MISCELLANEOUS

TELEPHONE CONSUMER PROTECTION ACT CLASS PLAINTIFFS DO NOT NEED TO SHOW RECEIPT OF JUNK FAXES

Critchfield Physical Therapy v. The Taranto Group, Inc., 263 P. 3d 767 (Kan. 2011).

FACTS: Defendant Taranto Group distributed and resold aesthetic medical devices. Taranto contracted with two outside vendors to send advertising faxes. Taranto did not own or review the databases and transmission logs used by one of the vendors. It provided the database used by the other, but did not possess or review the transmission logs. It was estimated at least 5,000 transmissions were made in violation of the Telephone Consumer Protection Act ("TCPA"). At some point the list of intended recipients was lost, and many of the plaintiffs threw away the faxes. After an individual and representative of similarly situated persons brought an action seeking damages and injunctive relief under the TCPA, Critchfield Physical Therapy filed a petition seeking to intervene as an additional class representative. Critchfield was then substituted as the sole individual plaintiff and as the representative of the proposed class. The district court issued an order certifying the proposed class, and in amended order, certified the order for interlocutory appeal. The Court of Appeals granted Taranto's application for permission to take an interlocutory appeal, and the Kansas Supreme Court granted Taranto's motion to transfer.

The TCPA is a federal response to the ever-increasing access through electronic means that advertisers have to contact consumers.

HOLDING: Affirmed.

REASONING: The TCPA is a federal response to the ever-increasing access through electronic means that advertisers have to contact consumers. It was specifically amended in 2005 to prohibit junk faxes. Taranto argued that the class should not have been certified, in part because the class lacked a common interest in that "it cannot be shown that the persons listed in the databases received the fax transmissions." Additionally, Taranto lost or destroyed the list of intended fax recipients and argued that most of the plaintiffs would not have kept the faxes they received. Taranto urged that the plaintiffs should have to prove that they actually received the faxes, and that no prior relationship existed.

The court looked to the plain language of the statute to discern the legislature's intent in creating the TCPA. The court found that the statute specifically prohibits the use of devices to "send" advertisements. The court stated that the statute creates no requirement that a transmission be received and reasoned that the legislature clearly expressed the intent to prohibit "sending" with no requirement that the plaintiff receive the fax. Although some plaintiffs may not have actually received the fax transmissions, the plaintiffs' entitlement to damages was still valid because harm may extend to intended recipients if, for instance they were so harassed that they turned off their fax machines. This was consistent with a similar interpretation was of the word "call" to include attempts to make calls. See *Lozano v. Twentieth Century Fox Film Corp.*, 702 F.Supp.2d 999, 1007 (N.D. Ill. 2010). The court concluded it was not necessary that a plaintiff demonstrate that a fax transmission was received by the plaintiff. It suffices that a plaintiff demonstrates that a fax transmission was unlawfully sent by the defendant. Furthermore, it was not a requirement for class certification that the plaintiff prove the identity of each class member or that they are entitled to damages.

STATE LAW DETERMINES THE STATUTE OF LIMITATIONS FOR A VIOLATION OF THE TELEPHONE CONSUMER PROTECTION ACT

Giovanniello v. ALM Media, LLC, 660 F.3d 587 (2nd Cir. 2011).

FACTS: In early 2004, Giovanniello reportedly received an unsolicited facsimile advertisement on his home machine in Connecticut from ALM, located in New York. More than five years after he received the fax, Giovanniello filed a class action suit against ALM Media, LLC, alleging violations of the Telephone Consumer Protection Act ("TCPA") for unsolicited fax advertisements. The TCPA prohibits use of any telephone facsimile machine to send unsolicited advertisements, and allows recovery of statutory damages in state court "if otherwise permitted" by the laws of that state. Giovanniello also invoked diversity jurisdiction to file the class action in the United States District Court for the District of Connecticut. ALM moved to dismiss the complaint due to the fact that it had been made in an untimely fashion under Connecticut law, the filing limitations of which had been incorporated by the TCPA. The district court granted ALM's dismissal motion, noting that the action was also barred by timing under the four year federal statute of limitations. However, the district court did not address whether the state or federal statute of limitations were applicable to the situation. Giovanniello appealed.

HOLDING: Affirmed.

REASONING: The court considered whether a state statute of limitations is included in "otherwise permitted" language of the TCPA, or whether the appropriate limitations period is the federal catchall limitations period. The court first recognized that although the TCPA does not expressly assign a statute of limitations for private causes of action, the "otherwise permitted" language in the statute clearly requires adherence to state laws. This reflects obvious intent from Congress that states have control over problems addressed by the TCPA. *Holster v. Gatco, Inc.*, 618 F.3d 218 (2nd Cir. 2010). The court reasoned that the purpose behind allocation of power was to prevent an evasion from jurisdictional coverage through interstate communications. Claims that are no longer permissible under a state statute of limitations cannot continue under the TCPA, regardless of the federal catchall statute of limitations. The court found that Connecticut law unquestionably applied because of Giovanniello's receipt of the facsimile in Connecticut. Additionally, this action under the TCPA is "otherwise permitted" under Connecticut law, which also recognizes a cause of action for the unlawful use of a facsimile machine to

transmit unsolicited advertising material. The court concluded that because the complaint was "otherwise permitted," it must have been filed in accordance with the Connecticut state limitations period, not the federal catchall statute of limitations. Having failed to meet these requirements, Giovanniello's claim was properly dismissed.

AUTOMATED CALL IN RESPONSE TO ADVERTISEMENT DID NOT VIOLATE TELEPHONE CONSUMER PROTECTION ACT

Mey v. Pep Boys, ____ S.E.2d ____ (W. Va. 2011).

FACTS: The plaintiff's son, who lived with the plaintiff, listed a used car for sale on Craigslist.com. He provided their home telephone number for interested parties to contact him. The plaintiff subsequently received an automated recorded telephone call that indicated a cash offer would be made for the car listed if the seller went to a named website and provided information about the vehicle. It further indicated that if the seller accepted the offer, the car was to be dropped off at the nearest participating Pep Boys in exchange for a check. As a result of the call, the plaintiff filed a class action complaint seeking damages and an injunction against three defendants under the Telephone Consumer Protection Act ("TCPA"). In response to the complaint, the defendants filed a motion to dismiss. The circuit court granted the motion after it concluded that the message did not constitute an advertisement subject to enforcement under the TCPA.
HOLDING: Affirmed
REASONING: The TCPA prohibits "any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(B) (2010). There are limited exceptions, such as when calls do not include the transmission of any unsolicited advertisement. 47 U.S.C. §227(b)(2)(B) (2010). The court found "unsolicited advertisement" to be "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior or express invitation or permission in writing or otherwise."

The court found the automated call in question to not be an unsolicited advertisement. It agreed with the circuit court's reasoning that when an individual responds to a classified advertisement and conveys interest in purchasing the product offered that a response does not constitute an unsolicited advertisement. The court reasoned that the classified advertisement did not contain any limiting instructions on how a third party was to contact the plaintiff's son, and that by posting the advertisement and telephone number on the internet, he expressly invited third parties to make inquiries about the car. The court noted that the legislative history of the TCPA states that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instruction to the contrary."

The plaintiff argued the automated message was not an offer to purchase the car, but rather a solicitation to entice the plaintiff into a marketing scheme intended to generate inspection and car repairs. However, the court rejected this argument and found that the telephone call was initiated for the purpose of communicating the defendants' interest in making a *bona fide* offer to engage in negotiations that might result in a *bona fide* offer for the car advertised. The fact that the defendants could have received a fee for the inspection was irrelevant. The court concluded that it would be unusual for a party responding to a classified advertisement for a used car to extend an offer without first inspecting it, and that the fee would not change the purpose of the initial call.

A telephone response to a classified advertisement is not a violation of the Act as long as the purpose of the call is to inquire about or offer to purchase the advertised product.

The court held that under the TCPA a telephone response to a classified advertisement is not a violation of the Act as long as the purpose of the call is to inquire about or offer to purchase the advertised product or service, rather than to encourage the purchase, rent, or investment in property, goods or services.

BUSINESS CANNOT SUE BETTER BUSINESS BUREAU OVER UNFAVORABLE RATING

Castle Rock Remodeling, LLC v. Better Business Bureau of Greater St. Louis, Inc. ____S.W.3d____ (Mo. Ct. App. E.D. 2011).

FACTS: Castle Rock Remodeling ("Castle Rock") filed a petition against the Better Business Bureau ("BBB") alleging defamation and tortious interference with business expectancy. Castle Rock asserted that the rating given to it by BBB states or implies that Castle Rock: (a) is a generally unreliable firm which has recently lost its accreditation with BBB; (b) has numerous complaints filed against it, and has not responded in a timely manner or has demonstrated bad faith in an effort to resolve the complaints; (c) has failed to resolve the underlying cause or causes of the pattern of complaints, and; (d) regularly engages in deceptive advertising and only changes its policies when admonished by BBB. Castle Rock claimed that BBB's "C" rating, statements regarding seventeen complaints, BBB's concerns over Castle Rock's advertising, and the expiration of Castle Rock's BBB accreditation had a negative impact on Castle Rock's business. Castle Rock also sought declaratory judgment requiring BBB to give it an "A" rating and BBB accreditation. The trial court granted BBB's motion to dismiss for failure to state a claim upon which relief can be granted.
HOLDING: Affirmed.
REASONING: Castle Rock argued that the trial court erred in granting the motion to dismiss because the petition stated a cause of action for defamation, and because BBB's representations were either statements of fact or were actionable statements of opinion which necessarily imply the existence of undisclosed defamatory facts. The court found that several of the factual statements were not defamatory when stripped of the pleaded innuendo and read in their most innocent sense. Furthermore, even if some of the factual statements were defamatory, the statements were true, and the defamation element of falsity was not met. The court concluded that the factual statements in the BBB report were either capable of non-defamatory meaning or true, and, therefore, found the statements non-actionable as a matter of law.

As to the "C" rating, assuming it was capable of a defamatory meaning, the court inquired if one or more privileges would shelter the defendant from legal action. Such privileges primarily arise from various protections offered by the First Amendment to the U.S. Constitution. They include the absolute privilege accorded statements of opinion, which even if made maliciously or insincerely, do not give rise to a libel cause of action. However, the privilege does not apply when the statement of opinion implies the existence of undisclosed defamatory facts. The test to be applied to determine if a statement is opinion is whether a reasonable factfinder could conclude that the statement implies an assertion of objective fact. The court looked to whether the "C" rating could reasonably have been interpreted as stating actual facts about Castle Rock, capable of being proven true or false. Generally, claims for defamation based upon ratings or grades fail because a rating or a grade cannot be objectively verified as true or false and thus, are opinion accorded absolute privilege.

The court relied on *Browne v. AVVO, Inc.* to determine whether BBB's statements could reasonably be interpreted as stating actual facts. 525 F. Supp. 2d 1249 (W.D. Wash. 2007). In *Browne* the court noted the defendants' website stated that the underlying data was weighted based on the defendant's subjective opinions regarding the relative importance of various attributes. Even though the defendant's rating relied on objectively verifiable data, the interpretation of that data was ultimately a subjective assessment and not objectively verifiable. That court concluded that neither the nature of the information or the language used "would lead a reasonable person to believe that the ratings are a statement of actual fact." As in Browne, BBB's rating system relies on objective and subjective components, and BBB's weighting of the objective data. The report was clear that the impression of the rating was opinion and that "BBB's rating of a business reflects the BBB's opinion about the business" and BBB's judgment. It was clear to the court that the BBB rating was based on "an evaluating process" and "subjective opinion." Thus, neither the nature of the information provided nor the language used on BBB's website would lead a reasonable person to believe that the rating was a statement of actual fact. Additionally, the "C" rating was not sufficiently factual to be susceptible of being proved true or false. Even though Castle Rock may have disagreed with the BBB's evaluations of the facts underlying the rating, the rating itself could not be proved true or false. Therefore, the rating was protected as opinion under the First Amendment, and no suit may be brought. The court concluded that none of the asserted factual statements or the rating was actionable as defamation.

That court concluded that neither the nature of the information or the language used "would lead a reasonable person to believe that the ratings are a statement of actual fact."

Castle Rock also contended that the trial court erred because its petition stated a cause of action in that BBB did not act in good faith in its dealings with and evaluation of Castle Rock. It argued that BBB's ratings should only be given a qualified or conditional privilege allowing Castle Rock to prove malice or bad faith on the part of BBB. However, the court found that a qualified privilege only applies to factual statements that are false. It exists where a plaintiff is required to prove actual malice, i.e., knowledge of the falsity or publication of false statements while having serious doubts about their truth. Because the only factual statements in Castle Rock's pleadings were either not defamatory or true and the allegation regarding the "C" rating was opinion protected by the First Amendment, the qualified privilege was not at issue and the trial court did not err in dismissing Castle Rock's libel claim.

LAW FIRM CANNOT SUE BANK OVER COUNTERFEIT CHECK

Greenberg, Trager & Herbst, LLP v. HSBC Bank USA, ____ N.E.2d ____ (N.Y. 2011).

FACTS: Law firm Greenberg, Trager & Herbst ("GTH") received a Citibank check for $197,500 from a new foreign client intended to cover the cost of its $10,000 retainer, with the excess to be wired back to the client. On September 21, 2007, GTH deposited the check into its attorney trust account at HSBC bank. The check was then sent to Citibank for processing the following business day, September 24, 2007. The routing number on the check was not one of the acceptable numbers for the Citibank branch to which the check was sent. Upon visual inspection of the check by a Citibank employee, the check was sent back with the notation "sent wrong." HSBC corrected the routing number and subsequently submitted the check to a different Citibank branch on September 26, 2007.

While the check was being processed, HSBC had provisionally credited GTH's account with the funds. Unaware of any delay, on September 27, 2007, GTH contacted HSBC to determine if the check had "cleared." Upon oral confirmation over the telephone that the check had "cleared," GTH proceeded to wire $187,500 from its account to its supposed client on September 28, 2007. Four days after the wire transfer, on October 2, 2007, Citibank notified HSBC that the check was being "dishonored" as a suspected counterfeit. HSBC notified GTH that the check had been dishonored, revoked its provisional settlement, and charged back the account in the amount of the dishonored check.

GTH sued both HSBC and Citibank. GTH brought suit against HSBC for negligence, and negligent misrepresentation — specifically for HSBC's failure to inform GTH of the check's initial return on September 25, 2007, and for informing GTH over the phone that the funds had "cleared." In addition, GTH alleged Citibank was negligent in failing to identify the check as counterfeit when it was initially presented to its processing facility on September 24, 2007.

The trial court granted summary judgment to both banks. The Appellate Division affirmed the dismissal, holding that HSBC had no duty to inform GTH of the returned check prior to it being formally dishonored on October 2, 2007, HSBC's representation that the check had "cleared" did not give rise to a negligent misrepresentation action where there was no fiduciary relationship, and GTH was in the best position to guard against the risk of a counterfeit check by knowing its client. Additionally, the court held that the personnel at Citibank were not in a position to discern whether the check was counterfeit and had

no duty to inform HSBC at the time it was originally presented for examination on September 24, 2007. GTH appealed the decision to New York's highest court.

HOLDING: Affirmed.

REASONING: The court began its analysis by examining the manner in which banks process checks and the applicable legal guidelines. The court found that such transactions are governed by the Uniform Commercial Code ("UCC"), which requires a bank use ordinary care in presenting a check or sending a check for presentment, sending notice of dishonor or non-payment or returning a check, and settling a check when the collecting bank receives final settlement from the payor bank. The UCC sets a deadline of midnight on the next banking day for a collecting bank to take the above actions regarding a check from a depositor. The bank found that in this case, after GTH deposited the check at HSBC on Friday, September 21, 2007, HSBC sent the check for presentation on Monday, September 25, which was within its deadline of midnight on the next business day. Citibank returned the check as "sent wrong" within its midnight deadline on September 25, 2007. HSBC then also acted within its midnight deadline by repairing the routing number on the check and sending it to the proper bank on September 26, 2007.

Because GTH was not a customer of Citibank (the payor bank), the court concluded the only duty owed to GTH was to either pay, return, or dishonor the check in compliance with UCC 4-301 and 4-302. The court determined that summary judgment for Citibank was proper because there was no question that Citibank met its obligation by returning the check within the appropriate deadline.

Regarding GTH's first claim against HSBC, that it negligently informed GTH that the check had "cleared" and that the funds were available for transfer, the court held that liability for negligent misrepresentation of this type has only been imposed on persons who possessed something close to the level of a fiduciary relationship. *Kimmell v. Shaefer*, 89 N.Y.2d 257 (1996). GTH argued that HSBC was its agent due to their long-term relationship, in addition to UCC 4-201, which provides that before a settlement by a collecting bank becomes final, that bank is an agent of the owner of the item. The court noted that this provision does not impose a fiduciary duty on a collecting bank. The court stated that the term "agent" means that the item and any inherent risk in that item remains with the depositor and not the collecting bank. *Hanna v. First Natl. Bank of Rochester*, 87 N.Y.2d 107 (1995). HSBC disputed the existence of a fiduciary relationship. HSBC also argued that GTH had expressly waived its claims by contract. The contract between GTH and HSBC provided that GTH waived any claim against the bank arising out of representations made by the bank regarding balance information. The court found that GTH's relationship with HSBC was as a depositor and that it was insufficient to sustain a negligent misrepresentation cause of action.

There was also considerable discussion about the ambiguity and meaning of the term "cleared" in banking; with the majority dismissing the notion that "cleared" had a definite meaning on par with final settlement. The UCC allocates the risk to the depositor until final settlement. UCC 4-213. Because the court understood that "cleared" could refer simply to the availability of funds and not to final settlement, and as there was no actual final settlement, any risk would have remained with GTH. Ultimately, the court ruled GTH's reliance on the word "cleared" as an assurance of final settlement was unreasonable as a matter of law.

GTH's action for negligence alleged that HSBC owed GTH a duty to inform it when the check was initially returned as "sent wrong" on September 25, 2007. GTH argued that this should have been treated the same as being dishonored and accordingly should have resulted in a charge back of the account. A collecting bank owes a depositor a duty of ordinary care. UCC 4-202. The court agreed with HSBC that it was consistent with ordinary care for a bank to process the check in the manner they did and to consider the return as an administrative return rather than a dishonor. Because an administrative return did not trigger the same notification and charge back mechanisms in place for a dishonor, it did not create a duty for HSBC to do so. There was evidence that these actions were in accordance with standard banking practices — even if the UCC did not explicitly provide for an administrative return, it was reasonable for HSBC to consider the check as still being processed rather than dishonored. GTH failed to allege any further facts suggesting the bank acted unreasonably — accordingly, its negligence claim failed.

Finally, as to GTH's claim that it should prevail under the theory of equitable estoppel, the court noted that the doctrine of equitable estoppel only applies when an innocent party suffers from the acts of a third person, in which case the party that enabled the third person must bear the loss. The court reasoned that neither Citibank nor HSBC breached any duty owed to GTH. The court disagreed with GTH's contention that the banks were in the best position to detect the counterfeit check. Instead, it found that GTH was in the best position to guard against the risk of a counterfeit check by knowing its "client."

CUSTOMERS CAN RECOVER COST OF MITIGATING DAMAGES FROM DATA THEFT

Anderson v. Hannaford Bros. Co., 659 F.3d 151 (1st Cir. 2011).

FACTS: Hannaford Brothers is a national grocery chain whose electronic payment processing system was breached by hackers on December 7, 2007. The hackers stole up to 4.2 million credit and debit card numbers, expiration dates, and security codes, but did not steal customer names. On February 27, 2008, Visa Inc. notified Hannaford that Hannaford's system had been breached. Hannaford discovered the means of access on March 8, 2008, contained the breach on March 10 and gave notice to relevant financial institutions on March 10, some of which immediately cancelled customers' debit and credit cards. On March 17, Hannaford publicly announced the breach and resulting theft of debit and credit card numbers belonging to individuals who had made purchases at more than 270 of its stores. It also announced it had received reports of approximately 1,800 cases of fraud resulting from the theft of those numbers. Some financial institutions did not cancel customer cards, asserting that they wished to wait for evidence of unauthorized activity before taking action. Customers who requested that their cards be cancelled were required to pay fees for replacements, and some customers purchased identity theft insurance and credit monitoring services to protect themselves against possible consequences of the breach.

Twenty-six separate suits against Hannaford were consolidated into one lawsuit in the District of Maine. The con-

solidated complaint alleged that at least fourteen of the named plaintiffs actually had unauthorized charges charged against their accounts. Seventeen of the named plaintiffs had their cards cancelled by the bank, and two named plaintiffs requested that their issuers give them replacement cards. Plaintiffs alleged seven causes of action and sought damages for unauthorized charges and fees paid to banks for cancellation, credit insurance, and replacement card costs.

Hannaford moved to dismiss. The district court granted the motion in part, and divided the remaining plaintiffs into three categories allow the implied contract, negligence, and Main Unfair Trade Practices Act ("MUTPA") claims to proceed. For these three surviving claims, the district court concluded that dismissal depended on whether the alleged injuries were cognizable under Maine law. It determined that the first category, composed of plaintiffs who did not have fraudulent charges posted to their accounts, could not recover because their claims for emotional distress were not cognizable under Maine law. The second category, composed of a single plaintiff whose fraudulent charges had not been reimbursed, could recover for actual financial losses. The third category, composed of plaintiffs whose fraudulent charges had been reimbursed, could not recover because their alleged consequential losses were "too remote, not reasonably foreseeable, and/or speculative (and under the MUTPA, not a 'substantial injury')." In particular, the claimed overdraft fees, loss of accumulated reward points, and loss of opportunities to earn reward points were not foreseeable at the time of sale. Further, the district court determined that there was no way to value or compensate the time and effort that consumers spent to reverse or protect against losses, and that there was no allegation to justify the claim for identity theft insurance since no personally identifying information was alleged to have been stolen. The district court determined that the third category of plaintiffs could not recover.

After its ruling, the district court certified two questions to the Maine Supreme Court, the first of which was: in the absence of physical harm or economic loss or identity theft, do time and effort alone, spent in a reasonable effort to avoid or remediate reasonably foreseeable harm, constitute a cognizable injury for which damages may be recovered under Maine law of negligence and/or implied contract? The Maine Supreme Judicial Court accepted the certification and answered the first question in the negative, agreeing with the district court that time and effort alone do not constitute a cognizable harm under Maine Law. The district court entered judgment in favor of Hannaford. Plaintiffs appealed the district court's decision.

HOLDING: Affirmed in part, reversed in part.

REASONING: The court agreed with the district court that the plaintiffs' claim under MUTPA failed, but not because the plaintiffs did not allege substantial loss. The court found that the plaintiffs had adequately alleged theories of negligence and breach of implied contract, but that adequate pleading did not guarantee whether the particular types of damages alleged were recoverable under those theories. The court grouped the plaintiffs' various claims of damages into two groups: mitigation costs and opportunity loss.

Under Maine law, damage must be both reasonably foreseeable, and, even if reasonably foreseeable, of the type which Maine has not barred for policy reasons. Although reasonable foreseeability "may set tolerable limits for most types of physical harm, it provides virtually no limit on liability for nonphysical harm." In such cases, Maine courts limit recovery by considering not only reasonable foreseeability, but also relevant policy considerations such as "societal expectations regarding behavior and individual responsibility in allocating risks and costs." *Alexander v. Mitchell,* 930 A.2d 1016, 1020 (Me. 2007). Maine courts have weighed these considerations in the context of mitigation costs and determined that a plaintiff may recover for costs and harms incurred during a reasonable effort to mitigate, regardless of whether the harm is nonphysical. The court has expressly said so both in its response to the certified questions and in its decision to apply the Restatement (Second) of Torts § 919, which provides that "[o]ne whose legally protected interests have been endangered by the tortious conduct of another is entitled to recover for expenditures reasonably made or harm suffered in a reasonable effort to avert the harm threatened." To recover mitigation damages, plaintiffs need only show that the efforts to mitigate were reasonable, and that those efforts constitute a legal injury, such as actual money lost, rather than time or effort expended.

Without any Maine law on the subject other than the decision on the plaintiff's certified question, the court turned to the decisions of other courts that applied §919 of the Restatement. The court found that other courts awarded mitigation costs even when it was not certain at the time that the costs were necessary, when mitigation costs were sought but other damages were unavailable, and when mitigation costs exceeded the amount of actual damages. The Seventh Circuit held that incidental costs expended in good faith to mitigate harm are recoverable — even if the costs turn out to exceed the savings. *Toledo Peoria & W. Ry. v. Metro Waste Sys., Inc.*, 59 F.3d 637 (7th Cir. 1995) ("[a]ny other result would effectively penalize [the plaintiff] for fulfilling its obligation under Illinois law to minimize its damages"). The Fourth Circuit has noted that plaintiffs should not face "a Hobson's choice" between allowing further damage to occur or mitigating the damage at their own expense. *Toll Bros., Inc. v. Dryvit Sys., Inc.*, 432 F.3d 564, 570 (4th Cir. 2005) (a plaintiff may recover the cost of its reasonable attempts to mitigate, even if the injury is "wholly financial" in nature).

The question became whether plaintiffs' mitigation steps were reasonable. The court noted this involved a large-scale criminal operation conducted over three months and the deliberate taking of credit and debit card information by sophisticated thieves. Unlike the cases cited by Hannaford, this case did not involve inadvertently misplaced or lost data which had not been accessed or misused by third parties. The court found that there was actual misuse as well has a real risk of misuse, not merely a hypothetical risk. Additionally, there was no suggestion that there was a way to predict whose accounts would be used to ring up improper charges. By the time Hannaford acknowledged the breach, there were over 1,800 fraudulent charges, and a reasonable expectation that many more would follow. Hannaford did not notify is customers of exactly what data, or whose data, was stolen. It reasonably appeared that all Hannaford customers who used credit or debit cards during the class period were at risk of unauthorized charges. The court also reasoned that the fact that many banks or issuers issued new cards was evidence of the reasonableness of replacement of cards as mitigation. Those banks thought the cards would be subject to unauthorized use, and can-

celled those cards to mitigate their own losses in what was a commercially reasonable judgment. That other financial institutions did not replace cards immediately did not make it unreasonable for cardholders to take steps to protect themselves.

The court found it was foreseeable that a customer, knowing that her credit or debit card data had been compromised and that thousands of fraudulent charges had resulted from the same security breach, would replace the card to mitigate against misuse of the card data. Similarly, it was foreseeable that a customer who had experienced unauthorized charges to her account would reasonably purchase insurance to protect against the consequences of data misuse. The court also concluded that the plaintiffs' claims for identity theft insurance and replacement card fees involved actual financial losses from credit and debit card misuse. Under Maine contract law, those losses are recoverable as mitigation damages so long as they were reasonable.

However, as to the "opportunity costs," the court found that general principles of recovery in both contract and tort, barred the plaintiffs' remaining claims. It held that the district court correctly concluded that the plaintiffs' claims for loss of reward points, loss of reward point earning opportunities, and fees for pre-authorization changes were not recoverable. Those injuries were too distant from the data breach because they were incurred as a result of third parties' unpredictable responses to the cancellation of plaintiffs' credit or debit cards. The court doubted that it was reasonably foreseeable that an issuing bank would deny a cardholder's entitlement to accumulated points when the card was merely replaced with a new one. Nor was it reasonably foreseeable that pre-authorization arrangements would involve change fees in the event of a credit or debit card replacement.

The court concluded that the mitigation damages discussed were cognizable under Maine law and reversed the district court's dismissal of the plaintiffs' negligence and implied contract claims as to those damages. The court affirmed the district court's dismissal of the remaining claims.

The question became whether plaintiffs' mitigation steps were reasonable.

UCC APPLIES TO SALE AFTER JUDGMENT OF FORECLOSURE, WHEN TERMS OF JUDGMENT ARE NOT FOLLOWED

Williams v. Gillespie, 346 S.W.3d 727 (Tex. App.—Texarkana 2011).

FACTS: In 1995, Gillespie sold a bulldozer and a track hoe to Williams on credit. Williams defaulted four years later and Gillespie obtained a default judgment ("Abstracted Judgment") in the amount of approximately $76,000 for the note and fees. Gillespie obtained a writ of execution, but did not deliver it to the officer authorized to serve it. Instead, he informed Williams of its existence. Williams voluntarily relinquished the equipment to Gillespie. Gillespie testified that Williams agreed to forego a public sale by the sheriff to allow Gillespie to sell the equipment by private sale in an attempt to maximize the sales price and, thus, reduce Williams's debt as much as possible. Gillespie sold the bulldozer for $35,000 via private sale but was unable to sell the track hoe. He retained it for his own use and credited Williams with $11,500, an amount greater than any offer he had received. During the intervening years, Williams made a few intermittent payments on the debt.

Several months after the default judgment was entered, Gillespie caused an abstract judgment to be issued and filed it in the Office of the Nacogdoches County Clerk. Nine years later, he filed a second abstract judgment and a second writ of execution was entered. The second writ of execution was mailed to the Angelina County Sheriff. Gillespie then filed suit to foreclose the judgment lien on several pieces of non-exempt property owned by Williams and his wife, based on the Abstracted Judgment. Williams requested a take-nothing judgment in his second amended answer and at trial argued the default judgment had been satisfied because Chapter 9 of the Texas Business and Commerce Code ("UCC") applied to the private sale of the bulldozer and the retention of the track hoe and, because Gillespie violated various provisions of Chapter 9 there was no longer any debt owed. The trial court found that the UCC does not apply to this case and ordered that the nonexempt real property be sold at a public sale to satisfy the Abstracted Judgment. Williams appealed.

HOLDING: Reversed.

REASONING: The court found that the Abstracted Judgment authorized an officer to seize the equipment and sell it pursuant to a public sale. There was no authorization in the judgment for the conduct of a private sale. A valid sale under a judgment occurs only when there is strict compliance with the terms of the foreclosure judgment. *Kolbo v. Blair*, 379 S.W.2d 125, 130 (Tex. Civ. App. —Corpus Christi 1964). Because Gillespie did not comply with the terms of the judgment, the sale of the bulldozer and track hoe was not a judicial foreclosure sale.

Williams contended that the trial court erred in concluding the UCC did not apply to the private sale of the bulldozer and track hoe. Because the bulldozer and track hoe were not sold pursuant to the terms of the judgment, Williams argued, the UCC must apply. The court agreed.

The judicial sale is not subject to the Code, but is conducted under other rules of law. The nonjudicial sale by the secured party is conducted under the rules of the Code. It is freely permitted and may be either public or private, the choice of remedies resting in the secured party. When Gillespie elected to sell the collateral at a private sale instead of abiding by the terms of the Abstracted Judgment, he necessarily elected to proceed under former Section 9.102 of the UCC (in effect at the time of the private sale).

The court found that Gillespie failed to provide any authority that the UCC does not apply when a judgment of foreclosure is obtained, but the terms of the judgment are not followed. It noted that the UCC version in force at the time stated that it did not supplant common law unless specifically stated. The UCC preempts the common law if the UCC and the common law conflict. Because the UCC prescribed the methods to be followed in a nonjudicial sale f collateral after default, Gillespie was obligated to follow the UCC, not pre-existing common law. The court concluded that the UCC governed the private sale of the bulldozer and the retention of the track hoe.