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Cyber & Privacy Newsletter - Israel

Important Precedential Court Case in Israel - Dismissal of Class Action Motion against Facebook for Cyber Incident related Data Breach

Court decisions in Israel in privacy breach litigation following cyber incidents are scarce, and thus far no significant precedents were set in this developing arena.

On 12th July 2022, the District Court in Haifa handed down a decision in C.A. 7322-10-18 Axelrod v. Facebook class action motion ("**the Motion**"), dismissing a motion to certify a class action against Facebook, setting out some significant principles.

The Motion related to the security breach discovered by Facebook in September 2018, which reportedly had exposed the personal data of nearly 50 million users. The Petitioner sought to represent a Class consisting of all Israeli Facebook users whose accounts were compromised or suspected of being compromised in the incident.

The Judge rejected the Petitioner's allegation that Facebook breached its contractual undertaking in its Terms of Service. Facebook clearly stated in these terms that it provides its services "as is", without fully guaranteeing that they are free of deficiencies. It did not present its systems as immune from attacks. While the terms of Service are deemed as uniform contract, this statement is not a depriving condition.

The decision states that "**the world is not perfect, and there are no systems which are fully protected against attackers**".

While Facebook must take reasonable action to trace attacks and contain them, it does not have a strict liability that no attacks or data breaches occur. It also cannot and should not anticipate every one of the endless possible attacks on its systems.

The Judge also dismissed the Petitioner's allegation that Facebook is responsible for a consumer misrepresentation regarding the level of its services. Given there cannot be an anticipation that Facebook's systems will be fully protected against attacks, the mere fact that an exceptional attack occurred does not indicate that misrepresentations were made, especially in view of Facebook's above statement in its Terms of Service.

It was also determined that the Petitioner failed to prove that he sustained any damage as a result of the breach. Most of his data which may have been exposed in the incident is not private, as he published it on his own initiative on his Facebook pages.

Based on the conclusion that Facebook did not make misrepresentations regarding the level of its security, the Judge determined that the Petitioner failed to substantiate the cause of action of "**breach of autonomy of will**", according to which the Class members suffered from negative feelings and were denied the freedom of choice.

The Judge rejected the allegation that Facebook was negligent, as it is unreasonable for users to expect that there will be no security breaches in its systems. An absolutely breach-free security plan is simply impossible.

Finally, the Judge determined that Facebook did not breach the Privacy Protection Law ("**the Law**"), since it did not breach the privacy of its users without their consent, but rather was under a malicious attack, and the users' personal data was provided to Facebook by them. In any event, Favebook has a good defence under the Law, as it did not know and did not ought to know of the provicay breach, in view of the fact that the volnerability which was exploited by the attackers was complex and unique. Furthermore, Section 6 of the Law, which determines that there shall be no right for a civil claim pursuant to the Law for negligable damage, applies in this case, since the Petitioner failed to prove that he or any of the Class members sustained any real damage, even though years have passed since the incident.

GOS comment – while the District Court's decision may be appealed and is not a binding precedent, it sends an important message that the mere fact that a data breach occurred should not in itself be sufficient to certify a class action motion on an entity which was subject to a cyber-attack. This is an important decision which acknowledges that cyber-attacks are inevitable, that there are no systems which are fully protected against attackers and thus that breach of privacy does not automatically lead to liability of the company whose systems were breached.

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