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US casino operator sues cyber security company

Kara Scannell in New York

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Affinity Gaming, an operator of 11 casinos in four US states, is suing cyber security company Trustwave for failing to contain a breach it was hired to shut down, opening a new avenue of liability around data breaches.

The lawsuit, filed in US District Court in Nevada in late December, is one of the first of its kind where a client challenges a cyber security company over the quality of its investigation following a hack.

"This litigation demonstrates that as the law of data privacy and security continues its lightning-fast evolution, so does litigation in this area," said Joseph DeMarco, a lawyer specialising in data privacy who is not involved in the litigation. He added the standards of what cyber security companies are expected to meet are still evolving.

"I expect to see more of these cases as more and more breaches are investigated, sometimes in ways that the victim is not satisfied with," Mr DeMarco said.

Affinity hired Trustwave, a Chicago-based cyber security company, to investigate a hack that exposed credit cards belonging to as many as 300,000 customers who used their plastic at restaurants, hotels and gift shops on its casino properties. Affinity alleges it later learned that a second hack took place while Trustwave was analysing its systems but they missed it and concluded the breach was contained.

Trustwave denied any wrongdoing. "We dispute and disagree with the allegations in the lawsuit and we will defend ourselves vigorously in court."

To date most litigation has been between the hacked company and its customers or the banks that reimburse them.

Target paid $10m to the 40m customers whose credit card information was stolen during a 2013 breach, one of the largest at the time. Some banks, which reimbursed Target customers, also sued the retailer and last year received $39m as part of a settlement. Target paid another $67m to Visa. Two banks sued Trustwave over the Target breach but later dropped the claim.

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> - Craig Newman, a lawyer specialising in data breaches

The US Federal Trade Commission has sanctioned companies for failing to protect customer data. Last month LifeLock, an identity theft protection company, agreed to pay $100m, a record amount, to settle with the FTC for violating a past resolution by failing to establish an information security program to protect customers' social security, credit card and bank account information.

The new angle is not surprising because the number of cyber breaches is growing and the costs of dealing with them are ballooning.

"This lawsuit is all about risk allocation. Where and how a breached company recovers for its losses is really the issue," said Craig Newman, a lawyer who specialises in data breaches. "It's not just about looking for a deep pocket, but determining whether fault lies elsewhere."

In this case, Trustwave said it deactivated or removed most of the malware on the system and concluded the breach was "contained," according to the lawsuit. Four months later, a consulting firm hired to perform penetration testing to comply with gaming regulations discovered suspicious activity that linked back to the malware that Trustwave said it had disabled, Affinity alleges.

A second firm Affinity hired determined "the unauthorised access and renewed data breach occurred on a continuous basis both before and after Trustwave claimed that the data breach had been 'contained,'" according to the lawsuit.

The gaming company said it has used $1.2m of a $5m cyber insurance policy to handle expenses related to the breach. It is seeking at least $100,000 in damages from Trustwave.

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