

# In Re Zappos.com, Inc.

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IN RE ZAPPOS.COM, INC., 888 F.3D 1020 (9TH CIR. 2018)

In *In Re Zappos.com, Inc.*,<sup>1</sup> the United States Court of Appeals for the Ninth Circuit reversed and remanded the district court's judgement.<sup>2</sup> The court determined that its previous decision in *Krottner v. Starbucks Corp.*, and the court's most recent decision in *Clapper v. Amnesty International USA*, are not irreconcilable.<sup>3</sup> The Ninth Circuit held, pursuant to *Krottner*, that plaintiffs have Article III standing.<sup>4</sup>

## I. BACKGROUND

In January 2012, hackers successfully breached the online retailer Zappos.com.<sup>5</sup> The hackers obtained personal identifying information (PII) for over 24 million Zappos customers, including individuals' names, account numbers, passwords, email addresses, billing and shipping addresses, telephone numbers, and credit and debit card information.<sup>6</sup> Following the breach, several Zappos customers filed putative class actions throughout the United States, claiming that Zappos.com did not sufficiently protect their personal information.<sup>7</sup> The law suits were consolidated for pretrial proceedings.<sup>8</sup> The district court granted in part and denied in part Zappos's motion to dismiss and granted Zappos's motion to strike the Complaint's class allegations.<sup>9</sup> The district court dismissed plaintiffs' claims for lack of Article III standing.<sup>10</sup> In doing so, the district court distinguished between the Plaintiffs, dividing them in two separate groups.<sup>11</sup> The district court ruled that the first group of plaintiffs, who had already suffered financial losses from the hacking incident, had Article III standing, while the plaintiffs who had not yet experienced any such loss lacked Article III standing.<sup>12</sup> The district court reasoned that only the first group of plaintiffs had Article III standing because those plaintiffs had experienced "actual fraud . . . as a direct result of the breach."<sup>13</sup> The district court found that, unlike the first group of plaintiffs, the

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1. In Re Zappos.com, Inc., 888 F.3d 1020 (9th Cir. 2018).

2. *Id.*

3. *Id.*

4. *Id.* at 1023.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 1024.

10. *Id.* at 1023.

11. *Id.* at 1024.

12. *Id.*

13. *Id.*

second group lacked Article III standing because those plaintiffs “failed to allege instances of actual identity theft or fraud.”<sup>14</sup> At issue on appeal was whether both groups of plaintiffs, solely focusing on the hacking incident itself and not any subsequent illegal activity, had Article III standing.<sup>15</sup>

## II. ANALYSIS

“The court reviewed the district court’s standing determination de novo.”<sup>16</sup> The court began its analysis by establishing what a plaintiff must show to establish Article III standing.<sup>17</sup> To establish Article III standing, a plaintiff must show that he or she has suffered an “injury in fact[,]” “that is concrete and particularized, actual or imminent, not conjectural or hypothetical.”<sup>18</sup> Moreover, a plaintiff must establish that the suffered injury is traceable to the challenged action and that the injury suffered is likely to be redressed by a favorable judicial decision.<sup>19</sup>

The court started by rejecting defendant’s argument that the court’s previous decision in *Krottner v. Starbucks Corp.* does not control this case.<sup>20</sup> Further, the court determined that its decision in *Krottner* is not inconsistent with the Supreme Court’s judgement in *Clapper v. Amnesty International USA*.<sup>21</sup> First, the court looked at the Supreme Court’s decision in *Clapper*.<sup>22</sup> The plaintiffs in *Clapper* brought suit arguing that the government’s surveillance pursuant to the Foreign Intelligence Surveillance Act of 1978 would result in injury-in-fact to them as attorneys because the government could surveil privileged telephone and email communications between them and their clients abroad.<sup>23</sup> Plaintiffs argued that they had Article III standing “because there was an objectively reasonable likelihood that their communications would be acquired . . . at some point in the future.”<sup>24</sup> However, the Court rejected plaintiffs’ argument in that a reasonable likelihood of injury was insufficient, and that Article III standing requires an injury which is certainly impending.<sup>25</sup> The Court found that plaintiffs’ injury was too attenuated, as it rested on a series of inferences.<sup>26</sup>

However, unlike like *Clapper*, in *Krottner* the Ninth Circuit held plaintiffs had established Article III standing.<sup>27</sup> In *Krottner*, a thief stole a laptop containing individuals’ names, addresses, and social security numbers.<sup>28</sup> Following the incident, Starbucks sent out a letter to affected

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14. *Id.*

15. *Id.* at 1023.

16. *Id.* at 1024.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 1025.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* (quoting *Clapper v. Amnesty International USA*, 568 U.S. 398, 401).

25. *Id.* at 1025.

26. *Id.* at 1026.

27. *Id.*

28. *Id.* at 1024.

employees informing them of the incident and telling them to monitor their financial accounts.<sup>29</sup> Subsequently, employees sued and were found to have Article III standing, alleging an “increased risk of future identify theft.”<sup>30</sup> The court concluded that the plaintiffs had “alleged a credible threat of real and immediate harm” because a laptop with their personal information had been stolen.<sup>31</sup> The court distinguished itself from the Supreme Court’s decision in *Clapper* because the standing analysis the Court applied there was “especially rigorous because the case arose in a sensitive national security context involving intelligence gathering and foreign affairs.”<sup>32</sup> Moreover, the court determined that its decision in *Krottner*, unlike *Clapper*, did not involve a separation of powers issue.<sup>33</sup> The plaintiffs in *Krottner* did not rely on a series of interferences, rather the thief had stolen all the requisite information needed to open accounts and spend money in the plaintiffs’ names.<sup>34</sup> Thus, the court rejected defendant’s argument and found the Supreme Court’s decision in *Clapper* was not inconsistent with the court’s decision in *Krottner*.<sup>35</sup>

The Ninth Circuit asserted that its *Krottner* decision controls the result here.<sup>36</sup> The court found that, like *Krottner*, the type of information obtained from the Zappos breach placed the plaintiffs at a high risk for “phishing” and “pharming.”<sup>37</sup> Specifically, plaintiffs alleged that their credit card number, information which Congress has treated as sensitive information, was seized.<sup>38</sup> According to the court, when Zappos urged its affected customers to change their passwords after the theft, Zappos conceded that the obtained information was highly sensitive.<sup>39</sup> As such, the court found that the plaintiffs sufficiently established the element of injury-in-fact.<sup>40</sup> Further, the court was not persuaded by Zappos’s argument that the alleged injury-in-fact was not imminent.<sup>41</sup> The court reasoned that just because the plaintiffs may not experience the full extent of identity theft or fraud for years to come does not mean their injury is diminished.<sup>42</sup> Therefore, the court found that the plaintiffs had sufficiently pleaded an injury in fact based on the substantial risk the Zappos hackers posed.<sup>43</sup> The court concluded that the remaining Article III standing requirements were satisfied, holding that plaintiffs’ risk of future harm was fairly traceable to the breach of Zappos and the risk of identity theft was redressable by relief.<sup>44</sup>

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29. *Id.* at 1025.

30. *Id.* (quoting *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1142 (9th Cir. 2010)).

31. *Id.* (quoting *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1143 (9th Cir. 2010)).

32. *Id.* at 1026.

33. *Id.*

34. *Id.*

35. *Id.* at 1023.

36. *Id.* at 1027.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 1028.

41. *Id.*

42. *Id.* at 1028-29.

43. *Id.*

44. *Id.* at 1029.

### III. CONCLUSION

For the foregoing reasons, the court held plaintiffs have Article III standing and reversed and remanded the district court's judgement.<sup>45</sup> A petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit was denied on March 25, 2019.

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45. *Id.* at 1030.