

Fears of Future Identity Theft Generally Not Sufficient To Establish "Actual Damages" In A Lawsuit

March 18, 2009

Over the last few years, incidents involving disclosures of personal information by consumer financial service providers have been big news, ranging from the theft of laptop computers containing social security numbers, to hacker attacks on computer networks containing confidential information, to the more "vanilla" theft of personal documents. Not surprisingly, the plaintiffs' bar has been attempting to turn all of this worry about identity theft into big money - even where no identity theft has occurred. However, courts around the nation have been considering such claims, and responding with a virtually uniform voice to state that, however the claim may be styled, a plaintiff's speculative fear of potential future identity theft does not constitute "actual damages" under the law, and accordingly reject such lawsuits.

In the latest court opinion to address this issue, *Pinero v. Jackson Hewitt Tax Service, Inc.*, No. 08-3535, 2009 U.S. Dist. LEXIS 660, (E.D. La. January 7, 2009), Chief Judge Sarah S. Vance dismissed various statutory and tort claims, including negligence, breach of contract, violations of a Louisiana data breach notification statute, and claims under the Tax Reform Act of 1976, against a national franchisor of income tax preparation services and its local independent franchisee. In the *Pinero* case, the plaintiff contended that the independent franchisee had failed to dispose of certain documents properly, which allegedly contained personal information. However, the plaintiff neither contended that her documents fell into the hands of a wrong-doer, nor that she had suffered any actual identity theft. Her damages claims were largely based on alleged emotional injuries and mental anguish, and theoretical consequential damages about steps she might need to take to deal with potential identity theft.

The Court rejected this theory of damages, and dismissed 6 of 7 claims, including negligence, breach of contract, and violations of the Louisiana data breach notification statute, holding that this type of speculative "injury" does not meet the required damages element. Also, in a holding of first impression, Judge Vance dismissed the federal claim for statutory penalties under the Tax Reform Act of 1976, ruling that commercial tax preparers are simply not subject to the provisions of the law governing disclosure of tax return information by the I.R.S. or its agents. The Court further ruled that the Louisiana data breach notification statute did not apply to paper documents - notably, [Louisiana is not alone in this regard](#). Judge Vance also dismissed claims for fraudulent inducement and the Louisiana unfair trade practice law for a failure to adequately allege an intent to defraud. The Court only let the invasion of privacy claim survive, albeit noting skepticism about whether such a claim could succeed on the merits.

For further discussion of this case, see our recently published [piece](#) in the ABA "Secure Times" newsletter. And for a broader discussion of how other cases have addressed these types of claims,

please see our [article](#) published in Andrews Litigation Reporter.