2016 IL App (1st) 142672-U

FIFTH DIVISION
January 6, 2017

No. 1-14-2672

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IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

	)	Appeal from the
ARIN A. BOVAY, *et al.*, individually and on behalf of all others similarly situated,	)	Circuit Court of
	)	Cook County
	)	
Plaintiffs-Appellants,	)	Nos. 01 CH 18096
	)	02 CH 4693
v.	)	03 CH 7605
	)	(consolidated)
SEARS, ROEBUCK AND CO.,	)	
	)	Honorable
Defendant-Appellee.	)	Mary L. Mikva,
	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Gordon and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming orders of the circuit court of Cook County denying motion to enforce settlement and granting summary judgment in favor of defendant on invasion of privacy, Illinois Consumer Fraud Act, and unjust enrichment claims.

¶ 2 This appeal arises out of the alleged wrongful disclosure of customer information by Sears, Roebuck and Co. (Sears). Appellants Nancy Woods, Mark Triezenberg, Mary Rawson, Patricia Clark, Richard Terrel Gore, and Mary Rodriguez (plaintiffs) represent a certified class of

Sears credit card customers in consolidated class action lawsuits filed against Sears in the circuit court of Cook County. On appeal, plaintiffs assert that Sears violated the terms of its privacy policy and Illinois law by wrongfully disclosing its credit card customers' "personal, private and confidential information" to third-party marketers without their authorization or consent. Plaintiffs contend that the circuit court erred in (a) denying plaintiffs' motion to enforce an alleged settlement in 2004, and (b) granting summary judgment in favor of Sears in 2014 on plaintiffs' invasion of privacy, unjust enrichment, and Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq.*) (West 2000)) claims. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3 I. BACKGROUND

¶ 4 Between September 9, 1995, and June 22, 2001 (class period), Sears credit card holders received copies of written card account and security agreements (agreements) when their Sears credit cards were issued and upon subsequent revisions of an agreement. The agreements provided that Sears may share certain information regarding customers with specified parties. For example, the agreement provided in 1999:

> "**Section 16. INFORMATION SHARING WITH AFFILIATES.** From time to time, subject to applicable law, we may use or furnish third parties information about you or your Account. Specifically, applicable law permits us to share information about our transactions or experiences with you or your Account with third parties and also with companies affiliated with us ("Sears Affiliates"). Applicable law also permits us to share additional information about you or your Account (including, but not limited to, information from applications you submit and information from credit reporting agencies) with Sears Affiliates. By entering

into the Account relationship with us, you agree to this use and disclosure of information[.]" (Emphasis in original).

The agreement further provided that a customer could instruct that "non-transaction and non-experience information" not be shared by contacting an address or toll-free telephone number.

¶ 5 When Sears sent customers a new agreement in the fall of 1999, it included a separate insert (the 1999 privacy insert) which provided, in part: "Your privacy is also very important to us. **That is why our policy is not to rent or sell our customers' information to anyone outside the Sears family of businesses.**" (Emphasis in original). In 2001, Sears mailed a Gramm-Leach-Bliley Act notice (the GLBA notice) to customers.[1] The GLBA notice provided, in part: "Sears Credit may share your customer information with the Sears family of businesses ***. The Sears family of businesses includes all Sears affiliates as well as other selected businesses with which Sears has a relationship[.]" The GLBA notice stated that the shared information may include "[n]ame, address, telephone number, and account number, which will be encrypted if the account number is shared with service providers offering marketing services with the authority to make charges to the account."

¶ 6 In October 2001, Sears credit card holders Arin A. Bovay (Bovay) and Debra Wathen (Wathen) (the *Bovay* plaintiffs) filed a putative class action complaint against Sears pursuant to section 2-801 of the Code of Civil Procedure (Code) (735 ILCS 5/2-801 (West 2000)) in the circuit court of Cook County (case number 01 CH 18096). The complaint alleged that Sears obtained access to and improperly disclosed "personal, private and confidential information," including cardholder names, addresses, telephone numbers, credit card account numbers, and

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[1] Enacted in 1999, the Gramm-Leach-Bliley Act (P.L. 106-102 (Nov. 12, 1999)) requires companies that offer consumers financial products to explain their information-sharing practices to their customers and to safeguard sensitive data. See https://www.ftc.gov/tips-advice/business-center/privacy-and-security/gramm-leach-bliley-act (last viewed on December 21, 2016).

"zip-code based demographic information, lifestyle and demographic information which includes age and estimated income, how long cardholders have held accounts with Sears, credit limits, balances, recent purchase information, and whether cardholders are apt to respond to future marketing based on past responses to marketing activity." The complaint further alleged that Sears failed to inform customers of such disclosures and, in fact, "routinely and consistently represented" that "Sears does not rent, sell or exchange information about its customers" and that access to information regarding Sears customers was restricted to the "Sears family of businesses." According to the complaint, Sears received millions of dollars in payments in exchange for the disclosure of customer data to Memberworks,[2] Incorporated, f/k/a Cardmember Publishing Corporation (Memberworks) and "other telemarketers, direct mail marketers and other vendors." The four-count complaint included invasion of privacy, violation of the right to privacy under the Illinois Constitution, consumer fraud, and unjust enrichment counts.

¶ 7 Sears filed a motion to dismiss the complaint pursuant to section 2-615 of the Code. 735 ILCS 5/2-615 (West 2000). The *Bovay* plaintiffs responded that many of Sears' arguments were "tried and rejected in a very similar case" that was pending in the Superior Court of California: *Utility Consumers' Action Network v. Sears Roebuck & Company* (case number 306232) (*UCAN* litigation). The *Bovay* court dismissed with prejudice the count alleging violation of the right to privacy under the Illinois Constitution; the remaining counts were stricken with leave to replead. In March 2002, Mark Triezenberg (Triezenberg) and Mary Rawson (Rawson) filed a similar putative class action complaint against Sears in the circuit of Cook County (case number 02 CH 4693). The *Bovay* and *Treizenberg* cases were consolidated.

¶ 8 In July 2002, plaintiffs Bovay, Nancy Woods (Woods) and Elizabeth Turner (Turner),

[2] The company is referred to as "Memberworks" and "MemberWorks" in the record on appeal.

but not Wathen, filed a first amended complaint, alleging that Sears "improperly and wrongfully disclosed, both directly and indirectly, personal, private, and confidential information to MemberWorks, Cendent, Encore Marketing and Allstate Motor Club, independently owned companies that are neither subsidiaries of, nor affiliates of, Sears[.]" In a section 2-619 motion, Sears contended: (a) the claims were time-barred because they accrued at the time the accounts were opened; (b) Sears' compliance with the safe harbor provisions of the Gramm-Leach-Bliley Act as of July 1, 2001, precluded any of the claims arising on or after such date; (c) the four entities to which plaintiffs claimed Sears disclosed their information were members of the Sears family of businesses; and (d) no unjust enrichment claim existed because, among other things, written agreements governed the relationships between Sears and its credit card holders.

¶ 9 In April 2003, Patricia Clark (Clark), Richard Terrel Gore (Gore) and Mary Rodriguez (Rodriguez) filed a putative class action complaint against Sears in the circuit court of Cook County (case number 03 CH 7605). *Clark* was consolidated with *Bovay* and *Triezenberg*.

¶ 10 In an effort to resolve the Illinois lawsuits and the *UCAN* litigation, the parties participated in mediation before the Honorable Edward Infante (Ret.) at the JAMS mediation center in San Francisco on April 8 and 9, 2003, June 12 and 13, 2003, and July 17, 2003. The parties disagree regarding whether a settlement was reached during the June 13 session. In correspondence from its counsel on Monday, June 16, 2003, Sears indicated it was "not willing to leave the attorneys' fee and notice issues open for Court review" and, if those issues were resolved, "Sears remains committed to the terms of the settlement discussed Friday via the mediator's proposal." One of plaintiffs' attorneys responded that a judicially-enforceable agreement had been reached during the mediation session "because all material terms except fees and costs were agreed upon and we also agreed on a mechanism for resolving the fees and cost

issues." The parties apparently attempted to resolve the remaining attorney fee issues during a mediation session on July 17, 2003, but succeeded only on the *UCAN* litigation.

¶ 11 Plaintiffs filed a motion to enforce settlement in the consolidated cases. During an evidentiary hearing, Cathleen Combs (Combs), an attorney for the *Triezenberg* plaintiffs, testified regarding the terms of the purported settlement. With respect to attorney fees, Combs stated that the parties agreed to "submit it to the Court." On cross-examination, she testified that Sears had not signed any agreement and she also confirmed that conversations had occurred in the hallway after the mediation regarding the "kind and number of notices."

¶ 12 Paul Miltonberger (Miltonberger), an in-house attorney for Sears, testified that Judge Infante proposed on June 13, 2003, that the parties agree "to meet at an additional mediation session to further address the attorneys' fee issue and suggested that we also agree that in the absence of a resolution at that mediation, that we leave the issue of attorneys' fees for a court determination." Miltonberger testified, "We made it clear to Judge Infante that we did not have final sign-off from the people that he had been talking to throughout the mediation, but that the consensus of those in the room at the time was that the proposal that he had made was acceptable and that I would recommend that when I got back to Chicago." In Miltonberger's discussions with his supervisor on the next business day, "the initial reaction to one of the issues which was the manner in which we had discussed dealing with attorneys' fees, would not be acceptable and could not be approved nor would he recommend it to our general counsel." Miltonberger testified that "we needed to make clear that the notice provisions and an agreement with regard to notice needed to be locked in as well before *** a final settlement was reached on all issues." After the hearing, the circuit court entered a memorandum opinion on July 14, 2004, denying the motion to enforce the settlement agreement.

¶ 13 In January 2005, the circuit court granted in part and denied in part various motions to dismiss the *Bovay*, *Triezenberg*, and *Clark* cases. The *Bovay* and *Triezenberg* plaintiffs each filed a second amended complaint and the *Clark* plaintiffs filed a first amended complaint – the operative complaints for purposes of this appeal.

¶ 14 The *Bovay* second amended complaint alleged that Sears "wrongfully disclosed, both directly and indirectly, confidential data, including financial data such as credit card numbers and cardholder account balances, to four companies – MemberWorks, Cendent, Encore Marketing and Allstate Motor Club (collectively, 'Third-Party Club Providers') – which are independent entities that are neither subsidiaries nor affiliates of Sears or under Sears' control." The second amended complaint further alleged:

> "Beginning several years before the start of the Class Period, Sears entered into information-sharing agreements with each Third-Party Club Provider. Pursuant to those agreements, each Third-Party Club Provider agreed to collaborate on parameters to be set for data-mining procedures. Each time a Third-Party Club Provider requested a list of Sears customers be provided to them, Sears would use a set of selection criteria, which included information such as particular account balances, to mine its Sears database to obtain and provide the requested information. After Sears mined its database, Sears would generate or cause to be generated a list of customers to disclose to the Third-Party Club Provider. Sears calls this list an output vendor file. Each output vendor file would directly include at least the following information: name, address, telephone number, and a scrambled credit card account number, which the Third-Party Club Providers had the ability to de-scramble. In addition, each output vendor file,

which already directly communicates financial information, communicates much more information than simply name, address, telephone number and account number. For example, if one selection criteria used was 'account balance over $150' (Sears has admitted using account balance as a selection criteria), each output vendor file based on such selection criteria would tell a Third-Party Club Provider that each customer on the output vendor file has a particular type of account balance."

According to the second amended complaint, the "Third-Party Club Provider" – "[a]rmed with an output vendor file" or "OVF" – "would attempt to sell one of several programs (such as dining or travel services or health or dental care) to each Sears cardholder" listed on the OVF through telemarketing or mail solicitations. The programs included but were not limited to: Sears Credit Alert, Sears Discount Travel, Sears Premier Health, and Sears Motor Club. The second amended complaint further alleged that "[b]ecause the Third-Party Club Providers already possessed the customers' account numbers (a fact that customers often would not know), the Third-Party Club Providers would automatically bill customers' Sears credit cards." The providers charged a certain amount per program, and "each time a sale is made," Sears received a percentage of the cost of the program, totaling many millions of dollars.

¶ 15 The three counts of the *Bovay* second amended complaint alleged invasion of privacy, violation of the Consumer Fraud Act, and unjust enrichment. The four-count *Triezenberg* second amended complaint also included a breach of contract claim, alleging:

"Sears had an explicit agreement with the plaintiffs and class members not to publicly disseminate their confidential information. The credit card agreement specifically stated that 'Sears does not rent, sell or exchange information about its

> customers.' The privacy policy specifically states it is Sears' policy 'not to rent or sell our customers' information to anyone outside the Sears family of businesses."

The first amended complaint in *Clark* alleged five counts: (1) invasion of privacy; (2) invasion of privacy in violation of the Illinois Constitution; (3) violation of the Consumer Fraud Act; (4) unjust enrichment; and (5) breach of contract.

¶ 16 After a hearing, the circuit court entered an order in June 2005 addressing the dismissal motions filed by Sears. In the *Bovay* case, the court struck any allegations asserting a "misappropriation of name and likeness" theory and denied the remainder of the motion to dismiss. In the *Triezenberg* and *Clark* cases, the court granted the motions to dismiss without prejudice as to the respective breach of contract counts; the motions were otherwise denied. Sears filed answers and various affirmative defenses.

¶ 17 The circuit court entered a class certification order in April 2008, appointing Woods, Turner, Triezenberg, Rawson, Clark, Gore, and Rodriguez as class representatives.[3] This court and the Illinois Supreme Court subsequently denied petitions for leave to appeal the order granting class certification. *E.g.*, *Clark v. Sears, Roebuck & Co.,* 229 Ill. 2d 664 (2008) (table).

¶ 18 In July 2010, plaintiffs filed a consolidated motion for summary judgment as to Sears' liability. They contended, in part, that the "OVF's were created only after Sears, and sometimes a third-party company named Acxiom, performed sophisticated data mining procedures on Sears' credit card customer database." Plaintiffs asserted that, contrary to the language of the 1999 privacy insert and the 2001 GLBA notice, Sears "continued to sell and disclose Class members' private and confidential information to third-party marketers" without informing them. According to plaintiffs, "[t]elemarketing scripts, which were reviewed and approved by Sears,

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[3] Although Bovay voluntarily withdrew as a putative class representative, we continue to refer to the *Bovay* case herein for ease of reference.

directed the telemarketers, if asked, to tell Class members that they did not have access to their Sears credit card number."

¶ 19 In deposition testimony, Laurie Schirmer (Schirmer), the director of Clubs and Services for Sears, described the type of information Sears possessed regarding its customers. She stated, "We have name, address, their account number, the zip level demographics ***, how long they've been a Sears customer, what their credit limit is, what type of balance they have on their account, whether *** they've responded in the past to telemarketing or direct mail offers, their do not promote information, how frequently they have said no to telemarketing offers." She indicated that Sears targeted customers based on its own scoring models. According to Schirmer, companies like Cendant and MemberWorks are not telemarketing companies; they contract with telemarketing companies. Schirmer confirmed that if a program was charged to a member's card and then the member failed to pay his or her balance by the end of the month, Sears retained 100% of the interest charge. Another Sears employee testified during her deposition that, as of August 18, 2000, she was unaware of "what kind of Sears customer-related information [Cendant] share[d] with third parties and who these third parties are."

¶ 20 In March 2011, Sears filed Defendant's Joint Response to Plaintiffs' Consolidated Motion for Summary Judgment as to Defendant's Liability and Memorandum in Support of Defendant's Cross Consolidated Motion for Summary Judgment. According to Sears, "[i]f a Customer charged a membership fee to their Sears Card, the Customer's decrypted/unscrambled account number was sent to Sears through a secure means." Sears represented that "[t]his was the **only** circumstance under which a Sears Card account number was decrypted/unscrambled." (Emphasis in original). Sears further stated that "[o]nly a limited number of the Business Partners' IT employees had the ability to decrypt/unscramble account numbers; likewise, only

certain Sears IT employees had access to the unencrypted credit card numbers." Because telemarketers did not have access to either encrypted or unencrypted Sears account numbers, Sears asserted that the "scripts accurately explained to Customers that the telemarketers did not have access to their Sears Card information[.]"

¶ 21 Sears included information regarding the named plaintiffs, including select portions of their deposition testimony and data that Sears or its counsel had gathered from public sources, *e.g.,* online telephone directories and court dockets. According to Sears, except for Rodriguez's telephone number, the name, address and telephone number of each named plaintiff were publicly available. Some plaintiffs acknowledged providing personal information to other credit card companies. None indicated that they had sought to be placed on Sears' "do not promote" or "do not call" lists. Although certain plaintiffs recalled receiving marketing solicitations relating to Sears-branded programs, none recalled actually making a purchase. No plaintiff lost any money, sought medical treatment, or was aware that he or she was the victim of identity theft as the result of Sears' actions. However, Gore stated his faith in Sears had been damaged, and other plaintiffs asserted that their privacy had been invaded.

¶ 22 After continuing litigation,[4] the circuit court entered an order denying plaintiffs' motion for summary judgment and granting Sears' motion. In their notice of appeal, plaintiffs sought review of multiple orders, including: (a) the August 4, 2014, order granting summary judgment in favor of Sears; and (b) the July 14, 2004, order denying the motion to enforce the settlement.

¶ 23 II. ANALYSIS

¶ 24 Plaintiffs advance two primary arguments on appeal. First, they contend that the circuit

[4] In August 2011, Sears had filed a motion to compel arbitration and stay the proceedings pursuant to the Federal Arbitration Act (9 U.S.C. § 3 (1994)). We affirmed the circuit court's order denying the motion. *Bovay v. Sears, Roebuck and Company*, 2013 IL App (1st) 120789.

court erred in failing to recognize that the parties had entered into a binding settlement. Second, they assert that the circuit court erred in granting summary judgment in favor of Sears on their claims of: (1) public disclosure of private facts; (2) intrusion upon seclusion; (3) violation of the Consumer Fraud Act; and (4) unjust enrichment. We address each argument in turn.

¶ 25 A. Existence of Binding Settlement

¶ 26 Plaintiffs challenge the circuit court's order entered on July 14, 2004, denying their motion to enforce the settlement agreement. The order provided, in part:

> "While plaintiffs have presented evidence to support their claim that the parties reached an understanding with respect to certain terms of a settlement, it has not been shown that as a matter of law an enforceable settlement agreement was entered into on all the essential terms of the matters discussed. The correspondence between counsel after the June 13th session does not constitute a binding settlement or a sufficient memorialization in writing of all of the essential terms of a recorded oral understanding entered into with the mediator."

Plaintiffs assert that the parties had agreed to a settlement which included payment of plaintiffs' counsels' reasonable attorney fees and costs in the *UCAN* litigation and Illinois actions. According to plaintiffs, the amount of attorney fees to be awarded was to be determined through further negotiation or, if negotiations failed, by the California and Illinois courts on petition. Sears contends, in part, that there was no "meeting of the minds" on all matters by the parties as a result of the mediation sessions, *i.e.*, notice and attorney fee issues remained unresolved.

¶ 27 A circuit court has discretion to determine whether a settlement occurred, and we will not reverse its decision unless it is contrary to the manifest weight of the evidence. *Kulchawik v. Durabla Manufacturing Co.*, 371 Ill. App. 3d 964, 969 (2007). The circuit court's determination

regarding the validity of a settlement agreement is against the manifest weight of the evidence only if the opposite conclusion is clearly apparent or where a decision is palpably erroneous and wholly unwarranted. *Id.*; accord *K4 Enterprises, Inc. v. Grater, Inc.*, 394 Ill. App. 3d 307, 312 (2009). "[W]e give the trial court's decision great deference because the [t]rial court is in a far better position to determine the credibility of witnesses." (Internal quotation marks omitted.) *Northwestern Memorial Hospital v. Sharif*, 2014 IL App (1st) 133008, ¶ 26.

¶ 28 In considering the circuit court's decision regarding whether a settlement agreement existed, we begin with what a settlement agreement is. "A settlement agreement is in the nature of a contract and is governed by principles of contract law." *K4 Enterprises*, 394 Ill. App. 3d at 313. "Oral agreements are binding so long as there is an offer, an acceptance, and a meeting of the minds as to the terms of the agreement." *Id.* A meeting of the minds occurs "when there has been assent to the same things in the same sense on all essential terms and conditions." *Quinlan v. Stouffe*, 355 Ill. App. 3d 830, 839 (2005). "For a contract to be enforceable, the material terms of the contract must be definite and certain." *K4 Enterprises*, 394 Ill. App. 3d at 313.

¶ 29 However, a contract is sufficiently definite and certain to be enforceable if the court is able – from the terms and conditions thereof – to ascertain what the parties have agreed to do applying proper rules of construction and principles of equity. *Quinlan*, 355 Ill. App. 3d at 838. As stated in *Rose v. Mavrakis*, 343 Ill. App. 3d 1086, 1091 (2003):

> "[I]n order for a contract to be capable of enforcement, its terms and provisions must enable the court to determine what the parties have agreed to do. [Citation.] Although some terms of a contract may be missing or left to be agreed upon, the parties' failure to agree upon an essential term of a contract indicates that the mutual assent required to make a contract is lacking, and thus, there is no

enforceable contract. [Citation.] The lack of nonessential details, however, will not render a contract unenforceable. [Citation.]"

¶ 30 The circuit court in the instant case stated, in part, that "[i]t cannot be determined from the evidentiary submissions that the parties had agreed, as part of an overall settlement, to a mechanism to decide the fees and costs." Based on our review of the record, we agree with the circuit court's assessment. As the circuit court noted, "[a]lthough plaintiffs have persuasively shown that Sears' representatives attended the mediation with authority to settle the litigation, there [were] some conflicting evidentiary inferences that at the end of the June 13th session, the Sears' representative expressed to the mediator that he would have the proposal reviewed by Sears' personnel, who were not present at the mediation."

¶ 31 In addition, the record indicates that the parties attempted to resolve the fee issue during a mediation session in July 2003 and a settlement conference with the circuit court in August 2003. Such continued efforts are consistent with Sears' position that a definitive resolution had not been reached on June 13, 2003. Furthermore, we share the circuit court's assessment that "[i]n view of certain conflicting testimony, it is also a factor for consideration that there was a lack of any evidentiary submission from the mediator to support the agreement that purportedly was entered into in his presence." *Compare K4 Enterprises*, 394 Ill. App. 3d at 308-09 (affirming the enforcement of a settlement agreement; noting the trial judge "was present during the settlement negotiations and found that the parties had reached a settlement agreement at that time").

¶ 32 Furthermore, "[r]egardless whether the parties believed they had reached an agreement, a contract is not valid without enforceable essential terms." *Quinlan*, 355 Ill. App. 3d at 839. According to the circuit court in this case, a "persuasive showing" had not been made that issues involving notice and attorney fees were "non-essential terms of the settlement." On appeal,

plaintiffs contend that "[b]ecause a mechanism was agreed upon for determining reasonable fees and costs, as well as notice, the specific fees and costs amount and method of notice, which must be approved by a court order under relevant class action rules in any event, are non-essential terms of a settlement." However, the case plaintiffs cite in support of this proposition, *Brundidge v. Glendale Federal Bank, F.S.B.*, 168 Ill. 2d 235 (1995), is inapposite. In *Brundidge*, the Illinois Supreme Court held that "the circuit court is vested with the discretionary authority to choose the percentage-of-the award method or the lodestar method to determine the amount of fees to be granted plaintiffs' counsel in common fund class action litigation." *Id.* at 243-44. However, unlike the instant case, there was no dispute in *Brundidge* regarding the existence or terms of a settlement. The parties had agreed that the defendant bank "would pay a set sum to plaintiff's counsel" and the bank "also agreed not to oppose an additional attorney fee petition from plaintiff's attorneys." *Id.* at 237.

¶ 33 Furthermore, we are not persuaded by the plaintiffs' reliance on the statutory provisions in the Code addressing notice issues in class actions. See, *e.g.*, 735 ILCS 5/2-803 (West 2004) (providing that "the court in its discretion may order such notice that it deems necessary to protect the interests of the class and the parties"). As noted by one of Sears' attorneys during the circuit court proceedings, "the fact that [the trial court] has to pass on the attorneys' fees and notice issue is a red herring because this Court has to pass on every aspect of any proposal of that settlement." The existence of statutory requirements regarding circuit court approval of a class action settlement does not elevate every term of a potential settlement to "essential" status.

¶ 34 We conclude that the circuit court's denial of plaintiffs' motion to enforce was not against the manifest weight of the evidence. Although we recognize that "Illinois encourages the settlement of claims and, to that end, settlement agreements may be oral" (*Kim v. Alvey, Inc.*, 322

Ill. App. 3d 657, 669 (2001)), we cannot conclude that the circuit court's decision was palpably erroneous and wholly unwarranted. *E.g.*, *Kulchawik*, 371 Ill. App. 3d at 972.

¶ 35 B. Summary Judgment

¶ 36 The circuit court ruled in favor of Sears on the parties' cross-motions for summary judgment. "When parties file cross-motions for summary judgment, they agree that only a question of law is involved and invite the court to decide the issues based on the record." *Pielet v. Pielet*, 2012 IL 112064, ¶ 28. "Summary judgment motions are governed by section 2-1005 of the Code of Civil Procedure." *Id.* ¶ 29. "Pursuant to that statute, summary judgment should be granted only where the pleadings, depositions, admissions and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is clearly entitled to judgment as a matter of law." *Id*. "If the plaintiff fails to establish any element of the cause of action, summary judgment for the defendant is proper." *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 163 (2007). "Although summary judgment is an expeditious method of disposing of a lawsuit, it is a drastic remedy and should be allowed only when the right of the moving party is free and clear from doubt." *Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill. 2d 17, 31 (1999). We review the grant of summary judgment *de novo*. *Pielet*, 2012 IL 112064, ¶ 30.

¶ 37 1. Public Disclosure of Private Facts

¶ 38 The circuit court granted summary judgment in favor of Sears and against plaintiffs on their claims of public disclosure of private facts. The tort of public disclosure of private facts requires: (1) publicity was given to the disclosure of private facts; (2) the facts were private, and not public, facts; and (3) the matter made public was such as to be highly offensive to a reasonable person. *Cooney v. Chicago Public Schools*, 407 Ill. App. 3d 358, 366-67 (2010);

Wynne v. Loyola University of Chicago, 318 Ill. App. 3d 443, 453 (2000). "An action for public disclosure of private facts provides a remedy for the dissemination of true, but highly offensive or embarrassing, private facts." *Poulos v. Lutheran Social Services of Illinois, Inc.*, 312 Ill. App. 3d 731, 739 (2000).

¶ 39 Plaintiffs contend that the circuit court granted summary judgment in favor of Sears on plaintiffs' public disclosure of private facts claim "based on an erroneous finding that, as a matter of law, none of the information Sears disclosed regarding Plaintiffs constituted private facts." Plaintiffs further assert that the circuit court "erroneously discounted Sears' implicit disclosure of numerous other private facts regarding Plaintiffs, including household income, credit limits, cardholder balances, and purchase history."

¶ 40 In an action for public disclosure of private facts, the plaintiff must establish that the facts disclosed were private, not public. *Wynne*, 318 Ill. App. 3d at 453. This court has stated "that matters of public record such as names and dates of birth have not been held to be private facts." *Cooney*, 407 Ill App. 3d at 367. Conversely, in cases such as *Johnson v. Kmart Corp.*, 311 Ill. App. 3d 573, 579 (2000), we have considered "such things as employees' family matters, health problems, and sex lives" to be "clearly private." The information disclosed by Sears regarding plaintiffs was more in the nature of "personal information" and not "private facts, which are facially embarrassing and highly offensive if disclosed." *Cooney*, 407 Ill App. 3d at 367.

¶ 41 Plaintiffs suggest that Sears acknowledged the private nature of the information at issue through its objections to interrogatories in unrelated litigation in Los Angeles County, *i.e.*, Sears objected to the disclosure of certain customer names and information regarding their purchases based on the customers' "legitimate privacy interests." Plaintiffs also contend that language in Sears' contracts with the third-party marketers acknowledged the "confidential" nature of the

customer information. We agree with Sears, however, that "[t]here is no authority for Plaintiffs' apparent contention that 'confidential' facts necessarily are 'private' facts; only courts, not contracting parties, can make that legal determination." See also *JP Morgan Chase Bank, N.A. v. Earth Foods, Inc.*, 238 Ill. 2d 455, 475 (2010) (noting that a "party is not bound by admissions regarding conclusions of law because the courts determine the legal effect of the facts adduced").

¶ 42 We further observe that plaintiffs provided information that they claim was improperly disclosed. In *Wynne v. Loyola University of Chicago*, 318 Ill. App. 3d 443, 453 (2000), a college professor discussed her infertility problems and psychiatric care with "a few colleagues." A colleague included this information in a memorandum that was disseminated to a number of university employees. *Id.* at 447. Affirming the grant of summary judgment in favor of the defendants on the professor's public disclosure of private facts claim, the appellate court held that "[w]hile these were certainly private facts, plaintiff, in disclosing them to her colleagues, did not keep them private." *Id.* at 453. To the extent plaintiffs herein voluntarily disclosed information to Sears, those facts similarly did not retain their private nature.

¶ 43 Plaintiffs also contend that "[i]n granting summary judgment, the Circuit Court considered only the information Sears explicitly disclosed to third-party marketers (customer name, address, telephone number and Sears credit card number), but disregarded all of the additional income, credit, and demographic information that Sears, by definition, directly, implicitly, or indirectly disclosed in creating OVFs on the basis that it was not 'actually shared.' " We agree with the circuit court's statements regarding this "indirect disclosure" theory:

> "[Plaintiffs] argue that the files were created by parsing sensitive information to create lists of cardholders and suggest that someone reviewing these lists might

> deduce sensitive information about individuals, such as race or credit history, used to create the file. Plaintiffs believe the potential for these deductions amounts to an indirect disclosure of private information that violates Plaintiffs' privacy rights. Plaintiffs cite no authority supporting this position, and the Court will not breathe life into the theory here. Doing so would inject an impossible amount of speculation and subjectivity into the inquiry. Indeed, the new test would become whether anyone could deduce private facts from the public disclosure, not what was actually disclosed."

¶ 44 Even assuming *arguendo* that the facts disclosed were private, the "publicity" requirement has not been satisfied. "In a case involving the public disclosure of private facts, 'publicity' means 'communicating the matter to the public at large or to so many persons that the matter must be regarded as one of general knowledge.' [Citations]." *Wynne*, 318 Ill. App. 3d at 453. However, if a plaintiff has a special relationship with the individuals to whom the matter was disclosed, the publicity requirement may be satisfied by disclosure to a small number of people. *Id*. "[T]he rationale behind the rule that disclosure to a small number of people may satisfy the publicity requirement, is that disclosure to a small group may be just as devastating to the person." *Id*. The operative complaints in this case do not allege that information was disclosed to the public at large or to any persons with whom plaintiffs had a special relationship.

¶ 45 The tort of public disclosure of private facts also requires that the matter made public was such as to be highly offensive to a reasonable person. *Cooney*, 407 Ill. App. 3d at 366-67. Plaintiffs contend on appeal that "[i]n determining whether the matters made public would be offensive to a reasonable person, the Circuit Court *** disregarded all of the income and credit information implicitly disclosed by Sears to third-party marketers." The cases plaintiff cite in

support of this proposition, however, are inapposite. For example, in *Manns v. Briell*, 349 Ill. App. 3d 358, 359 (2004), the defendant in an automobile accident lawsuit refused to provide information during pretrial discovery regarding his personal financial affairs, arguing that such discovery was appropriate only after entry of a final judgment against him exceeding the limit of his insurance policy. *Id.* The plaintiff argued that the defendant's financial status affected her ability to evaluate her case for settlement. *Id.* at 362. Noting that "[t]here are important differences between a liability insurance policy and a defendant's personal financial assets," the appellate court ruled in favor of the defendant. *Id.* at 365. Unlike the instant case, *Manns* did not involve privacy matters; the "only two matters" at issue were the liability for the collision and the amount of damages. *Id.* at 361. As the *Manns* court noted, the requested financial information was not pertinent to either issue. *Id.*

¶ 46 We also disagree with plaintiffs' conclusory statement that "a reasonable person could certainly find that the disclosure of income and credit information was highly offensive." As an initial matter, there has been no showing that Sears directly disclosed any income or credit information. Even if income and credit information were disclosed, we do not consider such matters to be highly offensive to a reasonable person. *Compare Miller v. Motorola, Inc.*, 202 Ill. App. 3d 976, 981 (1990) (whether disclosure of plaintiff's mastectomy and reconstructive surgeries was "highly offensive to a reasonable person of ordinary sensibilities" was a question of fact for the jury to determine).

¶ 47 Plaintiffs further contend that "[t]he highly offensive nature of the disclosure of customer credit card information lies not only in the disclosure of the fact that a customer has a Sears credit card, but also in the disclosure of the actual credit card number and the consequences of that disclosure." According to plaintiffs, "pre-acquired account telemarketing" – which they

define as telemarketing to individuals whose credit card information the marketer already possesses – "has been universally condemned as unfair, deceptive, and subject to abuse." Plaintiffs assert that "[i]n view of the fact that the most common complaint Sears received from cardholders was that 'they did not know they had signed up for a program or assented to a charge on their credit card' ***, there was no basis at all for the Circuit Court to conclude, as a matter of law, that the disclosure of Plaintiffs' credit card numbers was not highly offensive." We initially note certain deposition testimony of Laurie Schirmer from Sears: "Enrollment occurred only after the Sears customer or another authorized Sears Card holder in that household consented to purchasing the program. If the customer chose to enroll in the program he or she would have the choice of applying any charges to their Sears Card or another non-Sears personal credit card." In any event, we observe that plaintiffs herein did not actually enroll in any of the programs offered by Sears. In addition, plaintiffs have cited no evidence that Sears disclosed "actual credit card numbers." Finally, plaintiffs have not provided support for extending the reach of the tort of public disclosure of private facts beyond actual *disclosure*.

¶ 48 For the foregoing reasons, we conclude that the circuit court did not err in granting summary judgment in favor of Sears on plaintiffs' claims of public disclosure of private facts.

¶ 49 2. Intrusion Upon Seclusion

¶ 50 Plaintiffs also challenge the circuit court's ruling in favor of Sears regarding another privacy tort: intrusion upon seclusion. To state a cause of action for intrusion upon seclusion, a plaintiff must allege: (1) an unauthorized intrusion into seclusion; (2) the intrusion would be highly offensive to a reasonable person; (3) the matter intruded upon was private; and (4) the intrusion caused the plaintiffs anguish and suffering. *Cooney*, 407 Ill. App. 3d at 366. Although all five appellate districts in Illinois had previously recognized the validity of a cause of action

for invasion of privacy by intrusion upon seclusion, the Illinois Supreme Court in *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 35, formally recognized the tort. Examples of bases for the tort of intrusion upon seclusion include: "invading someone's home; an illegal search of someone's shopping bag in a store; eavesdropping by wiretapping; peering into the windows of a private home; and persistent and unwanted telephone calls." *Lovgren v. Citizens First National Bank of Princeton*, 126 Ill. 2d 411, 417 (1989), citing W. Prosser & W. Keeton, Torts § 117, at 854-55 (5th ed. 1984).

¶ 51 The circuit court found that "the information that Sears gathered did not require it to invade or to intrude upon Plaintiffs' privacy." According to the circuit court, "Sears could certainly access its own records without giving rise to an unauthorized intrusion." Plaintiffs contend on appeal that such conclusion "ignores that Plaintiffs supplied private information to Sears for the limited purpose of applying for Sears' credit cards (including, *e.g.*, household income), but that Sears accessed that information for completely unrelated purposes."

¶ 52 A federal district court case applying Illinois law – *In re Trans Union Corp. Privacy Litigation*, 326 F. Supp. 2d 893, 902 (N.D. Ill. 2004) – is instructive on the issue of whether there was an "unauthorized intrusion." The *Trans Union* plaintiffs argued that Trans Union held their "private and detailed financial information in trust," and was prohibited from using it for targeted marketing purposes. *Id.* The court disagreed, concluding that "Trans Union's accessing its own lawfully obtained files cannot be considered an unlawful intrusion." *Id.* The court noted that the plaintiffs' claim that "Trans Union lawfully accessed information from its files, but then wrongfully distributed the information to third parties," might possibly support a claim for improper disclosure, but does not support a claim for unauthorized intrusion. *Id.*

¶ 53 Plaintiffs contend that "the court's reasoning in *Trans Union* rests on a distinction

without a difference – if the sole purpose for accessing data base information regarding a cardholder is to use it in an unauthorized or unlawful manner, accessing the information is unauthorized irrespective of whether the information is ultimately improperly disclosed." As Sears correctly observes, plaintiffs provide no support for this proposition. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016). Furthermore, Illinois courts have held that the critical inquiry is whether there has been an unauthorized *intrusion*, not a subsequent publication or dissemination of information.

¶ 54 For example, in *Lovgren v. Citizens First National Bank of Princeton*, 126 Ill. 2d 411, 414 (1989), our supreme court considered "whether the act of placing an advertisement in a local newspaper, which notified readers about a public auction of farmland and which named the owner of the property as the seller, without the owner's knowledge or consent, gives rise to a cause of action for the invasion of plaintiff's privacy." The court concluded, in part, that the defendants' alleged actions did not constitute unreasonable intrusion into the plaintiff's seclusion because "the alleged offensive conduct and subsequent harm resulted from the defendants' act of publication, not from an act of prying ***." *Id.* at 417. In *Miller v. Motorola, Inc.*, 202 Ill. App. 3d 976, 979 (1990), the plaintiff consulted with her employer's resident nurse regarding her leaves of absence to undergo a mastectomy and reconstructive surgeries. Although the nurse had indicated that such information would be kept confidential, the plaintiff was told by a coworker that she had been informed of the plaintiff's mastectomy. *Id.* In concluding that the plaintiff failed to state a claim for intrusion upon seclusion, the court held that the employer's "alleged wrongful actions involve the dissemination or publication of information voluntarily provided to defendant by plaintiff, not defendant's unauthorized intrusion." *Id.* at 981.

¶ 55 Plaintiffs also attempt to distinguish *Dwyer v. American Express Co.*, 273 Ill. App. 3d

742, 743-44 (1995), wherein the defendant credit card companies allegedly categorized and ranked their cardholders into six tiers based on spending habits and then rented this information to participating merchants as part of a targeted joint-marketing and sales program. The defendants also offered joint marketing ventures to merchants who generated substantial sales through the American Express card; the defendants mailed special promotions devised by the merchants to cardholders and shared the profits generated by the advertisements. *Id.* at 744. The appellate court observed that the "[d]efendants rent names and addresses after they create a list of cardholders who have certain shopping tendencies; they are not disclosing financial information about particular cardholders." *Id.* at 747. The court concluded, in part, that "we cannot hold that a defendant has committed an unauthorized intrusion by compiling the information voluntarily given to it and then renting its compilation." *Id.* at 746.

¶ 56 Plaintiffs contend that, unlike in *Dwyer*, "Sears accessed information in its own database for its own purposes completely removed from the limited purpose for which Plaintiffs had provided Sears with any information." We disagree; the *Dwyer* court found that the plaintiffs had sufficiently alleged that the defendants had failed to inform the plaintiffs that information regarding their card usage would be utilized. *Id.* at 750. Plaintiffs also assert that "[i]n neither *Dwyer* nor *Trans Union*, did the courts address circumstances such as those presented in this case, where Sears accessed its own cardholder information, then used that information as a basis for conducting an investigation regarding its cardholders by purchasing additional information regarding them." However, plaintiffs have offered no legal basis for holding Sears liable for any possible intrusions by Acxiom.

¶ 57 Plaintiffs further contend that "[i]n addition to Sears' unauthorized intrusion into the Plaintiffs' privacy by virtue of its accessing of their private information, Sears was also

responsible for the physical intrusion into Plaintiffs' privacy." According to plaintiffs, "Sears furnished Plaintiffs' private information to third-party marketers and telemarketers intending the information to be used to bombard Plaintiffs with unwanted telephone calls and mailed advertisements, with Sears itself profiting off that intended use." Plaintiffs rely upon *Melvin v. Burling*, 141 Ill. App. 3d 786, 787 (1986), wherein the court held that the plaintiffs had stated a cause of action for intrusion upon seclusion where "the defendant intentionally ordered merchandise in the plaintiffs' names without the plaintiffs' consent, to be sent to the plaintiffs, followed by demands for payment to the plaintiffs for such unordered merchandise." However, in the instant case, there is no indication that plaintiffs were charged for services or products that they had not ordered. In any event, based on our review of the record, we agree with Sears that there is no evidence that plaintiffs' seclusion was "bombarded" by any marketing efforts.

¶ 58 Even assuming *arguendo* that there has been an "unauthorized intrusion," other elements of the tort of intrusion upon seclusion have not been satisfied. For example, the "third element of the tort, requiring allegations of private facts, is the predicate for the other elements, and as such, if this element is not proven, this court need not reach the other elements." *Jacobson v. CBS Broadcasting, Inc.*, 2014 IL App (1st) 132480, ¶ 47. See also *Cooney*, 407 Ill. App. 3d at 367 (noting that "[w]hile the theories contain different elements, both the intrusion and public disclosure torts require 'private' matters or facts"). Two decisions of this court – *Johnson v. Kmart Corp.*, 311 Ill. App. 3d 573 (2000), and *Busse v. Motorola, Inc.*, 351 Ill. App. 3d 67 (2004) – provide guidance on what constitutes a "private fact."

¶ 59 In *Johnson*, an employer hired private detectives who posed as employees to investigate theft, vandalism and drug use in the workplace. *Johnson*, 311 Ill. App. 3d at 575. The appellate court found that summary judgment should not have been granted with respect to the employees'

intrusion upon seclusion claims against their employer. *Id.* at 579. The court noted that the evidence showed that "the investigators compiled information regarding employees' family problems, health problems, sex lives, future work plans, and attitudes about defendant and reported this extremely personal information to defendant." *Id.*

¶ 60 In *Busse*, cellular telephone companies provided "customer databases" to a private research firm to conduct studies on a potential link between wireless telephone usage and mortality. *Busse*, 351 Ill. App. 3d at 69. The customer data supplied to the research firm included "customers' names, street addresses, cities, states, zip codes, dates of birth, social security numbers, wireless phone numbers, account numbers, start-of-service dates and the electronic serial numbers of the customers' phones." *Id*. The research firm obtained missing data for certain wireless customers through a credit bureau. *Id.* A class action lawsuit alleged, among other things, intrusion upon seclusion. *Id*. In affirming the grant of summary judgment to the defendants, the appellate court held that the information at issue did not "rise to the level of intimate personal facts held to be actionable in *Johnson.*" *Id.* at 72. The court concluded:

> "Here, plaintiffs failed to establish the information obtained by [the research firm] was private. In the absence of an Illinois law defining social security numbers as private information, we cannot say that defendants' use of this number fulfills the privacy element necessary to plead intrusion upon seclusion. Nor are the individual pieces of information – names, address, particulars of cell phone use – facially revealing, compromising or embarrassing." *Id.* at 73.

¶ 61 We view the instant case as more akin to *Busse* than *Johnson* and conclude that the information at issue was not "private" for purposes of the tort of intrusion upon seclusion. None of the information regarding plaintiffs was "facially revealing, compromising or embarrassing."

Id. We further note that "to succeed in adequately pleading and proving a cause of action for unreasonable intrusion upon seclusion, a plaintiff must demonstrate that the intrusion is not only offensive, but *highly* offensive to a reasonable person." (Emphasis in original). *Schmidt v. Ameritech Illinois*, 329 Ill. App. 3d 1020, 1030-31 (2002). There is no indication in the instant case that any intrusion would be deemed highly offensive to a reasonable person.

¶ 62 In light of our conclusion that the other elements of the tort of intrusion upon seclusion cannot be satisfied, we need not consider plaintiffs' arguments regarding whether a showing of "anguish and suffering" is required. We conclude that the circuit court did not err in granting summary judgment in favor of Sears on plaintiffs' claims of intrusion upon seclusion.

¶ 63 3. Consumer Fraud Act

¶ 64 Plaintiffs also challenge the circuit court's ruling regarding their Consumer Fraud Act claims. "The Consumer Fraud Act is a regulatory and remedial statute intended to give broad protection to consumers, borrowers, and business people against fraud, unfair methods of competition, and other unfair and deceptive business practices." *Ramirez v. Smart Corp.*, 371 Ill. App. 3d 797, 805, fn. 2 (2007). The Illinois Supreme Court has stated that a "Consumer Fraud Act claim requires (1) a deceptive act or practice by the defendant, (2) the defendant's intent that the plaintiff rely on the deception, (3) the occurrence of the deception in a course of conduct involving trade or commerce, and (4) actual damage to the plaintiff that is (5) a result of the deception." *DeBouse v. Bayer AG*, 235 Ill. 2d 544, 560 (2009); 815 ILCS 505/2 (West 2000).

¶ 65 As the circuit court accurately observed, "[t]he parties strenuously disagree about whether Sears' statements regarding its use of customer information were fraudulent and whether Sears' failure to disclose its use of customer information as part of its agreements with third-party marketers was a material omission." The circuit court concluded that it "need not resolve

these issues since there is clearly no evidence of 'actual damage,' and thus Plaintiffs' [Consumer Fraud Act] claim fails even if Sears committed a deceptive act or practice." As discussed below, we agree with the circuit court's assessment.

¶ 66 This court has consistently held that only a person who suffers actual damage as a result of a violation of the Consumer Fraud Act may bring a private action. *Morris v. Harvey Cycle and Camper, Inc.*, 392 Ill. App. 3d 399, 402 (2009). "The Consumer Fraud Act provides remedies for purely economic injuries." *Id.*; accord *White v. DaimlerChrysler Corp.*, 368 Ill. App. 3d 278, 287 (2006). Actual damages must be calculable and measured by the plaintiff's loss. *Morris*, 392 Ill. App. 3d at 402. "A plaintiff need not prove the amount of damages to an absolute certainty; however, he must present enough evidence to create a genuine issue of fact pertaining to damages." *Petty v. Chrysler Corp.*, 343 Ill. App. 3d 815, 823 (2003). "That evidence must include a basis for computing damages with a fair degree of probability." *Id.*

¶ 67 Plaintiffs contend on appeal that they "were damaged in that they had their privacy invaded, were harassed by numerous unwanted telemarketing calls and direct mail solicitations, and exposed to an increased risk of identity theft." As discussed below, the foregoing does not constitute "actual damage" for purposes of the Consumer Fraud Act.

¶ 68 *Cooney v. Chicago Public Schools*, 407 Ill. App. 3d 358 (2010), provides guidance on the damage issue. In *Cooney*, a printing company retained by a board of education mailed to over 1,700 former employees a list "contain[ing] the names of all 1,750 plaintiffs, along with their addresses, social security numbers, marital status, medical and dental insurers and health insurance plan information." *Id.* at 360. When the board learned of the disclosure of the personal information, it sent a letter to the former employees requesting that they return or destroy the list; the board subsequently offered the former employees one year of free credit protection

insurance. *Id*. In affirming the dismissal of the plaintiffs' complaints, the appellate court noted that "[t]o support a Consumer Fraud Act claim, actual damages must arise from purely economic injuries." (Internal quotation marks omitted). *Id.* at 365.

¶ 69 The *Cooney* court rejected the plaintiffs' contention "that they alleged actual damages because the disclosure put them at increased risk of future identity theft." *Id*. Citing *Yu v. International Business Machines Corp.*, 314 Ill. App. 3d 892, 897 (2000), the court opined that "[w]ithout actual injury or damage, the plaintiff's claims constituted conjecture and speculation." (Internal quotation marks omitted.) *Cooney*, 407 Ill. App. 3d at 365. The court also rejected the plaintiffs' contention that the "purchase by some plaintiffs of credit monitoring services" constituted an actual economic injury and that the board's offer of such services constituted an admission of actual damages. *Id.* at 366.

¶ 70 As in *Cooney,* plaintiffs herein did not sustain actual damage. During her deposition, Clark stated, "I believe that my privacy has been damaged"; Rodriguez and Rawson expressed similar sentiments. Gore indicated that his "trust in a company like Sears has been abused." Triezenberg stated he was damaged by "telemarketer calls, invasion of privacy." When asked to describe "how it is you believe you've been injured as a result of Sears' conduct being complained of in this lawsuit?," Woods responded, "I don't know." As the class representatives have not proven their claims for consumer fraud, the consumer fraud claim asserted on behalf of the class cannot stand. *Mulligan v. QVC, Inc.*, 382 Ill. App. 3d 620, 631 (2008).

¶ 71 Furthermore, the cases cited by plaintiffs are unavailing. Citing *Giammanco v. Giammanco*, 253 Ill. App. 3d 750, 758 (1993), plaintiffs assert on appeal that "this Court has distinguished 'actual damage,' which is the 'loss, hurt, or harm' resulting from 'the illegal invasion of a legal right,' from 'damages,' which is the 'recompense or compensation awarded

for damage suffered.' " *Id.*, citing Ballentine's Law Dictionary 303 (3d ed. 1969). However, the *Giammanco* court did not address the Consumer Fraud Act or the concept of "actual damage" under the statute. Citing *Puritt v. Allstate Insurance Co.*, 284 Ill. App. 3d 442, 445-46 (1996), plaintiffs also contend that "courts have recognized that a party has sustained actionable injury or is in imminent risk of sustaining actionable injury (sufficient to confer standing) in the absence of a showing of any economic injury or risk of economic injury." This basic threshold that generally must be met to establish standing – "a person must show that he has sustained, or is in imminent danger of sustaining, an injury" (*id.* at 446) – has no direct relationship to the principles which govern our analysis herein.

¶ 72 The plaintiffs further argue that the Illinois Supreme Court in *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 502-03 (2002),"recognized an increased risk of future harm to constitute an injury or 'damage' for which a plaintiff may recover." In *Dillon*, a physician surgically inserted a 16-centimeter catheter into a vein in the plaintiff's upper chest to administer chemotherapy. *Id.* at 487. After the plaintiff completed chemotherapy, the physician inadvertently removed only a seven-centimeter portion of the catheter. *Id.* The remaining nine-centimeter fragment migrated to the plaintiff's heart and was not discovered for more than one year. *Id*. at 487-88. A jury awarded the plaintiff $1.5 million for past pain and suffering, $1.5 million for future pain and suffering, and $500,000 for the increased risk of future injuries. *Id.* at 488-89. The Illinois Supreme Court held "simply that a plaintiff must be permitted to recover for *all* demonstrated injuries." (Emphasis in original). *Id.* at 504. The court stated that "[a] plaintiff can obtain compensation for a future injury that is not reasonably certain to occur, but the compensation would reflect the low probability of occurrence." *Id.* Because the jury was inadequately instructed on the increased risk of future injury as an element of damages, the cause

was remanded for a new trial solely on that element of damages. *Id.* at 508.

¶ 73 According to plaintiffs, the *Cooney* decision "fails to acknowledge that the [Illinois] Supreme Court has recognized an increased risk of future harm to constitute an injury or 'damage' for which a plaintiff may recover." However, Sears correctly notes that the *Cooney* court "relied on a post-*Dillon* decision wherein the Illinois Supreme Court explained that increased risk of future harm 'is *not* the injury itself.' " (Emphasis in original). *Cooney*, 407 Ill. App. 3d at 365, citing *Williams v. Manchester*, 228 Ill. 2d 404, 425 (2008). In any event, as Sears observes, "[t]here is no evidence that conduct by Sears quantifiably increased Plaintiffs' pre-existing risk of identity theft and none of them were victims of identity theft."

¶ 74 Simply put, plaintiffs cannot prove the requisite "actual damage" required under the Consumer Fraud Act. See *DeBouse*, 235 Ill. 2d at 550. We thus need not consider the remaining elements of such a claim. We affirm the circuit court's grant of summary judgment in favor of Sears as to plaintiffs' Consumer Fraud Act claims.

¶ 75 4. Unjust Enrichment

¶ 76 Finally, the plaintiffs challenge the circuit court's ruling regarding their unjust enrichment claims. "To state a claim for unjust enrichment, 'a plaintiff must allege that the defendant has unjustly retained a benefit to the plaintiff's detriment, and that defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience.' " *Saletech, LLC v. East Balt, Inc.*, 2014 IL App (1st) 132639, ¶ 36 (citing *HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc.*, 131 Ill. 2d 145, 160 (1989)); accord *Board of Managers of Hidden Lake Townhome Owners Ass'n v. Green Trails Improvement Ass'n.*, 404 Ill. App. 3d 184, 193 (2010).

¶ 77 "Even when a person has received a benefit from another, he or she is liable for payment

only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it. The mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor." (Internal quotation marks omitted.) *Saletech*, 2014 IL App (1st) 132639, ¶ 36. "The plaintiff's recovery is limited to the reasonable amount by which the trial court finds the defendant was unjustly enriched at the expense of the plaintiff." *Schlosser v. Welk*, 193 Ill. App. 3d 448, 450 (1990).

¶ 78 As an initial matter, the parties disagree as to whether a plaintiff may assert a stand-alone action for unjust enrichment. We observe that a number of Illinois cases have held that unjust enrichment does not constitute an independent cause of action. *E.g.*, *Saletech*, 2014 IL App (1st) 132639, ¶ 36; *Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶ 25; *Martis v. Grinnell Mutual Reinsurance Co.*, 388 Ill. App. 3d 1017, 1025 (2009); *Mulligan*, 382 Ill. App. 3d at 631. Like the circuit court, however, we will accept plaintiffs' premise that unjust enrichment may, in limited circumstances, be pled as a stand-alone cause of action. *E.g.*, *Peddinghaus v. Peddinghaus*, 295 Ill. App. 3d 943, 949 (1998).

¶ 79 When a plaintiff is seeking recovery of a benefit that was transferred to a defendant by a third party, courts have found that retention of the benefit would be unjust where: (1) the benefit should have been given to the plaintiff, but the third party mistakenly gave it to the defendant instead; (2) the defendant procured the benefit from the third party through some kind of wrongful conduct; or (3) the plaintiff for some other reason had a better claim to the benefit than the defendant. *HPI Health Care Services*, 131 Ill. 2d at 161-62. The operative complaints in the instant case do not allege any mistaken payments, nor were the payments procured by the wrongdoing of Sears vis-à-vis any third parties. Furthermore, we agree with the circuit court that there is no "other reason" that plaintiffs should have better claim to the money than Sears. As in

Dwyer, Sears "create[d] value by categorizing and aggregating" the cardholder information; plaintiffs' names and other information have "little or no intrinsic value" absent organization by Sears. *Dwyer*, 273 Ill. App. 3d at 749. Although not necessary for our analysis, we also observe that none of the named plaintiffs actually made any purchases as a result of the challenged marketing and sales practices. As Sears has not been enriched by any funds from Woods, Triezenberg, Rawson, Clark, Gore or Rodriguez, we fail to see why they would have a "better claim to the benefit" than Sears.

¶ 80 Furthermore, the unjust enrichment claims fail because the relationship between Sears and plaintiffs was governed by the agreements during the class period. "Because unjust enrichment is based on an implied contract, where there is a specific contract which governs the relationship of the parties, the doctrine of unjust enrichment has no application." (Internal quotation marks omitted.) *People ex rel. Hartigan v. E & E Hauling, Inc.*, 153 Ill. 2d 473, 497 (1992). Accord *Gagnon*, 2012 IL App (1st) 120645, ¶ 25; *Karimi v. 401 North Wabash Venture, LLC*, 2011 IL App (1st) 102670, ¶ 14; *Howard v. Chicago Transit Authority*, 402 Ill. App. 3d 455, 460-61 (2010); *Martis v. Pekin Memorial Hospital, Inc.*, 395 Ill. App. 3d 943, 952 (2009); *Board of Managers of Hidden Lake Townhome Owners Ass'n*, 404 Ill. App. 3d at 193; *Wheeler-Dealer, Ltd. v. Christ*, 379 Ill. App. 3d 864, 872 (2008). But see *Peddinghaus*, 295 Ill. App. 3d at 949 ("[s]ince plaintiff's unjust enrichment claim is based on tort, instead of quasi-contract, the existence of a specific contract does not defeat his cause of action"). Given the various agreements that governed the relationships between Sears and plaintiffs during the class period, plaintiffs' "quasi-contract" unjust enrichment claims fail.

¶ 81 For the foregoing reasons, we affirm the circuit court's grant of summary judgment in favor of Sears on plaintiffs' unjust enrichment claims.

¶ 82 CONCLUSION

¶ 83 We affirm the judgment of the circuit court of Cook County (i) denying plaintiffs' motion to enforce the settlement and (ii) denying plaintiffs' motion for summary judgment and granting summary judgment in favor of Sears.

¶ 84 Affirmed.