



Portfolio Media, Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

7th Circ. Won't Revisit Neiman Marcus Data Breach Ruling

By **Jody Godoy**

Law360, New York (September 17, 2015, 5:29 PM ET) -- The Seventh Circuit declined to rehear an appeal it decided against Neiman Marcus over a payment card data breach on Thursday, leaving in place the precedential ruling that held plaintiffs can sue for the trouble and expense of preventing fraud on their accounts.

The ruling will allow the suit in Illinois federal court, which has been on ice for a year during the appeal, to move forward. The plaintiffs claim their payment card details were compromised in the 2013 breach of Neiman Marcus systems that affected a proposed class of 350,000 customers, saying the retailer cut corners on security measures that could have prevented or mitigated the breach and didn't give them timely notice of the attack.

U.S. District Judge James B. Zagel **tossed the March 2014 suit** in September, saying he wasn't convinced that unauthorized charges for which the plaintiffs, who say they were exposed to both fraudulent charges and an increased risk of identity theft, would be reimbursed qualified as injuries sufficient for standing.

The Seventh Circuit **overturned that decision** in July. The appellate court said that preventive costs that cardholders might incur such as credit monitoring subscriptions and replacement card fees "easily" qualify as concrete injuries and that Neiman Marcus would not have provided free credit monitoring to customers who shopped at the retailer during 2013 if it didn't expect repercussions from the breach.

The appellate panel distinguished the data breach suit by Neiman Marcus customers from the U.S. Supreme Court's 2013 decision in *Clapper v. Amnesty International*, which Neiman Marcus had successfully invoked to undermine the plaintiffs' standing. In that case, the justices determined that the possibility of communications being intercepted by the government wasn't enough to confer standing on plaintiffs who complained of having to take costly steps to keep their conversations private.

The Seventh Circuit held that unlike the speculated government snooping in *Clapper*, identity fraud is a foreseeable consequence of a data breach and that plaintiffs have standing to bring claims over the time and cost taken to prevent such fraud.

In early August, Neiman Marcus **asked the appellate court** to rehear the matter en banc, saying that the court had made numerous errors in the ruling and that the decision "all but declares that such breaches automatically confer standing."

Neiman Marcus said the appellate panel's ruling contradicted Supreme Court precedent in *Clapper*. In doing so, the court had improperly gone beyond the complaint to speculate about harms the plaintiffs hadn't alleged, the retailer argued.

The erroneous precedent would have long-term effects on data breach law if not amended, the retailer warned.

The appellate panel's reasoning has already been invoked in other data privacy suits, including an Alabama action against a hospital where an **employee stole patient data** and used it to file tax returns and a dispute between the Federal Trade Commission and Wyndham Hotels **over multiple breaches**.

Tina Wolfson of Ahdoot & Wolfson PC, who represents the plaintiffs, said the Seventh Circuit's decision not to rehear the issue comes as no surprise.

"We don't think it's controversial, we think it's the correct interpretation of Clapper," Wolfson told Law360.

Circuit Judges Diane P. Wood, Michael S. Kanne and John Daniel Tinder, who decided the appeal, also considered the petition for rehearing.

Counsel for Neiman Marcus did not immediately reply to a request for comment.

The plaintiffs are represented by Theodore W. Maya and Tina Wolfson of Ahdoot & Wolfson PC and Joseph Siprut of Siprut PC.

Neiman Marcus is represented by David H. Hoffman, Daniel Craig and Tacy Flint of Sidley Austin LLP.

The case is Remijas et al. v. The Neiman Marcus Group LLC, case number 14-3122, in the U.S. Court of Appeals for the Seventh Circuit.

--Editing by Patricia K. Cole.

All Content © 2003-2015, Portfolio Media, Inc.