

## 9th Circuit Court of Appeals Revives Data Breach Class Action Against Zappos for 2012 Data Breach

April 27, 2018 - Last week we wrote about the 7th Circuit Court of Appeals reviving a data breach class action suit against Barnes & Nobel even though the plaintiffs in the case couldn't show financial damages from the breach. A similar case is moving through the 9th Circuit involving online retailer Zappos (owned by Amazon). As with the Barnes & Nobel case, the law suit had been dismissed in favor of Zappos in a lower court. And as with the Barnes & Nobel case, the plaintiffs appealed and were able to get the case reinstated by the appellate court.

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Both cases had been dismissed in the lower court for the same reason; lack of standing. In most cases, plaintiffs need to show a concrete financial injury to have standing. And the Supreme Court has ruled has ruled that even if an objectively reasonable analysis of a breach concludes that a financial injury is likely, that isn't sufficient to confer standing.

In the Zappos case, victims of the breach had their credit card number stolen. Therefore, the appeals court ruling determined that there was an immediate threat for identity theft. The court also had evidence that some victims of the breach had already experienced identity theft. Thus, they weren't relying on the "objectively reasonable" argument.

These two rulings leave something of a gray area in the law that will likely have to be decided by the Supreme Court at some point. The argument that many plaintiffs' attorneys are making is that the ongoing threat of identity theft and the costs for credit monitoring millions of consumers are having to pay for provides enough of a financial loss to confer standing. Some federal circuits have agreed with this argument, while others have not. This is now leading to "circuit shopping" by attorneys when they file lawsuits such as this.

by Jim Malmberg

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