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Sony's Win Leaves Opening For Data Breach Plaintiffs

By **Allison Grande**

Law360, New York (October 15, 2012, 9:28 PM ET) -- A California federal judge's decision to let Sony Corp. customers revise their putative data breach class action provides plaintiffs with a possible tool to get past the motion-to-dismiss stage, but they will need to prove an actual, present injury to ultimately succeed on any claims or win any substantial relief, attorneys said Monday.

In a ruling Thursday, U.S. District Judge Anthony J. Battaglia found that PlayStation Network and Qriocity services customers affected by a massive data breach had Article III standing to sue Sony for allegedly failing to protect their private information from hackers because they had "articulated sufficient particularized and concrete harm to sustain a finding of injury-in-fact" at this early stage of the proceedings.

"Even though Sony alleges no harm has yet occurred, in certain circumstances, as the court finds pertinent here, future harm may be regarded as a cognizable loss sufficient to satisfy Article III's injury-in-fact requirement," the ruling said. "As the [U.S.] Supreme Court has noted, the evidence required to support or oppose Article III standing will necessarily increase as the litigation progresses."

While this holding saved the suit from dismissal, attorneys noted that the reprieve may be only temporary, as the plaintiffs now must overcome a higher bar to demonstrate the sufficiency of their seven causes of action, which Judge Battaglia directed them to replead Thursday after finding that they lacked sufficient detail regarding actual losses stemming from the data breach.

"This opinion is another example of how federal courts are distinguishing between the injury requirement a plaintiff must meet to meet the standing threshold under Article III [and] the injury requirement for most causes of action, [which is higher,]" Shook Hardy & Bacon LLP data security and privacy group co-chair Al Saikali told Law360 on Monday. "The analysis results in a decision like this one, where the court determines that plaintiffs have standing to bring their lawsuit but do not have cognizable injuries to succeed."

Judge Battaglia's analysis of the Article III standing question hews closely to how courts have been resolving this issue recently, according to Bryan Cave LLP senior counsel Daniel Rocky.

"Although early courts addressing these cases viewed Article III standing as a barrier — and in some cases, it remains so — many of the more recent cases, such as Northern District of California Judge [Lucy] Koh's decisions in the In re: iPhone and Facebook litigations, have held that plaintiffs can satisfy Article III standing based on the prospect of future harm and without allegations of current, nonspeculative, out-of-pocket losses."

The dispute goes back to April 2011, when Sony discovered that hackers had broken into its network and obtained PSN and Qriocity user data for as many as 31 million users, including credit and debit card information, according to the suit. A week after the incident, Sony informed the public that the personal information had been stolen and admitted that its own failures "may have had a financial impact on our loyal customers," the complaint said.

Following the announcement, the Judicial Panel on Multidistrict Litigation merged a number of consumer suits in August 2011, and the plaintiffs filed their consolidated class action complaint in January.

In attempting to convince Judge Battaglia of their standing arguments, both Sony and the plaintiffs pointed to the Ninth Circuit's 2010 decision in *Krottner v. Starbucks Corp.*, which held that exposure of personal information constitutes injury-in-fact only where the plaintiffs face "a credible threat of real and immediate harm" as opposed to harm that is simply "conjectural or hypothetical."

By agreeing with the plaintiffs that the case was analogous to *Krottner*, Judge Battaglia built on a trend within the Ninth Circuit that plaintiffs have a better chance at succeeding on their Article III standing arguments if the alleged breach involves a criminal element, according to Tyler Newby, an attorney in the San Francisco office of Fenwick & West LLP.

"The takeaway is that if there is a criminal activity associated with the data breach that can result in the leakage or loss of sensitive financial data and personally identifiable information, that is most likely going to be sufficient within the Ninth Circuit to maintain standing under the Constitution," he said.

On the other hand, if the data breach is the result of an accidental loss of information, courts may be less likely to find that there is an imminent threat of future harm, as the Eastern District of California concluded in its January order dismissing the putative class action *Whitaker v. Health Net of California Inc.*, according to Newby.

Saikali said the issue of whether consumers in data breach cases have suffered cognizable injuries was "sort of a mixed bag right now," although he noted that it tends to favor defendants, with notable exceptions including the Eleventh Circuit's Sept. 5 decision in *Resnick v. AvMed Inc.* and the First Circuit's October 2011 decision in *Anderson v. Hannaford Brothers Co.*

While the *Hannaford* decision allowed plaintiffs to proceed with their class action stemming from a 2008 data breach at the supermarket company, Fox Rothschild LLP partner Scott Vernick said that suit differed from the Sony class action because the *Hannaford* plaintiffs were able to demonstrate that they'd suffered out-of-pocket losses in having to pay for replacement credit cards. Likewise, in the *Resnick* ruling, the court revived a putative data breach class action after finding the plaintiffs had made an explicit connection between the stolen materials and the subsequent opening of bogus bank accounts.

But in the Sony case, the plaintiffs will have a harder time proving that they have suffered actual monetary losses that they can tie to their claims, according to Snell & Wilmer LLP partner Timothy Toohey.

"The real test is [going to be] whether plaintiffs can sufficiently demonstrate a cognizable injury to satisfy the harm or damages element of the underlying causes of action," he said. "It is here that the courts have required more."

While the plaintiffs attempted to demonstrate injury by arguing that their PlayStation consoles had diminished in value since the breach and that they had spent money

attempting to mitigate the risk of identity theft, Judge Battaglia concluded that these assertions proved insufficient to allow their seven causes of action — including negligence and violation of California's Unfair Competition Law, False Advertising Law and Consumer Legal Remedies Act — to survive as currently pled.

"This case suggests that injury will continue to be a big issue for plaintiffs in these cases," Mintz Levin Cohn Ferris Glovsky and Popeo PC member Kevin McGinty said. "Once plaintiffs get over the hurdle for the standing piece, they find themselves in the same place as other cases, where it has been very hard to prove injury if the allegations are just loss of data and nothing more."

The Sony plaintiffs may also struggle to maintain their suit as a class action down the road, due to the difficulty in proving this type of harm on a classwide basis, McGinty added.

"The question of whether or not a consumer has suffered these kinds of losses is very particularized," he said. "Now that they have to go back to the drawing board and allege injury with more specificity, it might be difficult to prove that an injury that one named plaintiff suffered is the same as what another class member experienced."

Regardless of the ultimate resolution of the Sony case, attorneys said courts would continue to grapple with these injury and standing questions as these cases continue to pop up in increasing numbers.

"It's a very difficult and treacherous legal landscape in this space without a doubt," Vernick said. "We have a very data-driven society with protection of privacy at the forefront. Given all the vulnerabilities having to do with data, some of which can be prevented and some of which cannot, the plaintiffs' bar will continue to be active."

The plaintiffs are represented by Paul J. Geller of Robbins Geller Rudman & Dowd LLP, Adam J. Levitt of Wolf Haldenstein Adler Freeman & Herz LLC, Ben Barnow of Barnow & Associates PC, Brian R. Strange of Strange & Carpenter, David A. McKay of Herman Gerel LLP, Timothy G. Blood of Blood Hurst & O'Reardon LLP and Gayle M. Blatt of Casey Gerry Schenk Francavilla Blatt & Penfield LLP.

Sony is represented by Mark P. Szpak, Douglas H. Meal, Robert B. Gordon, Rocky C. Tsai and Harvey J. Wolkoff of Ropes & Gray LLP, Amanda Catherine Fitzsimmons and William S. Boggs of DLA Piper LLP, David Alan Walton of Beirne Maynard & Parsons LLP, Morris Weinberg Jr. of Zuckerman Spaeder LLP, Thad A. Davis of Gibson Dunn & Crutcher LLP and Karin Pagnanelli of Mitchell Silberberg & Knupp LLP.

The case is In re: Sony Gaming Networks and Customer Data Security Breach Litigation, case number 3:11-md-02258 in the U.S. District Court for the Southern District of California.

--Additional reporting by Sean McLernon. Editing by Elizabeth Bowen and Richard McVay.

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