



Digital Privacy and Other Liability Issues in the Digital Economy

Presentation for ATRA
Megan L. Brown, Partner, Wiley Rein LLP
November 12, 2019

Copyright © 2019 Wiley Rein LLP



Federal legislation may not happen, so states are taking action

- Both parties have indicated support for privacy legislation but there are divisions
 - Preemption
 - Rulemaking authority
 - Enforcement and private rights of action
- States will consider privacy laws. Several major ones have passed (California)
- States are regulating security, including in Internet of Things (IoT) devices.



The risk of privacy class actions is growing

- Litigation normally requires a tangible harm but we are seeing an expansion of the right to sue and a relaxation in the “standing” barrier to sue
 - Key example is the **Illinois Biometric Information Privacy Act (“BIPA”)**
 - Hundreds of suits filed after *Rosenbach v. Six Flags Entertainment Corp.* (Illinois Supreme Court)
 - *Patel v. Facebook*, class action in federal court under BIPA (9th Cir.)



Plaintiffs bar is eager to cash in on privacy claims

- A handful of lawyers are bringing novel lawsuits to extract damages and settlements without showing that anyone has been harmed from alleged privacy violations.
- Plaintiffs' firms brag about "creative" lawsuits over "intangible privacy harms" that extract settlements and judgments "without having to show any direct loss."
- They seek huge fees and drive massive settlements



“[A]s there are more suits, plaintiff lawyers are going to be more knowledgeable and you’ll end up with a snowball effect that takes off quickly. The plaintiffs’ bar is talking about this. They’re salivating over this. It’s going to be a feeding frenzy.”

Mike Mimoso, IoT Hacks May Bring Frenzy of Litigation, Flashpoint BLOG (Aug. 21, 2018) <https://www.flashpoint-intel.com/es/blog/iot-hacks-may-bring-frenzy-of-litigation/#!> (quoting plaintiff attorney in IoT security suit)

Copyright 2019 Wiley Rein LLP - accompanied by verbal presentation by Megan L. Brown



Edelson

INSIDE THE FIRM

Privacy and Technology

We have gained a "national reputation as a law firm with [our] commitment to pursuing big-ticket cybersecurity and privacy cases on behalf of consumers." (Law360, January 2018). In a recent, we were the only plaintiff firm to be named a "Cybersecurity & Privacy Group Of The Year" (Law360, January 2018) and were one of five firms to be named "The Top Lawyers" in the Privacy/Data Breach category (The National Law Journal, May 2018). [View our privacy and cybersecurity information and services for a complete list of our attorneys.](#)

Have a case?

GET IN TOUCH

- Edelson claims over \$1 billion in privacy settlements and judgments and is lead counsel in 6 million person class, multi-billion dollar suit. *In re Facebook Biometric Info. Privacy Litig.*, 326 F.R.D. 535 (N.D. Cal. 2018).

THE LYON FIRM

About | Case Results | Testimonials | Blog | FAQs | Search | Contact

800.513.2403

Personal Injury | Products Liability | Class Action & Mass Tort | Medical Malpractice | Catastrophic Injury

INVASION OF PRIVACY

We give you a voice
Complete the form for immediate access to a FREE legal consultation.

Name

Phone

Email

Tell us about your case

Affected by a Privacy Violation?

Understand your rights in a world where sensitive information is digitally processed, stored, and shared. Call or message us for a free, confidential consultation with a privacy lawyer.

1-888-452-4132

Message Us

Class Action Data Breach Lawsuits & Privacy Settlements

Invasion of Privacy Lawyer & Security Breach Attorneys investigate class action data breach lawsuits for plaintiffs nationwide.

If you have had personal information and data stolen, hacked or compromised you may have a claim against a company for failing to protect its customers from **foreseeable security breaches**. Companies with a large online presence cannot assume the data banks they control are safe; they have a duty to take precautionary measures to prevent data breaches. When personal and sensitive financial information is leaked, data breach class action lawsuits are likely to follow.



Privacy rights to sue invite abuse

- Plaintiff Richard Wuest filed 10 class actions under the **California Invasion of Privacy Act**, eight in the last two years.
- Wuest's suits mostly end with payments to him and his lawyer, over \$80,000 to Wuest and more than \$420,000 to his lawyers.
- According to the defendant's lawyers, Wuest made more money as a CIPA plaintiff than he did in his day job in insurance claims.

“Wuest used the threat of a class action to extract a premium deal far in excess of the value of his individual case”

— Judge Alsup

A. Frankel, *Detecting 'pattern of abuse,' Judge Alsup rejects privacy class action by repeat plaintiff* (Aug. 14, 2019); <https://www.reuters.com/article/us-otc-alsup/detecting-pattern-of-abuse-judge-alsup-rejects-privacy-class-action-by-repeat-plaintiff-idUSKCN1V423U>

Privacy laws should not create a private right to sue

- Invites a flood of litigation
- “Injury-free” lawsuits are hard to get out of court
- The cost of defending is high
- Companies are pressured into settling
- Innovation is stifled because of fear of suit
- State AG enforcement would be more consistent and allow considerations of policy and priorities



Any private right to sue should be limited

- Plaintiffs should not be permitted to bring suits but if they are, at the very least the law should:
 - Require showing of actual damages
 - Require notice to business with an opportunity to cure
 - Require reasonably prompt action via statutes of limitation
 - Exclude minimum statutory damages
 - Respect arbitration rights and provisions
 - Provide safe harbors and cure periods

Questions?



Megan L. Brown
mbrown@wileyrein.com
202.719.7579

- Wiley Rein LLP has a team of professionals who tackle all aspects of privacy and security legislation and compliance.
- We offer webinars on CCPA, GDPR, IoT, and more:
 - **Latest Update on State Privacy Laws: California and Beyond.** Click [here](#) to listen on demand.
 - **Biometrics News.** Click [here](#) to listen on demand.
 - **What to Watch: FTC Forecast for 2019.** Click [here](#) to listen on demand.
 - **California Consumer Privacy Act (CCPA) Briefing.** Click [here](#) to listen on demand.
 - **Federal Privacy Update: Congress, NIST & More.** Click [here](#) to listen on demand.
- **WileyConnect.com** is our tech and IoT blog, and **WileyConnected** is our podcast.



Antonio Reynolds
areynolds@wileyrein.com



Joan Stewart
jstewart@wileyrein.com



Kat Scott
kscott@wileyrein.com



Duane C. Pozza
dpozza@wileyrein.com

