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Consumer Law in the News

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CONSUMER LAW IN THE NEWS

*John Pera**

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I. INTRODUCTION

In the past twelve months, consumer law has been impacted by both negative and positive events. The consumer has fallen victim to substantial Internet hacks, rattling consumer confidence and privacy concerns. However, the consumer has also benefited from technological advancements such as emerging e-payment options. Therefore, in order to both protect consumer expectations and encourage technological progress, the consumer must be well informed. To that end, this article highlights three recent consumer law crises and what can be taken from them. The first crisis involves the Ashley Madison attack. The social networking site, which markets individuals in committed relationships, leaked personal data involving over 30 million adults.¹ The second crisis involves airline price fixing. Here, the Department of Justice investigated whether America's biggest airlines colluded to support artificially high airfares.² The final crisis involves the Volkswagen emissions scandal. U.S. regulators have accused

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¹ Beth Stackpole, *Hack Attacks Raise Stakes for Consumer Privacy*, THE ART OF THE HACK (Aug. 25, 2015), <http://theartofthehack.com/hack-attacks-raise-stakes-for-consumer-privacy/>.

² Drew Harwell, Ashley Halsey III, and Thad Moore, *Justice Department Investigating Potential Price Collusion*, WASHINGTON POST (July 1, 2015), http://www.washingtonpost.com/business/economy/doj-investigating-potential-airline-collusion/2015/07/01/42d99102-201c-11e5-aeb9-a411a84c9d55_story.html.

Volkswagen of programming approximately 500,000 diesel vehicles to cheat emissions tests to register lower emissions levels at testing sites than those actually emitted on the road.³

II. ASHLEY MADISON HACK

Ashley Madison is an online dating site that markets individuals in committed relationships. Their slogan is “Life is Short. Have an Affair.”⁴ The July 2015 Ashley Madison hack publically leaked over 30 million adult profiles containing email addresses, phone numbers, credit card numbers, and other personal information.⁵ The leaked data included thousands of government and military email accounts, casting government leaders and servicemen in an embarrassing light.⁶ Aside from leaked personal data, the breach had much broader ramifications. It showcased the vulnerability of online personal data and the need for more stringent security measures to properly safeguard customer privacy.⁷ As Michael E. Miller, foreign affairs reporter for *The Washington Post* stated, “[a]mid the gloating, a few people recognized the Ashley Madison leak as something much bigger than a chance to snicker: a turning point for American society, the internet and maybe even marriage”.⁸ Certainly, this hack has much broader implications than a security breach, and it should be a wake-up call which creates solutions to better protect the consumer.

Miller also stated the scandal could have far reaching ramifications for Internet privacy protections in both the United States and Canada, where the website is based, and it did.⁹ When the Ashley Madison data became publicly available, tens of millions of people were publicly confronted with choices they thought they made in private.¹⁰ This did not just result in users being caught

³ Mark Thompson and Ivana Kottasova, *Volkswagen Scandal Widens*, CNN MONEY (Sept. 22, 2015), <http://money.cnn.com/2015/09/22/news/vw-recall-diesel/>.

⁴ Nat’l Constitution Ctr., *Ashley Madison Hack Raises Bigger Privacy, Legal Issues* (Aug. 24, 2015), <http://blog.constitutioncenter.org/2015/08/ashley-madison-hack-raises-bigger-privacy-legal-issues/>.

⁵ Stackpole, *supra* note 1.

⁶ *Id.*

⁷ *Id.*

⁸ Nat’l Constitution Ctr., *supra* note 4.

⁹ *Id.*

¹⁰ *Id.*

cheating; users were caught in an incredibly visible way that is sure to follow victims around the Internet for years.¹¹

So, what are the next moves for Ashley Madison and their clients? Ashley Madison clients in the United States face a potentially embarrassing situation with few options.¹² There is no Fourth Amendment cause of action against private individuals; the Fourth Amendment only protects against unreasonable searches and seizures by the government.¹³ However, those affected may still pursue legal remedies. At least six complaints have been filed in federal court against Avid Life Media, the parent company of Ashley Madison.¹⁴ The complaints are similar to eight-class action complaints current and former Sony employees filed over the Sony studio hack.¹⁵ However, unlike the Sony hack, the Ashley Madison clients want anonymity—an unlikely guarantee from the court.¹⁶

The Toronto Police Services Superintendent has announced a bounty to anyone providing information leading to the identification, arrest, and prosecution of the person or persons responsible for the leak.¹⁷ Additionally, Avid Media has offered \$500,000 for information leading to the capture of the perpetrator.¹⁸ Finally, Avid Media attempted to mitigate damages and client embarrassment in the U.S. by limiting access to the online stolen database.¹⁹ Avid Media filed take down requests pursuant to the Digital Millennium Copyright Act (DMCA).²⁰ DMCA allows individual and corporate copyright owners to have content removed from the Internet if that content is used without permission.²¹ However, analysts remain skeptical that Ashley Madison is

¹¹ Nat'l Constitution Ctr., *supra* note 4.

¹² *Id.*

¹³ Nat'l Constitution Ctr., *supra* note 4.

¹⁴ Austin Siegemund-Broka, *Two Hacks: How Ashley Madison's Legal Woes Differ From Sony's*, BILLBOARD (Sept. 5, 2015), <http://www.billboard.com/articles/business/6685936/a-tale-of-two-hacks-how-ashley-madisons-legal-woes-differ-from-sonys>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Robert Hacket, *What To Know About The Ashley Madison Hack*, FORTUNE (Aug. 26, 2015), <http://fortune.com/2015/08/26/ashley-madison-hack/>.

¹⁸ *Id.*

¹⁹ Hacket, *supra* note 17.

²⁰ *Id.*

²¹ *Id.*

using DMCA against its designed purpose in order to suppress reporting on the issue.²²

Unlike the Sony employees, the Ashley Madison plaintiffs can likely prove actual damages. Ashley Madison clients paid the company to delete profiles it never deleted, so there's "[n]o problem with demonstrating an injury . . . [t]hat's a real, tangible out-of-pocket loss."²³ The recent Ashley Madison and Sony hacks highlight the need for heightened cyber security. Even if these complaints are dismissed or settled out of court, there needs to be more protection for the cyber consumer. A recent survey found less than a quarter of U.S. companies cited increased cyber security measures as their most significant IT investment this year.²⁴ Clearly, more work needs to be done to protect the consumer.

III. AIRLINE PRICE FIXING

Recently, the Department of Justice (DOJ) investigated whether U.S. airlines colluded to control capacity and keep airfare prices artificially high.²⁵ The four largest U.S. airlines—American Airlines, United Airlines, Delta Air Lines, and Southwest Airlines (the "Airline Defendants")—confirmed they are part of the DOJ probe.²⁶ However, few details of the investigation are available. DOJ has requested documents from airlines related to expansions, meetings with analysts, and officials at other airlines to see whether collusion occurred.²⁷

Although the investigation is still in the preliminary stages, it has not stopped the onslaught of lawsuits against the airliners. The Airline Defendants have all been hit with lawsuits alleging price-fixing.²⁸ Warren T. Burns, a Dallas attorney of Burns Charrest LLP stated, "[t]he defendants are so intent on raising profits

²² Nat'l Constitution Ctr., *supra* note 4.

²³ Siegemund-Broka, *supra* note 14.

²⁴ Stackpole, *supra* note 1.

²⁵ Jack Nicas, Brent Kendall, and Susan Carey, *Justice Department Probes Airlines for Collusion*, WALL STREET J. (July 1, 2015), <http://www.wsj.com/articles/justice-department-probes-airlines-for-collusion-1435775547>.

²⁶ Nicas, Kendall, and Carey, *supra* note 25.

²⁷ *Id.*; Terry Maxon, *DOJ Investigation Prompts Lawsuits Alleging that Airlines are Fixing Airfares*, DALL. MORNING NEWS (July 8, 2015), <http://aviationblog.dallasnews.com/2015/07/doj-investigation-prompts-lawsuits-alleging-that-airlines-are-fixing-airfares.html/>.

²⁸ Maxon, *supra* note 27.

that they appear to have colluded to gouge customers' pocketbooks and keep airfares sky high . . . [such action that] agree[s] to restrict capacity to keep [] profits high marks the very definition of an antitrust violation."²⁹ In this Dallas claim, the plaintiffs allege the Airline Defendants colluded to limit increases in their capacity with the expectation, intent, and effect that such limits on capacity would artificially increase prices for airfare.³⁰ Thus, despite high demand and low operating costs, airline capacity has remained relatively flat.³¹ These deceptive practices combined with artificially high prices have yielded record-high revenues for the airlines at the consumer's expense.³²

Senator Richard Blumenthal (D-Connecticut) alleges widespread anticompetitive, anti-consumer conduct.³³ Senator Blumenthal stated, "Consumers are suffering rising fares and other added charges that seem to be the result of excessive market power concentrated in too few hands and potential misuse of that power."³⁴ Diana Moss, the president of the American Antitrust Institute, agrees with Senator Blumenthal, and states that "[t]his is a long time coming, airlines have continuously signaled to each other that it was in their joint interest to keep capacity tight and to keep prices high."³⁵

The airlines, however, paint a much different story. A spokesperson from American stated, "We believe these lawsuits are without merit and will vigorously contest them . . . the airline industry remains highly competitive with more people flying than ever before. Demand has been enabled by a robust and competitive marketplace in which capacity has been added and average fares have decreased."³⁶ Airlines for America, the largest U.S. airline trade group, maintains a similar position. "We are confident that the Justice Department will find what we know to be true: our members compete vigorously every day, and the traveling public has been the beneficiary."³⁷

²⁹ *Id.*

³⁰ *Id.*

³¹ Maxon, *supra* note 27.

³² *Id.*

³³ Harwell, Halsey, and Moore, *supra* note 2.

³⁴ *Id.*

³⁵ Maxon, *supra* note 27.

³⁶ *Id.*

³⁷ Nicas, Kendall, and Carey, *supra* note 25.

Some analysts suggest the pricing trend was the result of three previous airline mergers.³⁸ Joel Chefitz, an antitrust lawyer at McDermott Will & Emery LLP, said, "It's somewhat ironic that the same DOJ who approved these mergers would now come out and cry foul."³⁹ Chefitz added, "The government will need evidence of a hard-core agreement between the airlines; I'd be shocked if they got together in a smoke-filled room and agreed to cut capacity."⁴⁰

From all of this, one thing is apparent: consumers deserve a fair and open market, free from price fixing. Roger Dow, president of the U.S. Travel Association, stated, "American consumers are already jaded enough about flying. We've been wondering for a while how many more gut punches the consumer could absorb before we see a dip in air-travel demand."⁴¹

IV. VOLKSWAGEN EMISSIONS SCANDAL

U.S regulators from the Environmental Protection Agency (EPA) said German car manufacturer Volkswagen had programmed some 500,000 vehicles to emit lower levels of harmful emissions during official tests than when on the roads.⁴² Volkswagen has admitted to use of this "defeat device" and further stated internal investigations found significant discrepancies in 11 million vehicles worldwide.⁴³ Martin Winterkorn, CEO of Volkswagen, stated, "Millions of people all over the world trust our brands, our cars and our technology. I am deeply sorry we have broken this trust."⁴⁴

The EPA described the software as a "defeat device."⁴⁵ The EPA said the engines were equipped with computer software that could sense test scenarios by monitoring speed, engine operation, air pressure and even the position of the steering wheel.⁴⁶ When

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Nicas, Kendall, and Carey, *supra* note 25

⁴¹ *Id.*

⁴² Thompson and Kottasova, *supra* note 3.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Russell Hotten, *Volkswagen: The Scandal Explained*, BBC (Oct. 7, 2015), <http://www.bbc.com/news/business-34324772>.

⁴⁶ *Id.*

the cars operated under controlled laboratory conditions, the device put the vehicle into a safety mode in which the engine ran below normal power and performance.⁴⁷ However, once on the road, the engines switched out of this test mode, allowing the engine to emit nitrogen oxide pollutants up to 40 times above what is allowed in the U.S.⁴⁸

Volkswagen responded promptly to the scandal, admitting guilt, launching an internal inquiry, beginning an extensive recall, and halting sales of new diesel cars.⁴⁹ Volkswagen has recalled nearly 500,000 cars in the U.S. and set aside nearly \$5 billion to cover costs.⁵⁰ However, worldwide, eleven million Volkswagen diesel cars are likely affected.⁵¹

Because Volkswagen admitted fault, the consumer has options. Volkswagen is in the process of recalling affected cars. Once recalled, customers can take their car to a mechanic to bring the car into compliance.⁵² Conversely, customers can sell their car secondhand. The EPA stated this is legal.⁵³

If the consumer decides to keep the car, they must be apprised on how the company responds to lowering emissions and whether the car's performance will suffer as a result.⁵⁴ Diesel engines have been an attractive option for prospective car owners, as the engine offers better gas mileage and produces more torque.⁵⁵ Volkswagen must communicate whether gas mileage or power will need to be recalibrated; otherwise, consumers may be able to file class-action lawsuits.⁵⁶ Potential claims include defrauding customers and causing falling values of second-hand Volkswagen cars, as well as refunding customers who paid extra for cars they

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Hotten, *supra* note 45.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Thad Moore, *The VW Scandal is Growing. Here is What Owners Need to Know*, WASHINGTON POST (Sept. 21, 2015), http://www.washingtonpost.com/business/economy/own-a-vw-diesel-heres-what-you-need-to-know/2015/09/21/f179d3f6-60a5-11e5-8e9e-dce8a2a2a679_story.html.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ BBC Business, *The VW Scandal—The Unanswered Questions*, BBC (Oct. 7, 2015), <http://www.bbc.com/news/business-34400305>.

thought were better for the environment.⁵⁷ Because Volkswagen has already admitted guilt, the only question that remains is the dollar amount that Volkswagen will pay out.

V. CONCLUSION

From Ashley Madison, to airline price fixing, to the VW emissions scandal, 2015 presented a plethora of consumer law issues and is indicative of why additional protection and regulation is needed. While Volkswagen has accepted fault, and the DOJ is investigating the airline industry, safeguards are needed so a car manufacturer cannot cheat on emissions tests and airlines cannot collude for higher ticket fares. With adequate protections, consumer confidence can only grow.

⁵⁷ *Id.*