

## BONUS SECTION G

### ILLINOIS APPELLATE COURT AFFIRMS LOWER COURT DISMISSAL OF CLASS ACTION SUIT ALLEGING NEGLIGENT SECURITY AT CASH STATION ATMS.

Cecilia E. Popp, for herself and for all others similarly situated, Plaintiff-Appellant,

v.

CASH STATION, INC., and Bank Participants, whose names are unknown but may be designated as Defendant Banks, A, B, ... ZZ, Defendants-Appellees.

No. 1-90-0321.

Appellate Court of Illinois,  
First District.

Dec. 4, 1992.

GORDON

\*1 In this consumer class action, plaintiff seeks to enjoin the operation of defendants' automated teller machine (ATM) network due to defendants' failure to provide even minimum reasonable personal security systems for the protection of its cardholders from third party criminal attacks, or alternatively, to require defendants to provide such security systems. Plaintiff appeals from the dismissal, pursuant to section 2-615 (Ill. Rev. Stat. 1989, ch. 110, par. 2-615), of her first amended complaint for failure to state a cause of action. We affirm the trial courts' decision.

Defendant Cash Station, Inc. is an Illinois not-for-profit corporation, which in conjunction with defendant banks, operates a network of ATM's throughout Cook County and nationwide. Plaintiff is the holder of a Cash Station card issued by the bank with which she has an account.

The Cash Station network offers customers, such as plaintiff, access to cash and other services from their existing bank accounts through ATMs at thousands of locations. Many of the ATMs are located in unsupervised locations, outside the perimeter of open businesses, and are operational outside of normal business hours. Through its advertising, Cash Station encourages customers the engage in transactions at the ATMs twenty-four hours a day, 7 days a week.

Defendants do not provide personal security systems such as silent call systems triggered by special buttons or a combination of buttons to alert police, or cameras to record persons near the machines at the remote location, nor is access to the machines always limited to persons possessing valid ATM cards. There have been numerous well documented cases of third-party criminal attacks on ATM customers, both in the Chicago area and nationwide.

Several years ago, Cash Station merged with another provider of ATM services in the Chicago area, Money Network. As a result of this merger, Cash Station now holds a virtual monopoly on cash access systems in the Chicagoland area, and consumers such as the plaintiff have no adequate alternative means of gaining remote access to their bank accounts.

As a result of defendants' failure to provide minimum personal security systems or to disclose that such security systems are not available, plaintiff and the class she purports to represent have suffered substantial damages. These include being "subjected to unreasonable, repeated, and continuing risk of injury from third party attack, both when they use their ATM cards and when they merely have them in their possession, whether on their person or otherwise." Plaintiff's complaint also contends that plaintiffs are damaged in being prevented from obtaining remote cash access services from other providers who could provide reasonable levels of security. Plaintiffs are also damaged in that they "are confused and subjected to unreasonable psychological stress in possessing and using their ATM cards."

In count I of her complaint, plaintiff alleges that the defendants have violated the Illinois Consumer Fraud Act (Ill.Rev.Stat.1989, ch. 121 1/2, par. 262) by marketing and selling cash card services without providing minimal personal security protection, by failing to disclose the inherent risks in the use or possession of an ATM card.

(brackets added by Editor)

\*2 Count II, brought under the Illinois Uniform Deceptive Trade Practices Act (Ill.Rev.Stat.1989, ch. 121 1/2, par. 311 et. seq.), alleges that defendants' marketing of Cash Station cards without the disclosure that minimum personal security is not provided "creates a likelihood of confusion and misunderstanding for Plaintiff in possession and/or using their Cash Station cards, which threatens their personal security."

Count III alleges that plaintiffs are business invitees of the defendants, and that, as a result, defendants owe plaintiffs a duty to maintain their premises in a reasonably safe condition to protect patrons from third-party criminal attack. Plaintiff alleges that defendants have breached this duty by failing to provide minimum reasonable personal security for users of Cash Station machines.

In Count IV, plaintiffs allege that they have agreements with the defendants under which defendants have impliedly warranted that they provide minimum personal security protection from foreseeable third-party attacks. This implied warranty has allegedly been breached by defendants' failure to provide such security.

Finally, Count V alleges that the merger between Cash Station and its only significant Chicago competitor, Money Network, eliminated the competition for consumer safety systems in the Chicago area, and produced a monopoly in remote access to accounts at the participating banks. Plaintiffs allege that this action constitutes an unreasonable restraint of trade under federal and Illinois antitrust laws. Ill.Rev.Stat.1989, ch. 38, par. 60 et. seq.

As relief for all the above counts, plaintiff seeks preliminary and permanent injunctions. Plaintiff seeks to enjoin the defendants from operating ATM terminals outside the perimeter of an open business during hours outside usual business hours; and also make a mandatory injunction requiring defendants to implement minimum reasonable personal security protection systems, including silent alarms and/or cameras and to notify consumers of the implementation of or lack of such personal security provisions.

Cash Station moved to dismiss plaintiff's first amended complaint under section 2-615 for failure to state a cause of action. After full briefing and argument, the trial court granted the defendant's motion and dismissed with prejudice, finding that plaintiff had failed to allege facts which gave rise to a duty on the part of defendants either to protect plaintiff from third-party criminal attack or to disclose that no security systems were provided. The court also found that, in regard to counts IV and V, which pled breach of an implied warranty and violation of the antitrust laws, plaintiff had failed to plead sufficient facts to state causes of action. Plaintiff filed a timely notice of appeal.

#### OPINION

On appeal, plaintiff first contends that the trial court erred in finding that the facts alleged fail to show that Cash Station owed a duty of reasonable protection to its cardholders. Plaintiff urges that a business owner who has notice of prior criminal attacks occurring on his property has a duty to protect its customers, business invitees, from such attacks. Plaintiff argues that Cash Station is aware of previous criminal attacks involving ATMs, that future third-party criminal attacks are foreseeable and therefore Cash Station has a duty to take reasonable protective measures.

\*3 As a general rule, "there is no duty on a landowner to protect others from criminal attacks by third persons on his property." (Rowe v. State Bank of Lombard (1988), 125 Ill.2d 203, 215, 531 N.E.2d 1358; see also Figueroa v. Evangelical Covenant Church (7th Cir.1989), 879 F.2d 1427; N.W. v. Amalgamated Trust & Savings Bank (1990), 196 Ill.App.3d 1066, 1071, 554 N.E.2d 629; Petrauskas v. Wexenthaler Realty Management (1989), 186 Ill.App.3d 820, 542 N.E.2d 902.) However, when there exists a special relationship between the parties, such as business invitor and invitee, the law may impose a duty to protect from reasonably foreseeable criminal activity. Rowe, 125 Ill.2d at 216; N.W., 196 Ill.App.3d at 1071; Figueroa, 879 F.2d at 1430.

In determining whether a duty exists, reasonable foreseeability of harm is the primary concern. (Petrauskas, 186 Ill.App.3d at 825; N.W., 196 Ill.App.3d at 1071.) Generalized allegations of crime will not suffice to establish that future criminal attacks are foreseeable. Compare Petrauskas (allegations that building was in "high crime area" and that person had been shot "across the street" from building found insufficient to make criminal attack foreseeable) with Duncavage v.

