

Standing issue won't halt data breach suit against Horizon Healthcare (C.A.3)

(January 25, 2017) - Horizon Healthcare Services has failed to convince a federal appeals court that insurance plan members lack standing to sue the company after two laptops with their unencrypted personal information were stolen from the insurer's headquarters.

In re Horizon Healthcare Services Inc. Data Breach Litigation, No. 15-2309, 2017 WL 242554 (3d Cir. Jan. 20, 2017).

Horizon's customers sufficiently alleged an injury-in-fact under the Fair Credit Reporting Act, 15 U.S.C.A. § 1681, which prevents unlawful disclosure of legally protected information and allows recovery of statutory damages for those violations, the 3rd U.S. Circuit Court of Appeals ruled.

Jeff Jacobson, a partner at Kelley Drye & Warren who defends against consumer fraud and privacy class actions but is not involved in this case, said the appeals court seems to be following a trend.

"The 3rd Circuit has now held three times in 18 months that if a company violates a federal statute intended to protect privacy, that violation is enough to confer standing to sue, even if the plaintiff has not suffered monetary or some other concrete harm as a result," Jacobson wrote in an email.

Jacobson referred to recent decisions in *In re Google Inc. Cookie Placement Consumer Privacy Litigation*, 806 F.3d 125 (3d Cir. 2015), and *In re Nickelodeon Consumer Privacy Litigation*, 827 F.3d 262 (3d Cir. 2016), which both raised questions about standing under the Wiretap Act, 18 U.S.C.A. § 2510, as well as other federal privacy statutes.

Majority, concurring opinions

U.S. Circuit Judge Kent A. Jordan wrote the panel's opinion, which U.S. Circuit Judge Thomas I. Vanaskie joined.

In a concurring opinion, U.S. Circuit Judge Patty Shwartz agreed Horizon's plan participants could proceed with their suit, but she diverged from her colleagues as to how she reached this conclusion.

Horizon's plan participants had standing to pursue their claims because of their alleged loss of privacy, not due to a statutory violation, she said.

The majority and concurring opinions both emphasized they did not decide the merit of the case's legal issues.

'Sweeping effects'

Information governance and management expert Linda G. Sharp, associate general counsel at ZL Technologies, said the decision may have "sweeping effects."

"For data breach matters that fall under FCRA in the 3rd Circuit, the issue of Article III standing is now clear. However, I assume plaintiffs will now seek to expand this ruling to apply in additional areas," she wrote in an email.

She also said she expects other courts to follow this precedent.

"This could create considerable havoc regardless of how careful a company is in protecting data of consumers, employees and customers," she added.

Sharp is not involved in the case.

Attorneys for Horizon and the plaintiffs did not immediately respond to requests for comments.

Stolen laptops lead to suit

The case began after two laptops were stolen from Horizon's Newark, New Jersey, headquarters in 2013.

The laptops were password-protected but stored unencrypted sensitive data for more than 800,000 Horizon plan participants.

The data included personally identifiable information, including birthdates and Social Security numbers, as well as protected health information, such as medical histories and test results, the opinion said.

Current and former plan participants Courtney Diana, Mark Meisel, Karen Pekelney and Mitchell Rindner sued the insurer in the U.S. District Court for the District of New Jersey in 2014 on behalf of a potential class.

They said Horizon willfully and negligently violated the Fair Credit Reporting Act. The complaint alleged various common law claims such as breach of contract, invasion of privacy and violations of New Jersey's consumer protection law.

Diana, Meisel and Pekelney allegedly received notification that their personal information was on the stolen laptops, but the complaint does not say their identities were stolen as a result of the breach.

Rindner said Horizon did not initially notify him of the breach. He also alleged someone submitted a fraudulent IRS tax return in his name in 2013 and tried using his credit card as a result of the theft of the insurer's two laptops.

No standing, no case

U.S. District Judge Claire C. Cecchi dismissed the suit, finding the plan participants never alleged a cognizable injury and lacked standing to pursue a federal lawsuit. [*In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, No. 13-cv-7418, 2015 WL 1472483 \(D.N.J. Mar. 31, 2015\)](#).

Without any actual instances of identity theft, Diana, Meisel and Pekelney could not show they had standing based solely on an alleged increased likelihood of future harm, Judge Cecchi said.

Rindner could not causally link his IRS identity theft or fraudulent credit card use to the Horizon data breach, she added.

The plaintiffs appealed and the 3rd Circuit revived their case.

Appeals court raises *Spokeo*

The majority said the alleged FCRA violations — namely, the allegedly willful and negligent unauthorized disclosures of the plaintiffs' sensitive information — were sufficient injuries-in-fact for standing purposes.

Relying on *Spokeo Inc. v. Robins*, 136 S. Ct. 1540 (2016), the majority pointed to the legislature's intent to create a private cause of action to remedy violations of the FCRA.

"Congress has elevated the unauthorized disclosure of information into a tort," the panel noted in a footnote.

In her concurring opinion Judge Shwartz looked to history, the second approach *Spokeo* mentions to determine whether an intangible injury constitutes an injury-in-fact.

"The common law has historically recognized torts based upon invasions of privacy and permitted such claims to proceed even in the absence of proof of actual damages," she wrote.

By Melissa J. Sachs

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Data breach plaintiffs do not have standing to sue in federal court based on allegations of possible future misuse of personally identifiable information, Horizon Healthcare Services argued to a federal appeals court in a proposed amicus brief.

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