



Privacy Litigation Trends - 2009

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Privacy Litigation Trends- 2009

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Data Breaches

- Maine Bureau of Financial Institutions Study
 - 71 of 75 banks surveyed had data breach since January 1, 2007
 - Expense Impact - \$2.15 million
- Information security breach occurs every three days – increase of 69% in 2008 for businesses, governments and universities
- Impacting nearly all industries

Data Breaches – Litigation Common Theories

- Breach of contract
- Negligence
- Breach of fiduciary duty
- Breach of implied covenant
- Invasion of privacy
- Intentional or negligent infliction of emotional distress
- Fraud/fraudulent inducement
- State consumer protection acts
- State unfair trade practices acts
- State data breach notification laws

Data Breaches

- Sovereign Bank v. BJ's Wholesale Club, Inc., 533 F.3d 162 (3d Cir. 2008) (ruling that whether credit card issuers were third-party intended beneficiaries of agreement between merchant and merchant's bank was a fact issue for jury to decide at trial)
- In re TJX Cos. Retail Security Breach Litigation (TJX has paid at least \$65 million to settle private lawsuits involving theft of credit card information belonging to 46 million customers)
- Hannaford Brothers Co. (cyber thieves accessed information for 4.2 million customers; four class actions filed three days later)
- Pinero v. Jackson Hewitt Tax Serv., 594 F. Supp. 2d 71 (E.D. La 2009) (dismissing nearly all claims but allowing claims for unfair trade practice to survive based upon claim that tax preparer made misrepresentations in its privacy policy)

No Harm, No Damages

- No causation or damages – clear precedent imposing significant hurdle for privacy and security cases
- Unauthorized release of personal information without misuse (e.g., fear of identity theft) is not recognized yet as a specific harm
- Monitoring service to prevent future misuse of personal data is not a harm
- Plaintiff must causally prove that harm was caused by the release of information
- Economic loss rule does not allow the recovery of tort damages for purely economic harms
- Standing can be a major obstacle - Randolph v. ING Life Ins. & Annuity Co., 486 F. Supp. 2d 1 (D.D.C. 2007)

No Harm, No Damages

- Belle Chase Automotive Care, Inc. v. Advanced Auto Parts, Inc., Civil Action No. 08-1568, 2009 U.S. Dist. LEXIS 25084 (E.D. La. March 24, 2009) (involving security breach within network potentially affecting customers' financial information)
- Caudle v. Towers, Perrin, Forster & Crosby, Inc., 580 F. Supp. 2d 273 (S.D.N.Y. 2008) (laptop stolen from employer's pension consultant with personal information of thousands of individuals)
- Ruiz v. Gap, Inc., Case No. 07-5739 SC, 2009 U.S. Dist. LEXIS 28894 (Apr. 6, 2009) (dismissing case, but highlighting significance of potential liability due to actions of vendors asking for too much private information and then not managing the information properly)

Data Mining

- Process of analyzing vast amounts of data from differing perspectives, and summarizing it for useful purposes, including to predict future trends and behaviors

Data Mining

- IMS Health v. Ayotte, 550 F.3d 42 (1st Cir. Nov. 18, 2008) (upholding constitutionality of New Hampshire law, the Prescription Confidentiality Act prohibiting transmission or use of patient-identifiable and prescriber-identifiable data for commercial purposes because it regulated conduct not speech)
- IMS Health, Inc. v. Sorrell, No. 1:07-cv-188, 2009 U.S. Dist. LEXIS 35594 (D. Vt. Apr. 23, 2009) (upholding Vermont law restricting use of prescription data for pharmaceutical marketing without the consent of the prescriber)

Data Mining

- Ayotte appeal to U.S. Supreme Court: “To what extent does the First Amendment protect the acquisition, analysis and publication of accurate factual information that is used by third parties for a commercial purpose?”

Employee Background Checks

- Fair Credit Reporting Act places procedural requirements on employers that take “adverse action” (such as a denial of employment) based upon a criminal background check
- Statutory and punitive damages are available for a violation regardless of whether an individual suffered actual harm or out-of-pocket damages

Employee Background Checks

The FCRA requires three pieces of paper if an employer wants to use a background check to take adverse employment action:

- 15 U.S.C. § 1681b(b)(2): Before obtaining consumer report, the employer must obtain the written consent of the consumer/prospective employee.
- 15 U.S.C. § 1681b(b)(3): If employer plans to take adverse action based on background check, the employer must provide a copy of the report and a statement of FCRA rights to applicant within a reasonable period of time before taking adverse action.
- 15 U.S.C. § 1681m: After taking adverse action, the employer must provide notice of the adverse action, which, as a practical matter, should be in writing to be compliant.

Employee Background Checks

- 15 U.S.C. § 1681k (Section 613): “At the time such public record information is reported to the (employer), the consumer reports agency should notify the consumer of the fact that public record information is being reported... together with the name and address of the person to whom such information is being reported.”
- 15 U.S.C. §1681i (Section 611): Consumer reporting agency must conduct reasonable investigation of information disputed by a consumer within thirty days of the date on which the agency receives the notice of the dispute from the consumer.

Employee Background Checks

- Timing between Pre-Adverse Action Letter and Adverse Action Letter – 5 business days has been held to be reasonable by one court

Social Networking

- 48% of adults have either a MySpace or Facebook page with 16% of adults updating their page at least once a day
- 200 million active Facebook users
- 5% of Americans currently use Twitter
 - 3 million Tweets per day

Social Networking and Litigation

- Moreno v. Hanford Sentinel, Inc., 172 Cal. App. 4th 1125 (Apr. 2, 2009) (no invasion of privacy associated with publication of MySpace page)
- Harris v. Blockbuster, Inc., Civil Action No. 3:09cv217-M, 2009 U.S. Dist. LEXIS 31531 (N.D. Tex. Apr. 15, 2009) (refusing to compel arbitration of class action alleging that Blockbuster violated the Video Privacy Protection Act by releasing its online customers' movie rental recent records to Facebook to then broadcast to the customers' Facebook friends)

Social Networking and Litigation

- Wolfe v. Fayetteville, Case No. 68-5205, 2009 U.S. Dist. LEXIS 15182 (D. Ark. Feb. 26, 2009) (allowing evidence from Facebook postings in support of discrimination claim)
- Mackelprang v. Fidelity National Title Agency, Case No. 2:06cv788-JCM-6WF, 2007 U.S. Dist. LEXIS 2379 (D. Nev. Jan. 9, 2007) (considering the allowing of discovery of MySpace message during relevant timeframe of plaintiff's suicide attempt)

Social Networking and Litigation

- Doe v. Friend Finder Network, Inc., 540 F. Supp. 2d 288 (D.N.H. 2008) (lawsuit over placement of false and unauthorized personal profile of her on an adult web community)
- Other uses developing in litigation (e.g., jury selection)

Identity Theft

- Identity Theft = 32-37% of all national fraud complaints
- Annual losses to consumers and businesses from identity theft are estimated to be \$50 billion
- Identity theft litigation is on the rise with risk of larger awards
- FTC's Red Flags Rule

Identity Theft

- Sloane v. Equifax Information Services, LLC, 510 F.3d 495 (4th Cir. 2007)
(awarding identity theft victim \$106,000 for economic losses and \$150,000 for mental anguish and remanding case to the district court that ultimately awarded \$302,000 in attorney's fees)

No Private Cause of Action

- Plaintiffs have struggled to assert privacy causes of action directly under statutes such as HIPAA and the Gramm-Leach-Bliley Act

No Private Cause of Action

- Acara v. Banks, 470 F.3d 569 (5th Cir. 2006) (HIPPA)
- Herman v. Kratche, Case No. 86697, 2006 Ohio App. LEXIS 5895 (Ohio App. Dist. Nov. 9, 2006) (HIPAA)
- Smith v. First Century Bank, No. 3:04cv591, 2007 U.S. Dist. LEXIS 24585 (E.D. Tenn. Mar. 30, 2007) (GLBA)
- Briggs v. Emporia State Bank & Trust Co., No. 05-2125-JWL, 2005 U.S. Dist. LEXIS 17883 (D. Kan. Aug. 23, 2005) (GLBA)

No Private Cause of Action

- Calloway v. Green Tree Servicing, LLC, Civil No. 08-552-SLR, 2009 U.S. Dist. LEXIS 31467 (D. Del. Apr. 13, 2009) (no private right of action under Sections 1681m and 1681s-2(a) of the FCRA, but one does exist under Section 1681s-2(b))
- Barnette v. Brook Road, Inc., 429 F. Supp. 2d 741 (E.D. Va. 2006) (private right of action under § 1681m of the FCRA not eliminated by FACTA)

No Private Cause of Action

- More creativity – claims alleging failure to meet standard of care set by legislative or regulatory standards or breach of fiduciary duty

No Private Cause of Action

- Acosta v. Bynum, 638 S.E.2d 246 (N.C. Ct. App. 2006) (HIPAA creates standard of care for negligence claim against doctor whose office manager accessed psychiatric records that caused to harm to a patient)
- Sorensen v. Barbuto, 177 P.3d 614 (Utah 2008) (characterizing duty of doctor or therapist to protect confidentiality of patients' records and information as a fiduciary one)

Constitutional Challenges

- More constitutional challenges to consumer privacy laws
- Tension between First Amendment and privacy rights
- Difficulty in narrowly tailoring statutes and remedies
- More cases without actual damages

Constitutional Challenges

- Harris v. Mexican Specialty Foods, Inc., No. 08-13510, 2009 U.S. App. LEXIS 7681 (11th Cir. April 9, 2009) (reversing district court decision and finding that the statutory damages - \$100 to \$1,000 – provision of the Fair Credit Reporting Act is constitutional)
- Jaynes v. Commonwealth, 276 Va. 443, 666 S.E. 2d 303 (2008) (ruling that Virginia's tough anti-spam statute was unconstitutional)

Preemption

- Definition: the principle that federal law will displace or trump any conflicting or inconsistent state law

Preemption

- Ferron v. SubscriberBase Holdings, Inc., No. 2:08-cv-760, 2009 U.S. Dist. LEXIS 23583 (S.D. Ohio Mar. 10, 2009) (holding that CAN-SPAM Act preempts Ohio's Electronic Email Advertisement Act but does not preempt Ohio's Consumer Sales Practices Act)
- Hoang v. Reunion.com Inc., No. 08-3518, 2008 U.S. Dist. LEXIS 103659, N.D. Cal. Oct. 3, 2008) (ruling that the CAN-SPAM Act preempts state statutory claims involving "forward-to-a-friend" emails except ones that include more fraud-type allegations beyond falsity)

Preemption

- American Bankers Assn. v. Gould, 541 F.3d 1214 (9th Cir. 2008) (holding the Fair Credit Reporting Act preempts part of California's Financial Privacy Information Act (SB1) but severing non-preempted portions from the statute)
- Gorman v. Wolpoff & Abramson, LLP, 552 F.3d 1008 (9th Cir. 2009) (finding that the Fair Credit Reporting Act prevents consumers from suing for defamation, invasion of privacy or negligence associated with reporting of a consumer's information unless furnished with malice or willful intent to injure the consumer)