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CLASS ACTIONS ARE CRITICAL TO REMEDY INVASIONS OF PRIVACY

Privacy problems created by today's technology-based marketplace are pervasive and only getting worse. For example, there are endless ways online sites can mine data and violate privacy to satisfy advertisers. As one blogger put it, "because most modern tech companies provide free services and depend nearly entirely on advertising revenue, their interests in data mining for targeted advertising will always run counter to users' privacy rights."¹ Data breaches (such as Target's massive in-store security breach or the recent JP Morgan Chase banking data breach) and identity theft are also growing public concerns. According to Privacy Rights Clearinghouse, there have been 408 intentional data breaches by businesses or healthcare companies since 2010, involving 1,950,557 individual records².

When companies profit from illegal use of customers' private data, class action lawsuits can stop these privacy violations while allowing customers to recover their losses.³ But the use of forced arbitration agreements with class action waivers in banking and online non-negotiable "terms of use" agreements is clearly escalating, "slam[ing] the door shut to any practical remedy."⁴

The following are examples of recent class action settlements won by customers whose privacy was violated and whose class actions were not blocked by forced arbitration clauses. They are all contained in CJ&D's extensive class action compilation, *First Class Relief*.⁵ They illustrate just how critical class actions are and what is at risk by the increasing use of forced arbitration clauses and class action bans in consumer contracts.

Countrywide Financial Corp. Customer Security Breach Litigation, (2010), No. 3:08-MD-01998-TBR, MDL 1998 (W.D. Ky.)

Countrywide Financial, Countrywide Home Loans and Bank of America settled with a class of customers for stealing thousands, perhaps millions of customers' private financial information to sell to third parties. After learning of the breach, Countrywide waited months to inform customers – exposing them to a high risk of identity theft and ruined credit histories – which made it impossible for plaintiffs to secure legitimate loans and lines of credit. Class members were eligible to receive up to \$50,000 per incident up to a total of \$5 million.⁶

Utility Consumers' Action Network, et al. v. Bank of America N.A., et al., (2007), No. CJC-01-004211 (Super. Ct. Cal.)

Bank of America settled with a class of customers for disclosing personal information to third party marketers without consent or notice in exchange for money. Bank of America agreed to

settle for \$10.75 million in benefits, including an option of 12 months of free card registry service or 90 days of free privacy assist identity theft program services for eligible class members, as well as a privacy tool kit.

Kehoe v. Fidelity Federal Bank and Trust, (2006), No. 03-80593-CIV (S.D. Fla.)

Fidelity Federal Bank settled with a class of 565,000 customers for obtaining driver registration information, which it used for marketing, in violation of the Driver Privacy Protection Act. Fidelity settled for \$50 million and agreed to destroy any personal information of class members allegedly obtained in violation of the Driver Privacy Protection Act.

Bouchard v. Optometrix, (2011), Case No. BC416146 (Super. Ct. Cal).

Optometrix and related companies and individuals settled with a class of customers and employees who were recorded or monitored in examination rooms, violating their privacy and creating emotional distress, among other things. The defendants paid \$899,565 in settlement funds, divided among eligible class members depending on if they were customers or employees, and whether or not they were recorded in the exam rooms or only monitored.⁷

NOTES

¹ William Peacock, Esq., “Next Big Practice Area: Privacy Class Action Lawsuits?”, *Technologist*, January 6, 2014; <http://blogs.findlaw.com/technologist/2014/01/next-big-practice-area-privacy-class-action-lawsuits.html>

² Chronology of Data Breaches, Privacy Rights Clearing House, <http://www.privacyrights.org/data-breach/new>

³ Lawrence T. Gresser and Karen H. Bromberg, “Privacy: The Next Frontier in Consumer Class Actions?” *New York Law Journal*, July 15, 2013, <http://www.newyorklawjournal.com/id=1202610687400/Privacy--The-Next-Frontier-in-Consumer-Class-Actions?slreturn=20140913170809>

⁴ Michael Rustad on the Death of Tort Law by Fine Print Contract, *Corporate Crime Reporter*, April 22, 2014, <http://www.corporatecrimereporter.com/news/200/michael-rustad-on-the-death-of-tort-law-by-fine-print-contract-3/>

⁵ <http://centerjd.org/content/first-class-relief-how-class-actions-benefit-those-who-are-injured-defrauded-and-violated>

⁶ Sarah Pierce, “Countrywide Settles Data Theft Class Action Lawsuit,” *Top Class Actions*, May 4, 2010, <http://www.topclassactions.com/lawsuit-settlements/lawsuit-news/632-countrywide-settles-data-theft-class-action-lawsuit/>; Sarah Pierce, “Countrywide Sued for ‘Aiding and Abetting’ Customer Identity Theft,” *Top Class Actions*, April 7, 2010, <http://www.topclassactions.com/lawsuit-settlements/lawsuit-news/585-countrywide-sued-for-aiding-and-abetting-customer-identity-theft/>.

⁷ Stipulation of Settlement, *Bouchard v. Optometrix*, Case No. BC416146 (November 15, 2011).