

## Privacy Group of the Year: Morrison & Foerster

By **Matt Fair**

*Law360, Philadelphia (January 18, 2013, 6:18 PM ET)* -- For not only helping defend clients against several major data security class actions but also for its work staying on top of legal and technological trends to help avoid litigation, Morrison & Foerster has earned a spot among Law360's top privacy and Consumer Protection Practice Groups of The Year.

With 60 attorneys working in offices across the globe, Morrison & Foerster privacy and data security group chair Miriam Wugmeister said the firm goes to great lengths to ensure that its members are well versed not just in regulatory issues or the latest evolutions in case law but in all aspects of the burgeoning field.

"Our privacy group does all aspects. I really push people to make sure if you litigate, it really helps if you counsel and vice versa. I make sure everyone does all aspects of it," she told Law360. "Something that's unique about our group is we're a cross-departmental group, so we have people who do regulatory advice, who negotiate contracts, who help do cutting-edge things like cloud computing and analytics all the way through to contentious issues with data protection authorities or state attorneys general and to full-blown litigation."

In 2012, the group found success in court by winning dismissal of a pair of putative class actions filed against Bank of America Corp. alleging that bank violated the Right to Financial Privacy Act by failing to protect consumers' electronic data when their customer service calls were transferred overseas.

BofA won dismissal of *Stein v. Bank of America Corp.* in August after a Washington federal judge ruled that the plaintiffs' complaint showed an "utter failure ... to offer any facts upon which this court could conclude that Bank of America, in violation of the RFPA, released [their] financial records."

A similar case, *Floyd v. Bank of America Corp.* was likewise dismissed in April.

Michael Miller, a partner with Morrison & Foerster in New York, said the dismissals were significant ones as courts work to figure out what exactly constitutes a pleadable injury in data security cases.

"We got the court to dismiss those cases on the grounds that the plaintiffs couldn't actually establish that there was any injury at all. The plaintiff never said, 'My information was taken overseas and the government stole it and it hurt me this, that, and the other way.' All they said was if you send it overseas, maybe it could be stolen," Miller said. "Courts are going to have to come to terms with what constitutes an injury when it comes to your data. Is it enough to say maybe someone is doing something that put your data at risk?"

Meanwhile, the firm managed to beat down a pair of class actions filed against Citigroup Inc. in federal courts in New York and California after the bank successfully moved to have the cases sent to arbitration.

In *Orman v. Citigroup Inc.* and *Golba v. Citigroup Inc.*, plaintiffs claimed that the bank failed to adequately secure credit card holders' sensitive financial information, leaving the company susceptible to a May 2011 breach that compromised the information of 360,000 customers and subjected the plaintiffs to identity theft.

Both cases were sent into arbitration, with a judge overseeing the *Orman* case in New York federal court finding that the plaintiffs' contention that an arbitration clause in their agreements with Citi would encroach on their statutory rights could not be applied to state statutory claims.

Miller said the courts made a noteworthy decision by not treating the cases similarly to antitrust class actions in which arbitration agreements were deemed unenforceable because the costs of pursuing individual remedies would be too excessive.

"The court might have said, 'You're never going to arbitrate this claim individually. Therefore, we will not force you to arbitrate it at all, and we'll let this proceed as a privacy class action,' but what we persuaded the court to do in these cases was to enforce the arbitration agreement," Miller said. "How courts deal with this issue is going to be very important going forward."

Wugmeister also said the firm has been successful in avoiding litigation by counseling clients to develop solid data security protocols and privacy controls and by defending companies against inquiries by the Federal Trade Commission.

"Most of our FTC matters I can't tell you about because we've convinced the FTC to go away," she said. "We've done that with a lot of our clients, and those are the good results that you never hear about."

Taking away their experiences representing clients on the cutting edge of litigation over quickly evolving data security and privacy matters, Wugmeister said her attorneys are able to stay ahead of the curve counseling clients with operations spanning the globe on how to comply with consumers protection laws in multiple jurisdictions to avoid lawsuits and regulatory action by governments.

"You have 80 countries with some kind of privacy law, and some of them contradict," she said, adding that she encourages her attorneys to stay abreast of legal and regulatory developments in as many jurisdictions as possible. "We have some clients where all the decisions are made at headquarters even if they're in 50 countries. Other companies have completely decentralized operations, so they need different policies for different places. Your approach on how to comply with privacy in those two very distinct models is very radically different."

Just one of quickly evolving areas of regulatory compliance the firm is working to stay ahead of is in behavioral advertising, or the way in which websites choose advertisements to display to users based on browsing history and personalized preferences.

Reed Freeman, a partner in the firm's Washington, D.C. office, said he's increasingly being called on to counsel clients on how to develop sound policies to integrate behavioral advertising into their web offerings.

“Legislators and regulators around the world have raised questions regarding the appropriate use of behavioral advertising given the targeting to individual devices based on activity of those devices,” he said. “We’re seeing a market demand for counseling services regarding not just behavioral advertising but any kind of customization of a website or a mobile website or an app, whether it’s the content of the app or the advertising in it.”

The constantly shifting landscape, Wugmeister said, is expected to give the group ample opportunity to grow in years to come.

“There’s going to be a huge amount of effort and thought into privacy and security in the years to come. I don’t think it’s going away anytime soon; I think it’s going to grow,” she said. “As my mother always says, I’m set until retirement.”

--Additional reporting by Matthew Heller, Allison Grande and Kaitlin Ugolik. Editing by Richard McVay.

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