

Memorandum

Remijas v. Neiman Marcus: The Seventh Circuit Expands Standing in the Data Breach Context

August 25, 2015

Introduction

The question of what constitutes standing under Article III of the U.S. Constitution in the context of data breach cases has been a topic of recent debate, both in and out of courtrooms. The Supreme Court in *Clapper v. Amnesty International USA*—a case that did not address a data breach—clarified that, in order to establish standing, plaintiffs must show that they suffered an injury that is “concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.”¹ In the data breach context, courts typically hold that the mere fact that a data breach occurred does not constitute an injury² and frequently find that evidence of harm offered by data breach plaintiffs is too attenuated or difficult to quantify to be deemed “actual or imminent” injury.³

The Seventh Circuit recently considered the issue of standing in a data breach action brought against Neiman Marcus and held that, under certain circumstances, data breach victims whose data has been stolen

¹ *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1147 (2013) (citing *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2752 (2010)).

² See, e.g., *In re Barnes & Noble PIN Pad Litigation*, No. 12-CV-8617, 2013 WL 4759588 at *4-5 (N.D. Ill. Sept. 3, 2013).

³ See, e.g., *Storm v. Paytime*, No. 14-cv-1138, 2015 WL 1119724, at *16 (M.D. Pa. Mar. 13, 2015) (holding that a heightened risk of identity theft “does not suffice to allege an imminent injury” and that damages in the form of plaintiffs’ increased expenses related to measures they took to protect themselves from identity theft after the breach may not be used to “manufacture” standing); *Peters v. St. Joseph Services Corp.*, No. 4:14-CV-2872, 2015 WL 589561, at *7 (S.D. Tex. Feb. 11, 2015) (dismissing the consumer’s complaint on the grounds that the purported increased risk of identity theft/fraud was “speculative” and thus did not constitute “certainly impending” injury and that the plaintiff “has not alleged any quantifiable damage or loss she has suffered as a result of the Data Breach”); *In re Barnes & Noble Pin Pad Litig.*, 2013 WL 4759588, at *5 (finding that improper disclosure of personal identifying information and loss of privacy were insufficient to establish standing and rejecting plaintiffs’ claim that defendant’s untimely and/or inadequate notification of the breach increased the risk that the plaintiffs will suffer “some actual injury” as a result of the breach).

but who have not yet experienced any actual injury nevertheless merit Article III standing.⁴ In so doing, the court's opinion in *Remijas v. Neiman Marcus* explicitly distinguishes *Clapper* in key respects, breaking with the trend of relying on *Clapper* to deny standing to data breach plaintiffs.

Remijas v. Neiman Marcus

A. Facts and Procedural History

In December 2013, Neiman Marcus began receiving reports from its customers that their payment cards had experienced fraudulent charges. An internal investigation subsequently revealed that the payment card data of approximately 350,000 customers stored in Neiman Marcus' system had been exposed to hackers' malware over a three-month period. Neiman Marcus sent breach notifications to all customers who had shopped at any of its stores during the prior twelve months and offered these customers one year of free credit monitoring and identity theft protection. As of the breach notification, approximately 9,200 of Neiman Marcus's customers had experienced fraudulent charges on their payment cards, all of which had been reimbursed.

A number of class-action complaints were consolidated into one that sought to represent the 350,000 customers whose data may have been hacked and a First Amended Complaint was filed in the United States District Court for the Northern District of Illinois. It alleged various causes of action, including negligence, invasion of privacy, and violation of multiple state data breach laws. The district court granted Neiman Marcus' motion to dismiss for lack of Article III standing,⁵ and the plaintiffs appealed to the United States Court of Appeals for the Seventh Circuit, which reviewed the district court's dismissal *de novo*.

B. The Seventh Circuit's Decision

The Seventh Circuit bifurcated its analysis into separate treatment of the 9,200 class members who had actually experienced fraudulent charges on their payment cards and the remaining members of the class who had not experienced any such charges. Although the former group had been reimbursed for the fraudulent charges that showed up on their payment cards, the court found that they still experienced injury beyond the fraudulent charges themselves in the form of "aggravation and loss of value of the time needed to set things straight, to reset payment associations after credit card numbers are changed, and to pursue relief for unauthorized charges."⁶ The holding that mitigation costs in the wake of actual injury are sufficient to

⁴ See *Remijas v. Neiman Marcus Grp., LLC*, No. 14-3122, 2015 WL 4394814, at *17 (7th Cir. July 20, 2015).

⁵ Neiman Marcus had also filed a motion to dismiss based on failure to state a claim, but the district court granted the dismissal based on the standing issue alone. No. 14 C 1735, 2014 WL 4627893, at *9 (N.D. Ill. Sept. 16, 2014).

⁶ *Remijas* at *7.

establish standing is consistent with general jurisprudence both in and outside of the data breach context.⁷

The Seventh Circuit's treatment of the remaining plaintiffs constitutes the more noteworthy portion of the opinion because it interprets *Clapper* in a way that no other federal appeals court has yet done in the context of a data breach. *Clapper* is commonly cited by defendants arguing against Article III standing for the proposition that "allegations of future harm can establish Article III standing if that harm is 'certainly impending,' but 'allegations of possible future injury are not sufficient.'"⁸ Such defendants have met with frequent success in getting claims dismissed for lack of standing.⁹ The *Remijas* court, however, focused on a footnote in *Clapper* that contemplated a more nuanced standard than the one quoted above:

"[Supreme Court] cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about. In some instances, [the Supreme Court has] found standing based on a 'substantial risk' that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm."¹⁰

Though the *Clapper* Court went on to deny standing based even on this "substantial risk" standard due to "the attenuated chain of inferences necessary to find harm,"¹¹ the *Remijas* court saw no such attenuation in its own set of facts. "Whereas in *Clapper*, 'there was no evidence that any of respondents' communications either had been or would be monitored,' in our case there is 'no need to speculate as to whether [the Neiman Marcus customers'] information has been stolen and what information was taken."¹² According to the *Remijas* court, this theft necessarily implies harm because, as the court asks rhetorically, "Why else would hackers break into a store's database and steal consumers' private information? Presumably, the purpose of

⁷ See, e.g., *In re Target Corp. Customer Data Sec. Breach Litig.*, MDL No. 14-2522, 66 F. Supp. 3d 1154, 1159 (D. Minn. Dec. 18, 2014) (allegations that financial losses resulted from the theft of credit and debit card information were sufficient for standing at the pleading stage).

⁸ *Remijas* at *6, citing *Clapper* at 1147.

⁹ See, e.g., *In re Barnes & Noble Pin Pad Litig.*, No. 12-CV-8617, 2013 WL 4759588, at *3 (N.D. Ill. Sept. 3, 2013) ("Nothing in the Complaint indicates Plaintiffs have suffered either a 'certainly impending' injury or a 'substantial risk' of an injury, and therefore, the increased risk is insufficient to establish standing."); *Galaria v. Nationwide Mutual Insurance Co.*, 998 F. Supp. 2d 646, 657-58 (S.D. Ohio 2014) ("Plaintiffs' Complaint does not sufficiently allege that the injury of identity theft, identity fraud, medical fraud, or phishing is certainly impending. Therefore, the increased risk of such injury does not suffice to confer standing."); *Strautins v. Trustwave Holdings, Inc.*, 27 F. Supp. 3d 871, 876 (N.D. Ill. 2014) ("*Clapper* compels rejection of [Plaintiff's] claim that an increased risk of identity theft is sufficient to satisfy the injury-in-fact requirement for standing.>").

¹⁰ *Id.* at *8, citing *Clapper* at 1150 n.5.

¹¹ *Clapper* at 1150 n.5.

¹² *Remijas* at *9 (citing *Clapper* at 1148).

the hack is, sooner or later, to make fraudulent charges or assume those consumers' identities."¹³

Interestingly, the court bolstered its conclusion regarding the inevitability of fraudulent charges with the fact that Neiman Marcus purchased credit monitoring services and identity theft protection for all affected consumers. "It is unlikely that [Neiman Marcus] did so because the risk is so ephemeral that it can safely be disregarded,"¹⁴ the court reasoned. It further hypothesized that, if Neiman Marcus had not offered credit monitoring and identity theft protection, affected consumers receiving notice of the breach would reasonably attempt to mitigate by investing in such services themselves based on a reasonable presumption of imminence of harm.¹⁵ Such mitigation would "easily qualif[y] as a concrete injury."¹⁶ *Clapper* took a dim view of using mitigation costs in standing inquiries¹⁷ and inspired numerous lower courts to do the same,¹⁸ but the *Remijas* court's consideration of mitigation costs merely reinforces the court's confidence that there was a sufficient likelihood of harm to confer standing in the first place. Companies that experience a Neiman Marcus-type breach would, in the court's eyes, find themselves presented with a Hobson's choice due to the inevitability of harm – even if they don't purchase credit monitoring services (or purchase it for reasons other than a belief in the certainty and imminence of harm), the fact that victims would purchase (or would have purchased) the same services themselves is fair game for a standing inquiry, and would anecdotally lend credence to that certainty and imminence.

¹³ *Id.* at *9.

¹⁴ *Id.* at *11.

¹⁵ "[A]n affected customer, having been notified by Neiman Marcus that her card is at risk, might think it necessary to subscribe to a service that offers monthly credit monitoring." *Id.*

¹⁶ *Id.*

¹⁷ "[R]espondents cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending. Because they do not face a threat of certainly impending [harm] . . . their costs are simply the product of their fear . . . which is insufficient to create standing. . . . "If the law were otherwise, an enterprising plaintiff would be able to secure a lower standard for Article III standing simply by making an expenditure based on a nonparanoid fear." *Clapper* at 1141.

¹⁸ See, e.g., *In re Barnes & Noble Pin Pad Litig.*, 2013 WL 4759588, at *5 ("Plaintiffs have not pled the harm they potentially face is imminent . . . Because of this, the costs they incurred in attempting to minimize their risks due to the security breach do not qualify as actual harm and thereby do not confer standing."); *Galaria v. Nationwide Mutual Insurance Co.*, 998 F.Supp.2d 646, 657 (S.D. Ohio February 10, 2014) (holding that plaintiff's purchase of credit monitoring, internet monitoring, identity theft insurance and/or data breach mitigation products in the wake of notification of theft of personal information was insufficient evidence of harm to establish standing under *Clapper*); *Storm v. Paytime*, No. 14-cv-1138, 2015 WL 1119724, at *16 (M.D. Pa. Mar. 13, 2015) (holding that damages in the form of plaintiffs' increased expenses related to measures they took to protect themselves from identity theft after the breach may not be used to "manufacture" standing under *Clapper*). See also *Reilly v. Ceridian Corporation*, 664 F.3d 38, 46 (3d Cir. 2011) ("Appellants' alleged time and money expenditures to monitor their financial information do not establish standing, because costs incurred to watch for a speculative chain of future events based on hypothetical future criminal acts are no more 'actual' injuries than the alleged 'increased risk of injury' which forms the basis for Appellants' claims.") (case decided before *Clapper* decision).

Significance and Context of *Remijas*

The *Remijas* opinion is notable for several reasons. First, it is the first federal appellate case concerning a data breach that both relied on the *Clapper* decision and found that at least some of the plaintiffs had standing based on the likelihood of future harm. Second, the decision comes amid a sea of lower court decisions that relied on *Clapper* to find the opposite. And third, the court reached its conclusion based on a set of facts that is fairly common across the landscape of data breach cases. Going forward, those plaintiffs that can establish the theft (and not merely the exposure) of exploitable consumer data will undoubtedly cite to the Seventh Circuit’s reasoning for the proposition that such theft is tantamount to a “certainly impending” injury for standing purposes, given the high risk that such data will be exploited.

As of this writing, Neiman Marcus has petitioned the Seventh Circuit for a rehearing *en banc* and has yet to receive a decision on whether such rehearing will be granted.¹⁹ It remains to be seen whether and how the case will continue to develop. In the meantime, companies should take note that courts may rely on the *Remijas* opinion in assessing data breach victims’ standing to sue based on the potentiality of future harms.

If you have any questions or would like additional information, please do not hesitate to contact any member of the Firm’s Privacy and Cybersecurity Practice.

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¹⁹ Petition for Rehearing En Banc, *Remijas v. Neiman Marcus Grp., LLC*, No. 14-3122, 2015 WL 4394814 (filed August 3, 2015).



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