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Sonic Signs \$5.7M Deal With Banks To Settle Data Breach Suit

By **Allison Grande**

Law360 (April 27, 2022, 9:46 PM EDT) -- A class of financial institutions suing Sonic Corp. over a 2017 data breach that compromised millions of payment cards is pressing an Ohio federal judge to sign off on a deal that would require the fast-food chain to fork over up to \$5.7 million and would avert a looming trial.

The three financial institutions leading the dispute — American Airlines Federal Credit Union, Arkansas Federal Credit Union and Redstone Federal Credit Union — argued in moving for preliminary approval of the class action settlement Tuesday that the proposed deal "confers substantial benefits" upon the class, especially considering the risks of proceeding with a case that's at "the doorstep of a complex trial."

"The parties have completed nearly every phase of litigation," including bids by Sonic for dismissal and summary judgment, a class certification fight that prompted a petition to the Sixth Circuit, full fact and expert discovery, and pretrial motion practice that included efforts to exclude certain experts and decertify the class, the credit unions contended.

These "contentious efforts" over the past three years have not only brought the dispute to the brink of a trial that "would involve technical expert testimony on complex liability issues and involve individualized evidence of class members' damages," but have also shown the parties "the risk of continued litigation" that would "involve considerable time and expense and be potentially costly to the relative merits of the claims and defenses at issue," the credit unions said.

"Although the litigation is advanced, plaintiffs still face substantial risk and the potential for no recovery or, even should they succeed, delayed recovery due to appeals and trials of individual damages," the credit unions added. "By settling the case now, plaintiffs ensured all eligible class members have an opportunity to submit a claim for a portion of their damages, and that their reward will not be delayed or defeated by continued litigation."

Under the terms of the proposed deal, Sonic has agreed to pay a total of up to \$5.73 million to resolve negligence claims being pressed by a certified class of U.S. banks, credit unions and financial institutions that had to reissue credit cards or reimburse customers when hackers stole personal information in a 2017 data breach at hundreds of Sonic Drive-In restaurants.

Of that sum, Sonic will 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. Class members are eligible to receive \$1 for each eligible payment card they reissued or \$1.50 for each eligible card that was involved in fraud.

In moving for preliminary approval, the financial institutions highlighted the fact that class members "need only submit a claim form" that identifies the affected cards and the timing of their reissuance or fraudulent use and stressed that they "need not prove their damages were caused by the Sonic data breach — a contentious issue the parties disputed throughout this action."

Sonic will be able to audit 10% of the claims or "any claim that looks erroneous on its face" for claims from financial institutions that include "basic data" regarding the timing of reissued and fraudulently used cards, and it can audit any claims in which class members instead choose to

provide the total amount of cards along with an explanation of how they calculated the numbers, according to the deal.

If the total value of class members' claims exceeds \$3 million, then the reissuance and fraud payments "will be decreased by a pro rata basis" such that the full \$3 million will be disputed to those class members that submitted timely and valid claims, the financial institutions added.

Aside from establishing the \$3 million fund, the proposed settlement also requires Sonic to pay up to \$500,000 for settlement administration, up to \$30,000 for class representative service awards and up to \$2.2 million for attorney fees and expenses, according to the financial institutions' motion.

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 James S. Gwin of the U.S. District Court for the Northern District of Ohio cut the financial institutions' negligence and declaratory relief claims in July 2020 but allowed their negligence claim to proceed after finding that the plaintiffs had adequately alleged that Sonic's affirmative acts had put the banks at a greater risk of harm due to the data breach.

In November 2020, Judge Gwin **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, 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.

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 and Erin Green Comite of Scott+Scott 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 and Liisa M. Thomas 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 Lauren Berg and Victoria McKenzie. Editing by Karin Roberts.