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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Sony Breach Ruling Provides Opening For Plaintiffs Bar

By **Allison Grande**

Law360, New York (January 22, 2014, 9:37 PM ET) -- Though he cut large portions of a proposed class action over [Sony Corp.](#)'s infamous data breach, a California federal judge on Tuesday preserved the plaintiffs' standing and security claims in a key ruling that shows courts have become willing to entertain claims they once quickly canned.

In a 97-page ruling, U.S. District Judge Anthony J. Battaglia granted Sony's motion to dismiss 43 of 51 claims in the plaintiffs' first amended class action complaint. The judge found that these negligence, breach of contract and other claims brought under the laws of nine states were insufficiently pled for a variety of reasons, including that they failed to allege actual damages or other requisite elements of the claims, or that they were precluded by the existence of contracts between the plaintiffs and Sony.

But while the ruling dealt a significant blow to the plaintiffs' prospects, the few claims that did survive, coupled with the judge's ruling that the plaintiffs had established the standing that would permit him to thoroughly consider each claim, provide a boost for data breach plaintiffs that have traditionally struggled to get their foots through the door.

"A few years ago, the plaintiffs likely wouldn't have gotten past the standing stage, and while it's still a pretty high bar, it's not insurmountable, due to what seems to be a slow but steady recognition by courts that in certain cases the loss of sensitive data can very well result in real injury," [Pepper Hamilton LLP](#) privacy attorney Jeffrey L. Vagle told Law360.

Attorneys pointed to two particularly notable holdings in the lengthy ruling that highlight the growing willingness by courts to at least entertain plaintiffs' efforts to recover for increasingly prevalent data breaches.

The first conclusion dealt with the threshold issue of whether the plaintiffs had alleged sufficient "injury-in-fact" to establish Article III standing, a hurdle that typically dooms many data breach class actions.

But Judge Battaglia sided with the plaintiffs, ruling their allegations that their personal information was collected by Sony and then wrongfully disclosed as a result of the 2011 intrusion that compromised the data of as many as 31 million users was sufficient to establish standing at this stage in the proceedings.

"Plaintiffs in data breach cases typically face a lot of challenges in asserting claims, and the court discusses many of those here," said Venkat Balasubramani, a partner with Internet and media boutique Focal PLLC. "However, importantly, the court declines to dismiss the entire lawsuit on Article III

standing grounds, perhaps demonstrating the limitations of standing as a doctrine to get rid of these lawsuits.”

In reaching his determination, Judge Battaglia rejected **Sony's argument** that the [U.S. Supreme Court's February decision](#) in *Clapper v. Amnesty International* — which held that a coalition of private citizens had failed to establish standing to challenge a government surveillance statute because they hadn't shown concrete evidence that the government spied on them — tightened the injury-in-fact analysis set forth by the Ninth Circuit in its December 2010 ruling in *Krottner v. Starbucks*.

Instead, Judge Battaglia ruled that both cases should be considered controlling because “Clapper simply reiterated an already well-established framework for assessing whether a plaintiff had sufficiently alleged an 'injury-in-fact.’”

Based on the holding, the judge concluded that the plaintiffs had plausibly alleged a “credible threat” of impending harm based on the disclosure of their personal information and that neither *Krottner* nor *Clapper* required the plaintiffs to allege that their data was actually accessed by a third party.

“Some people do feel that Clapper tightened the injury-in-fact analysis, so it's not an uncontroversial holding for the court to come out and say that Clapper didn't add anything new to the Article III standing analysis,” Vagle said.

The judge offered another surprising and potentially significant declaration in his adoption of the plaintiffs' argument that Sony had a legal obligation to provide “reasonable network security” to protect users' personal data.

“While this did not translate into a claim that survived dismissal due to quirks in the negligence doctrine, it's still a significant conclusion that other plaintiffs will likely latch on to,” Balasubramani said.

The determination also plays into the ongoing debate over how far companies need to go to secure their networks in the absence of formal data security rules, an issue at the heart of the [Federal Trade Commission's hotly contested enforcement actions](#) against [Wyndham Worldwide Corp.](#) and [LabMD Inc.](#), attorneys noted.

“It's a pretty powerful statement by the judge because it's starting to show that courts are recognizing that there is a duty on the part of those who hold sensitive information to take certain steps to take care of that data,” Vagle said. “The next logical question is what constitutes reasonable steps, which is not something for the courts to address at the dismissal stage, but it is an issue that companies are looking for guidance on.”

The ruling did provide some insight to data breach plaintiffs searching for viable claims that they could bring by way of the few claims that did survive, which were mainly based on Sony's alleged misrepresentations regarding “reasonable security” and “industry-standard encryption,” according to attorneys.

A common thread that ran through the surviving claims was that they were based on state consumer protection statutes that have limited damages potential or are restricted to injunctive relief or restitution, providing plaintiffs with a way to get around the difficulty of proving actual damages.

“If proven, the claims would result in Sony having to change what kind of disclosures it makes about privacy and the way it protects data, as opposed to providing plaintiffs with any money,” [Mintz Levin Cohn Ferris Glovsky & Popeo PC](#) member Kevin McGinty said.

The decision also broke some relatively new ground in holding that the plaintiffs' reliance on Sony's alleged security misrepresentations was sufficient to show a “loss of money or property” because the disclosures caused the users to purchase consoles that they would not have bought if they had not been given the security assurances, [Bryan Cave LLP](#) senior counsel Daniel Rockey noted.

“I would expect to see plaintiffs’ counsel attempting to connect their provision of personal information to the purchase of a product or service, and alleging that they would not have purchased said product or service had they known that the company did not have reasonable security safeguards,” he said, although he added that such an alleged connection would be difficult to make in most cases.

But despite the positive developments for plaintiffs, attorneys noted that the battle is still an uphill one, and that the Sony users still faced a tough task in maintaining the remaining claims now that they've gotten their foot in the door.

“This is not the first go around for the plaintiffs,” said Torin A. Dorros, the managing attorney of Los Angeles-based boutique firm Dorros Law. “There’s only so many bites at the apple a court is going to permit, and the court’s opinion reflects its apparent frustration with the plaintiffs’ case, several times labeling their arguments as 'nonsensical.’”

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 Harvey J. Wolkoff and Mark P. Szapak of [Ropes & Gray LLP](#) and Amanda C. Fitzsimmons and William S. Boggs of [DLA Piper](#).

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 Jeff Sistrunk. Editing by John Quinn and Chris Yates.

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