



Podcast Transcript

2022 DSIR Deeper Dive: Class Action Jurisprudence

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Guest: David Carney and Melissa Bilancini, **Host:** Amy Kattman

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For questions and comments contact:



David Carney

Partner
Cleveland
T: 1.216.861.7634 | dcarney@bakerlaw.com



Melissa Bilancini

Associate
Cleveland
T: 1.216.861.7094 | mbilancini@bakerlaw.com

Kattman: Ransomware, MFA, extortion, fraudulent fund transfer schemes. These topics and many others make up the key findings section of the 8th annual Data Security Incident Response Report, informally known as the DSIR Report. Each year, the incident response attorneys within the Digital Assets and Data Management Group, or DADM, provides statistics and analytics around the incidents they encountered in the previous year in a report that is eagerly received by clients, vendors, media outlets, and frankly anyone interested in or tasked with their company's digital asset and risks. I'm Amy Kattman, and you're listening to BakerHosts.

This is our 6th episode in the series exploring the 2022 DSIR report. Discussing class certification jurisprudence. Our guests today are Dave Carney, a partner in our Privacy and Digital Risk Class Action and Litigation team. And Melissa Bilancini, an associate on our Privacy and Digital Risk Class Action and Litigation team. Welcome to the show, Dave and Melissa.

- Bilancini: Thank you. It is great to be here.
- Carney: Thank you.
- Kattman: Melissa, over the years there haven't been many class certification rulings and actions arising from data breach incidents. Why is that and what changed to make this such a hot topic in 2022?
- Bilancini: One issue is the risk that is involved in moving that far into a class action lawsuit and the potential costs for defendants going forward and there haven't been very many class certification rulings, so it makes it a little bit difficult to do the cost benefit analysis, and in recent years there have been more data breaches that have occurred and more cases that are being filed in data breaches and for smaller data breaches. So, I think that that is something else that has led to the increased number of cases and the increased number of class certification rulings.
- Carney: Yeah, and I would just follow on to that, that two points which is, you know, a lot of the cases have settled in the past and then to further on Melissa's point, because it is a good one on the amount of litigation is increasing across the board on these data security incidents, and I think that is really in terms of why this is a hot topic the risk is growing for every time there is a data security incident that is announced.
- Kattman: Dave, what types of potential roadblocks are there to class certification in cases like this?
- Carney: There, the main roadblock that we have seen is kind of the individualized issues in order to have a class, you know, it is supposed to be a cohesive, every person has the same type of claim and when the claim is based on a risk of identity fraud, or, you know, actual identity fraud that might, any individual class member might have suffered, there are individual issues that are required to prove that claim. Did the person receive notification of another data incident? Was the information related to the information at issue in this incident? So, those types of individual issues have posed a substantial roadblock, and we've seen plaintiffs try and get creative to get around that roadblock with other theories of damages, but so far at least those, those really haven't picked up too much steam.
- Bilancini: And just to piggyback off of what Dave was saying, one example of a case that recently was certified for a class would be in re: Brinker Data Incident Litigation, which came out of the Middle District of Florida, and in that instance, the plaintiffs had alleged that there, it is a payment card case where they alleged that their information was stolen and then was put onto the dark web.
- Kattman: Just three months before Brinker, another federal district court made the opposite determination regarding an issue of multiple breach class members. Melissa, what were the key differences between these two cases?

Bilancini: There were two main differences. The first is the data that was at issue and the second was the acceptance of the plaintiff's expert testimony. In Brinker, the data that was at issue was credit card payment information and the multiple breach issue that David mentioned earlier was dealt with by the plaintiff's expert by saying that it wasn't an issue. He said that because credit card companies are so responsive to dealing with lost or stolen credit cards, any information that they found on the dark web would necessarily be related to this data breach incident and the district court judge agreed with the expert in that regard and then also agreed with the expert's analysis that it was possible to have a common method of calculating the damages and therefore he granted the class certification.

In the other case that you mentioned, the data was different. There were social security numbers that were involved and other personal information that may not as easily be taken off of the dark web and therefore when you have multiple breach plaintiffs, it becomes much more difficult for the plaintiffs in the case at issue to be able to show that that the breach at issue was the cause of that data being up on the dark web. And also in that other case, the court did not agree with the plaintiff's expert's testimony that they could determine a common method for ascertaining damages and causation.

Carney: And just to follow up on what Melissa said and kind of on the dark web piece, what, what we have seen in in class certification context, particularly in these cases, is testimony back and forth about the dark web and plaintiffs' information being on the dark web. And what we've seen in connection with that is also that, unfortunately, with the world we live in, a lot of information is on the dark web from all different types of places and one case we saw there was a Joker stash where you could actually go and buy a social security number for \$5. The name and a state search. So, I think the multiple breach problem as there are more and more incidents and more and more information showing up on the dark web, unfortunately. At least in cases involving social security numbers, like Melissa said or those, that type of information from, from a defendant's perspective, the multiple breach issue should hopefully continue to be a strong argument.

Kattman: As we wrap things up, what potential developments are in the works for Brinker, and how could these decisions affect class certifications in the data breach context, Melissa?

Bilancini: First and foremost, the cases on appeal right now before the Eleventh Circuit. Oral argument occurred on June the 8th 2022. So, if the case isn't settled between now and when a decision comes down, we should have one, hopefully in the early fall. And I think even if the plaintiffs are successful at the Eleventh Circuit, they still will have other challenges moving the case forward, even the judge and the district court in approving the class certification noted that a jury might reject the common method of calculating damages that he had agreed with for class certification. So, they still will have to prove causation, and they will still have to deal with damages before a jury, and both of those could be very difficult for plaintiffs to prove.

Carney: I had, Melissa, did you get did? Was there any coming out of the oral argument in Brinker? Any kind of thoughts on how the panel was leading?

Bilancini: I didn't see anything when I was looking. I'm but I'm excited to see what the decision is on this one.

Kattman: Dave, what are your thoughts?

Carney: Yeah, and then on the other front and, and you know, Brinker and then also where we go from here. You know, with Brinker one thing is of all these new litigations that we're seeing, and that Melissa talked about at the outset, we are seeing a decline in payment card incidents, and I think that goes also to what Melissa said about and the coordinate Brinker said about payment card issuers becoming more and more sophisticated and combating fraud. So, Brinker may be limited to some extent there, but going forward I think the more this is the first kind of appellate look at class certification in these data breach cases that I think we've had. There is another case pending where the Fourth Circuit looks like they are going to take a look at a class certification decision. So, I think the more appellate guidance we get on these cases will also help kind of set the stage for class certification going, going forward.

Kattman: Thank you, Dave and Melissa.

Bilancini: Thank you for having us.

Carney: Thank you.

Kattman: If you have any questions for Dave and Melissa, their contact information is in the show notes. As always, thanks for listening to BakerHosts. Comments heard on BakerHosts are for informational purposes and should not be construed as legal advice regarding any specific facts or circumstances. Listeners should not act upon the information provided on BakerHosts without first consulting with a lawyer directly. The opinions expressed on BakerHosts are those of participants appearing on the program and do not necessarily reflect those of the firm. For more information about our practices and experience, please visit bakerlaw.com.