

No Harm, No Foul: Precedent-Setting Ruling Limits Potential Liability Stemming from Allegations of Improper Disposal of Documents

By **Donna L. Wilson and Andrew S. Wein**

Always looking for the next golden goose, the plaintiffs' bar has, over the past few years, attempted to turn media attention and public concerns over data breaches and identity theft into big money. In claims filed in courts around the country, plaintiffs allege that their worries and fears about the potential for future identity theft entitle them to bring actions for damages, often in the form of putative class actions. However, in the recent case of *Pinero v. Jackson Hewitt Tax Services Inc.*, No. 2:08-cv-03535, 2009 U.S. Dist. LEXIS 660 (E.D. La. Jan. 7, 2009), Chief Judge Sarah Vance sharply restricted the types of claims that can be brought on such a basis.

Background

The *Pinero* case involved a putative class action against a national franchisor of income tax preparation services and its independent franchisee, seeking to certify a class and seeking damages under myriad theories of liability, primarily stemming out of speculative fear that an alleged mishandling of tax returns created an increased risk of identity theft. Plaintiff alleged that she had filed her tax returns with

the defendants and that two years later these tax returns were improperly disposed of by the franchisee. Plaintiff claimed to have suffered emotional and financial damages, not because of any actual identity theft, but because these actions had led to an increased *risk* of identity theft.

In her ruling partially granting the defendant's motion to dismiss, Judge Vance made several important holdings. First, she held that a commercial tax preparer is not subject to statutory liability under 26 U.S.C. § 6103, which governs disclosures of tax return information by the I.R.S. and its agents. Second, she rejected causes of action for negligence, breach of contract, and violations of a state data breach notification statute for failing to be based on "actual damages" but instead on speculative fears of future harm. Third, Judge Vance further held that the state data breach notification statute only applied to electronic documents containing personal information (as defined by the statute) and, accordingly, could not be applied to the alleged disclosure of paper documents.

The Court also dismissed counts for fraudulent inducement and violations of a state unfair trade practice statute, holding that "[g]enerally, there is no inference of fraudulent intent not to perform from the mere fact that a promise made is subsequently not performed" but granted the plaintiff leave to file an amended complaint. The Court failed to dismiss only the claim for invasion of privacy but highlighted that invasion of privacy is an intentional tort

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and, accordingly, requires proof that the defendants intentionally publicized the plaintiff's private information. Judge Vance also rejected the plaintiff's attempt to certify a class as premature.

Commercial Tax Preparers Not Covered by 26 U.S.C. §§ 6103 and 7431

The I.R.S., and certain enumerated private parties, are forbidden under 26 U.S.C. § 6103 from improperly disclosing tax return information, and 26 U.S.C. § 7431(b) authorizes private actions when § 6103 is violated. However, in her complaint, the plaintiff attempted to convert these narrow statutes into broad prohibitions applicable against virtually any private party who comes into possession of tax return information, including commercial tax preparers, accountants, and theoretically including even parties such as employers, investment companies, and others who handle personal financial information in their ordinary course of business. This legal theory, if accepted by the courts, could arguably expose these parties to statutory damages of \$1,000 per violation if any tax information in their possession was ever disclosed, even accidentally.

Prior to this case, no court had ever directly addressed whether tax preparers were covered by this statute. The plaintiff argued that, as parties involved in the "processing, storage, [or] transmission" of tax return information, commercial tax preparers were covered under subsection (n) of § 6103. The history and language of § 6103 made clear that the statute applied only to the government or to specific

ly enumerated parties who received access to confidential information from the I.R.S. as part of government business. As commercial tax preparers, the defendants argued that they obtained tax return information directly from the customer and, as such, should not be covered by either statute.

Judge Vance agreed with the defendants' arguments on this issue of first impression, ruling that the statute "does not include commercial tax preparers." The Court further held that only parties who receive tax return information "in the course of public business" could be subject to this statute and accordingly dismissed the claim under §§ 6103 and 7431.

Whether Emotional or Economic in Nature, Damages Allegedly Incurred Due to Speculative Fear of Identity Theft Are Not "Actual Damages"

Judge Vance also dismissed a variety of other claims in the case, including causes of action for negligence, breach of contract, and violations of a state data breach notification statute, holding that those claims were "not based on an actual injury, but the speculative future injury of identity theft." The plaintiff alleged that she suffered both emotional damages for fear and mental anguish due to worries about future identity theft and economic damages due to paying for credit monitoring in an effort to prevent that potential identity theft.

The Court rejected those theories of damages, holding that emotional damages were not sustainable under either negligence or contract-based theories. With regard to

negligence, the Court held that those allegations of damage were too inherently speculative to constitute “actual damages” under Louisiana law. Similarly, the Court held that emotional damages could not be recovered under a contract for the preparation of taxes, as it could not be considered a contract “intended to gratify a non-pecuniary interest.” Judge Vance also held that the alleged economic consequential damages were not recoverable, holding that “expenses related to credit monitoring to guard against future identity theft are not compensable damages.”

While this decision is consistent with an ever-growing body of case law holding that speculative fear of identity theft is not “actual damages,”¹ Judge Vance’s opinion is notable for its application of that requirement to tort, statutory, and contract-based claims.

State Data Breach Notification Law Held Not to Apply to Paper Documents

The Court also rejected the claim under the Louisiana Database Security Breach Notification Law for a second reason, holding that this state statute only applied to electronic databases and, accordingly, could not be applied to the facts alleged by the plaintiff. “Since plaintiff has alleged a breach of defendants’ paper records,” the Court held, “her claim is not cognizable under the [data breach notification] statute.”

While this case involved a Louisiana data breach notification statute, many states have data breach notification statutes that are similarly drafted. This decision could be persuasive

authority that similarly drafted statutes in other states also do not apply to the disclosure of paper documents.

Conclusion

These holdings could have significance to a wide range of businesses, as many companies handle documents that contain arguably personal information. But courts have increasingly held that a plaintiff’s fear of future identity theft, without more, is not enough to sustain a lawsuit. This decision reaffirms that growing body of case law.

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