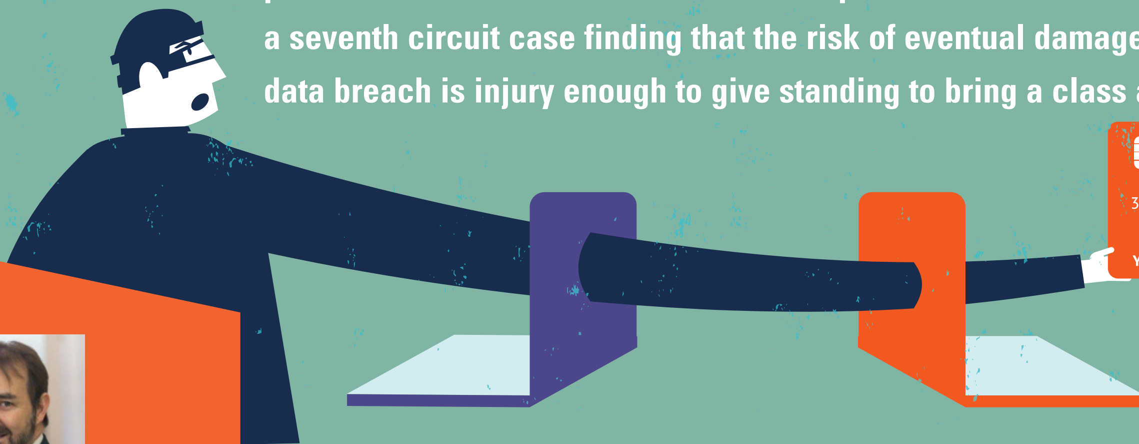
BY RICHARD L. MILLER II AND STEPHEN C. JARVIS

Using Class Actions for Credit Card Data Theft

Attorneys and potential clients often wonder what they can do if their personal information is stolen from a corporation. This article highlights a seventh circuit case finding that the risk of eventual damage from a data breach is injury enough to give standing to bring a class action.



RICHARD L. MILLER II *is a partner at Siprut PC in Chicago, where he concentrates his practice in class action and commercial litigation matters.*

rmiller@siprut.com

STEPHEN C. JARVIS *is partner at Wawrzyn and Jarvis LLC in Chicago, where he concentrates his practice in intellectual property, class action, and commercial litigation matters.*

stephen@wawrzynlaw.com

AS YOU'RE PREPARING TO LEAVE THE OFFICE ON A FRIDAY AFTERNOON, your phone rings. It's an existing client and she's upset about an email she received from BigBox, a national chain of hardware stores. BigBox's email explains that several months ago hackers installed malware on BigBox's computer network, and the credit card information of hundreds of thousands of customers was stolen.

BigBox is offering the client and the other victims a free credit-monitoring service. BigBox has also promised to fully reimburse any customers whose cards are used fraudulently. The client explains that you are the only lawyer she knows. She wants you to bring a class action against BigBox.

Looking out your office window, you realize that your plans of watching the Sunday Cubs game are slipping away. But in an effort to assist the client you ask intake questions. You learn that while the client's credit card number was stolen, there have been no fraudulent charges, and she has not spent any money on monitoring charges made on her credit card.

You quickly make two determinations. *First*, if the client were to file suit, the only way it makes sense would be as a class action. *Second*, you think the client doesn't have *standing* to bring suit. The hackers didn't make fraudulent charges on her credit card. No harm, no foul. You let her down easy, tell her to let you know if any fraudulent charges appear on her credit card in the future, and head home.

While commuting home, you vaguely recall reading about the seventh circuit's ground-breaking 2015 decision in *Remijas v. Neiman Marcus Group*.[1] And then you wonder if you gave competent legal advice.

1. *Remijas v. Neiman Marcus Group*, 794 F.3d 688 (7th Cir. 2015).

TAKEAWAYS >>

- Because an individual's damages are often low when their personal information is stolen from a corporation that they have done business with, it is usually best to proceed with their claims as a class action.

- Under the Federal Rules of Civil Procedure, the four requirements for class action certification are numerosity, commonality, typicality, and adequacy.

- A recent seventh circuit case holds that when hackers steal an individual's credit card information from a corporation that they have done business with, the very real risk that the hackers will *eventually* make fraudulent charges on the credit card is an injury sufficient to support standing.

The client has a class action case

You advised the client that a lawsuit against BigBox would only make sense as a class action lawsuit. What is the basis of this determination? To begin with, if the hackers *had* used your client's credit card, but racked up only a few hundred dollars in fraudulent charges, the costs of litigation would dwarf the value of recovery. Likewise, the other hundreds of thousands of BigBox customers whose credit cards were stolen are in the same position as your client, *i.e.*, they would not bring a suit over a few hundred dollars either.

A class action, however, enables the thousands of customers to bring one suit for potentially millions of dollars. In short, class action lawsuits both (1) incentivize plaintiffs to come together to seek recovery for small amounts of damages and (2) deter potential defendants from engaging in illegal behavior that would otherwise result in such small amounts of harm that no one would sue them.

Further, the client would likely meet the requirements to bring a class action. This is true even though class actions are an "exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only."[2] Courts will only "certify" a class, *i.e.*, permit the case to be tried as a class action, when a set of requirements meant to safeguard the rights of the absent individuals are satisfied. The four requirements for certification, which are codified in Federal Rule of Civil Procedure 23(a) are numerosity, commonality, typicality, and adequacy.[3]

Numerosity requires that there are so many individuals in the class that simply joining them as parties would be impracticable.[4] In your client's potential case, there are hundreds of thousands of victims, thus satisfying the first requirement.

Commonality requires that there be common questions of law and fact such that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[5] Again, your client and the other victims will assert similar questions of law and fact, *e.g.*, whether their credit card numbers were stolen, whether BigBox breached a duty owed to its customers, and the like.

Typicality requires that the claims and defenses of the representative is typical of everyone else in the class.[6] Your client and the rest of the class would likely assert the same claims against BigBox.

The final requirement is **adequacy**. This requirement demands that the representative must fairly and adequately represent the interests of the class members.[7]

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2. *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979).
3. Federal Rule of Civil Procedure 23(a) ("Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.").
4. See *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964) ("'[I]mpracticability' does not mean 'impossibility,' but only the difficulty or inconvenience of joining all members of the class.'" (internal citations omitted)).
5. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).
6. See *Retired Chicago Police Ass'n v. Chicago*, 7 F.3d 584, 596-97 (7th Cir. 1993) ("[T]he typicality requirement primarily directs the district court to focus on whether the named representatives' claims have the same essential characteristics as the claims of the class at large. A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory.") (internal citations omitted).
7. See *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1121 (7th Cir. 1979) ("[A]dequate representation is the foundation of all representative actions . . . .").

ALTHOUGH NONE OF THE *NIEMAN MARCUS* PLAINTIFFS' CREDIT CARDS HAD BEEN USED FRAUDULENTLY, THE RISK THAT THEY *WOULD* BE USED WAS SUFFICIENT TO BE DEEMED AN INJURY.

In short, your determinations were sound that a class action makes the most sense financially, and that your client could satisfy the requirements of bringing a class action lawsuit against BigBox.

Your client possesses standing

Is your determination that your client lacks standing to bring a suit against BigBox correct? Of course, standing is required not only in class action cases, but in every single case filed in federal court.[8] Indeed, standing stems from Article III of the Constitution, which establishes the "case-or-controversy" requirement.[9] Standing forbids federal courts from adjudicating "hypothetical" cases or from issuing advisory opinions.[10] To establish standing, your client must prove that (1) she suffered an injury (2) that was caused by BigBox and (3) can be redressed by a court.[11]

With that in mind, does your client have standing to file suit? On the one hand, the answer seems to be "no." If the hackers have not fraudulently used your client's credit card, and your client has not been forced to spend money monitoring charges, she does not appear to have actually been injured. Your client, on the other hand, insists: "How do I know that the hackers won't use my card? Am I just supposed to wait until they actually do?"

According to some district court decisions addressing this very issue, the fear that the hackers *may* use your client's card fraudulently is just too tenuous to establish the standing requirement of injury.[12] That position, however, has been rejected by the seventh circuit's decision in *Remijas v. Neiman Marcus*.[13]

Standing in the seventh circuit

The *Neiman Marcus* case clarifies what constitutes an "injury" to establish standing.[14] In a 2013 cyberattack, hackers installed malware on Neiman Marcus' computer system. Neiman Marcus eventually determined that the credit card information of 350,000 customers was exposed to the malware, and 9,200 of the customers were victims of fraudulent credit card charges. Neiman Marcus investigated the reports, publicly announced the data breach, notified customers, and offered one year of free credit monitoring and identity-theft prevention services.

A class action suit was brought against Neiman Marcus on behalf of the 350,000 customers. One group of plaintiffs had not experienced fraudulent charges and had not spent any of their own money on credit-monitoring or identity-theft prevention services. Sound familiar? Like your client, these plaintiffs argued that the *potential* fraudulent use of their credit cards was enough injury to establish standing.

The district court found that the plaintiffs had no standing to bring suit, because they had not suffered an injury.[15] The district court relied on the facts that none of those plaintiffs' credit cards were actually used fraudulently, and that none of those plaintiffs had been forced to spend money on preventative measures.

The seventh circuit disagreed. First, the court noted that the plaintiffs knew for a fact that their credit card information was stolen. Second, although none of those plaintiffs' credit cards had been used fraudulently, the risk that they *would* be used was sufficient to be deemed

ISBA RESOURCES >>

- Brandon M. Wise, *Bringing an Unpaid Minimum Wage Claim in Illinois,* 104 Ill. B.J. 36 (July 2016), https://www.isba.org/ibj/2016/07/bringinganunpaidminimumwageclaimini (comparing Illinois class actions to federal class actions).
- John A. Bruegger, *Anatomy of a Class Action Killer: Picking Off Named Plaintiffs after* Barber, 100 Ill. B.J. 208 (Apr. 2012), https://www.isba.org/ibj/2012/04/anatomyofaclassactionkillerpickingo.
- Mark Rouleau, *Seventh Circuit Throws the Baby Out With the Bathwater in Class Action Certification—Class Counsel's Misconduct as Basis for Decertifying Class:* Creative Montessori Learning Centers v. Ashford Gear LLC, *No. 11-8020 November 22, 2011*, Trial Briefs (Jan. 2012), https://www.isba.org/sections/civilpractice/newsletter/2012/01/seventhcircuitthrowsthebabyoutwitht.

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8. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (The elements of standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case, [and] each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof . . . .").
9. *Id.* at 559.
10. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.").
11. *Lujan*, 504 U.S. at 560-61.
12. See, *e.g.*, *Strautins v. Trustwave Holdings, Inc.*, 2014 WL 960816 (N.D. Ill. March 12, 2014); *In re Barnes & Noble Pin Pad Litigation*, 2013 WL 4759588 (N.D. Ill. Sept. 3, 2013).
13. See also *Lewert v. P.F. Chang's China Bistro, Inc.*, 2016 WL 1459226, *1 (7th Cir. Apr. 14, 2016).
14. *Remijas v. Neiman Marcus Group, LLC*, 794 F.3d 668 (7th Cir. 2015).
15. *Remijas v. Neiman Marcus Group, LLC*, 2014 WL 960816, at *3-4 (N.D. Ill. Sept. 16, 2014).

an injury. Additionally, the seventh circuit pointed to the fact that Neiman Marcus provided complimentary credit-monitoring services; therefore Neiman Marcus itself recognized the impending risk of future harm.

Conclusion

Your advice to your client that a class action is her best hope was sound. But, was your advice that she lacked standing appropriate? Well, perhaps if you had given that advice before the seventh circuit's opinion in *Neiman Marcus*.

Neiman Marcus clarified the analysis of standing in data-breach class action cases. Under the new reasoning, since your client's credit card had actually been stolen from BigBox, the very real risk that the hackers would *eventually* make fraudulent charges on her credit card is an injury sufficient to support standing.

While *Neiman Marcus* is only binding on district courts within the seventh circuit, class action plaintiffs will undoubtedly rely on that case in district courts in other jurisdictions. Will other circuits begin to follow the seventh circuit's lead? Only time will tell. IBJ

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