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Bad news for Target: Judge rejects standing defense in Sony privacy case

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Perhaps I was a bit too declarative last week when I predicted doom for consumer class actions based on Target's alleged failure to protect the personal information of 70 million (or even more) customers. A ruling Tuesday by U.S. District Judge Anthony Battaglia of San Diego in consolidated data privacy breach litigation against Sony gives all of those plaintiffs lawyers who've filed privacy cases against Target reason to hope the suits will survive.

My dire forecast that they wouldn't was based on several recent rulings by federal trial judges who tossed data breach class actions under the U.S. Supreme Court's 2013 ruling in *Clapper v. Amnesty International*. In *Clapper*, the court held that to establish standing to sue in federal court under Article III of the U.S. Constitution, a plaintiff must show actual or "certainly impending" injury. Standing requirements aren't satisfied when plaintiffs are simply afraid of injury, or when they spend money to ward off potential injuries. As of last week, all three judges to have considered *Clapper*-based dismissal motions from privacy defendants agreed that unless the customers could show hackers misused the stolen information, privacy plaintiffs lacked standing.

Now we have a split in the lower courts, thanks to Judge Battaglia in the Sony case, which involves allegations that the company failed to protect personal information from Playstation gamers. Battaglia said in Tuesday's decision that the *Clapper* decision did not actually tighten the standard of injury under Article III. Ninth Circuit precedent in *Krottner v. Starbucks*, the judge said, requires that an injury be based on "a credible threat of harm" that is "both real and immediate, not conjectural or hypothetical." The *Clapper* ruling didn't really change that analysis, Battaglia said. "Although the Supreme Court's word choice in *Clapper* differed from the 9th Circuit's word choice in *Krottner*," he wrote, "the Supreme Court's decision in *Clapper* did not set forth a new Article III framework, nor did the Supreme Court's decision overrule previous precedent requiring that the harm be 'real and immediate.'"

Under that standard, according to Battaglia, Sony Playstation users whose personal information was stolen by hackers have standing to sue Sony for the wrongful disclosure of their data because they've alleged a credible threat of impending harm.

Adam Levitt of Grant & Eisenhofer, who is co-lead counsel for the class suing Sony, told me by email that Battaglia "got it right" when he held that *Clapper* didn't really change the rules for Article III standing. "When companies like Sony collect personal information from consumers but then fail to adequately secure it, resulting in wrongful disclosures following a data breach, those consumers will continue to have standing to assert claims based on the credible threat of impending harm to them based on the disclosure of their personal information following a breach," Levitt said.

Sony counsel Harvey Wolkoff of Ropes & Gray declined to comment.

---- **Index References** ----

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