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The Equifax Data Breach and the Resulting Legal Recourse

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THE EQUIFAX DATA BREACH AND THE RESULTING LEGAL RECOURSE

ABSTRACT

What happens when one's sensitive information falls into the wrong hands? With the twenty-first century's advancement of technology comes the increasing problem of data breaches wherein sensitive information is exposed. On September 7, 2017, Equifax, one of three major United States credit reporting agencies announced one of the largest data breaches in the history of the United States. The data breach affected approximately 145 million consumers and subsequently a wave of consumer class actions followed. This Note clarifies why class action lawsuits and arbitration are not viable legal remedies for massive data breaches where entities like credit reporting agencies are hacked, and in this instance, where Equifax was hacked. Moreover, this Note also recommends the creation of an independent victim recovery fund as a remedy for the Equifax data breach. The fund would be modeled after other successful victim compensation funds such as the September 11th Victim Compensation Fund and the Deepwater Horizon Settlement Fund.

INTRODUCTION

Data breaches can be destructive when it comes to impact and legal recourse.[1] A consumer data breach, where a consumer's personal and sensitive information is disclosed, is even more disastrous.[2] The severity only increases when an agency that is given massive authority and access to millions of consumers' personal information is breached.[3] While it is apparent that additional steps should be taken to stop data breaches from occurring, due to the steadily increasing rate of breaches and the ever-growing technological world, the reality is that data breaches will continue to occur.[4] As former Federal Bureau of Investigation Director Robert Mueller aptly stated, "there are only two types of companies: those that

1. *See* PONEMON INST., *2017 Ponemon Cost of Data Breach Study*, INT'L BUS. MACHINES CORP. (June 2017), https://www-01.ibm.com/common/ssi/cgi-bin/ssialias?htmlfid=SEL03130WWEN.

2. *See* Dan Goodwin, *Why the Equifax Breach is Very Possibly the Worst Leak of Personal Info Ever*, ARS TECHNICA, Sept. 8, 2017, 2:09 AM, https://arstechnica.com/information-technology/2017/09/why-the-equifax-breach-is-very-possibly-the-worst-leak-of-personal-info-ever/.

3. Joan Goodchild, *Analysis: Why Equifax Breach is so Significant*, DATABREACHTODAY, Sept. 08, 2017, https://www.databreachtoday.com/interviews/analysis-equifax-breach-so-significant-i-3697.

4. *See 2017 Data Breaches Hit Half-Year Record High*, IDENTITY THEFT RES. CTR. https://www.idtheftcenter.org/2017-data-breaches-hit-half-year-record-high/ (last visited Sept. 12, 2018).

have been hacked and those that will be. And even they are converging into one category: companies that have been hacked and will be hacked again."[5]

In the case of a credit consumer agency, where the potential exposure is considerable, the critical issue is: what is the proper legal recourse for obtaining adequate compensation when a breach occurs? This issue arose, after Equifax, one of the major United States credit reporting agencies, revealed a major data breach within its internal system.[6] Consequently, the data breach exposed approximately 145 million consumers' sensitive information.[7]

The issue of how to resolve data breach compensation is not new and presents many difficulties to the legal field.[8] However, with a shift towards heightened consumer protection with an underlying effort to simultaneously protect and promote business growth, the question remains as to which form of legal recourse—litigation, arbitration, or an administrative remedy—should prevail to achieve such ends.

Part I of this Note explains the general background regarding data breaches, the shift towards consumer protection, and the effect this shift has on consumer-business legal disputes. Part II details the massive Equifax data breach and the immediate class action litigation that followed. Part III examines the pros and cons of potential remedies for aggrieved data breach victims: consumer class action lawsuits or arbitration. Part IV concludes with a recommendation of an administrative remedy to deal with both the Equifax data breach and other potential major credit consumer agency data breaches. At bottom, this Note argues that class action litigation and arbitration are not adequate legal recourse for the Equifax data breach. Further, this Note proposes the creation of a victim recovery fund that consumers affected by the Equifax data breach can access to receive compensation.

5. Robert S. Mueller, III, Director, Fed. Bureau of Investigation, Address at the RSA Cyber Security Conference in San Francisco, CA (Mar. 1, 2012), *available at* http://www.fbi.gov/news/speeches/combating-threats-in-the-cyber-world-outsmarting-terrorists-hackers-and-spies.

6. *Equifax Announces Cybersecurity Incident Involving Consumer Information*, EQUIFAX (Sept. 7, 2017), https://investor.equifax.com/news-and-events/news/20107/09-07-2017-213000628.

7. *Equifax Announces Cybersecurity Firm Has Concluded Forensic Investigation of Cybersecurity Incident*, EQUIFAX (Oct. 2, 2017) https://www.equifaxsecurity2017.com/2017/10/02/equifax-announces-cybersecurity-firm-concluded-forensic-investigation-cybersecurity-incident/.

8. Marian Riedy & Bartlomiej Hanus, *Yes, Your Personal Data is at Risk: Get Over It!*, 19 SMU SCI. & TECH. L. REV. 3, 3–4 (2016).

I. GENERAL BACKGROUND

A. THE RISE OF DATA BREACHES

While technological advancements can have many benefits for modern day consumers, these same technologies can create massive harm.[9] Today, we live in a "big data" world.[10] Most consumers use credit cards and debit cards, and personal information is regularly exchanged on websites every day.[11] While this use of technology is certainly helpful, this modern-tech world exacerbates the exposure of sensitive consumer information.[12]

In simplest terms, a data breach "is an unauthorized disclosure of personal information."[13] More specifically, a data breach is an "an event in which an individual name plus Social Security Number (SSN), driver's license number, medical record or a financial record/credit/debit card is potentially put at risk-either in electronic or paper format."[14] Unfortunately, professional hackers, who are often the culprits in a data breach, are using increasingly sophisticated technology to obtain data and then sell it on the black market.[15]

Data breaches are on the rise, both in prevalence and magnitude.[16] Despite an increase in regulatory scrutiny and more aggressive cyber-security spending, the number of data breaches continues to rise.[17] According to the mid-year report by the Identity Theft Resource Center, "The number of U.S. data breaches tracked through June 30, 2017, hit a half-year high record of 791 . . . . This represents a significant jump of 29% over 2016 figures during the same time period."[18] In addition to an increase in frequency, they have also increased in size.[19] This year, research has found that the average size of data breaches has increased 1.8%.[20] These

9. "While this world is convenient, the numerous threats that are associated with [it] should give people pause." *Id.* at 5–6.

10. *Id.*

11. *Id.*

12. *See* Roberta Anderson, *Viruses, Trojans, and Spyware, Oh My! The Yellow Brick Road to Coverage in the Land of Internet Oz*, 49 TORT & INS. L.J. 529, 536 (2014).

13. Tonia Klausner et al., *Data Breach Litigation: Empirical Analysis and Current Trends*, PRIVACY ASS'N, (Nov. 6, 2013), https://iapp.org/media/presentations/13PPS/PPS13_Defending_Data_Breach_PPT.pdf.

14. *Data Breach Reporting,* IDENTITY THEFT RES. CTR, http://www.idtheftcenter.org/id-theft/data-breaches.html (last visited Sept. 12, 2017).

15. Riedy & Hanus, *supra* note 8, at 4.

16. Anderson, *supra* note 12 at 535 ("Over the last two years, some of the world's most sophisticated corporate giants have fallen victim to some of the largest data breaches in history.").

17. Olga Kharif, *2016 Was a Record Year for Data Breaches*, BLOOMBERG TECH. (Jan. 19, 2017), https://www.bloomberg.com/news/articles/2017-01-19/data-breaches-hit-record-in-2016-as-dnc-wendy-s-co-hacked.

18. IDENTITY THEFT RES. CTR., *supra* note 4.

19. INT'L BUS. MACHINES CORP., *supra* note 1, at 1.

20. *Id.*

statistics confirm reality: data breaches, despite increased efforts to stop, "are on the rise with unprecedented frequency, sophistication, and scale."[21]

B. CONSUMER PROTECTION

As data breaches continue to proliferate in our modern-day technology-driven society, a question of legal remedies becomes ever more pertinent. Responses to several recent data breaches demonstrate that multiple methods of recourse exist.[22] Home Depot, Target, and E-bay are amongst many other large companies that have suffered data breaches where consumers' personal information was improperly exposed.[23]

Typically, where consumers who have contracted with a company in exchange for a service (i.e., a credit card company or bank) and sensitive information is exposed as a consequence of a data breach, they come together as a class and bring a suit against the company.[24] When attempting to resolve these civil disputes, companies have attempted to evade litigation by including mandatory arbitration provisions in their contracts with consumers.[25] These agreements require consumers to settle any disputes they have with the business through arbitration, in which a disinterested third-party rules on the matter, rather than going to court or joining a class-action suit.[26]

Moreover, the provisions habitually include class action waivers that "claims be brought in the 'individual capacity,' and not as a plaintiff or class member in any purported class or representative proceeding."[27] The Federal Arbitration Agreement (FAA) subsequently shut down any opposition, as Congress made private agreements to resolve disputes through arbitration "valid, irrevocable, and enforceable."[28] Until very

21. Anderson, *supra* note 12, at 532.

22. *Id.*

23. *See generally* Lorenzo Ligato, *The 9 Biggest Data Breaches of All Time*, HUFFINGTON POST (Aug. 21, 2015), https://www.huffingtonpost.com/entry/biggest-worst-data-breaches-hacks_us_55d4b5a5e4b07addcb44fd9e.

24. Currently, there are multiple circuit splits regarding whether plaintiff class members have standing to bring claims for data breaches. *See, e.g.*, Beck v. McDonald, 848 F.3d 262 (4th Cir. 2017) (holding that the plaintiff class did not have sufficient standing showing harm); *cf.* Attias v. Carefirst, Inc., 865 F.3d 620 (D.C. Cir. 2017) (holding that plaintiffs had sufficient standing to bring the action for harm caused by the data breach). While extremely topical and important regarding success in class action lawsuits, it is not the focus of this Note.

25. Often, these arbitration agreements are found within the fine print of agreements signed by consumers. These arbitration agreements are most often used when people contract with companies for credit cards or bank loans.

26. Jean Murray, *Learn How the Arbitration Process Works*, THE BALANCE (Aug. 13, 2018), https://www.thebalance.com/what-is-the-arbitration-process-how-does-arbitration-work-397420.

27. *See e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 336 (2011).

28. 9 U.S.C.A. § 2 (West 1947).

recently, the Supreme Court continued to uphold arbitration and class waiver provisions in consumer contracts under the FAA.[29]

However, after the 2008 financial crisis, the Obama administration took steps to prevent future financial disasters from occurring and began to shift away from these consumer contract provisions.[30] The administration proposed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), to further regulate the financial markets and protect consumers.[31] Additionally, the government formed the Bureau of Consumer Financial Protection (CFPB), an independent bureau to regulate consumer finance.[32] Pursuant to section 1028(a) of Dodd-Frank, Congress mandated the CFPB to study "the use of agreements providing for arbitration of any future dispute . . . in connection with the offering or providing of consumer financial products or services," and to provide a report to Congress on the same topic.[33] The statute also authorized the CFPB to implement consumer financial contract regulations, consistent with the results of the study and their report to Congress.[34]

Based on their study, the CFPB proposed an "Arbitration Agreement" (CFPB Rule or Rule).[35] The CFPB Rule prohibited "covered providers of certain consumer financial products and services from using an agreement with a consumer that provides for arbitration of any future dispute between the parties to bar the consumer from filing or participating in a class action concerning the covered consumer financial product or service" and "require[d] covered providers that are involved in an arbitration pursuant to a pre-dispute arbitration agreement to submit specified arbitral records to the [CFPB]."[36] The CFPB Rule which substantially expanded protections offered to consumers, was issued on July 19, 2017 and was set to come into effect on March 19, 2018.[37]

29. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. at 352, 365 (holding that the FAA preempts California's judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts); *see also* Am. Exp. Co. v. Italian Colors Rest., 570 U.S. 228, 231–38(2013) (holding that the FAA does not permit courts to invalidate a contractual class action waiver, contained in mandatory merchant arbitration clauses, even if it would not be economically practicable to maintain these actions individually).

30. *Dodd-Frank at Five Years, Reforming Wall Street and Protecting Main Street*, U.S. DEPT. OF. TREAS. 1 (July 2015), https://www.treasury.gov/press-center/Documents/DFA%205%20Year%20Deck.pdf.

31. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 12 U.S.C. 5301 (124 Stat.) 1376 (2010).

32. *See* 12 U.S.C. § 5491 (2012).

33. CFPB, *Arbitration Study: Report to Congress Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act §1028(a)*, CONSUMER FIN. PROT. BUREAU (Mar. 2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

34. 12 U.S.C. § 5518 (2017) (authorizing the CFPB to regulate arbitration in a manner that it determines to be "in the public interest and for the protection of consumers.").

35. *See* Arbitration Agreements, 82 Fed. Reg. 33210 (July 19, 2017).

36. *Id.*

37. *Id.*

The CFPB Rule has been quite controversial.[38] With a change in administration, the federal government was at odds over the Rule, and there was vast divergence in opinion over the future of the Rule.[39] While consumer advocacy groups strongly supported the CFPB Rule,[40] the U.S. Department of Treasury expressed disapproval of the Rule in its October 23, 2017 report.[41] The Department of Treasury declared that the CFPB's study of arbitration was faulty.[42] Moreover, the Department of Treasury stated that the Rule would impose extraordinary costs on businesses without providing substantive relief to the consumer class members.[43]

Shortly after the implementation of the CFPB Rule, efforts began to repeal it using the Congressional Review Act (CRA).[44] First, the House of Representatives voted to repeal the Rule.[45] On October 24, 2017, in a tight vote, the Senate passed a joint resolution to repeal the Rule.[46] Then, on November 1, 2017, President Trump signed a joint resolution passed by Congress removing the Rule under the CRA.[47] While the Rule had the potential to vastly change the consumer-business relationship, under this joint resolution, nullifying this rule, the CFPB Rule has no force or effect.[48] Thus, to this day, arbitration clauses can still be used by companies to mandate arbitration and bar class participation.

38. *See generally* C. Ryan Barber, *Mayer Brown's Andy Pincus, Ex-CFPB Attorney Deepak Gupta Debate Arbitration Rule*, THE NAT. L.J. (Sept. 25, 2017), https://www.law.com/nationallawjournal/sites/nationallawjournal/2017/09/25/pincus-gupta-on-cfpbs-arbitration-rule.

39. *See* Sylvan Lane, *House Votes to Repeal Consumer Arbitration Rule*, THE HILL (July 25, 2017), http://thehill.com/policy/finance/343652-house-votes-to-repeal-consumer-financial-protection-bureau-rule.

40. Donna Borak, et al., *Senate Kills Rule that Made it Easier to Sue Banks*, CNN (Oct. 25, 2017), http://www.cnn.com/2017/10/24/politics/senate-cfpb-arbitration-repeal/index.html (stating that consumer advocates considered the vote against the CFPB rule a "tremendous setback for Americans").

41. *Limiting Consumer Choice, Expanding Costly Litigation: An Analysis of the CFPB Arbitration Rule*, U.S. DEPT. OF. TREAS. (Oct. 23, 2017), https://www.treasury.gov/press-center/press-releases/Documents/10-23-17%20Analysis%20of%20CFPB%20arbitration%20rule.pdf.

42. *Id.* at 1.

43. *Id.*

44. Under the Congressional Review Act of 1996, Congress can take procedures to establish disapproval of regulatory rules issued by federal agencies, and can prevent the rule from taking effect. *See* 5 U.S.C. § 801-808 (2017); *see, e.g.*, Small Business Regulatory Enforcement Fairness Act of 1996; *compare with* America Advancement Act of 1996, Pub. L. No. 104-121, 101 Stat. 847 (1996) (both acts included provisions allowing the President and Congress to more easily nullify executive branch regulations).

45. Lane, *supra* note 39.

46. Borak, *supra* note 40.

47. Final Rule, CRA Revocation, 82 Fed. Reg. 224, 55500 (Nov. 22, 2017).

48. *See id.*

II. CREDIT REPORTING AGENCIES AND SUBSEQUENT DATA BREACHES

In the United States, there are three major nationwide consumer credit reporting agencies: Equifax Information Services LLC, TransUnion LLC, and Experian Information Solutions.[49] Credit reporting agencies collect, compile, and report information about consumers in the form of credit reports.[50] The credit reporting agencies then provide financial institutions and businesses—that are authorized to obtain the information[51]—a copy of your credit report in order to make certain types of decisions about you.[52] For example, "when you apply for a new loan or credit card, a lender may use the information in your credit report to determine whether to lend you money and at what rate based on their own risk criteria."[53] In addition to serving businesses, these agencies sell credit monitoring and fraud-prevention services directly to consumers.[54] However, due to the cyber security incident, Equifax offered all U.S. consumers free identity theft protection and credit file monitoring through Trusted-ID Premier, complimentary for a year.[55] Because these agencies are so widely used, these companies hold an ample amount of personal and sensitive consumer information. Therefore, when such information is exposed in a data breach, a major problem occurs, as massive amounts of sensitive financial information tumbles out in the open.

On September 7, 2017, Equifax announced a "cyber security incident" where the agency's internal system was hacked and accessed.[56] Equifax determined that the data breach could have potentially impacted up to 143 million U.S. consumers.[57] Equifax announced that the company learned of the breach on July 29, 2017,[58] and that the data breach occurred between

49. *Key Dimensions and Processes in the U.S. Credit Reporting System*, CONSUMER FIN. PROT. BUREAU 2 (Dec. 2012), http://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf.

50. *Id.*

51. Examples are credit card companies and loan lending banks.

52. *How Does Credit Reporting Work?*, EQUIFAX, https://help.equifax.com/s/article/ka1370000009Fq1AAE/How-does-credit-reporting-work (last visited Nov. 19, 2018).

53. *Id.*

54. *See e.g.*, *Equifax Products and Services*, EQUIFAX, https://www.equifax.com/personal/products/credit/monitoring-product-comparison/ (last visited Sept. 20, 2018).

55. *Equifax Announces Cybersecurity Incident Involving Consumer Information*, *supra* note 6.

56. *Id.*

57. *Id.*

58. On August 1, 2017, a day after the company discovered the data breach, the CFO and President sold a high amount of company stock that they owned. The company later issued a statement claiming that neither of the company executives were aware of the breach at the time they sold their shares. *Equifax says execs unaware of hack when they sold stock*, PHYS.ORG (Nov. 3, 2017), https://phys.org/news/2017-11-equifax-execs-unaware-hack-sold.html. However, the Securities and Exchange Commission brought charges against a former Equifax executive for insider trading. Press Release, U.S. Sec. & Exch. Comm'n, *Former Equifax Executive Charged with Insider Trading* (Mar. 14, 2018), https://www.sec.gov/news/press-release/2018-40.

mid-May and July 2017, where criminals gained access to "names, Social Security numbers, birth dates, addresses and, in some instances, driver's license numbers."[59] Additionally, Equifax determined that credit card numbers for "approximately 209,000 U.S. consumers, and certain dispute documents with personal identifying information for approximately 182,000 U.S. consumers were accessed."[60] At the completion of Equifax's investigation, on October 2, 2017, Equifax determined that "approximately 2.5 million additional U.S. consumers were potentially impacted, for a total of 145.5 million."[61] In addition to this data breach being one of the largest in magnitude, legal experts have opined that the Equifax data breach has "wide reaching implications," as there is real value in the financial information obtained and that this is worse than other credit card data breaches.[62]

Equifax's data breach differs from a typical data breach in several ways.[63] Unlike most corporate data breaches, consumers do not need to create an account or use Equifax's services for Equifax to receive the consumers' personal information.[64] Equifax can receive consumers' information regardless of any voluntary consent or business relationship with Equifax itself because Equifax collects the data provided to it and often purchases data from third parties.[65] This is due to the relationship between various third parties and Equifax. In these instances, victims never have control over whether to accept the risk of disclosure.

Typically, a compromised business that has been hacked (such as a credit card company) offers free credit monitoring from one of the three leading credit agencies, which are Equifax, Experian or TransUnion, to its consumers.[66] "While that monitoring routinely comes with an arbitration clause, consumers are not prevented by the service's provision from suing the breached company."[67] For example, when Target was hacked in 2014, the company offered customers free credit monitoring to the victims through the credit reporting agency Experian.[68] Even though Experian had

59. *Equifax Announces Cybersecurity Incident Involving Consumer Information*, *supra* note 6.

60. *Id.*

61. *Equifax Announces Cybersecurity Firm Has Concluded Forensic Investigation of Cybersecurity Incident*, *supra* note 7.

62. Goodchild, *supra* note 3.

63. David Lazarus, *The Real Outrage Isn't Equifax's Arbitration Clause – It's All the Others*, L.A. TIMES (Sept. 12, 2017, 3:00 AM), http://www.latimes.com/business/lazarus/la-fi-lazarus-equifax-arbitration-clauses-20170912-story.html.

64. Emily Marcum, Comment: *Corporate Liability for Data Breaches: Will Equifax Victims Have a Leg to Stand On?*, 18 WAKE FOREST J. BUS. & INTELL. PROP. L. 525, 529 (2018).

65. *Id.*

66. Lazarus, *supra* note 63.

67. *Id.*

68. *Id.*; *see also* Jia Lynn Yang et al., *Target says up to 70 million more customers were hit by December data breach*, WASH. POST (Jan. 10, 2014), https://www.washingtonpost.com/business/economy/target-says-70-million-customers-were-hit-by-dec-data-breach-more-than-first-

an arbitration clause, the clause did not preempt lawsuits against Target, and victims of the data breach still had a legal venue for compensation.[69] Here, however, the situation is different. "Equifax's breach is different in that the company that got hacked and the one offering credit monitoring are one and the same."[70]

Immediately after Equifax revealed the data breach, Equifax offered free credit monitoring services through "Trusted-ID Premier," where consumers could check to see if their personal information was impacted.[71] However, this website to help consumers included a serious catch: "to join Equifax's free identity theft protection program, consumers were required to agree to terms of service that included an arbitration clause and a class action waiver that would prevent consumers from joining class actions against the company."[72] However, within days and due to extensive exposure and criticism,[73] the company subsequently indicated "those clauses do not apply to this cybersecurity incident or to the complimentary Trusted-ID Premier offering."[74]

With the potential arbitration clause defense off the table,[75] floods of class action lawsuits were filed against Equifax.[76] These class action

reported/2014/01/10/0ada1026-79fe-11e3-8963-b4b654bcc9b2_story.html?utm_term=.87c8a9c9ebb8.

69. Lazarus, *supra* note 63.

70. *Id.*

71. *Equifax Releases Details on Cybersecurity Incident, Announces Personnel Changes*, EQUIFAX (Sept. 15, 2017), https://investor.equifax.com/news-and-events/news/2017/09-15-2017-224018832. Additionally, it seems abundant that consumers would be weary of trusting the company that led to the exposure of their personal information in the first place.

72. C. Ryan Barber, *Equifax is Bashed for Forcing Arbitration on Consumers After Data Breach*, NAT. L. J. (Sept. 8, 2017), https://www.law.com/nationallawjournal/almID/1202797576871.

73. *See* Diana Hembree, *Consumer Backlash Spurs Equifax To Drop 'Ripoff Clause' in Offer To Security Hack Victims*, FORBES (Sept. 9, 2017), https://www.forbes.com/sites/dianahembree/2017/09/09/consumer-anger-over-equifaxs-ripoff-clause-in-offer-to-security-hack-victims-spurs-policy-change/#1d80a51f6e7e.

74. *Equifax Releases Details on Cybersecurity Incident, Announces Personnel Changes*, *supra* note 71.

75. Although Equifax originally announced that they would not apply its arbitration clause and class action waiver for this data breach, the congressional repeal of the CFPB's arbitration rule raises this issue once again. *See* Final Rule, CRA Revocation, *supra* note 47.

76. Kevin McCoy, *Equifax Hit With At Least 23 Class-Action Lawsuits Over Massive Cyberbreach*, USA TODAY (Sept. 11, 2017, 5:20 PM), https://www.usatoday.com/story/money/2017/09/11/equifax-hit-least-23-class-action-lawsuits-over-massive-cyberbreach/653909001. Subsequent to learning of the arbitration clause, "a coalition of 70 consumer, legal and community organizations called Fair Arbitration Now released a statement lambasting the proposal." *See* Andrew Blake, *Equifax Updates Terms of Service After Arbitration Clause Causes Uproar Following Massive Breach*, WASH. POST (Sept. 9, 2017), https://www.washingtontimes.com/news/2017/sep/9/equifax-updates-terms-service-after-arbitration-cl. "New York Attorney General Eric Schneiderman called the terms of service 'unacceptable and unenforceable,' and said Equifax removed it by mid-afternoon Friday following conversations with his office." *Id.*

lawsuits increased steadfastly, after the Apache Software Foundation[77] released a statement indicating that Equifax received notice of the vulnerability that caused the breach, as well as instructions to fix the vulnerability, in March 2017.[78] Based on this security revelation, it seems the data breach could have been avoided altogether.

Consumers filed over sixty different class action lawsuits against Equifax Inc. and Equifax Information Services, LLC.[79] Also, credit unions began to sue Equifax.[80] The city of Chicago brought a suit against Equifax on behalf of Illinois citizens that have potentially suffered harm from the breach.[81]These class action suits are "predicated on the theory that Equifax's cyber security was inadequate, that the company knew or should have known of this inadequacy, and that it failed to take action to correct the inadequacy to the detriment of consumers."[82]

In addition to numerous consumer actions, plaintiffs brought a class action securities suit against Equifax, and the Securities and Exchange Commission brought charges against Equifax personnel.[83] The securities suit alleges damages based on the 17% percent drop in Equifax's share price after the breach disclosure.[84] Due to the pervasive effect of the data breach and alleged negligence by the companies' agents, Equifax must combat a string of lawsuits.

77. The vulnerability that hackers exploited to access Equifax's information was in the Apache Struts web-application software. *The Apache Software Foundation Confirms Equifax Data Breach Due to Failure to Install Patches Provided for Apache® Struts™ Exploit,* APACHE SOFTWARE (Sept. 14, 2017). https://blogs.apache.org/foundation/entry/media-alert-the-apache-software.

78. *Id.*

79. Corrado Rizzi, *Here's Every Class Action Lawsuit Filed Against Equifax So Far*, CLASSACTION.ORG, https://www.classaction.org/blog/heres-every-class-action-lawsuit-filed-against-equifax-so-far (last updated Mar. 15, 2018).

80. Tina Orem, *CUNA: More than 500 CU's Discuss Class Action Law Suit Against Equifax*, CREDIT UNION TIMES (Oct. 4, 2017), http://www.cutimes.com/2017/10/04/cuna-more-than-500-cus-discuss-class-action-lawsui.

81. Becky Yerak, *Chicago Sues Equifax Over Data Breach: 'A Financial Fraud was Committed Here'*, CHI. TRIB. (Sept. 28, 2017, 1:40 PM), http://www.chicagotribune.com/business/ct-biz-chicago-sues-equifax-0929-story.html.

82. Shari Claire Lewi & Amanda R. Gurman, *Equifax: Why this Data Breach is Different from All the Others*, 23 No. 15 WESTLAW J. BANK & LENDER LIAB. 1, 2 (2017).

83. Press Release*, Former Equifax Executive Charged With Insider Trading*, *supra* note 58; Kevin LaCroix, *Equifax Data Breach Litigation Now Includes Securities Suit*, THE D&O DIARY (Sept. 13, 2017), https://www.dandodiary.com/2017/09/articles/cyber-liability/equifax-data-breach-litigation-now-includes-securities-suit/.

84. Lewi & Gurman, *supra* note 82, at 2.

III. CLASS ACTION REMEDY VS. ARBITRATION

A. CLASS ACTION REMEDY

1. Benefits of Class Action Remedy

Beyond the fact that class action lawsuits provide relief for those who have suffered some sort of harm, there are many additional benefits to participating in a class action lawsuit where your data—in a consumer capacity—has been breached. Class actions "allow many potential plaintiffs to join their claims and share the cost of litigation when each has suffered injury at the hands of the same party and in a similar manner."[85] Likewise, this cost-saving benefit has gained support. The Supreme Court has held that class actions promote efficiency in that the "device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23."[86]

Additionally, class action litigation provides recourse for consumers who would otherwise not be able to avail themselves of any other remedy.[87] The Supreme Court has agreed with this reasoning, as class actions for small harms provide a mechanism for compensating individuals where "the amounts at stake for individuals may be so small that separate suits would be impracticable."[88] In *Discover Bank v. Superior Court*, for example, the California Supreme Court reasoned that because "damages in consumer cases are often small," without the availability of class actions, there would be no way to stop companies from wrongfully extracting small amounts from consumers.[89] In the situation where a consumer's data has been breached, the value of the breach may be relatively small.[90] The ability to aggregate similar small claims gives the "potential plaintiffs access to the

85. Cara Van Dorn, *When Joining Means Enforcing: Giving Consumer Protection Agencies Authority to Ban the Use of Class Action Waivers,*17 WAKE FOREST J. BUS. & INTELL. PROP. L. 245, 256 (2017).

86. Califano v. Yamasaki, 442 U.S. 682, 701 (1979). Rule 23 of the Federal Rules of Civil Procedure allows a class action to be maintained under certain conditions. *See* Fed. R. Civ. P. 23.

87. *See* Van Dorn, *supra* note 85.

88. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 616 (1997) (citing Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment) (stating that a class action may be justified under Federal Rule 23 where "the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable."). *See also id.* at 617 (citing Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997) (noting that "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her own rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.").

89. Discover Bank v. Superior Court, 113 P.3d 1100, 1108 (Cal. 2005).

90. Van Dorn, s*upra* note 85, at 256.

justice system when the damages incurred by each plaintiff alone would not justify the time, effort, and expense of bringing an individual action."[91]

As a remedy, class actions benefit consumers because their structure and effect encourage lawyers to take these cases.[92] In class action lawsuits, "[p]laintiffs' attorneys typically work on a contingency fee basis," where lawyers only receive compensation if they win and their compensation is a percentage of the amount won.[93] Therefore, a clear incentive exists for lawyers to participate and work to get the best settlement for the class, as they can reap substantial benefit themselves. Due to this contingency fee basis and the fee structure, "the cost and risk of litigation are only logically justified if the potential damages are high. In a class action, an attorney can earn legal fees from multiple clients, making even small-dollar claims financially feasible to pursue."[94] If, in order to obtain relief, data breach cases were required to be litigated individually, victims may encounter trouble obtaining representation, as the case may not be worth an attorney's time.[95]

Lastly, class action lawsuits can also serve as a major deterrent by discouraging future bad behavior.[96] "The threat of costly class litigation provides a potent incentive for companies to comply with regulations and avoid harmful or even risky behavior."[97] With the threat of future litigation, companies will likely work harder to stop future data breaches from occurring; therefore, class action litigation serves as a beneficial deterrent.[98]

The advantages of class action are especially applicable to consumer data breach victims. First, data breach victims' claims individually are quite small, as "the dollar value of an injury sustained due to compromised names, addresses, credit and debit card numbers, social security numbers, and other 'run-of-the-mill' personal information is usually quite small—less than $99 for most."[99] Therefore, victims can take advantage of the class action structure, and lawyers will be keen to take on the case.

2. Problems with Class Action Remedy

Due to the fact that the CFPB Rule was overturned under the CRA, it is unclear whether class action litigation will continue to prevail or perish

91. *Id.*
92. *See id.* at 258.
93. *Id.* at 258–59.
94. *Id.*
95. *See id.* at 261.
96. *Id.*
97. *Id.*
98. Brian Fitzpatrick follows the theory of deterrence where class action litigation serves as an important role because they deter corporate wrongdoing. *See* Brian T. Fitzpatrick, *Do Class Actions Deter Wrongdoing?* 202 (Vanderbilt L. Res. Paper No. 17-40, 202 (2017), https://ssrn.com/abstract=3020282.
99. Riedy & Hanus, *supra* note 8, at 6.

within consumer-business agreements and affect data breach claims. Additionally, while there are many benefits to class action litigation, there are also multiple negative consequences. One major problem with class action litigation as a remedy is that the victims do not actually fare that well in terms of total relief granted.[100] Opponents argue that the cost of class action suits far exceed the benefits.[101] Due to the large size of class members and the fact that data breach class actions often are consolidated under the multidistrict litigation statute, victims do not actually obtain substantive relief once divided amongst all class members.[102] Due to the sprawling nature of the Equifax data breach, the size of the class will likely be great, thus subsequent relief will likely be trivial.

In class action litigation, it is common for the individual plaintiff's class action recovery to be highly disproportionate to the class action attorney's compensation.[103] Attorney fees to class counsel often exceed total class compensation.[104] This is because the relief available to plaintiffs, by way of class action litigation, differs substantially from what the plaintiffs can actually recover.[105] Commentators argue that "class actions serve the interests of plaintiffs' attorneys more than those of plaintiffs themselves."[106] This inherent imbalance between compensation attributable to the plaintiffs' attorneys and the percentage of settlement value available to plaintiffs clearly demonstrates that class action litigation may not be the most appropriate method of achieving compensation for consumers.[107]

Given the lucrative legal fees for counsel in a large class action suit, a conflict of interest can arise. In other words, there is a clear "conflict of interest between class counsel, whose pecuniary interest is in their fees, and class members, whose pecuniary interest is in the award to the class."[108] Some commentators have argued that this conflict of interest leads plaintiffs' lawyers to "agree to settlements that better serve [his or her] own interests—and the defendants who should be their adversaries—than those

100. Jean R. Sternlight, *As Mandatory Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. MARY L. REV. 1, 34 (2000).

101. *Id.* at 35.

102. Multidistrict litigation is a federal legal procedure designed to speed the process of handling complex cases. Under the statute, where "civil actions involving one or more common questions of fact are pending in different districts," a "Judicial Panel on Multidistrict Litigation" decides which cases should be consolidated. 28 U.S.C. §1407 (1968).

103. DEPT. OF TREASURY, LIMITING CONSUMER CHOICE, EXPANDING COSTLY LITIGATION: AN ANALYSIS OF THE CFPB ARBITRATION RULE 4 (Oct. 23, 2017), https://www.treasury.gov/press-center/press-releases/Documents/10-23-17%20Analysis%20of%20CFPB%20arbitration%20rule.pdf.

104. *Id.*

105. *Id.*

106. Sternlight, *supra* note 100, at 34.

107. DEPT. OF TREASURY, LIMITING CONSUMER CHOICE, *supra* note 103, at 1.

108. Pearson v. NBTY, Inc., 772 F.3d 778, 787 (7th Cir. 2014).

of class members."[109] Moreover, because the stakes can be low for some of the victims in such class actions, there is no one monitoring the decisions of the class counsel, and the counsel is therefore even more at liberty to make decisions regarding the suit based on their own interests.[110]

Ultimately, "[g]iven the conflicts of interest inherent in class actions and given the high costs of class litigation, individuals might be better off giving up the possible deterrence or other benefits of a class action in return for reduced dispute resolution costs."[111] Therefore, when all is said and done, the consumer may actually receive less in a class action settlement than they are entitled to due to the attorney's conflict of interest. Thus, the consumer may never receive just compensation.

On top of lacking substantive benefits to consumers, class action litigation can also be extremely detrimental to businesses.[112] The cost of "'frivolous' litigation"[113] remains high.[114] This litigation is the result of defendants frequently settling large class action lawsuits unrelated to the merits of the claim.[115] "[H]owever legally untenable the claim or defense may be, a nuisance-value strategy can be profitable when it costs less to initiate the claim or defense than it does to seek its dismissal."[116] Consequently, defendants are pushed into settling potentially unmeritorious claims simply to avoid excessive costs and time spent litigating class action suits.[117]

Applying class action litigation as a remedy to major data breaches can be even further damaging. In addition to the cost of litigation, before any recovery is even considered, companies that have suffered a data breach already encounter enormous costs.[118] After a data breach is discovered, companies incur substantial expenses related to notification requirements.[119] "These costs include the creation of contact databases,

109. DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 79 (1st ed. 2000).

110. *Id.*

111. Sternlight, *supra* note 100, at 35.

112. This argument is especially relevant to publicly traded companies; where a company suffers a data breach and is toppled with litigation, the price of its stock may subsequently drop. Not only does the consumer victims and the company suffer, but any stockholders may suffer by the drop of the stock price.

113. *See* Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem*: *Mandatory Summary Judgment*, 90 VA. L. REV. 1849, 1850 (2004).

114. *Id.*

115. In general, large class action lawsuits are almost always settled, and very rarely go to trial. *See* Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, INST. FOR LEGAL REFORM 1–2, http://www.instituteforlegalreform.com/uploads/sites/1/Class_Action_Study.pdf.

116. Kozel & Rosenberg, *supra* note 113, at 1851.

117. *See id.*

118. *See generally*, PONEMON INST., *supra* note 1 (listing and categorizing the varied costs associated with data breaches).

119. Anderson, *supra* note 12, at 539.

determination of all regulatory requirements, engagement in outside experts, postal expenditures, email bounce-backs, and inbound communication setups."[120]According to the Penomon Institute's Cost of Data Breach Study, notification costs are the highest in the United States, in comparison to other countries.[121] These notification costs are just one of many exorbitant costs required of Equifax.

In addition to these notification requirements, companies have to spend an enormous amount of money on post-data breach response.[122] These post-data breach response activities include "help desk activities, in bound communications, special investigative activities, remediation, legal expenditures, product discounts,[123] identity protection services, and regulatory interventions."[124] After a data breach, before recourse for those affected is even considered, a company has already been impeded with expensive notification and post-data breach response costs.[125]

Applying class action litigation to the Equifax data breach will be extremely damaging to Equifax as a corporation and a business. Studies have found that, the more records lost, the higher the cost of the data breach.[126] Because the Equifax data breach affected approximately 145 million people, the costs associated with the breach are already very high.[127] While protecting the victims and making sure that there is a system in place for them to obtain relief is of the utmost concern, the fact that this was not an intentional act, despite any alleged negligence on behalf of Equifax, and that the cooperation of the company is of value to the victims and society, the interests of the company cannot be completely disregarded.

Additionally, the Equifax data breach is different than most other data breaches as the exposure was far more expansive, in that it affected both businesses and consumers alike. [128] "[U]nlike previous breaches, where harm fell squarely on consumers whose personal data was let loose into the wild, . . . the Equifax breach could trigger a shift in plaintiffs' class actions from potential harm to consumers to potential harm to businesses as a result

120. PONEMON INST., *supra* note 1, at 5.

121. *Id.*

122. *Id.*

123. In addition to ordinary data breach costs, Equifax provided the free credit monitoring service, Trusted-ID Premier. Normally, these consumers or companies contracting with Equifax pay for these credit-monitoring services.

124. PONEMON INST., *supra* note 1. The study also determined that the United States spends the most on post data breach response. *Id.*

125. Despite the excess cost of data breaches, many companies failed to adopt cyber security insurance. *See* Anderson, *supra* note 12, at 533.

126. PONEMON INST., *supra* note 1, at 3.

127. Stacy Caplow, *Equifax Faces Mounting Costs and Investigations from Breach*, N.Y. TIMES (Nov. 9, 2017), https://www.nytimes.com/2017/11/09/business/equifax-data-breach.html.

128. *See* Eduard Goodman, *The Equifax Data Breach and its Impact on Businesses*, LAW360 (Sept. 14, 2017, 2:36 PM), https://www.law360.com/articles/963870/the-equifax-data-breach-and-its-impact-on-businesses.

of the breach."[129] Therefore, because of the sprawling use of Equifax and other credit reporting agencies, both consumers and businesses may sue Equifax.[130] With the potential of limitless liability, it is unclear whether Equifax will be able to absorb these new financial burdens and whether these costs will instead be pushed off onto consumers. Because of the high costs and inequities for class members, and because endless lawsuits could put too much strain on Equifax, which we have established we require their cooperation, class action litigation should not be the default legal remedy in the Equifax data breach or breaches of similar nature.

B. Arbitration

While use of an arbitration clause has become moot in the Equifax data breach because the company will not seek to apply its arbitration clause and class action waiver, arbitration as a remedy may be a potential recourse in future data breaches.[131] Therefore, the question remains as to whether arbitration should be the legal remedy in a data breach similar to Equifax's.[132]

Arbitration as a means of a remedy in consumer disputes really took ground once Congress codified a policy favoring private dispute resolution and subsequently passed the FAA in 1925.[133] Under the FAA, written agreements to arbitrate are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[134] As the Supreme Court continued to uphold arbitration provisions, a majority of businesses included them in their consumer-business contracts.[135] There is extensive debate on whether arbitration clauses should be used in consumer contracts.[136]

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129. *Id.*

130. *See* Renae Marie, *After the Breach, Equifax Now Faces the Lawsuits*, WASH. POST. (Sept. 22, 2017), https://www.washingtonpost.com/news/business/wp/2017/09/22/after-the-breach-equifax-now-faces-the-lawsuits/?noredirect=on&utm_term=.6efa326f2f99 (noting that Madison-based Summit Credit Union may be the first of many financial institutions to bring a lawsuit against Equifax.)

131. While the Equifax data breach was the biggest in magnitude, it is not the first credit bureau agency data breach. In October 2015, Experian, a credit reporting agency, suffered a major data breach that potentially exposed 15 million consumers who had contracted with T-Mobile. Robert Hackett, *Experian Data Breach Affects 15 Million People Including T-Mobile Customers*, FORTUNE (Oct. 1, 2017), http://fortune.com/2015/10/01/experian-data-breach-tmobile/. Moreover, while many efforts have been taken to attempt to rectify the data breach problem, it is inevitable that these types of data breaches will continue in the future. *Data Breach Reporting, supra* note 14.

132. Because Congress repealed the CFBA's Arbitration Rule, credit consumer agencies may attempt to uphold arbitration agreements in future data breach claims.

133. 9 U.S.C.A. § 2 (West 1947).

134. *Id.*

135. *The Future of Mandatory Arbitration Clauses*, JONES DAY LLP (Nov. 2015), http://www.jonesday.com/files/Publication/141bd3d6-06e5-487e-8fd4-fe8c6ee585a3/Presentation/PublicationAttachment/2bb9bb69-4425-4d7a-9ff5-

1. Benefits Associated with Arbitration

Arbitration is "a means of dispute resolution intended to help consumers and businesses save time and money and achieve fair results when compared to traditional litigation."[137] Moreover, it follows the policy of genuine freedom to contract, derived from the U.S. Constitution.[138] Additionally, it furthers the argument that because arbitration is a "creature of contract," the parties of the agreement can design the process to accommodate their respective needs.[139] The benefit of arbitration is that it offers a system of fast, efficient dispute resolution for both consumers and companies, as opposed to lengthier litigation.[140]

Additionally, arbitration resolves the issue of class action litigation where lawyers file potentially frivolous claims knowing that the chance of the case settling will be very high.[141] In this regard, arbitration is especially beneficial to the business as it often deters lawyers from filing nuisance suits in hopes of scoring a massive settlement.[142] Moreover, it will assure that only those that have suffered damage from the data breach will receive compensation.

2. Problems associated with Arbitration

A major problem associated with mandatory arbitration agreements between consumers and companies is the high levels of misconception amongst consumers.[143] Often consumers do not realize they are giving up their rights, or alternatively, they fail to understand what giving up their rights even means.[144] In some instances, pre-dispute arbitration agreements are included in the fine print of a contract between a consumer and a company, and issues of notice and consent arise.[145] Because contracts can be both very lengthy and complex, many consumers do not read what they

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6de73e0517cc/Future%20of%20Mandatory%20Consumer%20Arbitration%20Clauses.pdf; Arbitration Agreements, *supra* note 35.

136. *See* Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 871 (2008).

137. *The Future of Mandatory Arbitration Clauses*, *supra* note 135.

138. *See* U.S. CONST. art. I, § 10.

139. Edna Sussman & John Wilkinson, *Benefits of Arbitration for Commercial Disputes*, A.B.A., https://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/March_2012_Sussman_Wilkinson_March_5.authcheckdam.pdf (last visited Nov. 19, 2017).

140. *See id.*

141. Lazarus, *supra* note 63.

142. *Id.*

143. Jeff Sovern, *Arbitration Clauses Trap Consumers with Fine Print*, AM. BANKER (Dec. 2, 2014), https://www.americanbanker.com/opinion/arbitration-clauses-trap-consumers-with-fine-print.

144. *Id.*

145. Lazarus, *supra* note 63.

are signing or clicking.[146] Likewise, because businesses rarely point out the arbitration agreement or attempt to explain it to the consumers they are contracting with, consumers are not even aware of the agreements that they are making.[147] Most consumers do not even know that they are prohibited from commencing litigation and are required to use arbitration.[148]

Arbitration is also fundamentally unfair due to the inherent lack of bargaining power between the parties.[149] While proponents contend that arbitration offers more party control, in fact, in consumer agreements, only the business benefits from any such party control because of the unequal bargaining power between the major business and the consumer.[150]

Beyond the argument that arbitration agreements lack fairness, the arbitration process is also arguably unfair as opponents contend that arbitration as a means of resolution overwhelmingly favors the company, and fails to adequately protect the consumers.[151] Studies by the advocacy group Public Citizen found that "over a four-year period, arbitrators ruled in favor of banks and credit card companies 94% of the time in disputes with California consumers."[152] With this apparent bias, consumers fail to obtain fairness and justice in cases where they in fact suffered harm from the business.

Arbitration is also less impartial.[153] When using arbitration, the parties choose their arbitrator.[154] Therefore, this ability can benefit the parties (but can also hurt another party) to an arbitration agreement.[155] Moreover, because parties choose the arbitrators and they are not randomly assigned (like a judge), arbitrators must compete for business with other arbitrators.[156] This competition "gives arbitrators the incentive to make decisions that benefit the parties to the agreement, so as to increase the likelihood that the arbitrator will be selected in the future."[157] Therefore, where there is an abundance of disputes against financial businesses, the arbitrators, for the sake of business, have the clear incentive to make decisions in favor of the financial company, as opposed to the consumers.[158]

146. *Id.*
147. *Id.*
148. *Id.* (noting that "fewer than 7% of consumers understood that an arbitration clause in their credit card agreements meant they couldn't sue the company — which is to say that about 93% didn't understand the provision.").
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. As opposed to litigation, where the judge is typically assigned randomly.
155. Christopher R. Drahozal, "*Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 709 (2001).
156. *Id.*
157. *Id*.
158. Lazarus, *supra* note 63.

Furthermore, the company in a dispute pays the arbitrator's fee.[159] Clearly "the arbitrator thus has a financial incentive to favor one side over the other."[160] Although there are many benefits to arbitration, because of the inherent unfairness to consumers, arbitration, as it stands today, should not be the legal recourse in most consumer-business disputes, specifically major data breaches within credit reporting agencies.

IV. SUGGESTED ADMINISTRATIVE REMEDY

A. VICTIM COMPENSATION FUNDS

Due to the apparent disadvantages associated with class action litigation and arbitration remedies, a data breach compensation fund would better reach the goal of compensating victims, while also limiting the costs and time associated with meritless or under-compensated litigation.[161]

Victim compensation funds are created to administer funds to those who have suffered an injury from a certain event. Victim recovery funds come in a variety of different forms. These funds can be either private or public, or a combination of both.[162] Recovery funds can be created in the settlement of litigation from which payments are made pursuant to an administered payout proceeding.[163] Alternatively, recovery funds can be created by statute, where it is "funded at least in part by private industry in exchange for immunity from or limitations on civil liability, to pay for injuries caused in whole or in part by the acts or omissions of a company."[164] Here, the former is applicable, as litigation against Equifax has already ensued.[165]

Victim recovery funds have had huge success in the United States. The first and most widely-known type of fund is workers' compensation funds for employees injured while on the job.[166] Prior to state-enacted workers' compensation laws, the only remedy for employees hurt on the job was to sue in court. Eventually, states began to implement laws and create funds

159. *Id.*

160. *Id.*

161. *See* Riedy & Hanus, *supra* note 8, at 37.

162. *See id.* at 38. For example, social welfare funds, such as Social Security and Welfare are paid entirely by taxpayers and administered by the Federal Social Security Administration. By contrast, other funds are paid by private or public insurance. *See id.*

163. *See, e.g.*, Lynn Mather, *Theorizing about Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, 23 L. & SOC. INQUIRY 897, 898 (1998) (noting the successful tobacco industry settlement fund that settled the major lawsuit for associated health care costs).

164. *See* Riedy & Manus, *supra* note 8, at 38.

165. However, in other instances, a statute-created fund can also be applicable in data breach cases.

166. *See generally History of the New York State Workers Compensation Board*, WORKERS COMPENSATION BOARD, http://www.wcb.ny.gov/content/main/TheBoard/history.jsp (last visited Sept. 14, 2018).

where injured employees could seek redress.[167] These funds are no-fault funds, which allow employees injured at work to obtain payment for lost wages and medical costs, without regard to any personal negligence or fault.[168] While workers' compensation, which employees pay into, is an ongoing fund, other recovery funds have been created after a "triggering" event where injury has spread amongst many people.[169] Two highly-regarded funds that were created for both September 11th victims[170] and BP oil spill victims[171] can be used as a model for a recovery fund for victims of the Equifax data breach.

The September 11th Victim Compensation Fund is an example of a fund created in exchange for restrictions on any further liability of the defendant to the victim.[172] Congress created the fund, which was financed by both taxpayer dollars and airline industry money.[173] The airlines provided a significant portion of the funds in exchange for restrictions on liability to the victims.[174] The September 11th Victim Compensation Fund compensated victims (or victims' families) in exchange for their agreement not to sue the airline corporations involved.[175] Under the conditions of the recovery fund, if the victim or the victim's family chose to take the offer, they could not bring suit against any defendants allegedly responsible for the event. If they chose not to take the offer, the victim could appeal.[176] The September 11th Victim Compensation Fund was highly successful, as "an estimated 97% of affected families chose to accept the award offer rather than pursue litigation."[177]

Similarly, a victim compensation fund was created after the 2010 massive BP oil spill.[178] BP created a trust fund with $20 billion dollars placed in an escrow account to compensate victims of the Deepwater

167. *See generally* Richard A. Epstein, *The Historical Origins and the Econ. Structure of Workers Comp. Law*, 16 GA. L. REV. 775, 776–79 (1982).

168. *See generally History of the New York State Workers Compensation Board*, *supra* note 166.

169. *See* Riedy & Hanus, *supra* note 8, at 43.

170. On September 11, 2001, a series of four coordinated terrorist attacks occurred in the United States, leaving thousands dead and many more injured. *See* Riedy & Hanus, *supra* note 8, at 41.

171. On April 20, 2010, an explosion rocked the Deepwater Horizon Drilling rig in the Gulf of Mexico. Shannon L. Sole, *BP's Compensation Fund: A Buoy for Both Claimants and BP*, 37 J. CORP. L. 245, 247 (2011). As a consequence, 4 million barrels of oil leaked into the Gulf of Mexico—the largest spill in American History. The spill had massive environmental, economic, and social consequences. *Id.*

172. *See* Riedy & Hanus, *supra* note 8, at 41.

173. *Id.*

174. *Id.*

175. *Id.*; *see also* Sole, *supra* note 171, at 252.

176. Riedy & Hanus, *supra* note 8, at 41–42.

177. Sole, *supra* note 171, at 252.

178. *See generally id.* at 246.

Horizon Spill.[179] The Gulf Coast Claims Facility (GCCF) has assumed responsibility for processing claims and claimants could seek compensation only through the Gulf Coast Claims Facility.[180] Similar to the September 11th Victim Compensation Fund, claimants would have to surrender their rights to sue BP to receive payments of compensation.[181] When the BP fund was modeled after the September 11th Victim Compensation Fund, it was "intended to be an expeditious, reliable alternative to tens of thousands of tort cases, sparing plaintiffs and the company alike the expense and uncertainty of drawn-out lawsuits."[182]

The successes of both funds derive from Kenneth Feinberg, who, as the Special Master,[183] allocated the fund to victims.[184] The purpose of these types of funds is to attempt to compensate victims and avoid protracted litigation.[185] Kenneth Feinberg believes the proposed success of a victim recovery fund derives from a uniformity approach and a streamlined process.[186]

These recovery funds have characteristics in common. While the injuries within each fund vastly differ,[187] the characteristics of the victims are all similar.[188] The victims' "harms were unexpected and were not a result of their own actions."[189]Additionally, these compensation funds protect "putative defendants from civil liability from 'wrongful' acts or omissions when the primary causative agent was a force, largely or entirely,

179. *Id.* at 250.

180. *Id.*

181. *Id.*

182. *GCCF Final Rules Governing Payment Options, Eligibility and Substantiation Criteria, and Final Payment Methodology,* GCCF (Feb. 18, 2011), http:// www.gulfcoastcla imsfacility.com/FINAL_RULES.pdf. The Final Rules implement a slightly different compensation scheme than was initially in place. *See* Editorial, Mr. Feinberg and the Gulf Settlement, N.Y. TIMES, Aug. 30, 2010, at A18 (describing the GCCF compensation scheme enacted shortly after the spill). Under the previous scheme, claimants could apply for an "emergency advance payment," an accelerated form of compensation available to individuals and businesses that paid out up to six month's lost income to any legitimate claimant, or a "final payment," which would compensate claimants for long-term damages. *Id.*

183. A special master is one who oversees the recovery fund and administers the payouts. *See Editorial,* Mr. Feinberg and the Gulf Settlement, *supra* note 182.

184. Kenneth Feinberg is an American attorney, specializing in mediation and alternative dispute resolution and is widely known for his success as serving as special master in compensating victims where necessary.

185. *GCCF FAQs,* GCCF (Aug. 11, 2010), https://www.restorethegulf.gov/sites/default/files /imported_pdfs/library/assets/gccf-faqs.pdf.

186. *See generally* KENNETH R. FEINBERG, WHAT IS LIFE WORTH? THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11 184 (PublicAffairs 2006) (examining the difficulties of determining compensation for victims of 9/11).

187. While some victims suffered physical injuries (for example, 9/11 and Workers Compensation), other victims suffered economic injuries (BP Oil Spill, and Equifax data breach).

188. *See* Riedy & Hanus, *supra* note 8, at 42.

189. *Id.* at 42.

out of the defendants' control."[190] Lastly, these funds are typically created after a "triggering" event which caused the harm.[191]

These three characteristics are similar to the facts in the Equifax data breach. Here, there is nothing these victims could have done to prevent the breach from occurring because the information was no longer in the consumers' hands, but in the hands of Equifax (and the hackers).[192] Second, with regard to culpability, although Equifax had a duty to protect consumers' personal information, the breach was not an intentional act but was done so at the hands of an unknown criminal actor.[193] In this case, Equifax, like many other businesses and organizations, including governmental agencies, did not stop the hacking from taking place. While Equifax should not be relieved of liability, it was not an intentional act and should at least be recognized as such. Lastly, the data breach was clearly the triggering event that caused any damage. Because the Equifax data breach shares common characteristics of other events that resulted in successful victim recovery funds, the likelihood of a victim recovery fund's success heightens. Thus, in contrast to the aforementioned downsides of class actions or arbitrators, victim funds produce positive outcomes and should therefore be the preferred remedial method.

B. BENEFITS OF A COMPENSATION FUND OVER OTHER LEGAL RECOURSES

A recovery fund as a compensation alternative to private litigation has many substantial benefits. The benefit of an administrated compensation method trumps private litigation because the fund can be designed to make compensation simpler and more efficient.[194] Who can recover and how much they can recover can be straightforward and less adversarial.[195] Moreover, both corporations and claimants benefit from the "certainty and stability" that a compensation program offers.[196] Additionally, both claimants and businesses encounter much lower transaction costs.[197]

Victim compensation funds can benefit victims where they are compensated more fairly than if they opted for traditional class action litigation. For victims, making a claim to a victim compensation fund can be simple and inexpensive.[198] If properly created and conducted, in victim

190. *Id.* at 43.

191. *Id.* While Workers' Compensation Boards do not apply to this last category, many other victim recovery funds are created after a certain event and therefore is a similar character of these types of funds.

192. *See, e.g.*, *id.* at 44.

193. In this instance, an unknown hacker.

194. Riedy & Hanus, *supra* note 8, at 38–39.

195. *Id.* at 39.

196. Sole, *supra* note 171, at 260.

197. *Id.*

198. Riedy & Hanus, *supra* note 8, at 39.

recovery funds, it is relatively simple to determine whether making a claim is justified.[199] And "the claimant will know, in advance, within reasonable limits, what to expect."[200] Claimants face lower hurdles to compensation under such a program, which provides "an easy, simple burden of proof."[201] Additionally, the claim resolution process will be much timelier than litigation because the fund avoids the cumbersome processes and "slow-turning wheels of justice dispensed through litigation."[202] Moreover, "the satisfaction of the claim is not dependent on external forces over which the victim has no control, such as which party has access to the best expert witnesses, or a jury's secret deliberations."[203] In summary, a recovery fund administered to victims "cover more cases, faster, more efficiently, and more predictably than tort — so as to improve compensation."[204] In addition to the countless benefits to the victims, these funds are also a better alternative for the companies. Compensation awards, a major cost for breached entities, can be predicted more precisely beforehand, saving time and therefore ultimately saving money.[205]

As there are substantial benefits of an administrative remedy, the proper legal remedy for the Equifax data breach should be a victim recovery fund, created like previous funds after injury-causing events.[206] The fund should be coordinated through an independent body, like the GCCF, to determine compensation.[207] Moreover, a Special Master with expertise in correctly compensating victims, like Kenneth Feinberg, should run the independent body.[208] Like the GCCF, victims must provide documentation to show that they have suffered harm.[209] Moreover, the aim of the fund should be the same as the aim of the BP fund, which was to minimize lawsuits against the company.[210] In order to be considered for the compensation fund

199. *Id.*

200. *Id.*

201. Sole, *supra* note 171, at 260.

202. Riedy & Hanus, *supra* note 8, at 39.

203. *Id.*

204. Randall R. Bovbjerg & Laurence R. Tancredi, *Liability Reform Should Make Patients Safer: "Avoidable Classes of Events" are a Key Improvement*, 33 J.L. MED. & ETHICS 478, 483 (2005).

205. Riedy & Hanus, *supra* note 8, at 40.

206. How much money Equifax should put in the fund, and how it will be funded are very important issues in regard to the success of the Fund. This amount should be determined based on extensive research done by the independent body afforded the role of distributing the money.

207. *See, e.g.*, GULF COAST CLAIMS FACILITY, http://www.gulfcoastclaimsfacility.com (last visited Nov. 19, 2017).

208. *See, e.g.*, Frances Romero, *Compensation Czar Kenneth Feinberg*, TIME (Oct. 23, 2009), http://content.time.com/time/nation/article/0,8599,1903547,00.html.

209. The issue of proximate cause (i.e., did the Equifax data breach cause the harm, or was the information breached through another avenue?) still persists; however, this is still remains a stronger alternative than class action litigation.

210. Niel King, Jr., *Feinberg Ramps Up $20 Billion Compensation Fund*, WALL. ST. J. (June 21, 2010), http://online.wsj.com/article/SB10001424052748704256304575321072301455004.html?KEYWORDS=bp+compensation+fund.

individual data breach victims would be required to file a claim with the fund before filing a lawsuit directly against the company.[211] Alternatively, the victim could voluntarily choose to pursue a lawsuit directly against the hacker.[212] However, like other victim compensation funds, instead of requiring exhaustion of the fund, the fund can be optional, where the decision is up to the victims as to whether to make a claim with the fund or proceeding directly to court.[213] Then, however, the incentives of opting for the fund over joining a class action lawsuit must be clearly articulated to the victims. Regardless of the form and implementation,[214] the goal of a victim recovery fund is to find a middle ground between Equifax, or other businesses, and the consumer victims.

CONCLUSION

Based on the reasons stated above, class action litigation and arbitration can be faulty avenues for legal recourse where consumers have suffered from damages massive data breaches. If the default legal remedy is class action litigation, the company will suffer excessively while the consumer will not even fare that well. By contrast, if the default rule is mandatory pre-dispute arbitration, consumers will likely suffer. While it appears at this point, that class action litigation is the most popular avenue, this option will only be excessively costly for Equifax, while failing to adequately provide timely or substantive recovery to victims.[215] Instead, a data breach compensation fund would better reach the goal of compensating true victims, while also limiting the costs associated with litigation.[216]

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211. *See* Riedy & Hanus, *supra* note 8, at 45.

212. *See id.* at 45. This exclusion will likely little practical consequence, however there may be instances where a hacker is revealed wither by claiming responsibility or being caught by the authorities and was subsequently subject to service of process. *See id.* at 45 n. 293.

213. *Id.* at 45.

214. The fund's overall structure requires more extensive research and expertise.

215. Riedy & Hanus, *supra* note 8, at 37.

216. *See id.*

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