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frained from doing so because he was in his underwear. Thus, ample evidence existed to conclude that the repossession did not result in a breach of the peace.

Trespass onto debtor's property is not *per se* breach of the peace

Koontz alternatively argued that Chrysler breached the peace by repossessing his vehicle in a manner which constituted criminal trespass to real property under Section 21-3 of the Illinois Criminal Code. Under the Criminal Code, criminal trespass occurs when a person enters upon the land of another, despite having received prior notice from that

individual that such entry is forbidden. 720 ILL. COMP. STAT. ANN. 5/21-3 (West 1994). Prior to the date of repossession, Koontz informed Chrysler that it did not have his permission to enter upon his land; consequently, he contended that Chrysler's potentially sanctionable criminal trespass amounted, at the very least, to a breach of the peace.

The court found the issue to be one of first impression in Illinois and, thus, proceeded to examine the relevant law from other jurisdictions. The court concluded that a mere trespass, in and of itself, does not result in a breach of the peace because the creditor enjoys a limited privilege, confined in purpose and in scope, to enter upon the land of a debtor. The court instructed that

where the collateral is enclosed in some fashion, i.e., by fence, gate, chain, etc., the secured creditor's privilege is severely diminished, especially where repossession can only be accomplished by breaking down the barriers designed to exclude potential trespassers.

The court evaluated Chrysler's entry upon Koontz's real property in light of these considerations and did not find a breach of the peace under the circumstances. Chrysler's entry was limited to the purpose of repossession, and there was no evidence to indicate that any barricades or enclosures had been transgressed. Therefore, Chrysler exercised its privilege lawfully and the deficiency judgment stands unaffected.

Banks and lenders violated consumer protection laws with direct deposit accounts

by Aaron R. Pettit

In *Cobb v. Monarch Fin. Corp.*, 913 F. Supp. 1164 (N.D. Ill. 1995), the United States District Court for the Northern District of Illinois held that the owner of a bank account, to which an allotted portion of the owner's paycheck was directly deposited and then immediately transferred to a lender, could state a cause of action against both the bank and the lender for violating disclosure requirements of the Electronics Funds Transfer Act ("EFTA"), 15 U.S.C. §§ 1693-1693r (1988), and for deceptive practices under the Illinois Consumer Fraud and Deceptive Practices Act ("ICFA"), 815 ILL. COMP. STAT. 505/1-505/12 (1993). The court also held, however, that the owner of such an account could not state a cause of action against the bank for failure to meet disclosure requirements under the Truth

in Savings Act ("TISA"), 12 U.S.C. §§ 4301-4313 (1995), against the lender under the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601-1667e (1988), and against both the bank and the lender under the Illinois Wage Assignment Act ("IWAA"), 740 ILL. COMP. STAT. 170/01-170/11 (1993). Additionally, the court upheld the plaintiff's claim against the lender that the loan agreements were unconscionable, but dismissed the unconscionability claim against the bank.

From November 1993 to November 1994, Verlina Cobb ("Cobb") obtained a total of ten different loans from three finance companies ("the lenders"). As specified in the loan agreements, three banks ("the banks") created bank accounts in Cobb's name and electronically and directly deposited an allocated portion

of Cobb's paycheck into the accounts. The banks then immediately transferred this portion from Cobb's account to the lenders' account as payment for the loans. Cobb filed for bankruptcy on February 3, 1995. At the time, Cobb had not fully repaid her loans. After filing for bankruptcy, Cobb filed actions against the banks, the lenders, and officers of both the banks and the lenders.

Cobb filed a motion to certify three separate classes, constituting all persons who entered into finance agreements with the lenders and into account authorizations with the banks. Despite the defendants' opposition, the court granted Cobb's motion to certify the classes.

Plaintiff claims violations of consumer protection laws

Cobb asserted several causes of action: (1) the banks and the lenders violated the disclosure requirements of the EFTA; (2) the lenders did not inform Cobb that they had procured a security interest in her bank accounts as required under the TILA; (3) the banks did not meet the disclosure requirements of the TISA; (4) the banks and the lenders executed a wage assignment from Cobb without providing notice as required under the IWAA; (5) the banks and the lenders engaged in a deceptive practice in violation of the ICFA; and (6) the banks and lenders entered into unconscionable loan agreements with Cobb under Illinois law. The defendants filed a motion to dismiss each of Cobb's counts.

Electronic Funds Transfer Act applies

The court first held that Cobb could state a cause of action against the banks and the lenders for violating provision of the EFTA. The defendants argued that Cobb's EFTA claim should be dismissed because Cobb's bank accounts were not "accounts" as defined in the EFTA. Pursuant to its authority under the EFTA, the Federal Reserve Board defined "account" in a set of regulations commonly referred to as "Regulation E," a consumer account "established primarily for personal, family, or household purposes." 12 C.F.R. § 226.2(a)(25) (1996). The court held that the lenders' interest in Cobb's accounts did not amount to a security interest in the property because the banks created the accounts for repayment of the loans, not to secure repayment upon default. Therefore, the court granted the

lenders' motion to dismiss Cobb's cause of action under the TILA.

Banks did not violate the Truth in Savings Act

In addition, the court held that Cobb could not state a cause of action against the banks for failure to meet the disclosure requirements of the TISA. Since the TISA's definition of "account" is substantially the same as the definition used in the EFTA and Regulation E, the court found that Cobb's account constituted an "account" under the TISA. The banks contended, however, that even if the accounts applied under the TISA's disclosure provisions, Cobb waived any right to obtain the disclosures in signing the loan agreements. Cobb argued that the disclosure requirements could not be waived. The court rejected Cobb's argument, citing a Supreme Court case in which the Court held that waiver is presumed to be available unless the statute contains an express prohibition of waiver. *United States v. Mezzanatto*, 115 S. Ct. 797, 801 (1995). Since the TISA contains no such preclusion of waiver, the court held that Cobb waived her rights to receive account statements or transaction reports regarding the loan agreements. Accordingly, the court granted the bank defendants' motion to dismiss the TISA cause of action.

Direct deposit account constitutes a valid assignment of wages

The court further held that Cobb could not state a cause of action under the IWAA. The IWAA invalidates an "assignment of wages earned or to be earned" unless "[g]iven to secure an existing debt of the wage-earner." 740 ILL. COMP. STAT. 170/1(2) (1993). Additionally, the IWAA requires creditors to give notice before they can collect wages under a wage assignment. The court interpreted the IWAA to apply only to wage assignments used to "secure" debt and intended as security upon default of a loan. The court found that the wage assignments in the present case were not designed to "secure" debt or to provide the lenders with security upon default and, therefore, the IWAA did not apply to the wage assignments in Cobb's case. Accordingly, the court granted the lender defendants' motion to dismiss the IWAA count.

Plaintiff sufficiently alleged fraud

Conversely, the court held that Cobb could state a cause of action against the banks and the lenders for violations of the ICFA. The ICFA prohibits "unfair or deceptive acts or practices," including misrepresentation, fraud, false promise, and concealment. 815 ILL. COMP. STAT. 505/2 (1993). Cobb claimed that the defendants "agreed to . . . [f]alsely represent to plaintiff and the class members that they could not revoke their authorizations to have the payments transferred to the finance company's account" and that the defendants required the plaintiff to sign a waiver of her rights to stop the electronic fund transfers. Section 205.10, a regulation passed pursuant to the EFTA, provides that a consumer has a non-waivable right to stop an electronic fund transfer from her account. 12 C.F.R. § 205.10 (1996). Furthermore, Cobb alleged that the defendants avoided disclosing required information to Cobb about her accounts by requiring her to sign a waiver of any rights to obtain account statements or transaction reports regarding the accounts, in violation of the EFTA.

The defendants argued that Cobb's allegations did not meet the heightened particularity standards of the Federal Rules of Civil Procedure for claims of fraud because the claims did not specify which defendants were involved in the fraud. The court rejected this argument, citing an exception to the particularity requirement where corporate insiders are involved and where the involvement of each is within the sole knowledge of the defendants. In such cases, the plaintiff is not required to specifically allege the involvement of each defendant. Thus, the court held that Cobb could state a claim against the defendants under the ICFA and dismissed the defendants' motion to dismiss the ICFA claims.

Loan agreements deemed unconscionable

Furthermore, the court held that Cobb could not state a cause of action for unconscionability against the banks but could state a cause of action for unconscionability against the lenders. In Illinois, a contract is "unconscionable when it is so one-sided that only one under delusion would make it and only one unfair and dishonest would accept it." *In re Estate of Croake*, 578 N.E.2d

567, 569 (Ill. App. Ct. 1991). Cobb alleged that the "combined effect of the extraordinarily high interest rates charged, the systematic violation of consumer protection laws . . . made all of the loans at issue unconscionable." The court concluded, however, that Cobb's complaint failed to allege that the banks were parties to the loan contracts or that they played any part in the creation of the loans. Further, the court held that the banks' activities fell short of the "systematic violations of consumer protection laws" and granted the banks' motion to dismiss the unconscionability claim.

The court stated, however, that it was unable to hold as a matter of law that Cobb did not state a claim for unconscionability against the lenders. Cobb alleged that the combination of the unreasonably high interest rates and the violations of consumer protection laws made the agreements with the lenders unconscionable. The court stated that the annual percentage rates charged by the lenders, which ranged from 57% to 101%, appeared to be unreasonably favorable and that Cobb may have lacked meaningful choice. As a result, the court denied the lender defendants' motion to dismiss the unconscionability claim.

In summary, the court granted the banks' motions to dismiss the TISA, IWAA, and unconscionability claims but denied the banks' motions to dismiss the EFTA and ICFA claims. Furthermore, the court granted the lenders' motions to dismiss the TILA and IWAA claims but denied the lenders' motions to dismiss the EFTA, ICFA, and unconscionability claims.

Editor's Note: On March 11, 1996, the United States District Court for the Northern District of Illinois, Eastern Division granted summary judgment to Bank One Chicago on the EFTA claim, and denied summary judgment on the ICFA claim. *Cobb v. Monarch Fin. Corp.*, 1996 WL 109624 (N.D. Ill. Mar. 11, 1996). Considering the EFTA claim first, the court held that there was no genuine issue as to how the direct deposits were handled. The mere existence of the direct deposit form did not rebut the fact that no account was created for Cobb. The court stated that Bank One did not need to provide transaction disclosures under EFTA because no transfers were effected. Cobb did not receive credit from Bank One, nor was credit conditioned on repayment by electronic transfer. The bank did not enter into the agreement, thereby waiving Cobb's rights under the

EFTA. Under the IFCA claim, the court denied the defendants' motion for summary judgment. The court assessed the statutory text, and cited *Kedziora v. Citicorp Nat'l Servs.*, 780 F. Supp. 516, 534 (N.D. Ill. 1991) for the proposition that a deceptive practice may be one that is "misleading," and whether or not a business form is misleading is a question of fact. The

court found that a reasonable trier of fact could find the direct deposit form misleading. Additionally, the court declined to find as a matter of law that Cobb did not suffer damages from the repayment arrangement. Reconsideration of the matter was denied on June 6, 1996. *Cobb v. Monarch Fin. Corp.*, 1996 WL 308279 (N.D. Ill. June 6, 1996).

Accident victims' right to privacy upheld over attorneys' free speech rights

by Sara E. Neff

Attorneys must wait 30 days to solicit Texas accident victims and their families through the mail. The United States Court of Appeals for the Fifth Circuit recently rejected the proposition that a 30-day ban on attorneys' direct mail solicitation of accident victims or their families is unconstitutional in *Moore v. Morales*, 63 F.3d 358 (5th Cir. 1995). In an action between attorneys and various commercial entities and the Attorney General of Texas, the United States Court of Appeals reversed the district court's ruling in favor of the attorneys. The court of appeals concluded that a Texas statute prohibiting attorneys from direct mail solicitation of accident victims or their families within 30 days of the accident advanced Texas' interest in protecting the privacy of accident victims and their loved ones and did not violate the attorneys' constitutional right to free speech.

The United States Court of Appeals for the Fifth Circuit refused to address the constitutionality of the statute as applied to other licensed groups such as physicians, surgeons, chiropractors, and private investigators. The court noted that other groups have not challenged the ban.

Texas legislature protects privacy of accident victims

In 1993, the Texas legislature enacted Texas Penal Code § 38.12(b)(1), which limits the right of several groups of licensed professionals, including attorneys, to solicit accident victims or their families. TEX. PENAL

CODE § 38.12(b)(1) (1994). The provisions of this statute serve several functions. First, the statute prevents licensed professionals from soliciting accident victims directly through the mail until 30 days have passed. Second, the statute restricts accident report access for 180 days following an accident and prevents solicitation of criminal and civil defendants through mail until 30 days after the initiation of legal proceedings. In addition, the statute enables victims to indicate, on the face of the accident report, whether they wish to be solicited.

District court found 30-day ban on solicitation unconstitutional

The attorneys challenged the 1993 statute on the grounds that it violated their right under the First and Fourteenth Amendment of the U.S. Constitution. The district court agreed, finding that the provisions of the statute presented an unreasonable impediment to commercial free speech. Thus, the district court declared the challenged provisions of the statute unconstitutional.

The 30-day ban must satisfy constitutional test

On appeal, the court tested the 30-day ban for constitutionality using the three prong test established in *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). In order to hold the 30-day ban on attorneys' direct mail solicitation of accident victims and their families constitutional, the court must find (1) a