IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BRADLEY EGGEN and MARY EGGEN,
on behalf of themselves and all others
similarly situated,

OPINION and ORDER

Plaintiffs,

14-cv-873-bbc

WESTCONSIN CREDIT UNION,

Defendant.

- -

In this class action, plaintiffs Bradley Eggen and Mary Eggen are proceeding on a claim that defendant WESTconsin Credit Union violated the Driver's Privacy Protection Act by disclosing their driver's license numbers in delinquency actions that defendant filed in Wisconsin state court. In an order dated August 16, 2017, I denied defendant's motion for summary judgment. Dkt. # 97. Further, I asked the parties to submit supplemental briefs on the question whether a trial is needed:

> Although plaintiffs did not file their own motion for summary judgment, it is not clear what issues are left to resolve as to plaintiffs' claims under the Driver's Privacy Protection Act. The issues I decided with respect to that claim are legal, not factual, so they do not require further review by the factfinder. Because the parties do not identify any other factual (or legal) issues that remain in dispute, I am directing the parties to show cause why I should not grant summary judgment in plaintiffs' favor on the court's own motion. Fed. R. Civ. P. 56(f) (court may grant summary judgment for nonmovant after giving notice and a reasonable time to respond). The parties should include a discussion of damages.

Id. at 2-3. After multiple delays, dkts. ##98-99 and 111-12, the parties have finished briefing their responses to the August 16 order.

In its response, defendant identifies several reasons why it believes that judgment should not be entered in plaintiffs' favor: (1) the Driver's Privacy Protection Act does not apply to this case because defendant obtained plaintiffs' driver's license numbers from plaintiffs themselves rather than from the Department of Motor Vehicles; (2) fact issues remain on the question whether defendant needed to disclose plaintiffs' unredacted driver's license numbers in the state court actions; (3) plaintiffs are not entitled to statutory damages without proof of actual damages; and (4) both legal and factual questions remain with respect to plaintiffs' entitlement to punitive damages. I disagree with each of these arguments, with the exception of the last one. Although disputes remain about punitive damages, the threshold question is a legal one, which is whether plaintiffs have sufficient evidence to allow a reasonable jury to find that defendant acted wilfully or recklessly. Accordingly, I am giving plaintiffs an opportunity to show that they can meet that standard before deciding whether to allow this case to proceed to trial.

OPINION

A. Issues Related to Liability

1. Scope of the Driver's Privacy Protection Act

Defendant argues that the Driver's Privacy Protection Act does not apply to this case because defendant acquired plaintiffs' driver's license numbers from plaintiffs' own driver's

licenses rather than from the Department of Motor Vehicles. Defendant cites 18 U.S.C. § 2721(a), which imposes disclosure limitations on a "State department of motor vehicles, and any officer, employee, or contractor thereof."

As an initial matter, defendant identifies no reason it failed to raise this issue in its summary judgment motion. Obviously, if I were to agree with defendant, it would require dismissal of the case, so it made no sense for defendant to wait until now to raise the issue.

In any event, I do not agree with defendant's argument because the Driver's Privacy Protection Act is not limited to § 2721(a). Rather, § 2724(a) prohibits any "person" from disclosing personal information from a motor vehicle record without a permissible purpose. Section 2722(a) prohibits the same conduct, again applying to "any person." The Act defines a "person" to include "an individual, organization or entity," 18 U.S.C. § 2725(3), so it encompasses defendant.

Although defendant devotes more than 10 pages in both its opening and reply briefs to this issue, defendant's argument cannot overcome the plain language of the statute. Hui v. Castaneda, 559 U.S. 799, 812 (2010) ("We are required . . . to read the statute according to its text."); Patriotic Veterans, Inc. v. Indiana, 736 F.3d 1041, 1046-47 (7th Cir. 2013) ("The preeminent canon of statutory interpretation requires that courts presume that the legislature says in a statute what it means and means in a statute what it says there.") (internal quotations and alterations omitted). Quite simply, nothing in § 2721(a) limits the reach of either of § 2722(a) or § 2724(a).

2. Fact issues

At summary judgment, defendant argued that it was entitled to disclose plaintiffs' driver's license numbers under 18 U.S.C. § 2721(b)(4), which allows disclosure of personal information "[f]or use in connection with any civil . . . proceeding in any Federal, State, or local court." In particular, defendant said that plaintiffs' driver's license numbers were included in documents attached to the state court complaints in accordance with Wis. Stat. § 425.109(1)(h), which provides: "A complaint by a merchant to enforce any cause of action arising from a consumer credit transaction shall include . . . an accurate copy of the writings, if any, evidencing the transaction."

In the summary judgment order, I found three problems with this argument. First, "defendant fail[ed] to identify the document at issue with any specificity, so it [was] impossible to determine as a matter of law whether the document or documents at issue were required by § 425.109." Dkt. #97 at 9. Second, defendant did not explain whether plaintiffs' driver's license numbers were needed on the documents. Third, even if the documents were required by § 425.109 and even if defendant needed to include the driver's license numbers on the documents, defendant had failed to identify any reason for failing to redact the numbers or file the documents under seal:

> Section 2721(b)(4) allows a party to disclose personal information "for use" in litigation. The loan documents themselves may have been attached "for use" in litigation, but defendant does not identify any purpose related to the litigation that was served by disclosing plaintiffs' driver's license numbers. Senne [v.Village of Palatine, Illinois, 695 F.3d 597, 606 (7th Cir. 2012)] ("[T]he actual information disclosed—i.e., the disclosure as it existed in fact—must be information that is used for the identified purpose. When a particular piece of disclosed information is not used to effectuate that purpose

> in any way, the exception provides no protection for the disclosing party."). In fact, defendant implicitly concedes that the numbers served no purpose because, since 2013, it has redacted driver's license numbers in documents filed in delinquency actions. Dft.'s Resp. to Plt.'s PFOF ¶ 20, dkt. #93. If § 2721(b)(4) were interpreted as allowing public disclosure of any protected information included in a document filed in litigation, even a required document, it would leave a gaping hole in the protections of the Act. Because that would be inconsistent with both the intent of Congress and the understanding of § 2721(b)(4) in Maracich[v. Spears, 133 S. Ct. 2191, 2202 (2013)] and Senne, I am denying defendant's motion for summary judgment on plaintiff's claims under the Driver's Privacy Protection Act.

Dkt. #97 at 10-11.

In its response to the court's order to show cause, defendant says that a fact issue remains on the question whether it can show that the documents it attached to the state court complaints were the type that were required by Wis. Stat. § 425.109. However, that argument is a nonstarter because the answer to that question does not matter. As noted above, even if Wisconsin law required defendant to include plaintiffs' driver's license numbers in state court filings, that does not explain defendant's failure to redact or seal the documents. Even now, defendant has not attempted to show that state law required it to disclose plaintiffs' driver's license numbers. There is no need to hold a trial on a potential factual dispute that could not affect the outcome of the case. Montgomery v. American Airlines, Inc., 626 F.3d 382, 389 (7th Cir. 2010) ("[D]isputed facts that are not outcome-determinative are not material and will not preclude summary judgment.").

In sum, defendant has not identified any reason why summary judgment should not be entered in plaintiffs' favor on liability.

B. Issues Related to Remedies

1. Liquidated damages

Under 18 U.S.C. § 2724(b)(1), "[t]he court may award . . . actual damages, but not less than liquidated damages in the amount of $2,500" for a violation of the Driver's Privacy Protection Act. Defendant interprets this provision to mean that a plaintiff cannot obtain liquidated damages without proof of actual damages. Further, defendant argues that plaintiffs have no evidence of actual damages, so they cannot recover liquidated damages either.

Defendant raises an interesting question of statutory interpretation, but, as plaintiffs point out, I already decided in Parus v. Kroeplin, No. 05-C-0063-C, 2006 WL 278374, at *2 (W.D. Wis. Jan. 31, 2006), that § 2724(b)(1) should be read as a disjunctive clause, so that "[i]f a plaintiff proves that his rights under the Act were violated, but is unable to show actual damages, he is entitled to receive liquidated damages in the amount of $2,500." I relied on Kehoe v. Fiduciary Federal Bank & Trust, 421 F.3d 1209, 1213 (11th Cir. 2005), in which the court concluded that "[t]here is no language in sub-section (b)(1) that confines liquidated damages to people who suffered actual damages" and that it did not make any sense to condition the award of liquidated damages on proof of actual damages because "[l]iquidated damages are a contractual substitute for actual damages and are paid even in the absence of proof of actual damages." In addition, the court relied on dicta in Doe v. Chao, 540 U.S. 614, 623 (2004), in which the Supreme Court stated that no proof of actual damages would be needed under a statute reading that "the Government would be liable to the individual for actual damages 'but in no case . . . less than the sum of $1,000.'" Because

that language is similar to § 2724(b)(1), the court in Kehoe found the discussion in Chao to support a conclusion that § 2724(b)(1) does not require proof of actual damages as a prerequisite to an award of liquidated damages.

In Pichler v. UNITE, 542 F.3d 380, 398 (3d Cir. 2008), the court followed Kehoe and added its own reasoning:

> [T]he first phrase ("The court may award—actual damages") is a grant of authority to the court—it enables the court to award actual damages, however high they might be. The second phrase ("but not less than liquidated damages ..."), then, limits that authority on the low end of the scale, creating a damage award floor. While the court may award actual damages, it may not grant an award "less than liquidated damages in the amount of $2,500." 18 U.S.C. § 2724(b)(1). But the first clause does not affect the baseline award of liquidated damages in the amount of $2,500 for any DPPA violation that the District Court chooses to compensate. In other words, the second phrase creates a base amount below which the court may not go, whether the plaintiff is able to prove actual damages or not.

Defendant ignores each of these cases and relies instead on Potocnik v. Carlson, No. 13-CV-2093 (PJS/HB), 2016 WL 3919950 (D. Minn. July 15, 2016). However, that court seemed to conflate the issue of "actual damages" with "actual injury" when it held that, "to recover liquidated damages for a DPPA violation, Potocnik must first prove that she suffered actual injury." Id. at *12. "Actual injury" is not just a requirement to obtain damages; it is a requirement to file any federal lawsuit. Lewis v. Casey, 518 U.S. 343, 349 (1996) ("The requirement that [a plaintiff] must show actual injury derives ultimately from the doctrine of standing [so] "an actual injury [is a] constitutional prerequisite."). Because the Court of Appeals for the Seventh Circuit has concluded that the disclosure of private information in violation of the Driver's Privacy Protection Act qualifies as an actual injury, Graczyk v. West

Publishing Co., 660 F.3d 275, 278 (7th Cir. 2011), Potocnik is not persuasive. See also Sterk v. Redbox Automated Retail, LLC, 672 F.3d 535, 539 (7th Cir. 2012) ("[A]n unlawful appropriation of private personal information . . . is a perceived although not a quantifiable injury."). Accordingly, defendant has not shown that I should depart from the rule I adopted in Parus.

In Kehoe, 421 F.3d at 1216, the court stated that "the use of the word 'may' [in § 2724(b)(1)] suggests that the award of any damages is permissive and discretionary." However, neither side has identified any reason not to award the $2500 in liquidated damages authorized by the statute to each plaintiff. Further, defendant does not dispute plaintiffs' calculation that there are 382 class members, so I conclude that the class is entitled to a total of $955,000 in liquidated damages.

3. Equitable relief

Under 18 U.S.C. § 2724(b)(4), a court may award "equitable relief as the court determines to be appropriate." Plaintiffs ask for an injunction directing defendant to seal or redact its state court filings that include plaintiffs' driver's license numbers. Defendant does not deny that such an order would be appropriate as a general matter, but it says that no order is "necessary" because it "has already started the process of doing just that." Dft.'s Br., dkt. #115, at 15. However, defendant admits that it has not yet filed any motions in state court to redact the relevant documents. Id. Thus, if I were to enter judgment in this case without issuing the injunction, defendant would have no legal obligation to follow through

with its promise. Because defendant raises no other objection to the proposed injunction, I am granting plaintiffs' request.

4. Punitive damages

Under 18 U.S.C. § 2724(b)(2), punitive damages may be awarded "upon proof of willful or reckless disregard of the law." I agree with the parties that I cannot resolve in this order the questions whether plaintiffs are entitled to punitive damages and, if so, what the award should be.

As I noted in a previous order, dkt. #105 at 2-3, defendant failed to argue in its summary judgment motion that plaintiffs cannot meet the standard for recovering punitive damages, so defendant forfeited its right to receive a ruling on this issue before trial. However, now that punitive damages is the only remaining issue, it makes sense to decide the issue before trial, particularly because plaintiffs' argument on punitive damages appears to be weak.

Defendant denies that it was aware of the requirements of the Driver's Privacy Protection Act when it disclosed plaintiffs' driver's license numbers. In addition, it says that it is now redacting that information from new court filings, so there is no need for deterrence, which is a primary purpose of punitive damages. Plaintiffs do not cite any contrary evidence, but simply make a conclusory assertion that defendant should have known better without citing any authority for the view defendant's conduct qualifies as "willful" or "reckless."

Accordingly, I will give plaintiffs an opportunity to show that they can meet the

standard for obtaining punitive damages under § 2724(b)(2) or to argue that it would be unfair to decide this issue before trial. Because defendant has forfeited its right to resolve this before trial, I am not giving defendant an opportunity to file a response. Rather, if plaintiffs make a prima facie case that the issue of punitive damages cannot be resolved now, the case will proceed to trial on that issue.

ORDER

IT IS ORDERED that plaintiffs Bradley Eggen and Mary Eggen may have until November 14, 2016, to show that (1) they have sufficient evidence to allow a reasonable jury to find that defendant WESTconsin Credit Union meets the standard for punitive damages under 18 U.S.C. § 2724(b)(2); or (2) it would be unfair to resolve this issue before trial. If plaintiffs fail to make that showing, I will dismiss the complaint as to plaintiffs' request for punitive damages and enter judgment in plaintiffs' favor on the remaining issues discussed in this order. If I am persuaded by any submission plaintiffs file, the case will proceed to trial as scheduled on the issue of punitive damages.

Entered this 27th day of October, 2016.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge