

## DATA SECURITY & PRIVACY ALERT

### IN A DEPARTURE FROM RECENT CASE LAW, CALIFORNIA DISTRICT COURT FINDS THREAT OF FUTURE HARM SUFFICIENT TO ALLOW A CONSUMER CLASS ACTION IN DATA BREACH MATTERS

The U.S. District Court for the Northern District of California declined to dismiss a data breach suit on the basis that the putative class of plaintiffs claimed only an “increased risk of future harm.” The suit arose after a data breach at Adobe Systems, Inc. during the summer of 2013. The hackers gained access to Adobe’s servers and their intrusion went undetected for several weeks. The hackers were able to reach databases containing customer information from full names to credit card numbers. Adobe estimated 38 million customers had been exposed.

A group of customers filed suit alleging that Adobe’s security practices were “deeply flawed” and that Adobe failed to “employ intrusion detection systems.” The customers claimed that Adobe’s deficiencies caused them to suffer an increased risk of future harm along with related risk mitigation expenses. Adobe filed a motion to dismiss asserting that the plaintiffs lacked standing under Article III of the Constitution because they failed to demonstrate any presently identifiable injury.

The District Court quoted from the Ninth Circuit case of *Krottner v. Starbucks Corp.*: “[T]he possibility of future injury may be sufficient to confer standing where the plaintiff is immediately in danger of sustaining some direct injury as a result” of the data breach. The Court noted evidence that the hackers specifically and maliciously targeted Adobe, and that there was great concern that the plaintiffs’ stolen data would be subject to misuse, and this likelihood could constitute the basis for a present injury. Consequently, the Court concluded that it was premature to dismiss the plaintiffs’ claims.

Courts in other federal districts have declined to confer Article III standing for data breach risks in isolation. The *Adobe* decision is a departure from that general approach. Companies that possess and maintain consumer’s personal data should take careful note of this shift. Consumer class actions in data breach cases have typically struggled for success, but this ruling may signal a change in the way courts view standing in these cases going forward.

*In re Adobe Sys., Inc. Privacy Litig.*, 13-CV-05226-LHK, 2014 WL 4379916, 2014 U.S. Dist. LEXIS 124126 (N.D. Cal. Sept. 4, 2014).

*This Data Security & Privacy Alert is intended to keep readers current on developments in the data security & privacy world and in the law, and is not intended to be legal advice. If you have any questions, please call **Sandy B. Garfinkel**, Chair of the firm’s Data Security & Privacy Group, at 412-566-6868.*