

## Seventh Circuit Gives “Legs” to Consumer Data Breach Class Action Suits: Increased Risk of Future Identity Theft Sufficient to Confer Article III Standing

On July 20, 2015, the U.S. Court of Appeals for the Seventh Circuit ruled that an increased risk of future fraudulent charges and a greater susceptibility to identity theft following a data breach were sufficient injuries to establish Article III standing, even if no actual harm has yet resulted from the breach. [\*Remijas v. Neiman Marcus Group, LLC\*](#), No. 14-3122 (7th Cir. Jul. 20, 2015). In so holding, the Seventh Circuit relaxes what has hitherto been a daunting standard in data breach class-action lawsuits, which have generally been dismissed for lack of standing—that is, the legal right of a party to bring a lawsuit based upon suffering a “concrete” injury “fairly traceable” to the challenged conduct, which is “likely to be redressed” by a favorable judicial decision.

In what is likely to be greeted with a standing ovation by the plaintiffs’ class action bar, *Neiman Marcus* is the first federal court of appeals decision to find that the data breach plaintiffs’ future injuries and attendant mitigation costs were sufficient to confer Article III standing. At least in the Seventh Circuit (that is, Illinois, Indiana, and Wisconsin), consumers who have been the victims of data

breaches have standing to sue not only for fraudulent charges and instances of actual identity theft, but also for an increased risk of future harm and harm-mitigation expenses (such as the cost of cancelling credit cards, obtaining credit reports and purchasing identity and/or credit monitoring).

### Background

In 2013, hackers breached high-end retailer Neiman Marcus’ servers, resulting in the potential disclosure of 350,000 customers’ payment card data and personally identifiable information, about 9,200 of whom had actually incurred fraudulent charges (which Neiman Marcus later reimbursed).

Following notice of the cyberattack in 2014, several class-action lawsuits were filed against Neiman Marcus for its alleged failure to adequately protect against such a security breach and to provide timely notice of the breach once it happened.

Plaintiffs alleged that they were injured in that Neiman Marcus’ alleged misconduct exposed them to an increased risk of future fraudulent credit card charges and an increased

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risk of identity theft. Plaintiffs also alleged present injuries, including the loss of time and money associated with resolving fraudulent charges and protecting against the risk of future identity theft. Notably, Neiman Marcus had offered all its potentially affected customers one year of free credit monitoring and identity-theft protection.

On September 16, 2014, the U.S. District Court for the Northern District of Illinois dismissed plaintiffs' Complaint, on the basis that none of plaintiffs' asserted injuries were sufficient to confer standing, relying upon the U.S. Supreme Court's decision *Clapper v. Amnesty Int'l USA*, 133 S.Ct. 1138 (2013), which held that a possible future injury must be "certainly impending" in order to establish standing.

In *Clapper*, the Supreme Court found that individuals did not have standing to challenge the Foreign Intelligence Surveillance Act ("FISA") because they "only suspected," but could not show, that their communications with suspected terrorists were intercepted by the government. This, the Court held, was too speculative to support Article III standing. Further, according to the Court, a "reasonable likelihood" of future injury is not enough for standing to sue, and the individuals' choice to take costly measures to protect their confidential communications does not suffice as a legally cognizable injury for standing purposes. (For a detailed summary of

*Clapper* and Article III standing, see our prior post available [here](#).)

Since the Supreme Court's 2013 *Clapper* decision, a growing number of courts have dismissed data breach class action lawsuits because, absent actual identity theft, the risk of future harm—as well as any money spent attempting to protect against potential identity theft—was too speculative to satisfy *Clapper*'s "certainly impending" threshold. At the district court level, *Neiman Marcus* was just yet another case following in the footsteps of this Article III standing trend.

### ***Neiman Marcus* Plaintiffs Fare Better Before the Seventh Circuit**

On appeal, the Seventh Circuit reversed the district court and remanded for further proceedings, ruling that *Clapper* "does not, as the district court thought, foreclose any use whatsoever of future injuries to support Article III standing."

In reaching its ruling, the Seventh Circuit distinguished *Clapper* in several important respects:

- First, whereas in *Clapper* there was no evidence that plaintiffs' communications had been or would be monitored, the *Neiman Marcus* plaintiffs did in fact have their credit-card information stolen. The Seventh Circuit emphasized that the risk of fraudulent charges or identity theft in these circumstances is

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“immediate” and “very real” – noting the plaintiffs’ allegation that the data breach occurred when hackers deliberately targeted Neiman Marcus to steal credit card information. As the Court rhetorically asked and answered, “Why else would hackers break into a store’s database and steal consumers’ private information? Presumably, the purpose of the hack is, sooner or later, to make fraudulent charges or assume those consumers’ identities.” For these reasons, “the Neiman Marcus customers should not have to wait until hackers commit identity theft or credit-card fraud in order to give class standing, because there is an ‘objectively reasonable likelihood’ that such an injury will occur.”

- Second, whereas in *Clapper* there was only “speculative harm based on something that may not even have happened,” in *Neiman Marcus* there was a “substantial risk” of future harm based on the fact that a breach did take place. The costs the plaintiffs in *Neiman Marcus* incurred in attempting to protect themselves against future identity theft and fraudulent charge were based on an “imminent harm,” not based on a fear (“nonparanoid” or otherwise) as they were in *Clapper*. Tellingly in this regard,

Neiman Marcus offered credit-monitoring services to all of its customers whose information may have been exposed — an act which would likely not have been undertaken if “the risk is so ephemeral that it can safely be disregarded.”

As to the 9,200 Neiman Marcus customers who had suffered fraudulent charges on their accounts, the Seventh Circuit found that these individual plaintiffs had unquestionably experienced standing-conferring injury—despite being fully reimbursed—as they “suffered the aggravation and loss of value of time needed to set things straight, to reset payment associations after credit card numbers are changed, and to pursue relief for unauthorized charges.”

### **Implications of *Neiman Marcus***

The *Neiman Marcus* ruling potentially heralds a new era for data breach class action lawsuits. At least in the credit/debit card data breach context, the increased risk of future harm and harm-mitigation expenses may very well now satisfy Article III standing’s requirement, even under *Clapper*’s “certainly impending” standard.

That said, the specific facts of *Neiman Marcus*—including that the breach allegedly arose from a deliberate hacker attack and that a significant number of potentially exposed cards had been subject to fraudulent charges—will likely be invoked to limit its holding. In this regard, it is

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reasonable to anticipate that courts may find standing only if the alleged risk of future harm is accompanied with a concrete, present financial harm, as such harm makes the likelihood that others will suffer some injury in the future more imminent and less speculative.

Whether and to what extent courts outside the Seventh Circuit will follow *Neiman Marcus* remains to be seen. One thing is certain, however, and that is thanks to *Neiman Marcus*, consumers who are victims of cyberattacks now have a much-needed leg up when it comes to qualifying for standing.

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