

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 03-80593-Civ-HURLEY/LYNCH

JAMES KEHOE, on behalf of himself  
and all others similarly situated,

Plaintiff,

v.

FIDELITY FEDERAL BANK AND  
TRUST,

Defendant.

FILED  
JUL 26 PM 1:17  
CLERK OF DISTRICT COURT  
S.D. OF FLA. - WPB

**RENEWED MOTION FOR SUMMARY FINAL JUDGMENT  
OF DEFENDANT, FIDELITY FEDERAL BANK AND TRUST**

Defendant, FIDELITY FEDERAL BANK AND TRUST ("Fidelity"), pursuant to Rule 56 of the Fed.R.Civ.P., moves this Court for an order granting summary final judgment in favor of Fidelity. As grounds therefor, Fidelity states that:

1. Plaintiff, James Kehoe, on behalf of himself and all other similarly situated ("Plaintiff"), has filed a putative class action Complaint against Fidelity alleging violations of the Drivers Privacy Protection Act, 18 U.S.C. §§ 2721-24 ("DPPA").

2. The gravamen of Plaintiff's Complaint is that Fidelity knowingly obtained and used within the meaning of DPPA "personal information" contained in "motor vehicle records" maintained by the State of Florida in violation of DPPA because those individuals did not provide "express consent" to the State of Florida for the distribution of their "personal information".

3. Since it was amended effective June 1, 2000, DPPA has required that before a state may disclose personal information derived from motor vehicle records, the individual whose

information is to be disclosed must have expressly consented to such disclosure. However, contrary to DPPA, after June 1, 2000, the State of Florida (the "State") continued to disclose personal information even if the individual involved did not give express consent. The State kept such information private only if the individual involved had affirmatively indicated to the State that the personal information be kept confidential, which is consistent with the requirements under DPPA before the amendment.

4. Plaintiff alleges that Fidelity violated the DPPA by obtaining personal information from the State, when the State itself has violated the DPPA in selling that information to Fidelity. Plaintiff implicitly alleges by omission that Fidelity is liable under the DPPA, even if Fidelity did not know (which it did not) that the State failed to obtain the consent required by the DPPA since June 1, 2000. Further, Plaintiff does not allege any actual damages and instead alleges that he is seeking "the liquidated sum of \$2,500" for each member of the class.

5. From June 1, 2000 to June 20, 2003, Fidelity purchased personal information from the State, specifically the names and addresses of individuals registering new and used automobiles in Palm Beach, Martin and Broward Counties. Supplemental Affidavit of Dennis J. Casey ¶ 3 ("Casey Aff. ¶ 3") attached as **Exhibit "A."** Fidelity mailed to these individuals solicitations for the refinancing of car loans. Fidelity purchased such information relating to approximately 565,600 individuals. Casey Aff. ¶ 4.

6. On August 21, 2003, Fidelity filed its Motion to Dismiss and/or in the Alternative Motion for Summary Judgment [D.E.#9]. On February 2, 2004, the Court entered its order Denying Defendant's Motion to Dismiss [D.E.#50]. In that Order, the Court indicated that it would "revisit the issues raised by the defendant on summary judgment once discovery has been completed."

Pursuant to the Court's Order Setting Trial Date and Discovery Deadlines [D.E.#23], the deadline for Summary Judgment Motions is March 26, 2004 (ninety days before calendar call).

7. Summary Judgment must be entered because as a matter of undisputed fact: (1) there is no evidence that Fidelity obtained any information about Plaintiff from the State; (2) Plaintiff has not suffered actual damages; and (3) Fidelity did not know, and had no reason to know, that the State lacked the express consent of the individuals whose information was released (the "knowingly" requirement of § 2724(a)).

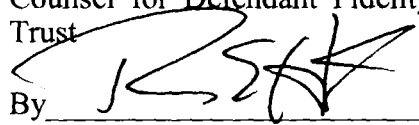
8. In resolving the issues of statutory construction, Fidelity relies upon standard rules of statutory construction set out at length in the beginning of Section III of its memorandum; upon cases dealing with similarly constructed statutes including the recent Supreme Court Opinion in *Doe v. Chao*, 540 U.S. \_\_\_, 124 S.Ct. 1204 (2004).

WHEREFORE, Fidelity requests the Court enter an order that:

- A. Grants summary judgment in Fidelity's favor and against Plaintiff and the putative class; and
- B. Grants such other and further relief as the Court deems necessary and proper.

Dated: March 26, 2004.

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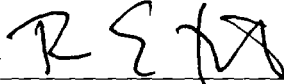
By   
\_\_\_\_\_  
L. Louis Mrachek  
Fla. Bar No. 182880  
Roy E. Fitzgerald  
Fla. Bar No. 856540

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished to all parties on the attached service list, by  U.S. Mail,  Facsimile, [ ] Hand Delivery, [ ] overnight delivery, this 26 day of March, 2004.

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By



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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 03-80593-Civ-HURLEY/LYNCH

JAMES KEHOE, on behalf of himself  
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FIDELITY FEDERAL BANK AND  
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Defendant.

SUPPLEMENTAL  
AFFIDAVIT OF DENNIS J. CASEY, SUBMITTED BY DEFENDANT,  
FIDELITY FEDERAL BANK AND TRUST, IN SUPPORT OF ITS  
SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT

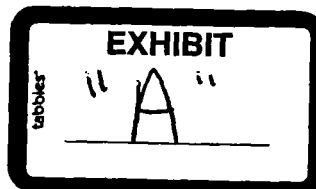
STATE OF FLORIDA

COUNTY OF PALM BEACH

BEFORE ME , the undersigned authority, personally appeared Dennis J. Casey, who upon being duly sworn, deposes and says:

1. I am over the age of 18 years and have personal knowledge of the facts and circumstances described herein by virtue of my involvement in them and by review of the records kept in the normal course of regularly conducted business by Fidelity Federal Bank and Trust ("Fidelity").

2. I serve as the Vice President/Director of Marketing of Fidelity. Fidelity is a publicly owned and locally operated federal savings bank that provides personal and business deposits, lending, insurance and trust services, within Palm Beach, Broward, St. Lucie, Indian River and Martin Counties. It has been in business for fifty-one years. It employs approximately 750 employees and has approximately 5,600 shareholders. The book value of Fidelity (assets minus liabilities from



Fidelity's balance sheet) is approximately \$177.8 million. At the closing of trading of the NASDAQ on March 23, 2004, the market capitalization of Fidelity was approximately \$544,800,000 (calculated by multiplying the number of outstanding shares (approximately 15.03 million shares) times the stock closing price (\$36.26 per share)).

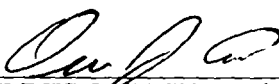
3. From June 1, 2000, to June 20, 2003, Fidelity purchased on a monthly basis from the State of Florida's Department of Highway Safety and Motor Vehicles, the name and addresses of individuals in a three county area (Palm Beach, Martin and Broward Counties) who, within the preceding thirty days, had registered new motor vehicles and used motor vehicles less than three years old. Fidelity paid the State for that information. The payment was one cent for each name and address provided. The State would forward the information electronically to a mass mailing service provider retained by Fidelity. The mailing went to the names and addresses provided to Fidelity by the State and contained solicitations to refinance automobile loans.

4. During the period in question, that is from June 1, 2000 to June 20, 2003, Fidelity paid the State approximately \$5,656 for the names and addresses of approximately 565,600 individuals.

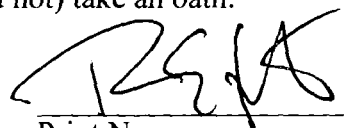
5. At no point until the filing of the Complaint herein did Fidelity know, or have reason to know, that the State had not complied with the amendment to the Driver Privacy Protection Act (the "DPPA") which went into effect on June 1, 2000 requiring the State to obtain express consent of the involved individual before the State could release personal information as defined in the DPPA relating to that individual.

FURTHER AFFIANT SAYETH NAUGHT.

FIDELITY FEDERAL BANK AND TRUST

By:   
DENNIS J. CASEY, Vice President  
Director of Marketing

BEFORE ME, the undersigned authority, this 26 day of March, 2004, personally appeared DENNIS J. CASEY, Vice President/Director of Marketing of Fidelity Federal Bank and Trust. The above-named individual  is personally known to me or  has produced \_\_\_\_\_ as identification which is current or has been issued within the past five years and bears a serial or other identifying number and who did (did not) take an oath:



Print Name: \_\_\_\_\_  
NOTARY PUBLIC - STATE OF FLORIDA  
Commission Number: \_\_\_\_\_  
My commission expires: \_\_\_\_\_

