



PENNSYLVANIA COURT FINDS EMPLOYER HAS NO TORT DUTY TO PREVENT EMPLOYEE DATA BREACH

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A well regarded Allegheny County trial judge finds that an employee may not maintain a private cause of action sounding in tort against his or her employer arising from a data breach. The opinion of the court, handed down in *Dittman v. UPMC*, No. GD-14-003285 (Allegheny County, May 28, 2015), is noteworthy for the clarity and decisiveness of the Court's analysis. The case, a class action lawsuit, arose from the highly-publicized breach of the non-public, personal information of thousands of employees of the Pittsburgh based healthcare giant University of Pittsburgh Medical Center. According to the Court, "the members of the class consist of all 62,000 UPMC employees as well as an untold number of former employees, whose names, birth dates, social security numbers, confidential tax information, address, salaries and bank account information were stolen from UPMC's computer systems." (Opinion and Order at p. 1). Some members of the class had already suffered actual damages following the breach, with third parties having filed tax returns using the victims' data.

The gravamen of the Plaintiffs' complaint was that UPMC owed a duty to its employees, as a matter of law, to safeguard and protect the data and had breached that duty by failing to prevent the breach.

The Plaintiffs sought to buttress their complaint by pleading background information regarding the increasing frequency and severity of data breaches, which have become ubiquitous in recent years. The court, however, used that information against the Plaintiffs, finding that data breaches are so prevalent that imposing a tort duty on employers would potentially debilitate companies and flood the already busy courts with new cases:

[If a tort duty were to be imposed] in Pennsylvania alone, perhaps hundreds of profit and nonprofit entities would be required to expend substantial resources responding to resulting lawsuits. [Employers] are victims of the same criminal activity as the plaintiffs. The courts should not, without guidance from the Legislature create a body of law that does not allow ... victims of criminal activity to get on with their business.

(Opinion and Order at p. 5, 6).

The court also noted how elusive the concept of reasonable care can be in the data security context, i.e. how would a jury determine what constitutes "adequate" data security? Finally, the court looked to the legislative history of Pennsylvania's data breach notification statute, finding that drafts of the bill that became Pennsylvania's statute provided for a private cause of action, but no such provision survived to the final bill as enacted.

Although the *Dittman* decision is law only in Allegheny County, its author is an influential jurist and the holding is consistent with Pennsylvania law. Absent another source of duty, the primary

obligation of a party, subject to Pennsylvania law, holding non-public, personal information remains the notification obligation imposed by Pennsylvania's breach notification statute, 73 Pa. C.S.A. § 2301, *et seq.*



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