

## Class Cert. Is Next Frontier Of Data Breach Litigation

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Article III standing has overshadowed the proliferation of data breach cases in the past several years. No doubt, establishing standing is a challenge for many data breach plaintiffs and much has been written about how various circuits address the standing threshold.

Less explored are the obstacles a plaintiff must overcome to win class certification if the plaintiff can survive a motion to dismiss based on standing. Few data breach cases have attained class action status. One of those scarce cases, *Smith v. Triad of Alabama LLC*,<sup>[1]</sup> the first consumer data breach case to receive class certification, offers insight into what potential class plaintiffs must show. It has been nearly two years since the *Smith* court granted class certification, and no other consumer data breach class action has attained certification to date. This means *Smith* continues, for the moment, to be an important authority for class certification litigants to follow.

In *Smith*, a hospital employee stole patient records.<sup>[2]</sup> With the help of an unknown accomplice, the employee filed at least 124 fraudulent federal tax returns.<sup>[3]</sup> The hospital sent notifications to patients, five of whom sued the hospital for violations of the Fair Credit Reporting Act, negligence, invasion of privacy, negligence per se and breach of contract.<sup>[4]</sup> The invasion of privacy claim was dismissed, but the court denied dismissal of the other counts, finding that the plaintiffs demonstrated standing by alleging that the plaintiffs' social security numbers were used to file fraudulent tax returns and that the plaintiffs suffered economic damages as a result.<sup>[5]</sup>

The plaintiffs then moved to certify the class, defined as all persons whose personal identification was stolen from the hospital by the employee.<sup>[6]</sup> The plaintiffs asserted that they met the Rule 23(a) prerequisites of numerosity, commonality, typicality and adequacy, and that certification was proper under Rule 23(b)(3), which requires "that the questions of law or fact common to the class members predominate over any questions affecting only individual members," and that "a class action is superior to other methods for fairly and



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efficiently adjudicating the controversy.” (Fed. R. Civ. P. 23(b)(3)).[7]

In granting class certification, the court focused on several arguments raised by the hospital. First, the court found that the class was “adequately defined and clearly ascertainable” even if, as the hospital argued, each plaintiff had not proven that each missing hospital record was actually stolen rather than misplaced.[8] The court stated that the U.S. Court of Appeals for the Eleventh Circuit had not required a showing of actual misuse to prove standing, and therefore, no such requirement was required to define the class.[9]

Next, the court considered whether typicality was destroyed by the fact that some plaintiffs signed the hospital’s admission form called a notice of privacy practices, or NPP, which created an express contract between the plaintiff and the hospital, and some plaintiffs did not sign an NPP, and thus had only an implied contractual relationship with the hospital.[10] The court handled this divergence by dividing the class into two subclasses.[11]

The court grappled most with what the hospital argued was the individualized nature of predominance and causation. The court explained that minor individualized issues of causation and damages did not defeat predominance where the common issues of contract formation (whether an express or implied contract) and breach were so central to the case.[12] Regarding damages in particular, the court conceded that each plaintiff would have to put on a case for damages.[13] But the court also found that the “burden of corralling this run of mini-trials shrinks in comparison to the burden of conducting a full-blown trial on every issue contained in every cause of action, for every class member. Individualized damages do not sink the putative class.”[14]

The court acknowledged that causation was a tougher question because it entails an inquiry into each class member’s financial history.[15] Citing to an earlier data breach case, *Resnick v. AvMed Inc.*,[16] that examined standing, the Smith court stated that the Eleventh Circuit has accepted circumstantial proof of the causal connection between identity theft and data breach, but requires “a nexus between the two instances beyond allegations of time and sequence.”[17]

*Resnick* held that the plaintiffs in that case had succeeded in showing something more than a temporal connection, as required, by alleging that the sensitive information on a stolen laptop was the same sensitive information used to steal the plaintiff’s identity.[18] Based on

Resnick, the Smith court opined that “proving this nexus may require a review of any prior thefts of each class member’s identity.”[19] The court did not view this as adding a significant burden for the plaintiffs because the named plaintiffs already would have to show that they incurred damages as a result of delayed or rejected tax returns and/or their mitigation efforts, and therefore, it would be little more for them also to show that they have not previously had their identities stolen.[20] The same evidence would support findings of causation and damages.

Ultimately, the court dispensed with the matter by determining that “causation is at best a background issue in this dispute” because the most important questions in the litigation, the hospital’s duty and breach, are common in nature.[21] The court concluded, “causation and damages, while also necessary for a finding of liability, orbit around these two central questions” and “would not feature so prominently in the resolution of the case.”[22]

When examined closely, the Smith opinion lays out some of the hurdles potential class plaintiffs may face in the pursuit of certification and offers hints for navigating defendants’ arguments. It also educates defendants on plaintiffs’ vulnerabilities.

For instance, to establish causation, which also is a component of standing, plaintiffs must allege not just a temporal connection, meaning the “time and sequence” between the data breach and their stolen identities, but they also must show “the logical relationship between the two events.”[23] Resnick teaches that plaintiffs can navigate that challenge by alleging, and ultimately proving, that the stolen sensitive information was the same sensitive information used to steal the plaintiffs’ identity.

Resnick cautioned, however, that “[h]ad Plaintiffs alleged fewer facts, we doubt whether the Complaint would have survived a motion to dismiss,” signaling to defendants that plaintiffs have a high bar in demonstrating the causation necessary for standing and for class certification.[24] Smith recognizes the problem of the individualized nature of establishing this “logical connection’ because it acknowledged that each plaintiff may need to show whether it suffered any prior identity thefts.[25]

Yet Smith, in an another twist, concludes that the causation issue does not defeat class certification because the plaintiffs “already have to show that they incurred damages as a result of delayed or rejected tax returns and/or their mitigation efforts. It is little more for them also to show that they have not previously had their identities stolen.”[26] Since the

proof necessary for causation is the same as the proof for damages, the Smith court found the evidence supporting the two issues to be “so interwoven as to justify their likely joint resolution in bifurcated mini-trials.”[27]

Plaintiffs can glean from this reasoning that individualized causation may not sink certification if the proof needed for causation and damages is overlapping or closely related. Defendants, on the other hand, will parse the facts to enumerate and to emphasize all the individualized determinations that they argue will predominate the common issues.

Smith and Resnick comprise a dialogue on key issues of standing and class certification. Because there is little other class certification precedent in the data breach arena, future plaintiffs and defendants will look to these cases, Smith in particular, for guidance and weigh in on that conversation.

As the onslaught of data breach actions grows, litigants not only will see a broader array of class certification court opinions, but they also will need to detangle the inevitable variation of rulings that will come out of the different circuits.

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[1] 2017 WL 1044692 (M.D. Ala. March 17, 2017).

[2] Id. at \*2.

[3] Id.

[4] Id.

[5] Id.; Report and Recommendation, [Smith v. Triad of Alabama LLC](#), 14-cv-00324-WKW-GMB at \*19 (M.D. Ala. Sept. 2, 2015).

[6] Smith, 2017 WL 1044692 at \*3.

[7] Id. at \*11.

[8] Id. at \*6.

[9] Id.

[10] Id. at \*10.

[11] Id.

[12] Id. at \*12.

[13] Id. at \*14.

[14] Id.

[15] Id.

[16] 693 F.3d 1317 (11th Cir. 2012).

[17] Smith, 2017 WL 1044692 at \*14, citing Resnick, 693 F.3d at 1326-28.

[18] Resnick at 1327.

[19] Smith at \*14.

[20] Id.

[21] Id. at \*15.

[22] Id.

[23] Resnick at \*1326-1327, citing [Stollenwerk v. Tri-West Health Care Alliance](#), 254 Fed.Appx. 664, 667 (9th Cir. 2007).

[24] Resnick at \*1327.

[25] Smith at \*14.

[26] Id.

[27] Id.