

Kelley Drye Wins Precedent-Setting Dismissal of Claims Arising From Alleged Consumer Privacy Breach

January 13, 2009

Is the mere fear of a possibility that personal information may be at an increased risk of improper use enough for a person to have a claim for emotional or consequential damages? On January 7, 2009, in *Pinero v. Jackson Hewitt Tax Service, Inc.*, the U.S. District Court of the Eastern District of Louisiana ruled "No." Kelley Drye & Warren LLP represented the defendant in this precedent-setting case.

Chief Judge Sarah S. Vance of the Eastern District of Louisiana granted Kelley Drye's motion to dismiss various statutory and tort claims, including negligence, breach of contract, and violations of both Louisiana and federal statutes, against a national franchisor of income tax preparation services and its local independent franchisee. Plaintiff Vicky Pinero's lawsuit alleged that the local independent franchisee's alleged failure to properly dispose of certain documents allegedly containing personal information damaged her by creating an increased risk of identity theft. Plaintiff neither contended that her documents fell into the hands of a wrong-doer, nor that she had suffered any actual identity theft.

The Court rejected plaintiff's claims of negligence, breach of contract, and violation of the Louisiana Database Security Breach Notification Law based on her failure to allege actual, as opposed to speculative, damages. The Court also dismissed plaintiff's claims under the Louisiana Unfair Trade Practices Act and for fraudulent inducement, because she failed to adequately allege an intent to defraud. In addition, in a holding of first impression, the Court 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. Of plaintiff's seven claims, only one – the invasion of privacy claim – survived, but the Court questioned whether that claim would survive scrutiny after discovery on the merits. The Court also denied plaintiff's motion for class certification as premature.

The Court's opinion is notable for requiring, in the context of fraud, statutory, and contract-based claims, that a plaintiff allege concrete damages, rather than merely the speculative fear of future identity theft. The overwhelming majority of cases to date to have considered this issue have focused on negligence-based claims. Accordingly, this decision is one of the strongest statements yet that a plaintiff's alleged fear of identity theft cannot form the basis for a damages claim under virtually any legal theory.