

Privacy Group Of The Year: Cohen Milstein

By **Ben Kochman**

Law360, New York (January 26, 2018) -- Cohen Milstein Sellers & Toll PLLC last year carved out new legal ground in brokering a record-setting \$115 million deal to end litigation over a massive 2015 data breach at the nation's second-largest health insurer, enough to earn the firm a spot among Law360's Practice Groups of the Year.

Anthem Inc. agreed to a preliminary deal resolving a crush of multidistrict litigation in August after Cohen Milstein and co-counsel convinced a California federal judge to keep alive claims that the health care giant had breached a contract with the nearly 80 million customers whose Social Security numbers and personal health data were exposed in the breach.

The terms of the deal call for Anthem and its affiliates to create a pool of funds to provide credit protection and fraud resolution for affected customers, as well as some cash compensation. The company will also pay up to \$38 million in attorneys' fees.

If finalized, class lawyers say the deal would become the largest-ever settlement in a data breach case — and open up new legal routes for plaintiffs seeking data security damages.

Key to the case were U.S. District Judge Lucy H. Koh's rulings moving forward customer claims that Anthem may owe them "benefit of the bargain" contract breach damages due to the difference between the market value of Anthem's insurance as promised, and the "inadequate" data security that was actually delivered, said **Andrew N. Friedman**, co-chair of Cohen Milstein's consumer protection team.

"There was a promise to protect your data. However, there was not a corresponding price," Friedman said. "We were trying to determine the value: How much is that worth? The 'benefit of the bargain' is supposed to measure the difference."

He added: "Judge Koh's opinions in this case will go a long way in data breach cases where there is a contractual agreement between the class members and the defendants. I think this will give them another avenue for damages, and open up new avenues for resolution."

In another argument likely to come up in future data breach suits, lawyers for the insurance recipients had also argued at the class certification stage that personally identifying information has a "market value," which includes the cost to class members of protecting that data from being fraudulently used.



The preliminary settlement came after a marathon 2 1/2 years in which the firm says it took or defended more than 200 depositions in the case and pored over roughly 3.8 million pages of documents.

Members of Cohen Milstein's consumer protection practice also worked on the steering committee for the classes suing in two other massive privacy cases that made headlines in 2017: Home Depot and Vizio.

A Georgia federal judge gave final approval in September to a \$25 million settlement in the Home Depot case, in which financial institutions alleged that the retailer's negligent security controls allowed for a customer data payment breach that compromised 56 million credit and debit card numbers.

In the Vizio case, Cohen Milstein is among several firms representing smart TV consumers who claim the company violated the Video Privacy Protection Act by secretly collecting information on what they watched and sharing it with advertisers and third-party data brokers. In July, a California federal judge ruled that Vizio could not duck the case, which is still pending.

The firm is also among those vying to be named lead counsel in a slew of consumer cases accusing credit reporting firm Equifax of failing to take adequate steps to avoid a data breach the company says affected more than 145 million Americans. Cohen Milstein's complaint is one of more than 200 class actions recently consolidated in the Northern District of Georgia.

The seven-lawyer consumer protection team — which in the past decade has increasingly taken on privacy cases — prides itself on litigating every case as if it is going to trial, even if nearly all its suits end before that stage.

"You have to be prepared to try them, because the other side knows whether you are prepared or not," said partner **Geoffrey Graber**. "If you're not ready, they are going to make their decisions on whether to settle and how much to settle for accordingly."

Friedman said he expects the firm's slate of data security lawsuits to keep on growing, and that judges are likely to give less leeway in future years to corporations playing it fast and loose with consumer data.

"It behooves any company which has any kind of personal information to be on the cutting edge, because courts are going to hold them to a higher standard now," he said. "If you hold that kind of information, you can't just say hacks are inevitable. Those days are over."

--Editing by Catherine Sum.

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