C.D. Cal. Oct. 1, 2018)).

⁷³ See *Bass v. Facebook, Inc.*, 394 F. Supp. 3d 1024, 1028 (N.D. Cal. 2019).

⁷⁴ *Id.* at 1032.

⁷⁵ *Id.* at 1034.

⁷⁶ *Bass*, 394 F. Supp. 3d at 1035.

⁷⁷ *Id.* at 1040.

⁷⁸ See generally *In re SuperValu, Inc. Customer Data Sec. Breach Litig.*, 925 F.3d 955 (8th Cir. 2019).

⁷⁹ See *id.*; see also *Attias v. CareFirst, Inc.*, 365 F. Supp. 3d 1, 16 (D.D.C. 2019) (showing that the heightened standard articulated in *SuperValu* has found support in which the Court sidesteps *Dieffenbach* by creating a distinction between pleading the cost of "prophylactic" measures to mitigate against potential loss arising from identity theft, as opposed to "responsive" measures necessary to mitigate the actual damage caused by the misuse of personal data).

Holmes' alleged injuries – *the expenditure of time monitoring his account, the single fraudulent charge to his credit card, and the effort expended replacing his card* – do not constitute actual damage. *The time Holmes spent protecting himself against the threat of future identity theft does not amount to an out-of-pocket loss.*⁸⁰

The court in *SuperValu* implicitly declined to adopt the Seventh Circuit's seemingly unqualified conflation of personal time spent rectifying the effects of a data breach, which it characterized as an out-of-pocket loss.⁸¹ In that respect, *SuperValu* potentially looms as a rebuke of the more liberal pleading requirements for establishing Article III standing applied in *Dieffenbach*. One could argue that *SuperValu* merely imposes a heightened standard of fact pleading, and that its holding should be limited to a ruling on the allegations of the complaint before it. Nevertheless, viewed through any lens, the impact of the Seventh Circuit's holding in *Dieffenbach* and its progeny on the application of state consumer protection statutes to the development of the law of damages for lost personal time cannot be overstated. It enables the articulation of a fresh approach to, and marked departure from, a majority view that seemed to have been solidified in *Hannaford*.

(b) Case Law Construing Federal Statutes

Judicial interpretations of Congressional intent to uphold federal statutory claims for lost personal time damages emerged a bit earlier, but seem to be evolving more cautiously and more sporadically than their state consumer-protection law counterparts. The primary reason may be the conspicuous absence of uniform federal legislation or administrative regulation establishing a standard level of cybersecurity, or a time frame for personal information holders to notify consumers of a data security breach.⁸² This statutory void has impeded the development of a discernible pattern of case law interpreting Congressional policy.⁸³ Existing federal statutes and administrative regulations lack the necessary “teeth” to enforce data security breaches. For example, the Federal Trade Commission has been vested with authority under the Federal Trade Commission Act (“FTCA”)⁸⁴ to enforce against “unfair or deceptive acts or practices in or affecting commerce,” and the Commission has used this authority to bring a number of administrative enforcement actions against companies that have failed to protect consumer financial data against hackers.⁸⁵ However, the Eighth Circuit Court of Appeals has held that the FTCA does not create a private cause of action.⁸⁶ One scholar has suggested that due to the varying security and consumer notification standards among the states; the limited jurisdiction of the Federal Trade Commission (“FTC”) to enforce its data security baseline at the administrative level;

⁸⁰ *SuperValu*, 925 F.3d at 964 (emphasis added) (citing *Dieffenbach v. Barnes & Noble, Inc.*, 887 F.3d 826, 830 (7th Cir. 2018)).

⁸¹ *Id.*

⁸² See Murray, *supra* note 52, at 37.

⁸³ See Cristiana Modesti, *Incentivizing Cybersecurity Compliance in the New Digital Age: Prevalence of Security Breaches Should Prompt Action by Congress and the Supreme Court*, 36 CARDOZO ARTS & ENT. L.J. 213 (2018) (advocating for Congressional action and proposing a federal legislative scheme).

⁸⁴ 15 U.S.C. § 45(a).

⁸⁵ See generally *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236 (3d Cir. 2015).

⁸⁶ *FTC v. Johnson*, 800 F.3d 448, 452 (8th Cir. 2015).

and the FTC's less than aggressive enforcement approach, a deep federal statutory void exists which may lead to increased litigation.⁸⁷

The authority for recognizing and upholding a prayer for damages for lost personal time, based upon the alleged violation of a federal statute, is the Federal Privacy Act of 1974.⁸⁸ This act has been the primary vehicle for claiming such damages under the existing, sparsely populated, federal statutory scheme. In *Beaven v. U.S. Dep't of Justice*, the plaintiffs-employees alleged that their supervisors allowed an employee roster containing sensitive personal information to be disclosed to inmates and other prison staff.⁸⁹ Interpreting the meaning of the "actual damages" provision of the statute in light of the Congressional intent, the court held:

Plaintiffs' 'lost time' damages does not require us to decide whether actual damages may include non-pecuniary losses - any Privacy Act injury incurred in the form of lost time is necessarily a pecuniary harm that is readily determined and does not require the court to speculate in the same manner as general or presumed damages.⁹⁰

In June of 2019, the Court of Appeals for the D.C. Circuit reconsidered the *Beaven* court's construction of the Privacy Act in *In re Office of Personnel Management Data Sec. Breach Litig.* ("OPM").⁹¹ In *OPM*, cyber-attackers breached multiple databases of the U.S. Office of Personnel Management, allegedly stealing the sensitive personal information of more than twenty-one million past, present, and prospective government workers.⁹² On appeal from the grant of defendant's motion to dismiss, the D.C. Circuit examined the allegations of a particular plaintiff who alleged that she spent more than one hundred hours resolving a fraudulent tax return filed using her personal identification, as well as closing a fraudulently opened account.⁹³ Relying on *Beaven*, the Circuit Court reversed the dismissal, holding that the plaintiffs' specific allegations were sufficient in alleging actual damages within the meaning of the Privacy Act.⁹⁴

(c) Class Action Settlements

Several data breach class actions have either slowly worked their way through the obligatory motions to dismiss or have quickly reached the stage where potential benefits of protracted class action litigation are outweighed by practicalities, cost savings, and the certainty

⁸⁷ See Murray, *supra* note 52, at 49.

⁸⁸ See generally 5 U.S.C. §552a (2012) (expressing one objective of the Act is to establish a code of fair information practices that requires agencies to comply with statutory norms for collection, maintenance, and dissemination of (personally identifiable) records, and that the act is limited in its scope and application to information maintained and used by "federal agencies").

⁸⁹ *Beaven v. U.S. Dept. of Justice*, 622 F.3d 540, 544 (6th Cir. 2010).

⁹⁰ *Id.* at 558 n.13.

⁹¹ See generally *In re U.S. Office of Personnel Mgmt. Data Sec. Breach Litig.*, 928 F.3d 42 (D.C. Cir. 2019).

⁹² *Id.* at 49.

⁹³ *Id.* at 66.

⁹⁴ *Id.* (declining to rule on whether the heightened pleading standard of Federal Rule of Civil Procedure 9(g), requiring that special damages be "specifically stated," applies to Privacy Act claims because the plaintiff's allegations about her time lost from work to address her fraudulent tax return and Verizon Wireless account suffice to satisfy the pleading standard).

of settlement.⁹⁵ In recent months, because of consumers' claims of lost personal time while mitigating their potential risks, the devastating effects of data breaches have finally gained recognition, particularly as legitimate elements of defendant-funded pools of class compensation. It could cost Equifax a minimum of \$1.38 billion in class compensation, credit monitoring, identity restoration, and improving data security as the 2017 Equifax data security breach potentially affected 147 million consumers.⁹⁶ Consequently, a settlement consolidating hundreds of class actions has been submitted for court approval to the Northern District of Georgia.⁹⁷ Under the proposed terms of the Equifax settlement, compensation for affected consumers will include up to twenty paid hours, at a rate of \$25 per hour, for "time spent taking Preventative Measures" or dealing with identity theft, with up to ten of those hours being self-certified, requiring no documentation.⁹⁸

The Premera Blue Cross data security breach settlement will similarly allow class members to file a claim for compensation from a \$32 million fund, for up to twenty hours of time at \$20.00 per hour "for time spent taking actions intended to remedy fraud, identity theft, or other misuse of a Settlement Class Member's Personal Information that is plausibly traceable to the Security Incident," with up to five hours of self-certified time for those who do not submit "Reasonable Documentation" related to their lost time.⁹⁹ The tentative settlement agreement in *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*,¹⁰⁰ which has not yet been approved, allows consumers to file claims for out-of-pocket costs, including "time spent remediating issues related to one or more of the Data Breaches at \$25.00 per hour," of which up to five hours may be derived from undocumented time.¹⁰¹

IV. Conclusion

With due credit accorded to the Beatles, "The Long And Winding Road"¹⁰² of 21st century data security breach class action litigation may provide a "Ticket To Ride"¹⁰³ for aggrieved consumers to recover damages for their personal time spent mitigating the effects of breaches.¹⁰⁴

⁹⁵ Murray, *supra* note 52, at 48-49 n.21, 54-55 (stating the cost of a data breach to a U.S. consumer information holder is an astronomical number of 7.9 million, and how these breaches can negatively impact the reputation and brand values, resulting in loss of revenue and devaluation of stock).

⁹⁶ *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 2020 U.S. Dist. LEXIS 7841, at *148, *166 (N.D. Ga. Jan. 13, 2020).

⁹⁷ *Id.*

⁹⁸ Settlement Agreement at 18-20, *In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 1:17-md-2800-TWT (July 22, 2019), available at <https://www.equifaxbreachsettlement.com/documents> [hereinafter *Equifax Settlement Agreement*].

⁹⁹ Settlement Agreement at 17-18, *In re Premera Blue Cross Customer Data Sec. Incident Litig.*, No. 3:15-md-02633-SI (May 30, 2019), available at https://www.premerasettlement.com/content/documents/settlement_agreement.pdf [hereinafter *Blue Cross Settlement Agreement*].

¹⁰⁰ See generally Settlement Agreement, *In re Yahoo! Inc. Customer Data Sec. Breach Litig. Settlement*, No. 5:16-MD-02752-lhk (Apr. 9, 2019), available at <https://yahoodatabreachsettlement.com/en/Home/Documents> [hereinafter *Yahoo Settlement Agreement*].

¹⁰¹ *Id.* at 6-7.

¹⁰² THE BEATLES, *The Long And Winding Road*, on LET IT BE (Apple Records 1970).

¹⁰³ THE BEATLES, *Ticket To Ride*, on HELP! (Capitol Records 1965).

¹⁰⁴ See Robert Hilburn, *The long and winding road*, LOS ANGELES TIMES (Sep. 22, 1985, 12:00 AM), <https://www.latimes.com/la-et-hilburn-michael-jackson-sep22-story.html>; see also Dave Rybaczewski, "Ticket To

Less than two years have passed since the Southern District of New York diverged from decades of established law, and opined that consumers in a handful of states could recover under their respective state consumer protection statutes for lost personal time spent taking their vehicles into the dealer for replacement of defective ignition switches.¹⁰⁵ The rapid evolution of case law since the groundbreaking decision in *GM LLC Ignition Switch Litig.* appears to be limited in scope to the narrow niche of allowing standing to recover damages for lost personal time spent reacting to actual or potential cyber-identity theft.¹⁰⁶

In the absence of a coherent and uniform federal legislative policy and a weak regulatory enforcement scheme at the federal administrative agency level, state consumer protection statutes have provided the primary legal vessel for effectuating this potential sea change. To a limited extent, the evolution has been paralleled by the recognition of standing to claim damages for lost personal time in cases involving data breach claims by federal government employees under the Federal Privacy Act.¹⁰⁷ In recent months, several of the largest companies in the world have agreed to set aside multi-million-dollar pools of cash for class members to claim limited compensation for their lost personal time, without providing any supporting documentation.¹⁰⁸

We are witnessing an exponential spike in the sheer number of data security breaches and records exposed in the United States.¹⁰⁹ In the past fifteen years, consumers have faced a far greater risk of identity theft every time they have made a retail purchase, participated in a Zoom conference, downloaded an app, or visited a social media site. Exploitation of existing and unimaginable forms of technological innovation will place an increased burden on courts to fashion remedies for damage claims for lost personal time. As our personal lives become more intertwined with devices, apps, and cyber-gadgets, malicious intrusions into those instruments will require us to expend an increased amount of leisure time reacting to invasions of our privacy and cyber-security. The future will bring claims for lost personal time damages arising from abuses of innovations, such as surveillance through tracking devices and facial recognition software; intrusions through downloaded apps to our own personal computers and cellphones; and wi-fi enabled smart cameras and smart speakers.¹¹⁰

In a perfect world, a recognition of the potential legal arc identified in this note combined with the ever-increasing risks posed by potential exploitation of new technology, would induce companies entrusted with personal and confidential consumer data to re-prioritize their risk-avoidance strategy. Such a re-thinking process might cause corporate data-holders to realize the long-term financial benefit that can be derived from minimizing the risk of data security breach litigation by investing in the minimally-expensive and readily-available preventative measures

Ride” History, BEATLES EBOOKS, http://www.beatlesebooks.com/ticket-to-ride?fbclid=IwAR1vxRvIL_xlDfKJ-EIHRDDoHyRXqYxEj_BLh1no0604lYgpdmxuk7eQFfw (last visited Apr. 16, 2020).

¹⁰⁵ See *In re GM LLC Ignition Switch Litig.*, 339 F. Supp. 3d 262, 327 (S.D.N.Y. 2018).

¹⁰⁶ See *supra*, Section III.

¹⁰⁷ See 5 U.S.C. § 552a(g)(1)(D) (2012) (providing a civil remedy to an individual for an agency’s “fail[ure] to comply with any other provision of this section, or any rule promulgated thereunder, in such a way to have an adverse effect on an individual).

¹⁰⁸ See Equifax Settlement Agreement, *supra* note 98; see also Blue Cross Settlement Agreement, *supra* note 99; see also Yahoo Settlement Agreement, *supra* note 100.

¹⁰⁹ See Caitlin Kenny, Note, *The Equifax Data Breach and The Resulting Legal Recourse*, 13 BROOK. J. CORP. FIN. & COM. L. 215, 217-18 (2018).

¹¹⁰ See Chris Isidore, *Smart camera maker Wyze hit with customer data breach*, CNN (Dec. 30, 2019), <https://www.cnn.com/2019/12/30/tech/wyze-data-breach/index.html> (providing insight of the type of market Wyze Labs is in, and explaining different occasions in which Wyze Lab’s systems were hacked).

designed to ward off would-be hackers.¹¹¹ If history provides a prologue, it would be unrealistic and naive to rely upon the financial wisdom and foresight of huge companies to voluntarily fund huge settlement pools for the benefit of consumers who incur lost time damages when responding to data security breaches, identity theft, and invasions of privacy. Faced with enhanced threats of hacking and data breaches intruding into their daily life, consumers will continue to demand legal redress for non-economic losses, measured purely by lost personal time reacting to such invasions.

The current legal scheme is insufficient to address, and will not withstand the burden of, these increased demands. We cannot rely upon federal district courts to consistently and cogently interpret and apply a hodge-podge of state consumer-protection statutes. Requiring that federal courts adjudicating class actions apply a patchwork of state statutes in nationwide data breach class action litigation would produce undesirable consequences. The remedies awarded to aggrieved plaintiffs would be conflicting and inconsistent, based upon the state of residence of the class representatives.

Given the confluence of the increased potential for technological intrusions and a patchwork legislative scheme, a comprehensive, uniform-focused federal statutory and administrative framework is needed: a framework that would apply to and allow equal access to private citizens of all states, rather than just United States government employees; primarily target the merchant entrusted with consumers' confidential data, rather than the cyber-attacker; and expressly create private rights of action in consumer class actions. A foundation, albeit shaky, already exists. The Federal Privacy Act would seem to be the logical place to start. Its scope could be expanded by eliminating its limited application to private and confidential information of federal government employees. The Identity Theft Enforcement and Restitution Act of 2008 could be amended to create a remedy against the merchant that allows its customers' confidential information to be breached, in addition to the anonymous and unidentifiable foreign hacker. Similarly, the FTCA could be amended by eliminating its exclusion of private causes of action and provide meaningful remedial "teeth." Although perhaps a function of political forces rather than legislative, the FTC could be earmarked for increased funding for investigatory functions, and statutorily tasked with more vigorous administrative powers to enforce the FTCA. Whether Congress has the will to implement these changes is questionable. The continued utilization of the current legal framework will only increase uncertainty for both consumers and merchants, increase consumer vulnerability to invasions of privacy and breaches of confidential information, and promote inconsistent legal relief. One thing is certain - only time will tell.

¹¹¹ See Murray, *supra* note 52, at 52 (referencing Verizon RISK Team, *2012 Data Breach Investigations Report*, showing a 2012 study concluding that 97% of breaches are avoidable without difficult or expensive countermeasures).