

When Banks Sue Merchants Over Data Breaches

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When payment card information is stolen in a data breach, the cardholders often bring class action litigation to recover their alleged losses. But the cardholders are not the only parties seeking to be made whole. The banks and credit card companies also suffer losses, and they have been seeking to recover through litigation or contractual self-help. Indeed, the banks and credit card companies typically assert claims that far exceed those of the cardholders and include numerous costs, such as the costs incurred in giving notice to cardholders, issuing new cards, and providing increased fraud monitoring for affected accounts. Four recent cases illustrate some of the issues and complexities that arise when financial institutions seek to recoup their losses.

1. Jetro Holdings LLC v. MasterCard Inc.

In *Jetro Holdings LLC v. MasterCard Inc.*, a credit card company exercised self-help to recover its losses from a data breach.[1] Jetro, a wholesale restaurant supplier, contracted with PNC Bank to process MasterCard transactions. After Jetro suffered data breaches in 2011 and 2012, MasterCard imposed \$7 million in contractual fines, penalties and fees on PNC Bank. PNC Bank, in turn, exercised its rights to set off that amount from monies it owed to Jetro.

Having no apparent basis to recover the \$7 million from PNC Bank, Jetro sued MasterCard under a theory of equitable subordination. Equitable subrogation is traditionally applied in insurance cases. It permits an insurer to stand in the shoes of its insured so that the insurer may seek recovery from the third-party responsible for the loss. Jetro argued that equitable subrogation was applicable to its situation because MasterCard had wrongfully imposed the fines, penalties and fees on PNC Bank and Jetro had effectively insured PNC Bank for that loss. The court rejected Jetro's argument, reasoning that Jetro's loss was caused by the cybercriminals who breached Jetro's computer systems and not MasterCard. The court therefore granted MasterCard's motion to dismiss Jetro's complaint for failure to state a claim.

2. First Choice Federal Credit Union v. The Wendy's Co.

In *First Choice Federal Credit Union v. The Wendy's Co.*, a group of financial institutions sued the restaurant chain to recover their losses from a data breach. Wendy's suffered the breach when malware, installed



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through the use of compromised third-party vendor credentials, affected a particular point of sale system at a small number of restaurants. Earlier this year, Wendy's customers filed a class action, claiming that their payment card information was exposed in the attack.[2] Their complaint alleged that the stolen information had been used to make fraudulent purchases, but did not indicate whether the banks and credit card companies had reimbursed the cardholders for those charges.

The financial institutions brought their own class action against Wendy's, claiming greater damages than the customers.[3] The financial institutions seek to recover their customer reimbursements, as well as the costs associated with their efforts to "cancel and reissue payment cards, change or close accounts, notify customers that their cards were compromised, investigate claims of fraudulent activity, refund fraudulent charges, increase fraud monitoring on potentially impacted accounts and take other steps to protect themselves and their customer." The financial institutions also seek damages from "lost interest and transaction fees due to reduced card usage" and the diminished value of credit card and account information.

3. In re Target Corp. Customer Data Security Breach Litigation

In the Target Corp. Customer Data Security Breach Litigation, the financial institutions also sought greater damages than the customers whose data was compromised. In 2013, Target suffered a data breach that exposed the personal information of 40 million customers. The customers began filing lawsuits, which were eventually consolidated.[4] Five months later, the financial institutions filed a separate class action seeking \$200 million in damages — with more than half representing the cost of replacing the compromised cards. Target ultimately settled with the financial institutions for \$39.4 million, an amount nearly four times greater than the \$10 million it paid to settle the consumer class action.[5]

4. In re Home Depot Inc., Customer Data Breach Security Litigation

After Home Depot's 2014 data breach, the banks and credit card companies also sued. In September 2014, Home Depot announced that a cyberattack had compromised approximately 53 million email addresses and 56 million credit card accounts. Within days of Home Depot's announcement, customers began filing lawsuits.[6] A few months later, the financial institutions followed with their own complaint.[7]

Visa Inc. and MasterCard subsequently contacted Home Depot to impose financial assessments against Home Depot for alleged losses arising from the data breach.[8] Home Depot filed a motion with the court, seeking permission to notify the other class members "of their proposed allocation of the assessments, ask [them] to accept the proposed allocation as full resolution of their rights under the card brand recovery process and [give them] the opportunity to accept funds beyond the allocation to release all claims related to the data breach."

A group of class members opposed the motion, arguing that Home Depot had acted without the prior consent of class counsel.[9] They alleged that Home Depot was contacting class members immediately prior to the Thanksgiving holiday in an attempt to confuse and pressure them into accepting the proposed allocations.[10] In December 2015, the court ruled in favor of Home Depot, allowing it to contact class members regarding the settlement, but motion practice on the issue continued.[11] In the court's latest ruling, this past February, it granted plaintiffs the right to conduct discovery regarding the communications.[12]

Conclusion

These four cases show that financial institutions and credit card companies are acting aggressively to recover any losses suffered as a result of their merchants' data breaches. While the consumer class actions tend to

dominate the headlines, the efforts of the financial institutions often involve far greater amounts and more intricate complexities. Moreover, as the Jetro case demonstrates, the financial institutions do not always have to sue, as their contractual arrangements may allow them to exercise self-help.

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[1] No. 60374/2015, (N.Y. Sup. Ct. May 3, 2016).

[2] Class Action Compl., Torres v. The Wendy's Co., No. 6:16-cv-00210-PGB-DAB (M.D. Fla. Feb. 8, 2016) (ECF No. 1).

[3] See Compl., First Choice Fed. Credit Union v. The Wendy's Co., No. 2:16-cv-00506-NBF-MPK (W.D. Penn. Apr. 25, 2016) (ECF No. 1). ("Wendy's Complaint")

[4] Transfer Order, In re Target Corp. Customer Data Sec. Breach Litig., MDL No. 14-2522 (PAM) (D. Minn. Apr. 2, 2014) (ECF No. 1).

[5] Consolidated Class Action Compl., In re Target Corp. Customer Data Sec. Breach Litig., MDL No. 14-2522 (PAM) (D. Minn. Aug. 1, 2014) (ECF No. 163).

[6] Consumer Plaintiff's Consolidated Compl., In re Home Depot, Inc., Customer Data Breach Sec. Litig., No. 1:14-md-02583-TWT, (N.D. Ga. May 1, 2015) (ECF No. 93).

[7] Financial Institution Plaintiff's Consolidated Compl., In re Home Depot, Inc., Customer Data Breach Sec. Litig., No. 1:14-md-02583-TWT, (N.D. Ga. May 27, 2015) (ECF No. 104).

[8] Mem. of Law in Support of Mot. for Entry of Order, In re Home Depot, Inc., Customer Data Breach Sec. Litig., No. 1:14-md-02583-TWT, (N.D. Ga. Oct. 23, 2015) (ECF No. 141-1).

[9] See Req. for Immediate Hr'g and Discovery and Supp. Resp. to Def.'s Mot., In re Home Depot, Inc., Customer Data Breach Sec. Litig., No. 1:14-md-02583-TWT, at 2 (N.D. Ga. Nov. 30, 2015) (ECF No. 146).

[10] Emily Field, Bank's Attys Blast Home Depot Over MasterCard Breach Deal, Law360 (Dec. 4, 2015).

[11] Order, In re Home Depot Inc., Customer Data Breach Sec. Litig., No. 1:14-md-02583-TWT, (N.D. Ga. Dec. 14, 2015) (ECF No. 154).

[12] Order, In re Home Depot Inc., Customer Data Breach Sec. Litig., No. 1:14-md-02583-TWT, (N.D. Ga. Feb. 8, 2016) (ECF No. 170).