

Comment: California judge's ruling in Adobe case resonates across US data-security litigation

Jurisdiction : North America / USA

13 Oct 14 | 23:18 GMT

Author: Mike Swift

IN BRIEF

In just four years on the bench, US District Judge Lucy H. Koh has already built a legacy of expansive rulings with an impact on the Internet and computer services industries. Now, Koh appears to have made a similarly momentous ruling in the increasingly busy area of data security, potentially undermining a valuable weapon for defense lawyers in data-breach litigation.

Just four years after being appointed by President Barack Obama, US District Judge Lucy H. Koh has already built a legacy of expansive rulings with an impact on the Internet and computer services industries.

Koh, who presided over the epic antitrust and patent trials between Apple and Samsung, and who recently denied a proposed \$324 million antitrust settlement involving Google, Apple and Intel as insufficient (see [here](#)), also sent shock waves through Silicon Valley last year when she found Google's Gmail scanning of messages to target advertising did not qualify for an exception to the federal wiretap law because it was part of the "ordinary course of its business" of delivering e-mail (see [here](#)). Litigation against the messaging services of Facebook and Yahoo swiftly ensued.

Now, Judge Koh appears to have made a similarly momentous ruling in San Jose, California in the increasingly busy area of data-security, with a ruling last month (see [here](#)) that may have undermined a valuable weapon for defense lawyers in data-breach litigation.

In an area of the law that remains unsettled, and where a seemingly unending series of data breaches suffered by the likes of Target, JP Morgan, Home Depot and others has consumers increasingly worried about the safety of their information, Judge Koh's ruling in Halpain v. Adobe could well result in more data security litigation and in cases that persist longer.

After a string of data breach lawsuits was tossed by judges who cited a 2013 US Supreme Court decision in Clapper v. Amnesty International, Judge Koh took a different view. She ruled that the Clapper decision, a case involving Section 702 of the Foreign Intelligence Surveillance Act, did not necessarily apply to the exposure of consumer data by hackers who breached a commercial computer system expressly to harvest data for criminal purposes, as in the Adobe case.

www.mlex.com
MLex customer services
customerservices@mlex.com

MLex London
141 Moorgate
London EC2M 6TX
United Kingdom

MLex Brussels
Rue de la Loi 67
1040 Brussels
Belgium

MLex Washington
1776 I (Eye) St. NW
Suite 260
20006 Washington, D.C.
USA

MLex New York
535 Fifth Avenue, 4th
Floor
10017 New York
USA

MLex San Francisco
32 7th Street
CA 94103
USA

MLex Hong Kong
Level 43 - AIA Tower
183 Electric Road
North Point
Hong Kong

In virtually every data breach, the actual harm to the plaintiffs lies in the future. The people who use malicious software or who exploit security mistakes to penetrate a commercial computer system generally auction off stolen information such as Social Security numbers or payment card data to other cyber-criminals, who use it to steal identities, to make phony charges or for other criminal deeds.

Because consumer harm at the time of a data breach is therefore somewhat speculative, and not necessarily an “injury-in-fact” that is “concrete,” “particularized” and “fairly traceable” to the defendant’s conduct – standards set by the Supreme Court to establish Constitutional standing – plaintiffs in privacy and data breach cases have struggled to establish Article III standing.

Judges such as US District Judge Jeffrey White have invoked the Supreme Court’s standard in the Clapper case – that an injury must be “certainly impending” – to grant motions to dismiss allegations such as those in a privacy case against Pandora (see [here](#)), where the Internet music service was accused of privacy violations for failing to obtain consent from users to share their personal information with third-party advertisers.

Adobe invoked Clapper in its motion to dismiss the Halpain litigation, brought in the wake of a 2013 data breach in which hackers accessed the personal information of at least 38 million people who bought and download software from Adobe. The information included names, login IDs, passwords, credit and debit card numbers, expiration dates, physical addresses and e-mail addresses. The hackers allegedly had access to Adobe’s system for several months before they were detected, and allegedly were able to decrypt protected information using Adobe’s own systems.

Koh ruled that the Adobe breach presented a very different set of circumstances from the ones that led to Clapper’s “certainly impending” injury standard, which concerned allegations, but no evidence, that the plaintiffs’ privileged communications were accessed by the government. The judge also found that an Article III data-breach standard set by the US Court of Appeals for the Ninth Circuit – a “credible threat of real and immediate harm” – in a case involving the theft of a laptop containing the personal information of Starbucks employees, *Krottner v. Starbucks*, was not irreconcilable with the Supreme Court’s Article III standard in the Clapper case.

“The risk that Plaintiffs’ personal data will be misused by the hackers who breached Adobe’s network is immediate and very real,” Koh wrote in the Sept. 4 order. “Thus, in contrast to Clapper, where there was no evidence that any of respondents’ communications either had been or would be monitored under Section 702, here there is no need to speculate as to whether Plaintiffs’ information has been stolen and what information was taken.”

www.mlex.com
MLex customer services
customerservices@mlex.com

MLex London
141 Moorgate
London EC2M 6TX
United Kingdom

MLex Brussels
Rue de la Loi 67
1040 Brussels
Belgium

MLex Washington
1776 I (Eye) St. NW
Suite 260
20006 Washington, D.C.
USA

MLex New York
535 Fifth Avenue, 4th
Floor
10017 New York
USA

MLex San Francisco
32 7th Street
CA 94103
USA

MLex Hong Kong
Level 43 - AIA Tower
183 Electric Road
North Point
Hong Kong

Judge Koh also found that because Adobe allegedly did not properly inform its users that its data security standards were not up to industry standards, it could be liable for claims that the company engaged in “fraudulent” conduct under California’s Unfair Competition Law.

“Plaintiffs have adequately pleaded that Adobe had a duty to disclose that its security practices were not up to industry standards, that this omission was material, and that Plaintiffs relied on this omission to their detriment,” Koh wrote.

Adobe declined to comment Monday. Although the Adobe case has not attracted the media attention of data breaches suffered by Target or Home Depot, both elements of Judge Koh’s decision, involving her view of Article III standing and Adobe’s alleged security disclosure omissions, have attracted attention among privacy and data security litigators.

“If this pure omissions theory takes hold, that could be a game-changer,” Douglas H. Meal, a litigator with Ropes & Gray in Boston who represents Wyndham Worldwide in its data-security litigation against the US Federal Trade Commission (see [here](#)), said in a speech at a privacy conference in Silicon Valley last month.

“This is an important decision and it certainly has implications for anybody who is thinking about how to litigate a case in the wake of a significant disclosure of consumer information,” said Thomas P. Brown, a partner and litigator with Paul Hastings in San Francisco who frequently represents Internet companies. “She’s planting a flag that even in the absence of a clear chain of causation between a consumer whose information has been exposed and a financial impact on that consumer, that a consumer whose information has been exposed has Article III standing. That is a big deal.”

Elizabeth E. McGinn, co-head of BuckleySandler’s Privacy, Cyber Risk & Data Security Group in Washington, said the Adobe ruling could spark more data-security litigation.

“This adds a little hope for class action plaintiffs, but I don’t think defense lawyers know yet where this is going. It’s a very interesting opinion. I think we should be watching this,” McGinn told MLex. “It shows the law is still unsettled in this area. Defense lawyers are not sure how far courts may go with the concept of risk of impending harm in this type of case.”

Scott A. Kamber, a prominent New York plaintiff attorney in class action privacy and data security litigation, agreed that the ruling could help data-breach plaintiffs.

“It’s not that Judge Koh created any great change in the law,” he said. “All she

www.mlex.com
MLex customer services
customerservices@mlex.com

MLex London
141 Moorgate
London EC2M 6TX
United Kingdom

MLex Brussels
Rue de la Loi 67
1040 Brussels
Belgium

MLex Washington
1776 I (Eye) St. NW
Suite 260
20006 Washington, D.C.
USA

MLex New York
535 Fifth Avenue, 4th
Floor
10017 New York
USA

MLex San Francisco
32 7th Street
CA 94103
USA

MLex Hong Kong
Level 43 - AIA Tower
183 Electric Road
North Point
Hong Kong

said was, 'Time out guys, Clapper does not provide carte blanche to corporate America for data breaches.' ”

Linked Case File(s)

IT security litigation - Halpain - Kar - Adobe Systems

Subjects : Privacy

Industries : Digital/Telecom, Internet, Mobile Web

Regulators / Courts : 9th Circuit, SCOTUS, US Courts

Jurisdiction : North America, USA

www.mlex.com

MLex customer
services

customerservices@mlex.com

MLex London

141 Moorgate
London EC2M 6TX
United Kingdom

MLex Brussels

Rue de la Loi 67
1040 Brussels
Belgium

MLex Washington

1776 I (Eye) St. NW
Suite 260
20006 Washington, D.C.
USA

MLex New York

535 Fifth Avenue, 4th
Floor
10017 New York
USA

MLex San Francisco

32 7th Street
CA 94103
USA

MLex Hong Kong

Level 43 - AIA Tower
183 Electric Road
North Point
Hong Kong

Forwarded on 15/10/2014 by **Mike Swift (MLex)**.

This content is intended only for the person to whom it is addressed.

All rights reserved on subscriber original content. Copyright MLex 2014.