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Sony hack ruling a double-edged sword

Last week, the U.S. District Court for the Central District of California denied Sony Pictures' motion to dismiss as to Article III standing in a case involving a major data breach. *Corona v. Sony Pictures Entertainment Inc.*, 14-9600 (filed Dec. 15, 2014). After the hack - supposedly carried out by the North Korean government in protest of the release of the 2014 movie "The Interview" - eight individuals filed a class action alleging that Sony failed to reasonably protect their personally identifiable information (PII), resulting in at least 15,000 current and former Sony employees' PII being compromised.

One may argue that *Corona* solidifies the feasibility of data breach cases filed in the 9th Circuit. But a closer look suggests the ramifications are far less clear.

For the last two years, it appeared as if data breach litigation would be defeated by the U.S. Supreme Court's decision in *Clapper v. Amnesty Intern. USA* (2013), a case out of the 2nd U.S. Circuit Court of Appeals brought by journalists and human rights advocates challenging the wiretapping practices of federal authorities. In a 5-4 decision dismissing the case, the Supreme Court held that plaintiffs must show "certainly impending injuries in fact" to demonstrate Article III standing.

Following *Clapper*, a majority of the district courts found that the breaches and loss of PII were insufficient to show that damages were "certainly impending." E.g., *Green v. EBay Inc.* (E.D. La. May 4, 2015); *Storm v. Paytime Inc.* (M.D. Pa. Mar. 13, 2015); *Peters v. St. Joseph Serv. Corp.* (S.D. Tex. Feb. 11, 2015).

However, a minority of courts, including some in the 9th Circuit, have applied different tests for Article III standing. See *In re Adobe Systems Inc. Privacy Litig.*, 13-5226 (N.D. Cal. Sept. 4, 2014) (finding an "immediate and very real" risk of harm); *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 11md2258 (S.D. Cal. Jan. 21, 2014) (finding a "credible threat of impending harm").

Specifically in *Adobe*, Judge Lucy Koh found persuasive pleadings alleging "an increased risk of future harm as a result of the ... data breach." In finding the future harm alleged sufficient for the purposes of defeating a motion for dismiss, Judge Koh commented, "after all, why would hackers target and steal personal customer information data if not to misuse it?"

Corona at first appears to follow *Adobe*. In refusing defendants' motion to dismiss based on Article III standing, Judge Gary Klausner states that the "real and immediate harm" test of *Adobe* is merely "a slight difference in wording" from the "certainly impending" test of *Clapper*. Like Koh in *Adobe*, Klausner buttresses the "real and immediate harm" test by citing to *Krottner v. Starbucks Corp.*, 628 F.3d 1139 (9th Cir. 2010), which preceded *Clapper*.

However, Klausner also stated, "[t]o the extent Plaintiffs allege *future harm or an increased risk in harm that has not yet occurred*, those allegations do not support a claim for negligence, as they fail to allege a cognizable injury." (Emphasis added.) The court thereby denied damages for "future harm" and "increased risks" for PII as "property" with "compensable value in the economy at large."

The summary dismissal of damages for "future harm" and "increased risks" deviates from *Adobe*. Indeed, it appears that Judge Klausner refused to make assumptions about the intent of the hackers in favor of the plaintiffs. Instead of prospective harm, *Corona* focused on allowing "cognizable injury(s) by way of costs relating to credit monitoring, identity theft protection, and penalties."

The departure of *Corona* from *Adobe* has significant implications for those bringing data breach class actions in the 9th Circuit. At first glance, plaintiffs may prefer the test of "real and immediate harm" to "certainly impending harm." But the loss of damages for *future* harm significantly reduces the maximum recovery available. In theory, future harm for identity theft may be significant. If damages are instead limited by remediation costs actually incurred, what is compensable will be far more limited.

Corona will not be the victory for the plaintiffs' bar some may think. Indeed, plaintiffs will be confronted with a perplexing dilemma when discussing the evolution of Article III standing cases in the 9th Circuit. On the one hand, it would seem that *Corona* follows *Adobe*; on the other hand, *Corona* severely handicaps those seeking to maximize recovery available for data breaches.

As for organizations doing business in California, *Corona* suggests that the costs of defense for data breach cases may increase, but the ultimate remediation costs - which include compensable damages - will be more palatable.

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