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THE DARK WEB AND TRACEABILITY IN DATA-BREACH CLASS ACTIONS

As data-breach class action litigation matures, courts and litigants increasingly must wrestle with the truism that data subjects' data already has been subjected to repeated unrelated data breaches. This breach history of data subjects and of their data affects all aspects of data-breach class action litigation, from article III standing to typicality to damages, and ultimately, to class certification itself. This Article explores judicial treatment of the effect of data subjects' prior data breaches on data-breach class action litigation.

By Scott J. Hyman, Genevieve Walser-Jolly, Lela Ames, Jack Altura, and TaeVeon Le *

I. INTRODUCTION

Data-breach class action litigation is maturing. Not only have the number of data-breach class action cases filed multiplied, but data subjects are typically the victims of numerous data breaches and the beneficiaries of participating as a class member in multiple class actions. While courts generally have wrestled with questions of standing, causation, and risk of identity theft, the existence of multiple-compromised data adds increased complexity to courts' analyses and additional problems

with data subjects' efforts to bring and participate in data-breach class actions.¹

The character of data breaches, both in size and complexity, has evolved and changed. Financial services, healthcare, and professional services were the three industry sectors that recorded the most data

* SCOTT J. HYMAN and GENEVIEVE WALSER-JOLLY are partners at Womble Bond Dickinson (US) LLP's Irvine, California office. Genevieve represents financial institutions, including banks, lenders, and loan servicers. LELA AMES is a partner with the same firm's Washington, D.C. office. JACK ALTURA is an associate with the firm's Irvine, California office and is a member of Womble's business litigation practice group. Their e-mail addresses are scott.hyman@wbd-us.com, genevieve.walser-jolly@wbd-us.com, lela.ames@wbd-us.com, and jack.altura@wbd-us.com. TAEVEON LE is a law student at the University of San Francisco School of Law and a candidate to receive his Juris Doctor with the class of 2028.

¹ This assumption does not necessarily apply to data subjects' efforts to bring such actions under specific data-breach statutes that allow statutory penalties without proof of actual damages.