

# MASSACHUSETTS LAWYERS WEEKLY

vol. 33, No. 17      December 20, 2004      <http://www.masslawyersweekly.com>      **DM DOLAN MEDIA COMPANY**      \$7.75 per copy

## Important Opinions

### **Criminal**

#### **Assault And Battery On Public Employee**

A defendant's conviction for assault and battery on a public employee must be vacated and a new trial ordered because the judge's method for ascertaining the jury's true intention after ambiguous verdicts could have affected the verdicts' integrity, the Supreme Judicial Court decides .....page 9.

### **Contract**

#### **Breach Allegation - Identity Theft**

In a suit alleging "that [the plaintiff's] identity was stolen as a result of [the defendants'] failure to adequately respond to a security breach of a retail website server which compromised her VISA Account," summary judgment should be granted to the defendants, as the plaintiff has demonstrated no action or inaction on the defendants' part which would render them liable for breach of contract, breach of the implied covenant of good faith and fair dealing, negligence, misrepresentation, breach of fiduciary duty, invasion of privacy or violation of G.L.c. 93A, says a Superior Court judge .....page 15.

See news story on this page.

## *Quorum Of Panel Could Issue Approval*

### *Board Granted Waiver From The Usual Rules*

By JOHN O. CUNNINGHAM

A three-person quorum of a five-member planning board could approve development of a parcel of land that was not subject to subdivision requirements, a Superior Court judge has ruled.

A neighboring landowner, who objected to the development, argued that legal requirements that a majority of board members must approve a subdivision should also apply to so-called "approval not required" or ANR applications for development.

But Judge Bonnie H. MacLeod disagreed, affirming the decision of the Framingham Planning Board on the development application.

The judge stated that "where the lots in question are not definitive subdivisions so as to require a majority vote, and where the statute and case law are devoid of any rules regarding the voting methods applicable to ANR

*Continued on page 31*

## **Identity Theft Claim Vs. Credit Card Co. Denied**

### *Private Information Was Stolen From Website*

By JASON M. SCALLY

A credit card company should not be held liable for "identity theft" where a cardholder's private information was stolen after a security breach on a retailer's website, a Superior Court judge has ruled.

The cardholder, bringing suit on behalf of other similarly situated cardholders, argued that the credit card company should be held liable for breach of contract, breach of the implied covenant of good faith and fair dealing, negligence, misrepresentation, breach of fiduciary duty, invasion of privacy or violations of G.L.c. 93A.

But Judge Bonnie H. MacLeod disagreed and granted the credit card company's motion for summary judgment.

The judge found that the cardholder had not proven any "action or inaction" on the part of the credit card company that linked it to the security breach.

MacLeod also denied the cardholder's attempt to postpone the summary judgment motion under Rule 56(f), saying she was "skeptical" that information obtained by additional, future depositions would change her ruling.

The 15-page decision is *Kuhn v. Capital One Financial Corporation, Inc. et al.*, Lawyers Weekly No. 12-366-04.

John Peter Zavez of Boston was the attorney for the plaintiff. Andrew P. Botti, also of



Photo by Merrill Shea

#### **JUDGE BONNIE H. MACLEOD** **No link between identity theft and the defendant**

Boston, represented the defendants. Neither party returned calls prior to deadline.

#### **Identity Stolen**

On June 18, 2001, defendant Capital One

*Continued on page 30*

# Identity Theft Claim Vs. Credit Card Co. Denied

*Continued from page 1*

was informed that a credit card belonging to the plaintiff, Deborah Kuhn, had been "compromised" as a result of a security breach on a retailer's website.

That same day, Capital One called Kuhn and told her about the breach. The company then shut down her account.

Later that day, Kuhn said she spoke with a Capital One representative who told her that no further action was necessary on her part. The company also sent Kuhn a letter explaining steps she could take to prevent additional fraudulent charges on her account.

Within a few days of the incident, approximately 18 fraudulent accounts were opened in Kuhn's name with \$25,000 being charged.

The plaintiff brought a suit, individually and as a representative of similarly situated persons, claiming that Capital One should be liable for breach of contract, breach of the implied covenant of good faith and fair dealing, negligence, misrepresentation, breach of fiduciary duty, invasion of privacy or violations of G.L.c. 93A.

Capital One then brought a motion for summary judgment on all counts.

## No More Time

The plaintiff argued, under a Rule 56(f) motion, that the summary judgment determination should be postponed, but MacLeod denied the motion.

Although the plaintiff claimed, through affidavit of her attorney, that more information would surface to support her claim once depositions had been taken of certain Capital One officials, the judge said she was "skeptical" that additional discovery would influence her decision on the defendant's summary judgment motion.

She cited an affidavit submitted by an employee of the defendant, which said that "Capital One does not provide our cardholder's social security numbers, dates of birth, mother's maiden name or PIN numbers to retail establishments, including websites."

"action or inaction" by the defendant, and so she granted summary judgment for the defense on all counts.

On the plaintiff's breach of contract claim, the judge found that the defendant had satisfied its contractual obligation by not hold-

more than bare assertions," while the defendant offered an affidavit describing how the company does not share private information other than account numbers and expiration dates.

"The defendant has demonstrated the absence of a triable issue," the judge said, "and plaintiff, in response, has failed to produce countervailing evidence."

MacLeod also determined that the plaintiff's misrepresentation claim should fail, because the evidence was "insufficient to amount to misrepresentation in the instant case" with the defendant's limited knowledge of the security breach.

She further rejected the notion of any fiduciary duty between the defendant and plaintiff, noting that "there are no transactions between plaintiff and Capital One that would take this situation outside the ordinary debtor-creditor relationship."

Regarding the plaintiff's claim for invasion of privacy, the judge noted that the defendant, "through its supporting affidavit met [its] burden of showing the absence of a factual question as to whether it played a causal role in plaintiff's identity theft." As a result, she said summary judgment was warranted on that claim.

Finally, MacLeod granted summary judgment for the defendant on the plaintiff's Chapter 93A claim.

She wrote: "The plaintiff has failed to show that the defendant's acts were in violation of any statutory or common-law duty, or 'within at least the penumbra of some common-law, statutory or other established concept of unfairness [or] is immoral, unethical, oppressive or unscrupulous.'" MLW

Questions or comments may be directed to the writer at [jscally@lawyersweekly.com](mailto:jscally@lawyersweekly.com).

---

**While MacLeod noted that summary judgment was not often granted on claims of negligence, she found in this case that the plaintiff's arguments were "nothing more than bare assertions," while the defendant offered an affidavit describing how the company does not share private information other than account numbers and expiration dates.**

---

The employee added that "I am not aware of any method or manner of fraud whereby one's identity can be stolen using only a credit card number and account expiration date."

As a result, MacLeod said she was not convinced that "discoverable materials probably exist" that would answer the plaintiff's questions.

## Claims Summarily Rejected

MacLeod said she could find not any link between the identity theft and any

ing the plaintiff liable for the fraudulent charges.

Similarly, she also rejected the plaintiff's claim for breach of the implied covenant of good faith and fair dealing, finding that the defendant fulfilled its obligations as set forth in the privacy notice.

While MacLeod noted that summary judgment was not often granted on claims of negligence, she found in this case that the plaintiff's arguments were "nothing

# Homestead In Massachusetts — Termination With Extreme Prejudice

*Continued from page 11*

tion of a second mortgage to his pre-existing homestead at a time when the homestead exemption was \$100,000. Following the 2000 amendment increasing the exemption amount

**FOCUS ON** Bankruptcy Law

- by deed;
- by release;
- "or pursuant to section two."