



Managing Legal Risks: Trends in Data Privacy & Security Class Action Litigation

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Scope: Third Quarter 2013

Managing Legal Risks: Trends in Data Privacy & Security Class Action Litigation (Third Quarter 2013)

Executive Summary

This report analyzes data-related class action complaints filed against private entities between July and September 2013 (Q3). The following are key findings concerning complaints over this period:

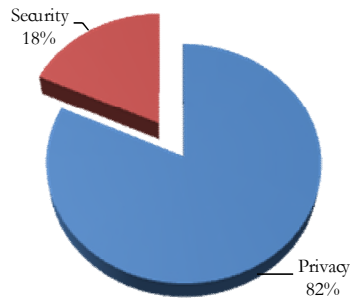
- A total of 22 data-related class action complaints were filed during Q3. This is a significant decline from the number of complaint filings in Q1 and Q2.
- The vast majority of complaints (82%) continue to involve data *privacy* (*i.e.*, collection, use, and sharing) as opposed to data *security* (*i.e.*, safeguarding) (18%).
- The number of telemarketing complaints under the Telephone Consumer Protection Act (“TCPA”) declined from previous periods. Nonetheless, telemarketing remained the most common primary legal theory alleged (27%).¹
- Data privacy and security cases were filed in a wide variety of state and federal courts, but California and Illinois remained the most popular forums for class action plaintiffs. The most popular federal forum was the United States District Court for the Northern District of California (14%) and the most popular state forum was Illinois (32%).
- In terms of industry sectors, health sectors (general health and pharmaceutical) saw an increase in complaints in Q3, accounting for approximately 28% of overall complaint volume, although many of the complaints focused on the same defendant. Technology sectors (internet services, mobile application/marketing, and social networking) were the targets of 23% of complaints; and retail sectors (home goods, retail general, and fashion/clothing) accounted for approximately 18% of complaints.
- 68% of the complaints continue to allege putative national classes.
- Consumers’ health information has become the leading type of data at issue (23%), displacing consumers’ contact information or mobile telephone number.
- Approximately 20 plaintiffs’ firms were involved in data-related litigation. While a few firms were involved in two or more cases, no firm has distinguished itself as a “leader” from a volume perspective.

¹ For a discussion of class action litigation involving the TCPA see Gajewski & Zetoony, [*Managing Legal Risks: Trends in Mobile, Text Message, Fax, and Telephone TCPA Class Action Litigation*](#) (Sept. 2013).

Part 1: Primary Legal Theories

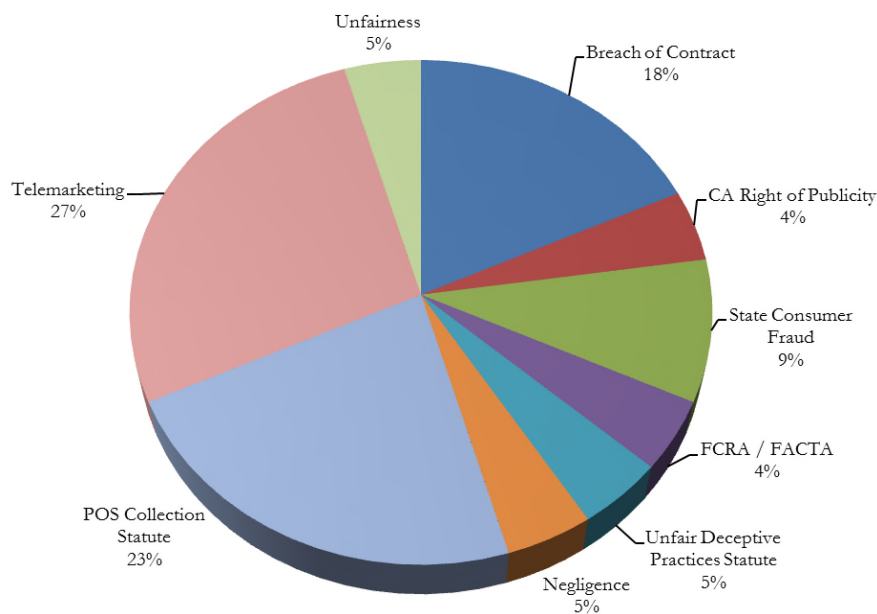
The vast majority of complaints (82%) focused on data privacy related issues – such as the propriety of a company’s collection, intentional sharing, or use of information. Data security – the protection of information from unintentional access or acquisition – was the primary focus in only 18% of complaints. This tracks the trend from Q1 and Q2 (which involved 87% data privacy and 13% data security) as well as the most recent enforcement pattern of the Federal Trade Commission.²

Data Security Versus Data Privacy Litigation



The largest category of complaints continue to relate to alleged telemarketing violations under the TCPA (27%). However, the percentage of telemarketing cases has significantly decreased from the prior period (when it accounted for 45% of all cases). The second largest category involved “POS” statutes that regulate the ability to collect information at the point of sale (23%). A significant reduction was also seen in the percentage of cases involving the Fair Credit Reporting Act (“FCRA”) (11% to 4%).

Primary Legal Theory Alleged



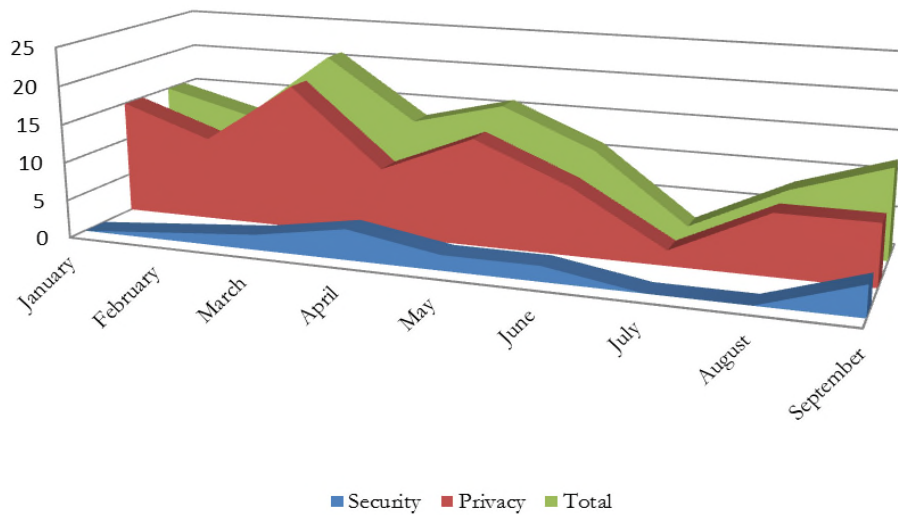
² See David Zetoon, *FTC Trend Report: Shift from Security to Privacy May Be Here to Stay* (Aug. 1, 2013).

Part 2: Volume of Litigation

A total of 22 complaints were filed during the period – a significant decline from the quantity reported during the prior period.

With regard to the breakdown of privacy and security complaints, although there were more privacy complaints in each month, the number of complaints involving data security increased slightly during the second half of Q3, during which time the number of complaints involving data privacy remained constant. The following chart shows the quantity of litigation year to date.

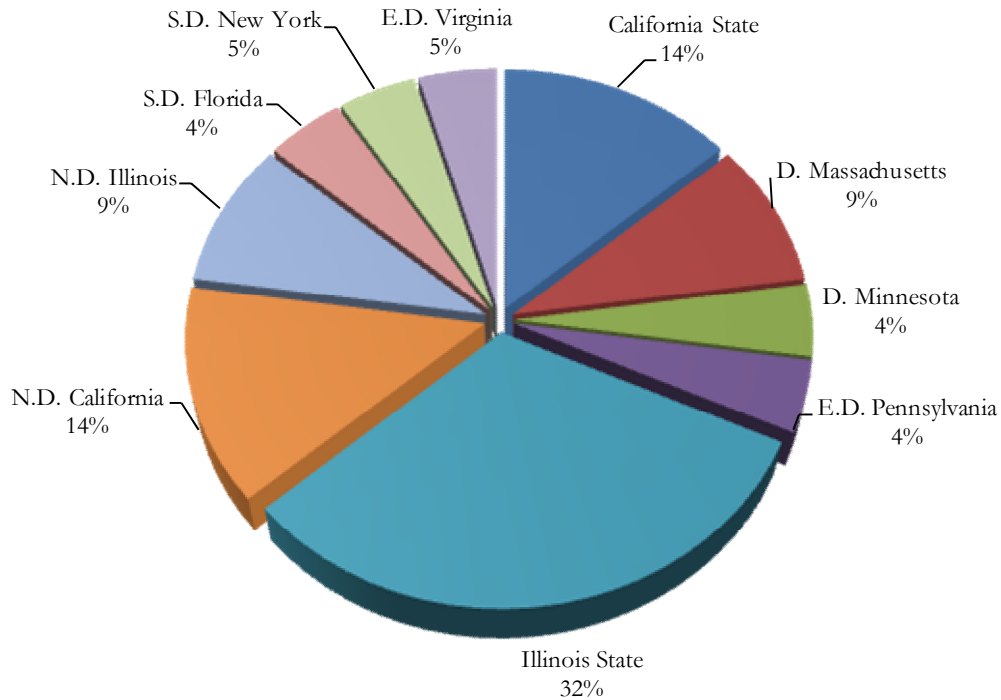
Volume of Complaint Filings by Month



Part 3: Favored Courts

Complaints were filed in fewer courts during the period as compared with the rest of the year (10 different courts versus 28 different courts). There was also a substantial shift away from the Central District of California. While that forum has been one of the most popular among plaintiffs, no complaints were filed there in Q3. Plaintiffs appear to have largely shifted to the Northern District of California (up +11%) and to Illinois state courts (up +22%).

Courts in Which Complaints Were Filed

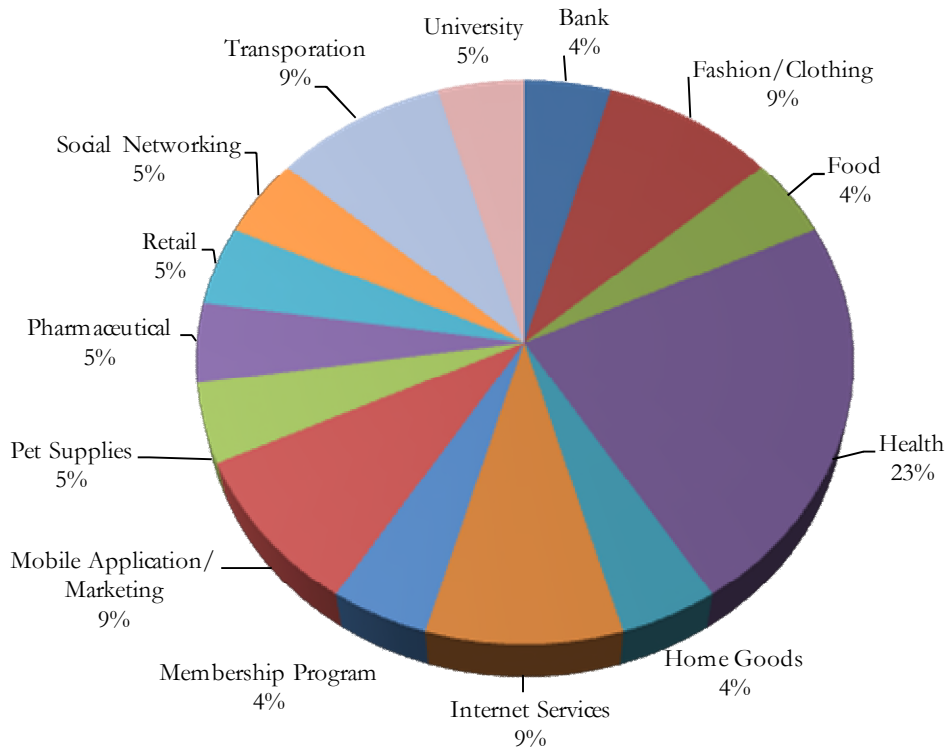


Part 4: Litigation By Industry

As noted in our previous report, there is far less concentration by industry category than is seen among other types of consumer class action litigation, and almost every industry has been targeted by class action plaintiffs.

Nonetheless, a majority of complaints from Q3 can be grouped into the following three industry categories: health (general health and pharmaceutical), technology (internet services, mobile application/marketing, and social networking), and retail (home goods, retail general, and fashion/clothing). Notably, whereas only 6% of complaints were targeted against health industries in Q1 and Q2, the percentage rose to 28% in Q3. The following chart provides a breakdown of complaints by the defendant's industry.

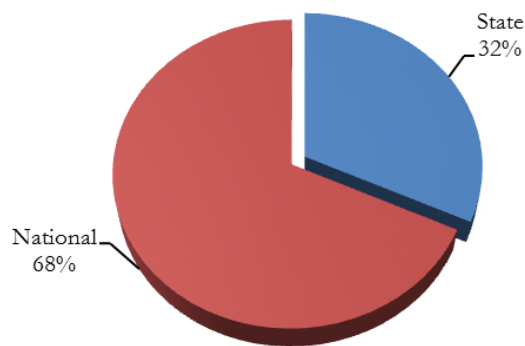
Percentage of Complaints by Defendant Industry



Part 5: Scope of Alleged Class (National v. State)

As indicated in the following chart, a large majority of complaints (68%) alleged a putative class that is national in scope (even if it also alleged one or more single-state subclasses). This closely tracks the proportion of putative national classes filed earlier in the year (70%).

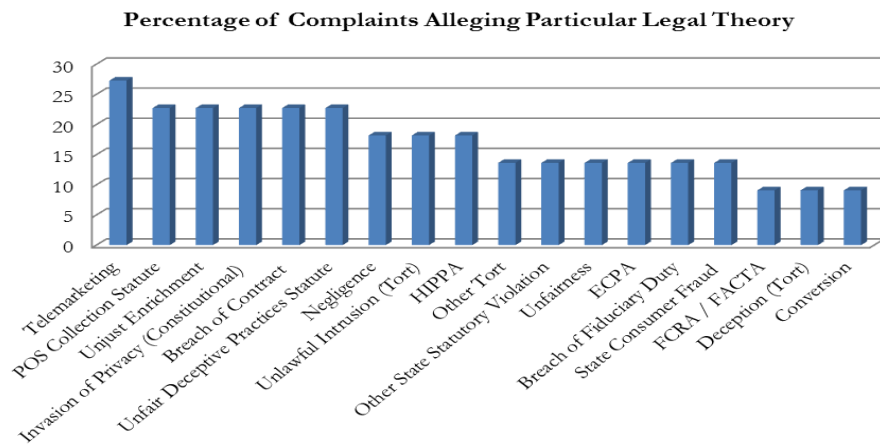
Scope of Alleged Class



Part 6: Variety of Legal Theories Alleged

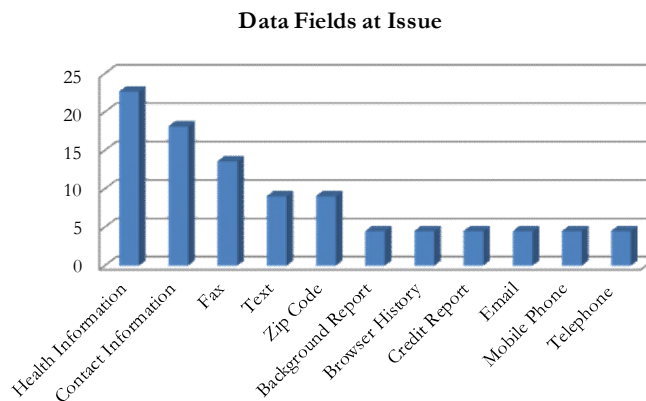
The complaints filed during the period alleged more than 18 legal theories. The following chart provides a breakdown of all of the legal theories alleged. The percentages collectively exceed 100% as many complaints include more than one legal theory.

The most common theory alleged was telemarketing under the TCPA (27%).³ Closely behind were claims regarding POS collection statutes, unjust enrichment, invasion of privacy (constitutional), breach of contract, and unfair and deceptive practices statutes (each 23%). Of note, the percentage of cases alleging a violation of the TCPA was significantly less than during the prior period (27% versus 45%). Other statutes saw a significant increase, such as HIPAA (18% versus 2%) and ECPA (18% versus 1%).



Part 7: Data Fields At Issue

The complaints filed during the period involved approximately 11 different types of data. The most common primary data field at issue was health information (23%), which was a significant increase from the prior period (3%). Other common data fields at issue were contact information (18%), fax (14%), text (9%), and zip code (9%). The following chart provides a breakdown of the complaints by the primary data field at issue.



³ For a more detailed discussion of complaints involving the TCPA see Gajewski & Zetony, [Managing Legal Risks: Trends in Mobile, Text Message, Fax, and Telephone TCPA Class Action Litigation](#) (Sept. 2013).

Part 8: Plaintiffs' Firms

Approximately 20 plaintiffs' firms were involved in filing the class action complaints during the period. As in Q1 and Q2, there were no clear "leaders" by volume of complaints filed for data privacy or data security cases. Nonetheless, the following firms filed the greatest number of data-related class action complaints during the period:

Edelman, Combs, Lattuner & Goodwin, LLC
Siprut PC
Wucetich & Korovilas

Part 9: Methodology

Complaints included within the data analyzed by this report were identified within the WestLaw Pleadings library as containing the phrase "class action," derivations of the phrases "personal information" or "personal data," and either the phrase "breach," "privacy," "security" or "notice." Searches were run to identify any class action complaints filed during the period that referenced the Telephone Consumer Protection Act ("TCPA"), the Children's Online Privacy Protection Act ("COPPA"), the Controlling the Assault of Non-Solicited Pornography and Marketing Act ("CAN-SPAM"), the Health Insurance Portability and Accountability Act ("HIPPA"), the Video Privacy Protection Act ("VPPA"), the Fair Credit Reporting Act ("FCRA"), the Electronic Communications Privacy Act ("ECPA"), and point-of-sale ("POS") statutes, including the Song Beverly Credit Card Act. These cases were then reviewed for relevance to data privacy or data security issues, and complaints alleging suit against government entities were excluded. As stated above, this report covers those complaints filed in the third quarter of 2013.

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