

## U.S. Supreme Court Opinion May Hobble Data Breach Class Action Suits: Possibility of Harm Is Not Enough to Confer Article III Standing

On February 26, 2013, the U.S. Supreme Court upheld a stringent constitutional standing requirement that a plaintiff needs to satisfy in order to pursue litigation in federal court. (See [\*Clapper v. Amnesty International\*](#), 568 U.S. 2013.) Now, to qualify as a sufficient injury for Article III standing purposes (that is, the legal right to bring a claim), the harm must be “certainly impending,” and not just merely “possible.”

While the specific controversy before the Court centered around governmental surveillance, *Clapper* has broader applicability, and easily covers data breach cases where a plaintiff seeks relief based solely on the mere loss of data or increased risk of future harm.

Given the difficulty in proving that a data breach has resulted in, or will result in, identity theft or some other concrete financial harm, *Clapper*'s strict standing requirement will likely cut data breach class action litigation off at the knees.

### Background

In *Clapper*, the plaintiffs—which included attorneys and human rights, labor, legal and media organizations—challenged the constitutionality of section 1881a of the 2008

amendments to the Foreign Intelligence Surveillance Act (“FISA”), which confers upon the government broad powers to intercept communications of non-U.S. persons located abroad, provided approval from the Foreign Intelligence Surveillance Court (“FISC”) is first secured. The plaintiffs sued to obtain a declaration that FISA is unconstitutional, and a permanent injunction against the surveillance on the grounds that it would gather plaintiffs’ own sensitive international communications with persons believed to be likely government targets.

The question before the Court was whether the plaintiffs had Article III standing to seek relief. A plaintiff must meet a number of requirements to have his/her case heard in federal court, including satisfying Article III of the United States Constitution which provides, among other matters, that “The Judicial Power shall extend to all Cases ... [and] to Controversies ...” This Article III standing requirement has generally been interpreted to mean that for a plaintiff to invoke federal court jurisdiction, the “case” or “controversy” at issue must involve an “injury in fact,” that is a concrete, particularized, and actual or imminent (not conjectural or hypothetical) injury caused by the complained of conduct.

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The District Court dismissed plaintiffs' complaint on the grounds that plaintiffs had failed to show the requisite "injury in fact" necessary to confer Article III standing. On appeal, the Second Circuit reversed, holding that plaintiffs showed (1) an "objectively reasonable likelihood" that their communications will be intercepted at sometime in the future, and (2) that they are suffering present injuries resulting from costly and burdensome countermeasures to protect the confidentiality of their communications from possible §1881a surveillance.

### **The Supreme Court's *Clapper* Decision**

Holding that the plaintiffs lacked Article III standing, the Supreme Court found that plaintiffs' alleged harm rested on a "speculative chain of possibilities" that failed to establish that their potential injury is "certainly impending" or is "fairly traceable" to §1881a surveillance:

- First, it is "highly speculative" whether the federal government will imminently target communications to which plaintiffs are parties. The plaintiffs were unable to demonstrate that they had any actual knowledge of the government's §1881a targeting practice.
- Second, even if plaintiffs' foreign contacts were the targets of imminent

surveillance, the plaintiffs could only speculate as to whether the government will seek to use §1881a-authorized surveillance, versus some other surveillance method (not challenged by the plaintiffs).

- Third, even if the government were to seek FISC authorization, it is only speculative as to whether the FISC will authorize the requested surveillance.
- Fourth, even if the government were to obtain FISC approval to target plaintiffs' foreign contacts under §1881a, it is "unclear" whether the government would succeed in obtaining those contacts' phone calls or emails.
- Fifth, even if the government were to target plaintiffs' foreign contacts, the plaintiffs could only speculate as to whether their own communications with those contacts would also be intercepted.

The Supreme Court thus rejected the Second Circuit's finding that standing could be based on "an objectively reasonable likelihood" that the plaintiffs' communications with their foreign contacts would be intercepted in the future. Instead, for purposes of Article III standing, the alleged harm must be "certainly impending."

The Supreme Court also rejected plaintiffs' argument that they suffer

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injury because the risk of §1881a surveillance requires them to undertake costly and burdensome measures to protect the confidentiality of their communications, including international travel to conduct in-person meetings. As the Court observed:

“[plaintiffs] 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 interception under §1881a, their costs are simply the product of their fear of surveillance, which is insufficient to create standing.”

### ***Clapper's* Implications for Data Breach Litigation**

Applying *Clapper's* holding to the context of data breach litigation, standing may no longer be established based upon the mere possibility that a third-party hacker may someday misuse a consumer's stolen information. A data breach plaintiff's allegations that his or her compromised data causes an increased risk of identity theft are simply insufficient to confer standing.

Nor may consumers “manufacture standing” for purposes of data breach litigation by incurring costs to monitor their credit or otherwise protect against the threat of future harm. By virtue of *Clapper*, costs to mitigate against hypothetical harm that is not

“certainly impending” are also insufficient to confer standing.

Looking ahead, *Clapper* will likely offer retailers and other companies defending against data breach litigation a solid Article III standing footing upon which to seek a lawsuit dismissal.

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