Violent Crime at ATMs

*By David E. Teitelbaum**

INTRODUCTION

The courts in 1992-93 have produced three noteworthy reported decisions addressing the potential liability of financial institutions and automated teller machine (ATM) networks for crimes perpetrated at ATMs. While two of the rulings are favorable to the banking industry, the third raises issues for ATM networks. State and local governments also have been active in considering, and occasionally adopting, legislation to set mandatory ATM safety standards.[1] This Article, however, will focus only on the judicial developments.

NETWORK LIABILITY

In the first case involving network liability, *Popp v. Cash Station, Inc.*,[2] a "consumer" class action was brought against Cash Station, Inc. (Cash Station), the operator of a midwest ATM network, and its member banks. Plaintiffs sought an injunction to require: (i) that Cash Station ATMs provide means of signalling for help; (ii) that the defendants implement "minimum reasonable personal security protection systems," including installation of silent alarms and/or cameras; and (iii) that the defendants notify their customers of such security devices or lack thereof.[3] In essence, the plaintiffs sought to obtain broad-based, legislative-type relief regulating ATM safety standards. Therefore, rather than address specific criminal conduct, plaintiffs were forced to base their case on extremely generalized allegations of potential criminal activity at hundreds of remote ATM locations.[4]

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1. *See, e.g.*, 10 N.Y. CITY ADMIN. CODE § 10-160 (McKinney Supp. 1993); GA. CODE ANN. tit. 7, ch. 8 (Supp. 1993). *See also* David Teitelbaum, *Violent Crime at ATMs*, 45 BUS. LAW. 1967 (1990).

2. 613 N.E.2d 1150 (Ill. App. Ct. 1992).

3. *Id.* at 1152. The prior history of this case was discussed in Teitelbaum, *supra* note 1, at 1971.

4. *Popp*, 613 N.E.2d at 1153.

The trial court dismissed the action for failure to state a claim and plaintiffs appealed.[5] The Illinois Appellate Court ruled against the plaintiffs, holding that "[g]eneralized allegations of crime will not suffice to establish that future criminal attacks are foreseeable."[6] Similarly, the plaintiffs' status as invitees on the defendants' property did not create a duty to protect the plaintiffs from criminal acts, because the defendants had no greater knowledge of the generalized criminal danger alleged than did the plaintiffs.[7]

Finally, the court noted that the determination whether to impose a duty " 'is ultimately a question of fairness' " which must involve " 'a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution.' "[8] Given the nature of the issues raised by the plaintiffs and the relief sought, the court concluded that a legislative, rather than a judicial, body would be the appropriate forum to weigh the plaintiffs' public policy claims.[9] ATM networks and banks must be cautioned, however, that the fact that the *Popp* court summarily rejected the plaintiffs' overreaching claims is not necessarily indicative of the treatment that would be given to particularized allegations of foreseeable criminal activity at a specific ATM.

Indeed, the second reported decision in 1992-93 regarding network liability arose in just such a context. In *Bunn v. Meridian Bankcorp,*[10] the plaintiff, whose son was shot to death after using an ATM, brought a claim against Meridian Bankcorp, Inc. (Meridian), which owned and operated the ATM, and against CoreStates Financial Corp. (CoreStates), which owned the MAC ATM network (MAC),[11] the primary ATM network in which Meridian participated.[12] Ruling on motions for summary judgment, the district court broadly stated that "[g]enerally, there is no duty of care to prevent harm caused by even foreseeable criminal acts of third parties."[13] Furthermore, the court found that CoreStates had no duty to provide security to ATM users.[14] Consequently, the court concluded there was no

5. *Id.* at 1152.

6. *Id.* at 1153.

7. *Id.* at 1154.

8. *Id.* at 1155 (quoting Bence v. Crawford Sav. & Loan Ass'n, 400 N.E.2d 39, 42 (Ill. App. Ct. 1980) (quoting Goldberg v. Housing Auth., 186 A.2d 291, 293 (N.J. 1962)). The court also ruled for the defendant on counts grounded in the Illinois Consumer Fraud Act, ILL. REV. STAT. ch. 121 1/2, paras. 261-272 (1989), the Illinois Uniform Deceptive Trade Practices Act, *id.* ch. 121, paras. 312(5), 312(12), and the tort law of implied warranty. *Popp*, 613 N.E.2d at 1156-58.

9. *Popp*, 613 N.E.2d at 1155.

10. No. CIV. A. 92-0948, 1993 WL 259434 (E.D. Pa. July 7, 1993).

11. CoreStates since has transferred its ownership of MAC to Electronic Payment Systems, Inc., a joint venture with several other financial institutions.

12. *Bunn*, 1993 WL 259434 at *1.

13. *Id.* at *2.

14. *Id.*

basis for a direct claim against CoreStates as the operator of the MAC network.[15]

The plaintiff also alleged, however, that CoreStates was vicariously liable for the conduct of Meridian because of an actual, implied, or apparent agency relationship between the two parties.[16] While the court found no evidence of an actual or implied agency relationship, it concluded:

> Plaintiff has adduced evidence from which a reasonable jury might find that CoreStates created an appearance of ownership or control at MAC ATMs in a manner designed to attract public patronage. It mandated that its logo be used at all MAC ATMs, and advertised and promoted the use of MAC ATMs.[17]

The court did not address, however, whether there were any factual issues related to the liability of Meridian as agent. Although the issue of Meridian's liability was not directly before the court, this complete omission is somewhat odd, given that any potential liability of CoreStates as principal would hinge on the liability of Meridian as apparent agent, and that the court earlier emphasized the general rule that there is no duty of care to prevent harm caused by even foreseeable acts of third parties in Pennsylvania.[18] Thus, while networks should certainly consider the apparent agency issues raised by the *Bunn* decision, it remains to be seen what the actual import of the case will be for ultimate network liability.

FINANCIAL INSTITUTION LIABILITY

Finally, in *Page v. American National Bank & Trust Co.*,[19] the Tennessee appellate court reaffirmed the extremely narrow test of foreseeability as applied to ATM crime. In that case, JoKatherine Page and her fourteen-year-old son, who together were assaulted and robbed at an American National Bank & Trust Co. (Bank) ATM, sued the Bank as the ATM owner and operator for negligent failure to implement various safety precautions at the ATM.[20] Although the trial court entered a jury verdict in favor of the plaintiffs, the Tennessee appellate court reversed, holding that "the sudden intentional criminal acts of the unidentified assailants, which could not have been prevented or deterred by the exercise of reasonable care by the Bank, was the sole proximate cause of harm."[21]

15. *Id.*
16. *Id.* at *3.
17. *Id.*
18. *Id.* at *2.
19. 850 S.W.2d 133 (Tenn. Ct. App. 1991).
20. *Id.* at 134.
21. *Id.* at 140.

In so ruling, the court reaffirmed its adherence to the rule in *Cornpropst v. Sloan*[22] that there is

> no duty . . . upon merchants and shopkeepers generally, whose mode of operation of their premises does not attract or provide a climate for crime, to guard against the criminal acts of a third party, unless they know or have reason to know that acts are occurring or about to occur on the premises that pose imminent probability of harm to an invitee.[23]

The court concluded that this standard was not met despite evidence that (i) five similar crimes were committed at the same ATM over the preceding four years, (ii) a victim of one such crime specifically notified bank management of the danger posed by the ATM, (iii) the area adjacent to the ATM provided a hiding place for thieves, (iv) the ATM was in a location that was not visible from main areas of traffic, (v) the area around the ATM was not well lit, and (vi) the ATM was located in a high crime neighborhood.[24] Thus, Tennessee remains firmly entrenched as a leading jurisdiction in strictly limiting the extent to which criminal acts of third parties may, if ever, be deemed sufficiently foreseeable to impose liability on an ATM operator.

22. 528 S.W.2d 188 (Tenn. 1975). For a discussion of the *Cornpropst* case, see David E. Teitelbaum, *Violent Crime at ATMs*, 44 BUS. LAW. 1145, 1147 (1989).

23. *Page*, 850 S.W.2d at 137.

24. *Id.* at 138. The court also rejected plaintiffs' claim that certain provisions of the Code of Federal Regulations requiring specific safety features to protect an ATM created a duty to protect the plaintiffs. *Id.* at 139-40.