seek all available remedies for breach of the privacy policy, without the need for private rights of action under such regulatory statutes as the FTC Act.[29]

Privacy policies can also be viewed simply as notices that warn consumers about the use of their personal information. Assuming that these notices are subject to change as business practices evolve, how effective are privacy policies as a means to protect privacy?

IN RE NORTHWEST AIRLINES PRIVACY LITIGATION

2004 WL 1278459 (D. Minn. 2004) (not reported in F. Supp. 2d)

MAGNUSON, J. . . . Plaintiffs are customers of Defendant Northwest Airlines, Inc. ("Northwest"). After September 11, 2001, the National Aeronautical and Space Administration ("NASA") requested that Northwest provide NASA with certain passenger information in order to assist NASA in studying ways to increase airline security. Northwest supplied NASA with passenger name records ("PNRs"), which are electronic records of passenger information. PNRs contain information such as a passenger's name, flight number, credit card data, hotel reservation, car rental, and any traveling companions.

Plaintiffs contend that Northwest's actions constitute violations of the Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. § 2701 *et seq.*, the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681, and Minnesota's Deceptive Trade Practices Act ("DTPA"), Minn. Stat. § 325D.44, and also constitute invasion of privacy, trespass to property, negligent misrepresentation, breach of contract, and breach of express warranties. The basis for most of Plaintiffs' claims is that Northwest's website contained a privacy policy that stated that Northwest would not share customers' information except as necessary to make customers' travel arrangements. Plaintiffs contend that Northwest's provision of PNRs to NASA violated Northwest's privacy policy, giving rise to the legal claims noted above.

Northwest has now moved to dismiss the Amended Consolidated Class Action Complaint (hereinafter "Amended Complaint"). . . .

The ECPA prohibits a person or entity from

> (1) intentionally access[ing] without authorization a facility through which an electronic communication service is provided; or
>
> (2) intentionally exceeds an authorization to access that facility; and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished.
>
> 18 U.S.C. § 2701(a).

Plaintiffs argue that Northwest's access to its own electronic communications service is limited by its privacy policy, and that Northwest's provision of PNRs to NASA violated that policy and thus constituted unauthorized access to the "facility through which an electronic communication service is provided" within the meaning of this section. Plaintiffs also allege that Northwest violated § 2702

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[29] Scott Killingsworth, *Minding Your Own Business: Privacy Policies in Principle and in Practice*, 7 J. Intell. Prop. L. 57, 91-92 (1999).

of the ECPA, which states that "a person or entity providing an electronic communications service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service." 18 U.S.C. § 2702(a)(1). Northwest argues first that it cannot violate § 2702 because it is not a "person or entity providing an electronic communications service to the public." . . .

Defining electronic communications service to include online merchants or service providers like Northwest stretches the ECPA too far. Northwest is not an internet service provider. . . .

Similarly, Northwest's conduct as outlined in the Amended Complaint does not constitute a violation of § 2701. Plaintiffs' claim is that Northwest improperly disclosed the information in PNRs to NASA. Section 2701 does not prohibit improper disclosure of information. Rather, this section prohibits improper access to an electronic communications service provider or the information contained on that service provider. . . .

Finally, Northwest argues that Plaintiffs' remaining claims fail to state a claim on which relief can be granted. These claims are: trespass to property, intrusion upon seclusion, breach of contract, and breach of express warranties.

To state a claim for trespass to property, Plaintiffs must demonstrate that they owned or possessed property, that Northwest wrongfully took that property, and that Plaintiffs were damaged by the wrongful taking. Plaintiffs contend that the information contained in the PNRs was Plaintiffs' property and that, by providing that information to NASA, Northwest wrongfully took that property.

As a matter of law, the PNRs were not Plaintiffs' property. Plaintiffs voluntarily provided some information that was included in the PNRs. It may be that the information Plaintiffs provided to Northwest was Plaintiffs' property. However, when that information was compiled and combined with other information to form a PNR, the PNR itself became Northwest's property. Northwest cannot wrongfully take its own property. Thus, Plaintiffs' claim for trespass fails. . . .

Intrusion upon seclusion exists when someone "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns . . . if the intrusion would be highly offensive to a reasonable person." . . . In this instance, Plaintiffs voluntarily provided their personal information to Northwest. Moreover, although Northwest had a privacy policy for information included on the website, Plaintiffs do not contend that they actually read the privacy policy prior to providing Northwest with their personal information. Thus, Plaintiffs' expectation of privacy was low. Further, the disclosure here was not to the public at large, but rather was to a government agency in the wake of a terrorist attack that called into question the security of the nation's transportation system. Northwest's motives in disclosing the information cannot be questioned. Taking into account all of the factors listed above, the Court finds as a matter of law that the disclosure of Plaintiffs' personal information would not be highly offensive to a reasonable person and that Plaintiffs have failed to state a claim for intrusion upon seclusion. . . .

Northwest contends that the privacy policy on Northwest's website does not, as a matter of law, constitute a unilateral contract, the breach of which entitles Plaintiffs to damages. Northwest also argues that, even if the privacy policy

constituted a contract or express warranty, Plaintiffs' contract and warranty claims fail because Plaintiffs have failed to plead any contract damages. . . .

Plaintiffs' rely on the following statement from Northwest's website as the basis for their contract and warranty claims:

> When you reserve or purchase travel services through Northwest Airlines nwa.com Reservations, we provide only the relevant information required by the car rental agency, hotel, or other involved third party to ensure the successful fulfillment of your travel arrangements. . . .

The usual rule in contract cases is that "general statements of policy are not contractual." . . .

The privacy statement on Northwest's website did not constitute a unilateral contract. The language used vests discretion in Northwest to determine when the information is "relevant" and which "third parties" might need that information. Moreover, absent an allegation that Plaintiffs actually read the privacy policy, not merely the general allegation that Plaintiffs "relied on" the policy, Plaintiffs have failed to allege an essential element of a contract claim: that the alleged "offer" was accepted by Plaintiffs. Plaintiffs' contract and warranty claims fail as a matter of law.

Even if the privacy policy was sufficiently definite and Plaintiffs had alleged that they read the policy before giving their information to Northwest, it is likely that Plaintiffs' contract and warranty claims would fail as a matter of law. Defendants point out that Plaintiffs have failed to allege any contractual damages arising out of the alleged breach. . . .

[The case is dismissed.]

NOTES & QUESTIONS

1. ***Breach of Contract.*** In *Dyer v. Northwest Airlines Corp.*, 334 F. Supp. 2d 1196 (D.N.D. 2004), another action involving Northwest Airlines' disclosure of passenger records to the government, the court reached a similar conclusion on the plaintiffs' breach of contract claim:

> To sustain a breach of contract claim, the Plaintiffs must demonstrate (1) the existence of a contract; (2) breach of the contract; and (3) damages which flow from the breach. . . .
>
> . . . [T]he Court finds the Plaintiffs' breach of contract claim fails as a matter of law. First, broad statements of company policy do not generally give rise to contract claims. . . . Second, nowhere in the complaint are the Plaintiffs alleged to have ever logged onto Northwest Airlines' website and accessed, read, understood, actually relied upon, or otherwise considered Northwest Airlines' privacy policy. Finally, even if the privacy policy was sufficiently definite and the Plaintiffs had alleged they did read the policy prior to providing personal information to Northwest Airlines, the Plaintiffs have failed to allege any contractual damages arising out of the alleged breach.

2. ***Damages.*** In *In re Jet Blue Airways Corp. Privacy Litigation*, 379 F. Supp. 2d 299 (E.D.N.Y. 2005), a group of plaintiffs sued Jet Blue Airlines for breach of

contract for sharing passenger records with the government. The court granted Jet Blue's motion to dismiss:

> An action for breach of contract under New York law requires proof of four elements: (1) the existence of a contract, (2) performance of the contract by one party, (3) breach by the other party, and (4) damages. . . .
>
> JetBlue . . . argues that plaintiffs have failed to meet their pleading requirement with respect to damages, citing an absence of any facts in the Amended Complaint to support this element of the claim. Plaintiffs' sole allegation on the element of contract damages consists of the statement that JetBlue's breach of the company privacy policy injured plaintiffs and members of the class and that JetBlue is therefore liable for "actual damages in an amount to be determined at trial." . . . At oral argument, when pressed to identify the "injuries" or damages referred to in the Amended Complaint, counsel for plaintiffs stated that the "contract damage could be the loss of privacy," acknowledging that loss of privacy "may" be a contract damage. It is apparent based on the briefing and oral argument held in this case that the sparseness of the damages allegations is a direct result of plaintiffs' inability to plead or prove any actual contract damages. As plaintiffs' counsel concedes, the only damage that can be read into the present complaint is a loss of privacy. At least one recent case has specifically held that this is not a damage available in a breach of contract action. *See Trikas v. Universal Card Services Corp.*, 351 F. Supp. 2d 37 (E.D.N.Y. 2005). This holding naturally follows from the well-settled principle that "recovery in contract, unlike recovery in tort, allows only for economic losses flowing directly from the breach."
>
> Plaintiffs allege that in a second amended complaint, they could assert as a contract damage the loss of the economic value of their information, but while that claim sounds in economic loss, the argument ignores the nature of the contract asserted. . . . [T]he "purpose of contract damages is to put a plaintiff in the same economic position he or she would have occupied had the contract been fully performed." Plaintiffs may well have expected that in return for providing their personal information to JetBlue and paying the purchase price, they would obtain a ticket for air travel and the promise that their personal information would be safeguarded consistent with the terms of the privacy policy. They had no reason to expect that they would be compensated for the "value" of their personal information. In addition, there is absolutely no support for the proposition that the personal information of an individual JetBlue passenger had any value for which that passenger could have expected to be compensated. . . . . There is likewise no support for the proposition that an individual passenger's personal information has or had any compensable value in the economy at large.

If you were the plaintiffs' attorney, how would you go about establishing the plaintiffs' injury? Is there any cognizable harm when an airline violates its privacy policy by providing passenger information to the government?

3. ***Breach of Confidentiality Tort.*** Would the plaintiffs have a cause of action based on the breach of confidentiality tort?
4. ***Enforcing Privacy Policies as Contracts Against Consumers.*** Suppose privacy policies were enforceable as contracts. Would this be beneficial to consumers? It might not be, Allyson Haynes argues: