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Sonic's \$5.7M Data Breach Deal With Banks Gets Final Nod

By **Allison Grande**

Law360 (October 17, 2022, 10:13 PM EDT) -- An Ohio federal judge on Monday gave his final sign-off to a \$5.7 million settlement to resolve a "highly complex" dispute that financial institutions brought against Sonic Corp. to recoup losses they allegedly incurred from a 2017 data breach that compromised millions of credit and debit cards.

In an order granting final approval to the class action settlement along with class counsel's request for \$1.64 million in attorney fees and reduced incentive awards of \$7,500 for each of the three named plaintiffs, U.S. District Judge James Gwin gave significant weight to the "reactions" of potential class members to the deal. The judge noted that out of more than 5,000 financial institutions that were determined to be covered by the deal, only two asked for exclusion from the settlement and none objected to the pact.

"The class members are sophisticated financial institutions that can reliably determine whether a settlement furthers their best interests," Judge Gwin wrote. "The class members' positive reaction to the settlement therefore favors approval."

The "complexity" of the dispute and the "significant risks" both sides faced in pressing forward with a case that's already spanned more than three years and was **gearing up for trial** when the settlement was reached also tilted the scales toward finalizing the deal, according to Judge Gwin.

"Plaintiffs faced a difficult battle in proving that Sonic's affirmative acts, rather than the hack, proximately caused their injuries," the judge wrote. "However, defendant Sonic faced extremely large damages exposure if plaintiffs won."

Judge Gwin also found to be "reasonable" class counsel's request for \$1.64 million in attorney fees and \$560,000 in expenses, which accounted for about 29% of the deal's \$5.7 million hypothetical common fund.

That figure falls within the "ordinary attorney's fee range" and is significantly less than the lodestar of just more than \$6 million that the five firms that have been serving as class counsel calculated for working more than 10,000 hours on the case, according to the judge.

"Considering the length and complexity of this case, as well as class counsel's performance during this litigation, the court finds that all of class counsel's substantially discounted hourly rates and hours spent for this litigation are reasonable," Judge Gwin ruled.

However, the judge refused to sign off on \$10,000 incentive awards for each of the three named plaintiffs, American Airlines Federal Credit Union, Arkansas Federal Credit Union and Redstone Federal Credit Union.

With each financial institution eligible to receive \$1 for each payment card they reissued or \$1.50 for each card that was involved in fraud, the proposed \$10,000 award would "essentially double" the recovery that American Airlines and Arkansas stand to recover for 7,000 and 6,300 compromised cards, respectively, according to the judge.

While Redstone "could theoretically" recover up to \$75,000 under the settlement since the financial institution alleges that it received Sonic-related alerts for 50,000 payment cards, "class counsel does

not say that Redstone deserves a greater award than the other named plaintiffs," Judge Gwin ruled in handing each of the class representatives a reduced award of \$7,500.

Monday's written order comes on the heels of Judge Gwin signaling at **an Oct. 6 hearing** that he found the proposed deal to be fair, reasonable and adequate to compensate the class and that he would issue an order in the coming weeks formalizing his findings.

The parties' dispute dates back to 2019, when financial institutions began filing suits over the Sonic data breach.

The matters were subsequently transferred into multidistrict litigation that had been created for related cases filed by Sonic customers over the breach. Sonic reached a separate **\$4.3 million deal** to resolve these consumer class actions in 2018, and the pact received court approval the following year.

Like the consumers, the financial institutions argued that Sonic had negligently failed to implement adequate data security at its restaurants, resulting in deficiencies that enabled hackers to install card-scraping malware at hundreds of franchise locations and to steal a batch of 5 million payment cards that were posted for sale on the dark web.

Sonic countered that a software vendor was solely responsible for the breach, and that the financial institutions had failed to show that Sonic either owed them a duty of care or caused the damages under the law of Oklahoma, where Sonic is based.

Judge Gwin allowed the banks' negligence claim to proceed in July 2020 and, in November of that year, he **agreed to certify** a class of banks, credit unions and financial institutions that reissued payment cards or reimbursed a compromised account tied to the breach, rejecting Sonic's argument that the potential class members hadn't suffered the same injury because not all had been injured.

The judge moved the case toward trial in September 2021, when he denied Sonic's bid for summary judgment after agreeing with the financial institutions that "genuine fact questions remain" for a jury to determine about whether the plaintiffs had alleged a viable claim for negligence under Oklahoma law.

As the parties were preparing for trial, Magistrate Judge Jonathan D. Greenberg helped broker the settlement over three days of mediation earlier this year.

Under the terms of **the \$5.73 million deal**, Sonic has agreed to set aside up to \$3 million to reimburse the financial institutions for payment cards that they had to reissue or that were used in fraud within four weeks of the card's being flagged by a card brand as being potentially compromised in the Sonic breach.

According to the order issued Monday, the claims administrator notified 5,085 potential-class-member financial institutions of the deal, and, by the end of the claims period, eligible class members had filed 360 claims.

"This case was highly complex," Judge Gwin wrote in finalizing the deal. "Unlike consumer class actions, this litigation involved legally sophisticated parties on both sides."

Even if the plaintiffs had prevailed at trial, "they still faced an appellate attack on their success up to and through trial," including challenges to the court's class certification ruling and "numerous evidentiary issues that were bound to arise at trial."

"So, by settling, plaintiffs avoided the real possibility that the class would be left with zero recovery," the judge added. "The likelihood of success on the merits (or the uncertainty of success), favors approving the settlement."

Representatives for the parties couldn't be reached for comment Monday.

The financial institutions are represented by Brian C. Gudmundson and Michael J. Laird of Zimmerman Reed LLP, Charles H. Van Horn and Katherine M. Silverman of Berman Fink Van Horn

PC, Joseph P. Guglielmo, Erin Green Comite and Margaret Ferron of Scott + Scott Attorneys at Law LLP, Karen Sharp Halbert and William R. Olson of Roberts Law Firm PA and Arthur M. Murray, Stephen B. Murray Sr. and Caroline Thomas White of Murray Law Firm.

Sonic is represented by Craig Cardon, Kari M. Rollins, Liisa M. Thomas and David M. Poell of Sheppard Mullin Richter & Hampton LLP.

The case is In Re: Sonic Corp. Customer Data Security Breach Litigation, case number 1:17-md-02807, in the U.S. District Court for the Northern District of Ohio.

--Additional reporting by Eric Heisig. Editing by Jay Jackson Jr.

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