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Data Breaches

New Plaintiffs May Proceed With Limited Class Claims in Zappos Data Breach Suit

A new set of plaintiffs may proceed with revised class data breach claims against Zappos.com Inc. after a federal judge recently dismissed previous class allegations (*In re Zappos.com Inc., Customer Data Sec. Breach Litig.*, 2016 BL 146174, D. Nev., No. 3:12-cv-00325-RCJ-VPC, 5/6/16).

The case stems from a 2012 data breach of Amazon Inc.'s Zappos which compromised 24 million customers' e-mail, billing and shipping addresses; phone numbers; the last four digits of credit card numbers; and account numbers and passwords (14 PVLR 1035, 6/8/15).

"The Zappos case highlights a key issue for class actions going forward: class certification," David Almeida, class action partner at Sheppard Mullin in Chicago, told Bloomberg BNA May 9.

Judge Robert C. Jones of the U.S. District Court for the District of Nevada ruled to strike the class allegations in the third amended complaint. The court reasoned that it wouldn't certify a broad class because "a majority of the putative class cannot claim any measurable damages."

Overly broad classes raise the issue of "whether a data breach class can ever be certified," Almeida said. "Any putative class will consist of individuals who suffered no injury, individuals with varying bank fraud reimbursement policies and individuals whose harm cannot be fairly traceable to the breach—i.e. their identity theft was a result of an entirely different occurrence," he said.

In the present case, the court said that it will allow the plaintiffs to narrow the class to include consumers "who suffered actual injury as a result of the Zappos data breach."

Plaintiffs Standing. In June 2015, the court held that the plaintiffs failed to show concrete injury stemming from the data breach and dismissed their claims without prejudice. The prior plaintiffs, joined by the new plaintiffs, filed a third amended complaint alleging similar facts and claims.

In the present case, the court dismissed the prior plaintiffs claims with prejudice. The court cited the U.S. Supreme Court's decision *Clapper v. Amnesty Int'l* which states that claims based on future injuries require that the injuries are imminent or that there is a substantial risk of that they will occur (12 PVLR 350, 3/4/13). The court reasoned that the prior plaintiffs still didn't allege any "instances of actual identity theft or fraud."

Conversely, the court ruled that the new plaintiffs have Article III standing because they alleged instances of actual injury that is "fairly traceable" to the Zappos data breach.

"Article III standing used to end almost all data breach class actions before they even got started," Almeida said. This has become less of an issue recently but "whether these cases are viable in the long run is very much an open question," he said.

Here, the court dismissed multiple claims by the plaintiffs. For example, the court declined to proceed on a negligence theory because the plaintiffs failed to show any duty under state law for Zappos to protect the data. Additionally, the court shot down the negligence claim because the plaintiffs only showed "actual economic injury" and didn't allege any "personal injury or property damage." The court also dismissed claims for breach of settlement agreement, breach of contract and unjust enrichment.

The court left the door open for the new plaintiffs to amend the complaint and assert claims that haven't been previously litigated.

Barnow and Associates, PC, The Coffman Law Firm and Glancy Prongay & Murray, LLP are interim co-lead class counsel. Stroock & Stroock & Lavan, LLP and Kaempfer Crowell represent Zappos.

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Full text of the May 6 opinion is available at http://www.bloomberglaw.com/public/document/In_re_Zapposcom_No_312cv00325RCJVPC_2016_BL_146174_D_Nev_May_06_2.