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Data Privacy and Security Insider

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ENFORCEMENT + LITIGATION

[SCOTUS Agrees to Hear Spokeo FCRA Case]

The U.S. Supreme Court (SCOTUS) this week agreed to hear a highly watched privacy case which will have great significance in the rapidly changing area of privacy law.

The case is *Spokeo Inc. v. Thomas Robins*, et. al. The case stems from a claim by Thomas Robins that he suffered injury when Spokeo, a company that compiles information from various sources and prepares reports on the information and sells it to subscribers, provided inaccurate personal information about him to prospective employers. Robins claims that Spokeo violated the Fair Credit Reporting Act (FCRA) because it unfairly reported false information about him, which caused him harm. The inaccurate information included his employment status, marital status, age, educational background, economic health and wealth level, as well as a picture of someone else.

The case was originally dismissed by a California federal judge in January of 2011, who held that the alleged violation did not sufficiently satisfy Article III standing as no injury-in-fact was shown. The judge stated that Robins had not alleged "actual or imminent harm" and the fear of possible future injury was insufficient to establish standing.

The Ninth Circuit reversed the dismissal in February of 2014, saying that a showing of actual harm is unnecessary for a claim of willful violations of the FCRA, and that he had properly pled causation and redressability, which is necessary for standing. Spokeo appealed to the U.S. Supreme Court.

The Solicitor General filed an amicus brief in March urging SCOTUS to reject Spokeo's appeal after SCOTUS requested input from the federal government on the issues presented in the appeal. The Solicitor General Stated in his brief that "public dissemination of inaccurate personal information...is a form of 'concrete harm' that courts have traditionally acted to redress, whether or not the plaintiff can probe some further consequential injury."

We privacy professionals have been and will continue to watch this case closely. If SCOTUS affirms the Ninth Circuit's decision, it is anticipated that it will encourage class action litigation, and some have predicted that it will open the flood gates. If it reverses the decision, the holding will settle the case law in this area and require plaintiffs to show actual harm in order to pursue litigation. We will keep you up to speed on how the case plays out.

– Linn Foster Freedman

[Target Proposed Settlement with MasterCard Faces Opposition]

We previously reported that Target and MasterCard had entered into a proposed $19 million settlement to reimburse card issuers for expenses related to the re-issuance of credit and debit cards to customers affected by the Target data breach.

Soon after the proposed settlement was announced, a number of banks and credit unions filed a class action suit seeking injunctive relief to block the settlement as they were not part of the settlement

negotiations, nor was the court. The proposed class requests that financial institutions refuse to participate in the settlement and that the court block the proposed settlement.

– Linn Foster Freedman

[TurboTax's Software Maker Intuit on the Hot Seat for Lax Security Measures to Prevent Tax Fraud]

Intuit, Inc., the maker of the software used by TurboTax customers to file electronic tax returns stopped its e-filing return program in February after receiving notices from multiple states that thousands of fraudulent tax filings had been filed through the software, resulting in the theft of billions of dollars in fraudulent tax refunds.

TurboTax customers filed a class action lawsuit in California alleging that Intuit failed to safeguard their personal information, including Social Security numbers, which caused them to become victims of identity theft.

The complaint is based on Intuit's alleged violation of the California Unfair Competition Law and Customer Records Act.

The Department of Justice, Federal Trade Commission and Congress are investigating the matter.

– Linn Foster Freedman

SOCIAL MEDIA

[Judge Denies Gawker Blog Interns' Request to Notify Class Action Members Through Broad Social Media Postings]

U.S. District Court Judge Alison J. Nathan denied a request by the Gawker group of interns, who filed a class action against Gawker for its unfair business practices, to disseminate notice of their class action through various social media outlets. The Gawker interns, led by plaintiffs, Aulister mark and Andrew Hudson, sought to post notices on Tumblr and Reddit, which could potentially reach individuals not connected to this Fair Labor Standards Act litigation. Judge Nathan stated that the plaintiffs' request to use other social media, like Facebook, Twitter, and LinkedIn was also overbroad; when the court had originally approved the plaintiffs' use of social media to reach potential class members, it understood the notice to be provided through private, personalized notification and messages to those individuals who may not be reachable. The court never contemplated the use of widespread public notices on all major social media. Judge Nathan said, "The proposals are substantially overbroad for the purposes of providing notice to potential opt-in plaintiffs, and much of plaintiffs' plan appears calculated to punish defendants rather than provide notice of opt-in rights." This sets an important precedent for other class action groups seeking to use social media for class notification purposes. While social media can be a useful tool in situation like this, the court will set a limit on its use.

– Kathryn M. Sylvia

DRONE PRIVACY

[Over 4,400 Comments on FAA's Proposed Drone Framework; Amazon Wants Less Restrictions and More Room for Technological Advancement]

The comments period closed on April 24, 2015 for the Federal Aviation Administration's (FAA) proposed drone framework and regulations, and there were over 4,400 comments submitted. Among those opposed to the limited scope of the proposed drone framework, Amazon.com Inc. (Amazon) said that the regulations were "overly prescriptive" and that the FAA should take a performance-based approach rather than establishing regulations that will most likely be based on outdated technology. We posted last week about the FAA's approval of Amazons' Prime Air delivery service drone testing; however, Amazon seeks to have one single operator fly its automated drones 10 miles or more, carrying packages weighing up to

5 lbs. However, Amazon's business model doesn't fit into the FAA's strict guidelines, which prohibit the use of multiple drones by one operator, beyond the sight of the one operator. Amazon is concerned that by the time the FAA's final regulations go into effect, technology will have advanced beyond the regulations scope. Amazon said in its comments, "Amazon is encouraged by the FAA's general preference to adopt a performance-based approach to regulating small [drone] operations. However, to truly embrace and embody performance-based regulation that creates a framework for small [drone] innovation to flourish, the proposed rule needs to be modified." We will watch closely as the FAA reviews all of the comments it received and responds with an updated rule that will both protect consumer privacy and permit advancing technology to flourish.

– Kathryn M. Sylvia

HEALTH INFORMATION PRIVACY

Telemedicine in Texas: New Requirements Approved by Texas Medical Board

Compliance with telemedicine rules are tricky these days, as many individual state medical boards regulate the practice of telemedicine within state borders. It is important to keep track of the changing laws related to telemedicine. For instance, the Texas Medical Board just approved new regulations related to telemedicine that take effect on June 3, 2015. In order to treat Texas residents through telemedicine, the physician must be licensed to practice in Texas.

The new regulations, among other changes, require physicians to see patients in person and face to face before providing health care to the patient remotely and specifically prohibit online questioning through email, texting or telephone. According to the Texas Medical Board, online or remote questioning is "inadequate to establish a defined physician-patient relationship." The regulations require physicians to provide medical treatment and diagnosis through the use of accepted medical practices, which includes documenting and performing a patient history, mental health examination and physical examination which must be "performed as part of a face-to-face or in-person examination." However, this requirement is not applicable to mental health treatment in Mental Health and Mental Retardation Centers and Community Centers unless there is a behavioral emergency.

The new regulations also amend the definition of an "established medical site" which excludes a patient's home where services can be rendered, but allows residential treatment facilities, halfway houses, jails, juvenile detention centers, prisons, nursing homes, group homes, rehabilitation centers, and assisted living facilities.

If you are practicing telemedicine, stay abreast of state requirements as they change frequently.

– Linn Foster Freedman

MERGERS & ACQUISITIONS

Epiq Acquires Iris Data for $134 Million

Epiq Systems Inc. recently announced that it has acquired Iris Data Services for $134 million. Epiq, which provides a range of services to the legal industry including data breach response, bankruptcy and class action and mass tort settlement administration, stated that the acquisition of Iris, an e-discovery managed service provider, will enable Epiq to also offer managed e-discovery services to its global client base of blue chip corporations and law firms.

– Linn Foster Freedman

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If you have any questions, please reach out to your contact at Robinson+Cole or Linn F. Freedman, chair of our Data Privacy and Security Team.

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