

Target Data Breach Deal's Hiccup Puts Focus On Standing

By **Allison Grande**

Law360, New York (February 2, 2017, 10:17 PM EST) -- The Eighth Circuit recently directed a lower court to reassess a \$10 million class action settlement that allowed Target to escape a broad range of data breach claims, including those raised by consumers who couldn't prove they had been harmed, a ruling that is likely to make litigants and courts alike focus even more sharply on the role of standing in class action pacts.

In a published decision issued Wednesday, a three-judge appellate panel, in remanding the case for further review, called out the district court's certification of the settlement class as not meeting the court's standards, saying, "the lack of legal analysis in both the preliminary and final orders suggests that class certification was the product of summary conclusion rather than rigor."

Specifically, the lower court had failed to "rigorously analyze the propriety of certification," particularly after arguments were raised by objector Leif Olson after preliminary certification over how the settlement offered no compensation for him and other class members who currently show they had suffered monetary losses from the breach while still requiring them to release Target Corp. from liability.

"In light of this ruling from the circuit court, we can expect trial courts around the country to take a closer look at proposed settlement terms in class action lawsuits arising from alleged privacy violations and data breaches," Shook Hardy & Bacon LLP data security and privacy group chair Al Saikali said.

Courts have gradually been paying more attention in recent years to the terms of privacy and data security pacts, especially as objections have been raised at the lack of actual monetary recovery for class members and high fees awards for plaintiffs' attorneys. For example, Facebook Inc. and a proposed class of users who had allegedly had their images used in sponsored ads without their permission had to rework a \$20 million settlement in 2012 after a district court judge rejected the initial deal because of concerns over a lack of direct monetary relief to class members.

However, the brunt of scrutiny to date has focused on the quality and quantity of compensation being given to class members who claim to have been harmed by a data breach or other alleged misuse of their information. The concerns examined by the Eighth Circuit differ in that they center on what should be done in cases where some class members may not yet be able to show that a privacy breach caused them any quantifiable losses.

"This case is likely to make practitioners on both sides really think through how you can settle on a

classwide basis, if that's what the parties choose to do, when you have a group that really cannot meet the concrete and particularized injury prong of the standing analysis at the moment," Pepper Hamilton LLP partner Jan P. Levine said.

The issue of standing has been the subject of many court opinions since May, when the U.S. Supreme Court ruled in *Spokeo v. Robins* that plaintiffs must allege a concrete tangible or intangible injury and cannot rely on a mere statutory violation to establish Article III standing.

These disputes overwhelmingly arise in the context of motions to dismiss the suit or certify classes. However, the Eighth Circuit's direction that the lower court give more consideration to the terms of the Target settlement and Olson's objections show that the question of how plaintiffs who only allege a risk of harm should be treated in the class action context is not limited to motions practice.

"This opinion is one that objectors are likely to cite to say there's a potential conflict between people that did not actually suffer loss and those that did," said Kevin McGinty, a member at Mintz Levin Cohn Ferris Glovsky & Popeo PC. "That was enough for the court to vacate and remand the settlement, which shows the issue is just as important in the settlement context as it is on the merits."

However, while the argument may be successful in getting objectors who haven't suffered any concrete harm yet what they view to be a better deal, it may prove problematic for the plaintiffs bar in general, defense attorneys noted.

"It puts the plaintiffs a little bit on the horns of the dilemma here because it'll be hard for the plaintiffs to go back and save the settlement without basically conceding that they brought a claim on behalf of people who had no loss," McGinty said.

Levine agreed that the settlement dispute presents a tension between the desire to settle and to ensure that those who suffered documented losses get adequate compensation.

If the group that hasn't suffered concrete harm is allowed to recover from the settlement pot, then arguments will be raised over the recovery being diluted. If the parties decide to resolve the purported intraclass conflict by completely excluding uninjured members, then they might be able to sue Target again if they suffer an injury in the future or find a hook in state court, where standing standards are generally lower, attorneys noted.

"It's a very interesting question for both sides about what to do when you want a fulsome settlement but are presented with part of a group that can't meet the *Spokeo* bar," Levine said. "It will be interesting to see how the district court handles this on remand."

While Wednesday's ruling marks what is believed to be the first time that the standing issue has played prominently into a privacy class action settlement, the quandary has come up in other class action disputes.

Perhaps most notably, the U.S. Supreme Court in its 1997 decision in *Amchem Products Inc. v. Windsor* struck down a global settlement of current and future asbestos-related claims on the grounds that the settlement class unfairly included both individuals who had developed diseases and other injuries from asbestos exposure, and those who had been exposed to asbestos but had not yet exhibited any physical symptoms.

The Supreme Court was also presented with the mixed-class issue in *Tyson v. Bouaphakeo*, which involved a proposed class of workers whose alleged uncompensated donning and doffing activities propelled them into overtime pay, and those who didn't break that threshold. However, in its ruling last year, the high court punted on that issue, affirming only that workers can use averages and other statistical analyses to show similarities between disparate class members.

These prior cases, along with the most recent Target decision, demonstrate the importance of considering the injury profiles of all members of a proposed settlement class and being aware of the possibility that failing to do so could hold up the process down the road, attorneys noted.

"Specific analyses and findings regarding the merits of any objections are an essential part of the rigorous analysis that trial courts are expected to give class settlements before approving them," Bradley Arant Boult Cummings LLP partner Michael R. Pennington said, adding that "neither the courts nor the parties should take objectors too lightly."

Olson is represented by Monica L. Davies of Jermusek & Davies LLC and Melissa A. Holyoak of the Competitive Enterprise Institute. Fellow objector James Sciaroni is represented by Robert Black.

The consumers are represented by Heins Mills & Olson PLC, Nichols Kaster PLLP, Morgan & Morgan Complex Litigation Group PA, Girard Gibbs LLP, Milberg LLP, Chestnut Cambronne PA and Stueve Siegel Hanson LLP, among others.

Target is represented by Faegre Baker Daniels LLP, Morrison & Foerster LLP and Ropes & Gray LLP.

The case is *In re: Target Corp. Customer Data Security Breach Litigation*, case number 0:14-md-02522, in the U.S. District Court for the District of Minnesota.

--Editing by Christine Chun and Catherine Sum.