

1 DENNIS JACOBS, Chief Judge, concurring in part and
2 dissenting in part:

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4 Insofar as the majority opinion superimposes a
5 negligence duty of care on the civil damages remedy of the
6 Driver's Privacy Protection Act ("the Act"), I respectfully
7 dissent.

8

I

9 An industry of "resellers" has arisen to facilitate
10 acquisition by legitimate end-users of information collected
11 by state motor vehicle bureaus. The Act is designed to
12 reduce abuses of the information and invasions of privacy.
13 At the same time, Congress was careful to craft remedies for
14 such abuse that would not impair the useful industry. See,
15 e.g., Protecting Driver Privacy: Hearing on H.R. 3365 Before
16 the Subcomm. on Civil and Const. Rights of the H. Comm. On
17 the Judiciary, 103d Cong. 4 (1994) (statement of bill
18 sponsor Rep. James P. Moran) ("Careful consideration was
19 given to the common uses now made of this information and
20 great efforts were made to ensure that those uses were
21 allowed under this bill."), available at 1994 WL 212698; 145
22 Cong. Rec. H2522 (daily ed. Apr. 20, 1994) (statement of
23 Rep. Moran) ("[The Act] strikes a critical balance between

1 an individual's fundamental right to privacy and safety and
2 the legitimate governmental and business needs for this
3 information."). The civil cause of action is worded in a
4 way well-calculated to target abuses without inflicting
5 collateral damage on the industry itself: "[a] person who
6 *knowingly* obtains, discloses or uses personal information,
7 from a motor vehicle record, for a purpose not permitted
8 under this chapter shall be liable to the individual to whom
9 the information pertains, who may bring a civil action in a
10 United States district court." 18 U.S.C. § 2724 (emphasis
11 added).

12 The majority opinion states that this language imposes
13 a duty upon resellers to "to make some inquiry before
14 concluding that disclosure is permitted." Maj. Op. at 31
15 (emphasis removed). I agree to the extent that resellers
16 should require end-users to specify a legitimate use and
17 give them notice that misuse subjects them to liability.
18 But it is undisputed that Arcanum, the reseller here, did
19 make such inquiry and provide such notice: it required the
20 customer to represent which legitimate purpose was being
21 pursued; it referenced the Act; and it elicited an
22 indemnification in the event of a statutory violation--all
23 of which served to warn the customer that violation of the
24 Act would entail consequences.

1 So the real holding of the majority opinion is that
2 these measures are not enough, and that resellers have a
3 duty of inquiry to verify the identity of the customer, and
4 to perform related investigations, as though selling a
5 firearm or dispensing a narcotic. That is a negligence
6 standard, and it is a judicial invention that alters the
7 nature of the industry's service and its economics, and
8 thereby upsets the balance of the Act.

9
10 **II**

11 The facts of this case arrange themselves into a law
12 school exam question. Defendant Aron Leifer had some run-in
13 with the driver of a car owned by plaintiff Erik Gordon.
14 Leifer jotted down the license plate number, used
15 Docusearch.com to get information associated with the
16 license plate number, and then harassed Gordon.
17 Docusearch.com is a website of defendant Arcanum
18 Investigations, which is owned and operated by defendant Dan
19 Cohn.

20 As the Docusearch.com website required, Leifer
21 certified that he had a permissible purpose for the
22 information under the Act, and warranted that he would
23 indemnify Arcanum against any breach. But he used an alias
24 (Jack Loren) to submit his request, and falsely selected

1 "Insurance Other" as his permissible purpose from a drop-
2 down menu. Arcanum forwarded the request to defendant
3 Softech International, Inc., for processing. The master
4 services agreement between the companies included a
5 certification from Arcanum that it would only request
6 records for certain purposes permissible under the Act, that
7 it would require its end users to certify compliance, and
8 that it would indemnify Softech against any violation.

9 Gordon brought a damages action against Leifer under
10 the Act. Leifer had no permissible reason for procuring the
11 license information, got it by false statements (using a
12 false name that did not match his credit card, and a false
13 affiliation with Bodyguards.com, a defunct website), and
14 used the information to violate Gordon's privacy. Leifer
15 settled the claim. That settlement fulfilled the purposes
16 of the Act. The district court dismissed the claims against
17 all the remaining defendants. I would affirm. The majority
18 vacates the dismissal as to Arcanum and Mr. Cohn.

19
20 **III**

21 "[O]ur inquiry begins with the statutory text, and ends
22 there as well if the text is unambiguous." BedRoc Ltd., LLC
23 v. United States, 541 U.S. 176, 183 (2004). The Act as a
24 whole could be clearer than it is, but Congress made the

1 civil remedy clear enough, given the ends in view: imposing
2 damages on those who abuse the information, while preserving
3 the industry that facilitates its use for fair purposes.

4 The only mental-state requirement in the civil cause of
5 action is the adverb "knowingly," which modifies the verbs
6 "obtains, discloses or uses," which are further modified by
7 the adverbial phrase, "for a purpose not permitted under
8 this chapter" 18 U.S.C. § 2724. Civil liability is
9 therefore imposed only on a person who obtains, discloses,
10 or uses personal information knowing that it is for a
11 purpose--such as peddling goods or harassment--that is not
12 legitimate. Leifer is such a person. Arcanum and Softech
13 are not, in my view, because they made disclosure only after
14 eliciting an affirmation of proper purpose, advising as to
15 statutory requirements, and exacting a warranty of
16 indemnification, which made the warning ominous.

17 The majority opinion superimposes on the statutory
18 wording a duty of (variously) "reasonable inquiry" (Maj. Op.
19 at 20, 39, 40), "due care" (32), "reasonable care" (30, 34-
20 36, 40), "some inquiry" (31), "reasonableness" (35), and
21 "reasonable diligence" (40). These amount to "negligence"
22 (33), and, as applied to this case, they mean that there is
23 a duty of a reseller to make inquiries of the end-user, at
24 least when there are "red flags" (32, 43). The flags here

1 are said to be: use of an alias; use of a credit card in a
2 different name (Leifer's own); use of an entity
3 (Bodyguards.com) that was defunct; and selection of
4 "Insurance Other" from the drop-down menu, which is not a
5 term expressly listed in the statute as a permitted use
6 (though insurance is, see 18 U.S.C. § 2721(b)(6) and (9)).

7 The standard adopted by the majority opinion therefore
8 requires at least that a reseller make inquiry and
9 investigation into: the user's identity, the match between
10 the user's name and the credit card used, and the current
11 status and activity of the employing entity. Without those
12 inquiries, there would be no red flags; they wave here only
13 by reason of the inquiries made via discovery in litigation.
14 Yet the majority subjects Arcanum and Mr. Cohn to a jury
15 trial because they failed to look for these red flags before
16 releasing Gordon's driver information. Implicit in that
17 ruling is a requirement that resellers conduct inquiries
18 looking for red flags in every application. And that
19 presupposes personnel who can identify anomalies, and
20 evaluate responses to inquiries (e.g., "I'm using my
21 employer's credit card"; "Oh, Bodyguards.com is doing
22 business under another name"; etc.). Although the majority
23 opinion persuasively demonstrates that Congress did not
24 intend to impose strict liability, see Maj. Op. at 19-23,

1 the burden imposed by the majority opinion is, in effect,
2 not all that much less.

3 The standard expressed in the statutory wording, a
4 "knowing" misuse, is straightforward and easy to apply to
5 transactions that are (like these) numerous and fleeting.
6 By contrast, the duty of reasonable inquiry imposed by the
7 majority opinion has no clear boundaries. See, e.g.,
8 Catharine Pierce Wells, A Pragmatic Approach to Improving
9 Tort Law, 54 Vand. L. Rev. 1447, 1452 (2001) ("[N]egligence
10 doctrine has never consisted of the kind of rules that can
11 make outcomes seem predictable and certain."). It was
12 reasonable for Congress to draw the line at a knowing
13 violation, especially in view of its intent to preserve the
14 industry of resellers (a goal acknowledged in the majority's
15 rejection of strict liability, see Maj. Op. at 21-22). With
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17 a clear, logical interpretation of the text available, there
18 is no need to look any further. BedRoc, 541 U.S. at 183.

20 IV

21 The majority adduces three arguments in support of
22 imposing a "duty of reasonable care" that would require
23 measures *beyond* those that Arcanum employed. None of these
24 reasons is convincing.

1 First, the majority opinion cites legislative history,
2 suggesting that it "supports the conclusion that resellers
3 must exercise some degree of care." Maj. Op. at 37. But
4 the citations reflect only an intent to protect the privacy
5 of drivers' personal information--a broad objective that
6 does not impose a duty of inquiry and that is compatible
7 with a standard that protects resellers that commit no
8 knowing wrong. The majority opinion thus succumbs to the
9 fallacy that all remedial legislation reflects an intent to
10 advance the remedial purpose by flattening every competing
11 consideration. The majority writes: "Leifer's threats to
12 Gordon's family and friends were precisely the sort of acts
13 that Congress sought to curtail." Maj. Op. at 39. All this
14 statement tells us about the duty of care is that a culpable
15 end-user such as Leifer should be liable, as he would be
16 under my reading as well.

17 Second, the majority opinion reasons that since the Act
18 allows punitive damages in cases of "willful or reckless
19 disregard of the law," 18 U.S.C. § 2724(b)(2), the threshold
20 for generic civil liability must be lower. Maj. Op. at 34.
21 But surely the distinction between the actual and punitive
22 damages is "disregard of the law"--and a law can be
23 disregarded only by persons who are aware of it. People in
24 relevant industries will know it, but few others will have

1 sufficient awareness to *disregard* it when they handle driver
2 records. This Act is not the kind of law imbued with
3 mother's milk.

4 Under a plain text reading, liability for actual or
5 liquidated damages arises for a knowing disclosure made for
6 an impermissible purpose, while punitive damages are
7 available only when that disclosure is made in disregard of
8 restrictions that the actor knows have been implemented by
9 the Act. The punitive damages clause does not refute the
10 requirement of a "knowing" mental state.

11 Third, the majority writes that the statute only makes
12 sense "logically" if it is associated with a duty of care.¹
13 Maj. Op. at 31 ("Logically, the language makes clear, albeit
14 implicitly, that resellers are obliged to use *some* care in
15 disclosing personal information obtained from motor vehicle
16 records."). The thrust of the argument is that, without a

¹ The Sixth Circuit managed to "logically" interpret the statute without recognizing a duty of care. See Roth v. Guzman, 650 F.3d 603, 611 (6th Cir. 2011) (disclosure is permitted so long as the reseller has a permissible reason to provide the records to the requestor). In fact, the majority opinion in that case ignored express calls from the dissenting opinion to identify such a duty. See id. at 618 (Clay, J., dissenting) ("The majority opinion circumvents the legal question of what duty the DPPA imposes on Defendants In doing so, the majority reasons that as long as a requestor represents . . . that it will use drivers' personal information in accordance with a DPPA exception, [motor bureau employees] do not violate the Act if they then knowingly disclose that information.").

1 duty of care requirement, "an upstream source could *always*
2 avoid liability by securing a representation that the
3 recipient of personal information had a permissible use,"
4 i.e., a certification or an indemnification agreement, both
5 of which were used by Arcanum here. Maj. Op. at 32. The
6 majority fears that this possibility would render the civil
7 remedy "toothless." Id. I disagree. The civil remedy
8 works admirably in the overall scheme.

9 The Act, which regulates an activity that uses
10 middlemen, sensibly places civil damages liability on the
11 person who knowingly handles the information for an improper
12 purpose. The Act operates in a way that is reasonable and
13 effective (and thus "logical"). Liability for damages is
14 imposed at the point in the sequence of transactions where
15 there is knowing misconduct. Punitive damages are imposed
16 for wilful or reckless "disregard of the law," that is, on
17 persons who know about this fairly obscure enactment
18 (usually by virtue of being in the business of violating
19 it). See 18 U.S.C. § 2724(b)(2). And the act also imposes
20 a criminal fine for knowing violations. See 18 U.S.C.
21 § 2723. The scheme as a whole induces prudent resellers to
22 warn end-users and to obtain representations of compliance.

23 In this case, the victim (Gordon) recovered damages
24 from the violator (Leifer). So it cannot be said that the

1 Act was "toothless" in this case. The Act doesn't have to
2 bite everybody.

3 The Act treats on an equal footing the end-users, the
4 resellers, and the state motor vehicle bureaus. So one
5 should be able to test the soundness of a ruling on the
6 reseller's duty by seeing if it can fairly be applied to the
7 motor vehicle bureau as well. It is therefore telling that
8 the majority opinion expressly concedes that its ruling does
9 not apply to the state motor vehicle bureaus. See Maj. Op.
10 at 40 n.14. Not that I disagree on that score: for my part,
11 I am not sure that every employee of a motor vehicle bureau
12 can be counted on to mobilize as an eager detective.

13 The measures taken by Arcanum and Softech adequately
14 assured that they would not knowingly make a disclosure for
15 an unpermitted purpose. But the majority opinion remands
16 for a negligence finding as to the website's instruction
17 that the customer "Must Select One" of the permissible uses
18 from the drop-down menu, and does so on the theory that such
19 an instruction affords no opportunity to state the true
20 reason. In my view, there is no basis for thinking that
21 Leifer would otherwise have revealed his true need for the
22 information (that would be: "I need to harass the

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1 registration holder with salacious phone calls"), or that
2 the instruction ("Must Select One") is an order to pick one
3 even if it is false. A lot of website owners should worry
4 about the implications of the majority opinion.