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Targeting Harm From a Data Breach:

Federal Judge Lets Plaintiffs Get Away With Kitchen-Sink Pleading

by Robert M. McKenna and Scott Lindlaw

A settlement has been reached in the 2013 Target data breach litigation, but the suit will probably live on for years to come. Plaintiffs' attorneys will be sure to study a key ruling as a road map on how to obtain standing by claiming a host of "injuries," so attorneys defending against data breach litigation should similarly analyze the decision.

The plaintiffs in this consumer class action against Target took a kitchen-sink approach to their lawsuit, tossing in all kinds of alleged injuries ranging from drained bank accounts, to victims bursting into tears, to ruined holidays. This approach served the plaintiffs well, as a federal judge found harms sufficient to survive a motion to dismiss. Whether it served the legal system is another matter, as the court declined to say exactly which of the sundry claims represented real injury and which were mere compost.

As discussed in a February 2014 WLF Legal Backgrounder,[1] plaintiffs in data breach and other privacy cases are developing creative legal theories for getting past the requirement of injury or harm in order to establish standing in federal court. To show standing under Article III of the U.S. Constitution, a plaintiff must establish "an injury-in-fact" that is "concrete and particularized and []actual or imminent, not conjectural or hypothetical."[2] For years, the "injury-in-fact" requirement resulted in the dismissal of most of these actions because plaintiffs could not prove concrete injury from supposed privacy invasions such as the lost value of information gathered by cookies. But the Target litigation shows how the plaintiffs' bar is adapting. And it illustrates how, on a motion to dismiss, loading up a complaint with every conceivable so-called injury can win the day.

The Target breach in November 2013 may be the most notorious theft of its kind, and the facts are widely known. Hackers penetrated the retail giant's computer networks and "compromised" the personal information of as many as 110 million people.[3] But do allegations that personal data was "compromised" count as "harm?" "Compromised"—whatever the term means—is a word that the plaintiffs use liberally, claiming over and over that it does amount to harm.[4] Judge Paul A. Magnuson of the District of Minnesota did not specifically reject or embrace this theory.

His silence may give comfort to future plaintiffs. The Target plaintiffs throw in a potpourri of alleged harms, such as delayed purchases of new cars, difficulties returning merchandise, and the "worst holiday ever."[5] Alongside those dubious "injuries" are many instances of unauthorized charges following the breach. The court apparently concluded that these unauthorized charges and a handful of other claims represented

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the type of "concrete and particularized," non-speculative injury-in-fact that the Supreme Court had in mind in *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*[6] But the court did not distinguish between what does and does not constitute injury-in-fact, potentially giving new ammunition to plaintiffs' lawyers. They can plausibly argue that the court never expressly rejected such claims of harm as the mother whose "plans to celebrate her daughter's 21st birthday on December 22, 2013 were spoiled."[7] And if the District of Minnesota tacitly accepted these types of "harms" as sufficient to obtain standing, they may argue, then other courts should embrace them, too.

The complaint opens with a series of extended narratives apparently designed to make the named plaintiffs more sympathetic:[8]

- A mother of five sees a fraudulent charge of $276 allegedly stemming from the breach. "As a result of the Target breach," the complaint alleges, she misses payments for her rent, her car, and a washer and dryer, causing about $200 in fees.[9]
- A wife whose husband was unemployed sees seven unauthorized charges totaling approximately $940. "Due to the Target breach," according to the complaint, she can't pay bills for her rent, car insurance, loans, and cell phone. This damaged her credit score, "disrupting her plan to purchase a car."[10]
- A Texas woman discovered more than $1,500 in unauthorized charges. Because she could not visit, or buy Christmas presents for her grandchildren, or host Christmas dinner, "[s]he experienced her worst holiday ever."[11]

For nearly 50 pages after that, the complaint marches through a litany of other alleged injuries:

- Unauthorized charges;
- ***Attempted*** unauthorized charges;[12]
- Loss of access to funds and credit;[13]
- Late-payment fees due to missed payments;[14]
- Household utilities shut off because of lack of access to funds;[15]
- Overdraft fees;[16]
- Identity theft;[17]
- ***Attempted*** identity theft;[18]
- Time spent resetting automatic payment instructions for accounts;[19]
- Unreimbursed card-replacement fees;[20]
- Time spent completing affidavits for banks;[21]
- Declined payment fees;[22]
- Being forced to borrow money to cover expenses;[23]
- Time spent filing a police report;[24]
- "[D]ifficulty returning items to Target using [a] replacement card";[25]
- Reduced credit and ATM limits.[26]

Some courts would probably not recognize certain of these claimed injuries on the ground that they are too attenuated or speculative.[27] As explained previously, others would probably falter on the Supreme Court's recent decision requiring that plaintiffs show a threatened injury is at least "certainly impending."[28] Aware of this, the plaintiffs cast one of their shakiest claims in precisely this language. In dozens of instances, they assert that "Plaintiff [] was harmed by having [] financial and personal information compromised and faces the imminent and ***certainly impending*** threat of future additional harm from the increased threat of identity theft and fraud due to her financial and personal information being sold on the Internet black market and/or misused by criminals."[29]

So which of these "victims" suffered an injury-in-fact? To read the opinion, the answer may be some or all. Each of the above-listed examples of alleged injury comes from paragraphs 1 and 8-94 of the complaint. The court agreed that several of these constituted "injuries":

> [P]aragraphs 1.a through 1.g and 8 through 94 of the Complaint are a recitation of many of the individual named injuries, including unlawful charges, restricted or blocked access to bank accounts, inability to pay other bills, and late payment charges or new card fees. … Plaintiffs' allegations plausibly allege that they suffered injuries that are fairly traceable to Target's conduct. This is sufficient at this stage to plead standing. Should discovery fail to bear out Plaintiffs' allegations, Target may move for summary judgment on the issue.[30]

Although the judge identified four specific allegations of harm as injuries, he never rejected the other alleged harms. Rather, by prefacing the four recognized injuries with the word "including," he seems to leave open the possibility that other claimed harms may also confer standing. Thus, nothing in this opinion stops future plaintiffs from claiming that the other injuries alleged in the complaint constitute harm.

Of course, at the motion-to-dismiss stage, it is not the court's role to sort out precisely which alleged harms constitute injury such that they entitle the plaintiffs to sue. As the court acknowledged here, to survive a 12(b)(6) motion, the complaint must contain "enough facts to state a claim to relief that is plausible on its face."[31] The court decided the complaint met that threshold test. Nothing obliged it to explain exactly why, or to identify the claims that were *bona fide* injuries versus those that were not.

The court did reject Target's argument that the plaintiffs had not adequately pled injury because some individual plaintiffs failed to "allege that their expenses were unreimbursed or say whether they or their bank closed their accounts."[32] The court found that those arguments "set a too-high standard for Plaintiffs to meet at the motion-to-dismiss stage."[33]

In the approximately three months since its issuance, no court has relied on this opinion on the issue of what constitutes injury-in-fact in the standing analysis. No plaintiff has pointed to this opinion as the basis for arguing that a specific alleged injury should grant standing. That is somewhat comforting.

But plaintiffs' lawyers are a creative lot, and one expects their theories to keep evolving. The February 2014 Legal Backgrounder noted that Target had offered customers free credit-monitoring services. It predicted that "[b]y providing these services free of charge, Target could deprive plaintiffs of one claim of 'harm.'"[34] That prediction has proven incorrect. The Target plaintiffs cite credit-monitoring costs as harm,[35] and dismiss Target's one-year offer as "inadequate":[36]

> Credit monitoring only informs a consumer of instances of fraudulent opening of new accounts, not fraudulent use of existing credit cards. Agencies of the federal government and privacy experts acknowledge that stolen data may be held for more than a year before being used to commit identify theft and once stolen data has been sold or posted on the Internet, fraudulent use of the stolen data may continue for years.[37]

Did the court find persuasive this new argument that credit monitoring is inadequate? No one except the judge knows. Here again, the court was silent on this argument. Nor will this case provide an answer, because the parties have entered into a settlement agreement.[38] The only certainties are that there will be future data breaches, that litigation will follow, and that plaintiffs' attorneys will continue to develop novel theories about what constitutes harm.

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Endnotes

[1] *See* Robert M. McKenna and Scott Lindlaw, *Targeting Harm from a Breach: Plaintiffs' Lawyers Get Creative in Data Privacy Suits*, Washington Legal Found. (Feb. 7, 2014), http://www.wlf.org/upload/legalstudies/legalbackgrounder/020714LB_McKenna.pdf.
[2] *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 120 S. Ct. 693, 704 (U.S. 2000).
[3] First Amended Consolidated Class Action Complaint ¶1, *In re Target Corp. Customer Data Sec. Breach Litig*., No. 0:14-md-02522-PAM, Dkt. No. 258 (D. Minn. Dec. 1, 2014).
[4] *See*, *e.g.*, *id*. at ¶¶12, 13, 86 ("Plaintiff [] was harmed by having her financial and personal information compromised . . .").
[5] *Id*. at ¶1(c).
[6] *Supra* note 2.
[7] *Id*. at ¶1(e).
[8] *Id*. at ¶1(a)-(g).
[9] *Id*. at ¶1(a).
[10] *Id*. at ¶1(b).
[11] *Id*. at ¶1(c).
[12] *See*, *e.g.*, *id*. at ¶¶11, 18, 62.
[13] *See*, *e.g.*, *id*. at ¶¶12, 76.
[14] *See*, *e.g.*, *id*. at ¶¶20, 32.
[15] *See id*. at ¶63.
[16] *See*, *e.g.*, *id*. at ¶¶77, 91.
[17] *See id*. at ¶16.
[18] *See id*. at ¶¶25.
[19] *See*, *e.g.*, *id*. at ¶¶13, 55.
[20] *See*, *e.g.*, *id*. at ¶¶32, 37, 77.
[21] *See*, *e.g.*, *id*. at ¶¶33, 42.
[22] *See id*. at ¶46.
[23] *See*, *e.g.*, *id*. at ¶¶54, 55, 91.
[24] *See id*. at ¶81.
[25] *See id*. at ¶82.
[26] *See id*. at ¶89.
[27] *See*, *e.g.*, *Reilly v. Ceridian Corp.*, 664 F.3d 38, 43 (3d Cir. 2011) ("The present test is actuality, not hypothetical speculations concerning the possibility of future injury."); *Katz v. Pershing, LLC*, 672 F.3d 64, 78 (1st Cir. 2012) (plaintiff's purchase of credit-monitoring and insurance guard against "a purely theoretical possibility [that] simply does not rise to the level of a reasonably impending threat."). *See also In re Google, Inc. Privacy Policy Litig.*, No. 5:12-cv-01382-PSG, 2014 U.S. Dist. LEXIS 100245, at *17 (N.D. Cal. July 21, 2014) (dismissing certain alleged threats of future harms in data privacy case as "conjectural" and collecting cases).
[28] *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1148 (2013) ("[R]espondents' theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending."); *see also Remijas v. Neiman Marcus Grp., LLC*, No. 14-C-1735, 2014 WL 4627893, at *4 (N.D. Ill. Sept. 16, 2014) ("[T]he complaint does not adequately allege that the risk of identity theft is sufficiently imminent to confer standing."); *Strautins v. Trustwave Holdings, Inc.*, No. 12-CV-09115, 2014 WL 960816 (N.D. Ill. Mar. 12, 2014) ("To the extent that [claimed injuries] are premised on the mere possibility that [personally identifiable information] was stolen and compromised, and a concomitant increase in the risk that she will become a victim of identity theft, Strautins' claim is too speculative to confer Article III standing.").
[29] *See*, *e.g.*, First Amended Consolidated Class Action Complaint ¶¶16, 21, 56, 67, *In re Target Corp. Customer Data Sec. Breach Litig*. (emphasis added).
[30] *In re Target Corp. Customer Data Sec. Breach Litig*., No. 0:14-md-02522-PAM, 2014 U.S. Dist. LEXIS 175768, at *7 (D. Minn. Dec. 18, 2014) (internal quotations and citations omitted).
[31] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 548, 127 S. Ct. 1955, 1961 (2007).
[32] *In re Target Corp.,* 2014 U.S. Dist. LEXIS 175768, at *7.
[33] *Id*.
[34] McKenna and Lindlaw, *supra* note 1
[35] *See, e.g.*, First Amended Consolidated Class Action Complaint ¶¶1(d), 10, 18, 21, 107, *In re Target Corp. Customer Data Sec. Breach Litig*.
[36] *Id*. at ¶183.
[37] *Id*.
[38] Order Certifying a Settlement Class, Preliminarily Approving Class Action Settlement, and Directing Notice to the Settlement Class, *In re Target Corp. Customer Data Sec. Breach Litig*., No. 0:14-md-02522-PAM, Dkt. No. 364 (D. Minn. Mar. 19, 2015).

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