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Crime Prevention Security Not Required for ATMs

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Recent Cases

Crime Prevention Security Not Required For ATMs

In *Popp v. Cash Station, Inc.*, No. 1-90-0321, 1992 WL 356851 (Ill. App. Dec. 4, 1992), the Illinois Appellate Court held that the company operating automated teller machines in the Chicago area had no duty to provide its customers with security protection from criminal attacks. The court further held that the company's marketing of cash access cards without disclosing its lack of machine security violated neither the Illinois Consumer Fraud Act nor the Illinois Uniform Deceptive Trade Practices Act.

Cash at Your Own Risk

Cash Station, Inc. ("Cash Station") operates a nationwide network of automated teller machines ("ATMs") in conjunction with member banks. Through the ATMs, account holders of member banks can withdraw cash from their accounts. Cash Station maintains twenty-four hour a day availability for the ATMs, most of which are not safeguarded with crime prevention devices such as cameras or silent alarms. Furthermore, Cash Station does not generally restrict access to the ATMs to only those possessing valid ATM cards. Numerous ATM customers have reported criminal attacks both in Chicago and nationwide.

Several years ago, Cash Station merged with Money Network, another supplier of ATM services. The merger created a virtual monopoly for Cash Station with regard to ATM services in the Chicago area.

Cecilia E. Popp ("Popp"), a Cash Station cardholder, filed suit against Cash Station. Popp alleged that she and other cardholders suffered damages from the exposure to risk of criminal attack while using the ATMs. Popp also contended that Cash Station violated Illinois antitrust laws since the merger with Money Network essen-

tially prevented ATM users from obtaining cash access services from other providers, who would furnish security. Popp sought to enjoin Cash Station from operating ATMs without security systems. In the alternative, Popp requested a mandatory injunction requiring the Cash Station to implement security systems and to notify customers of the ATMs' current safety measures.

The trial court dismissed Popp's complaint. The court found that Popp failed to allege any facts proving that Cash Station had a duty for the safety of the ATM customers. Additionally, the court stated that Popp failed to present any facts indicating that Cash Station had a similar duty to notify customers about ATM security. Popp appealed the decision to the Illinois Appellate Court.

No Foreseeability, No Duty

Popp first argued that Cash Station maintained an affirmative duty to implement reasonable measures for the protection of its ATM customers. Popp asserted that the duty stemmed from Cash Station's knowledge of previous, and the foreseeability of future, attacks at the ATMs. The court, however, rejected this contention.

The court stated that landowners generally have no duty to protect others from criminal attacks on their property. Only special relationships between the parties, such as a business relation, create such a duty. The court also noted that reasonable foreseeability of harm is the primary factor in determining whether a duty exists.

The court concluded that Popp failed to sufficiently show that Cash Station could foresee future attacks at the ATMs. More specifically, the court stated that Popp's reliance on statistics, rather than on specific allegations of where and when future crimes might occur, failed to prove foreseeability. Consequently, without the element of foreseeability, the court ruled that Cash Station did not assume a duty

to protect cardholders from attacks.

Additionally, the court held that Popp's status as an invitee on Cash Station's property did not create a duty. The court stated that in determining the duty owed to an invitee, both the landowner's knowledge and the invitee's lack of knowledge of the danger regarding the premises are relevant factors. The court found that since Cash Station had no unique knowledge of any future attack at ATMs, the risk involved was "speculative and remote." Furthermore, the court stated that Popp's complaint, which demonstrated her awareness of the possible attacks and risks of ATMs, negated any possible duty Cash Station might owe her.

Court Finds No Consumer Fraud

The court also rejected Popp's claim under the Illinois Consumer Fraud Act. The court stated that Popp failed to allege that Cash Station either misrepresented its security or concealed knowledge of specific dangers unknown to consumers.

Similarly, the court found that Cash Station had not violated the Illinois Uniform Deceptive Trade Practices Act (the "Act"). It stated that an action under the Act could be sustained only if Popp alleged facts that indicated cardholders were "likely to be damaged" in the future. The court found Popp's statement that Cash Station's conduct created "a likelihood of confusion" merely conclusory because she failed to state facts regarding how Cash Station failed to provide security systems or to disclose that the risks involved may have contributed to the confusion. Furthermore, the court emphasized that Popp's knowledge of the security risks and of Cash Station's alleged non-disclosure precluded any possibility of confusion.

Breach of Implied Warranty Argument Also Rejected

The court similarly affirmed the lower court's dismissal of Popp's

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breach of implied warranty claim. It noted that under Illinois law, failure to attach a copy of the contract from which the warranty arises, or an affidavit stating that a copy is unobtainable, warrants dismissal of the argument. Thus, the court concluded that although a written contract between the parties could have formed the basis of a warranty, Popp's failure to attach the appropriate documents justified dismissal of this claim.

Court Finds No Antitrust Violation

The court also rejected Popp's claim that Cash Station's merger with Money Network violated the Illinois antitrust laws. The court emphasized that a monopoly is not per se illegal and that only the use of anti-competitive means to achieve or maintain a monopoly violates the antitrust laws. Thus, Popp could recover only if she established that Cash Station engaged in some type of prohibited anti-competitive conduct, which consequently caused economic injury. The court found that Popp failed to allege that Cash Station possessed monopoly power to control prices or to exclude competition. Instead, Popp only alleged that, but for the merger, there would be competition between providers of ATM services which could induce one or more competitors to provide ATM security systems. The court concluded that Popp's complaint lacked specific facts required for a claim under the Illinois antitrust laws. Furthermore, the court stated that since Popp's fear of criminal attack was not an economic injury, an antitrust claim is inapplicable. ♦

— *Bina Sanghavi*

Texas Law Permits Fraud Claims Against Corporate Agents as Individuals

In *Walker v. F.D.I.C.*, 970 F.2d 114

(5th Cir. 1992), the Fifth Circuit Court of Appeals held that under Texas law, corporate officers are individually liable for their own deceptive and fraudulent representations, even if they acted within the scope of corporate authority. Furthermore, the court held that the Texas Deceptive Trade Practice-Consumer Protection Act, Tex. Bus. & Comm. Code Ann. sec. 17.41 et seq. (Vernon 1987), applies to loans if used to purchase specific items.

The Quid Pro Quo

In October 1982, real estate developers Ted Walker and James Brunson (the "Developers") contacted defendant Ron Bearden, a Mainland Savings Association ("Mainland") officer and director. The Developers offered to sell the International Energy Center building (the "IEC Building") to Mainland. Months of negotiations ensued, during which the parties discussed a \$21 million project development loan to the Developers. The Developers contended that Mainland offered the loan, along with \$1 million, in exchange for the IEC Building. However, the parties never executed a written loan agreement.

On August 8, 1983, the Developers exchanged the IEC Building and surrounding property with Mainland for \$1 million in cash and the alleged \$21 million loan. Mainland's attorney, drafted the exchange agreement.

Mainland, however, never issued the loan to the Developers. Consequently, they sued Mainland and two of its directors, Bearden and Hill, in Texas state court, claiming that Mainland failed to provide a \$21 million dollar loan in return for the sale of the IEC Building.

A legal morass ensued involving two connected suits and Mainland's insolvency. Mainland's insolvency brought in federal agencies as parties and the consolidated suits went back and forth between state and federal court. At the point of this appeal, the only remaining defendants were Bearden and Hill as individuals. A

Texas state court had entered a judgment in favor of Bearden and Hill stating that they could not be personally liable for the alleged acts unless they performed or made fraudulent representations outside the scope of their employment. The Developers appealed, and a federal district court affirmed the decision. The Developers appealed a second time.

Agents May be Personally Liable

On appeal, the developers contended that Bearden and Hill reneged on their promise of a \$21 million loan. The Developers charged that Bearden and Hill were liable for fraud, conspiracy, and on an estoppel theory. Additionally, the Developers claimed that Bearden and Hill violated the Deceptive Trade Practice-Consumer Protection Act (the "Act"). In response, Bearden and Hill asserted that corporate agents cannot be personally liable for acts committed within the scope of employment, and therefore, the court should dismiss the suit.

The Fifth Circuit rejected Bearden and Hill's argument. Instead, it found that under Texas law, corporate officers could be held individually liable for deception and fraud, even if it is committed within the scope of their corporate authority. The court based its decision on a Texas Supreme Court ruling, which held that under the Act, a corporate agent may be held personally liable for oral or written promises made by them, even if made within the scope of employment. The appellate court reversed, and a jury is set to decide this claim at trial.

Fraud Claim Against Bearden Reversed

The appellate court next addressed the claim of fraud against Bearden. It stated that, although Bearden submitted evidence that he did not make material misrepresentations, the Developers rebutted this evidence with sufficient proof to create an issue of material fact as to fraud. Consequently, the court held that there was sufficient