

Class Certification Poses Obstacles To Bank Class Actions Against TJX

GERARD M. STEGMAIER

The author analyzes the significance of a recent decision denying class certification in litigation seeking damages against TJX related to security breaches at the company.

TJX recently scored an important victory in its ongoing defense of claims related to security breaches at the company. The TJX breach may go down as among the most expensive ever. The company has already set aside or spent close to \$250 million on remediation. Over 100 million credit card account numbers have allegedly been compromised. While the costs remain enormous, in at least one aspect of the numerous litigations against TJX, the company has achieved an important victory. On November 29, 2007, a federal district court in Massachusetts denied class certification, holding that individual issues would predominate over class issues in resolving the case.

DENIAL OF CLASS CERTIFICATION

Consumers and others impacted by security breaches have turned increasingly to class action litigation as a tool to sue companies accused of mishandling personal information. Rule 23 of the Federal Rules of Civil Procedure governs whether an action may proceed as a class action.

Gerard M. Stegmaier, an attorney in the Washington, D.C., office of Wilson Sonsini Goodrich & Rosati, can be reached at gstegmaier@wsgr.com.

Motions to certify a class are often hotly contested because the inability to proceed on a class basis may make it unlikely or considerably more difficult for individual plaintiffs to bring their claims.

In its November ruling, the U.S. District Court for Massachusetts determined that the banks cannot proceed with claims against TJX on a class action basis.

RULE 23'S REQUIREMENTS

Federal Rule of Civil Procedure 23, which allows courts to determine the rights and remedies for large numbers of parties whose cases involve common questions of law and/or fact, requires that:

1. The class is so numerous that joinder of all members is impracticable;
2. There are questions of law or fact common to the class;
3. The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
4. The representative parties will fairly and adequately protect the interests of the class.

INDIVIDUAL ISSUES PREDOMINATE CLASS ISSUES

Judge Young ruled that he had “serious doubts” as to whether the proposed class had been properly defined. In particular, he pointed out difficulties in determining whether a proposed class member’s injuries stemmed from the alleged data breaches or unrelated fraud. Moreover, the judge expressed concern that the class as defined appeared to sweep in financial institutions who suffered no injuries as a result of the data breach.

The court also examined whether TJX misled the banks about whether it was adequately protecting its data. The court focused in particular on whether banks believed TJX’s statements about its payment processing and whether or not the financial institutions relied on those

statements. He concluded that the record raised “significant questions about whether there was in fact class-wide reliance” on TJX and its processor’s alleged misrepresentations. In Massachusetts, where the case has been filed, the alleged fraud claims require proof of reliance. In many cases, such as securities fraud class actions, reliance may be presumed.

In opposing class certification, TJX vigorously attacked the conduct of the financial institutions challenging the similarity of each bank’s claims and conduct. Numerous examples suggested differences among the banks’ reliance. “For instance, some banks appear to have considered only one factor — the need to keep up with the competition — when making their decisions about card issuance,” the court ruled. Another bank appeared to indicate that a merchant’s failure to comply with data security standards would not cause the bank to alter its behavior. And, at least one issuing bank indicated that its beliefs about TJX’s security, if any, did not influence its security procedures. The court further observed that “Visa informed at least some issuing banks that many merchants fail to comply with data security standards,” thus undercutting any allegations of reliance. Accordingly, the court determined that the allegations in the complaint raised too many individual questions.

While the court acknowledged that the proposed class had met the “typicality” requirement of Rule 23, it nonetheless still held that individual issues of reliance would predominate and therefore class certification was inappropriate. Absent overrule on appeal, the decision may seriously undermine banks’ ability to pursue fraud claims on a class basis where proof of individual reliance remains a necessary element. Each bank would now have to independently pursue litigation at much greater expense. The proposed class representative banks suing TJX have said they will appeal.

IMPLICATIONS

For those tasked with managing risk for their enterprises and assisting those who must remediate incidents, the TJX litigation remains an important case study. Not only is it likely that important theories will be tested but the incident and its handling also provide important lessons on

how to plan for incidents and respond both operationally and legally. Issues of damages and causation appear likely to continue to predominate, and their centrality in potential class actions may continue. The cost of security incidents also seems certain to continue to rise.