

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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IN RE: TARGET CORPORATION
CUSTOMER DATA SECURITY
BREACH LITIGATION

Case No. : 0:14-md-2522-PAM

TRANSCRIPT
OF
PROCEEDINGS
(MOTIONS HEARING)

The above-entitled matter came on for MOTIONS HEARING
before Judge Senior Judge Paul A. Magnus on November 21st,
2014, at the United States District Courthouse, Courtroom 7D,
316 N. Robert Street, St. Paul, Minnesota 55101, commencing
at approximately 10:00 a.m.

Reported by: RONALD J. MOEN, OFFICIAL COURT REPORTER, CSR,
RMR

CALIFORNIA CSR NO. : 8674

ILLINOIS CSR NO. : 084-004202

IOWA CSR NO. : 495

RMR NO. : 065111

1 THE COURT: We've got the Rule 12 motions on the
2 Target bank cases. Mr. Meal.

3 MR. MEAL: Yes, I'll be arguing, your Honor.

4 THE COURT: Okay.

5 MR. MEAL: May it please the Court, Douglas Meal on
6 behalf of Target. Your Honor, I think we had arranged that
7 each side would have 30 minutes for the argument. If it's
8 all right with your Honor, what I'd like to do is reserve ten
9 of my 30 minutes for rebuttal.

10 THE COURT: Sure.

11 MR. MEAL: Okay. Thank you, your Honor. Let me
12 begin by addressing the negligence claim. I'll be addressing
13 most of my remarks to the negligence claim.

14 THE COURT: Let's shoot for trying to do the
15 30-minute thing, but if we stretch that a little bit -- there
16 are lot of issues here, I know that. If it takes a few more
17 minutes, it's no big deal.

18 MR. MEAL: I appreciate that, your Honor. Thank
19 you. As your Honor knows, what we have in this case is an
20 allegation that my client, Target, suffered a criminal attack
21 in which criminal hackers intruded into Target's computer
22 network and stole payment-card data that had been provided to
23 Target by customers in Target stores and then used that
24 payment-card data to create counterfeit payment cards which,
25 in turn, were used to make fraudulent charges on the accounts

1 in question. What is going on in this lawsuit is that the
2 issuers of those payment cards that were counterfeited and
3 that had their accounts fraudulently used are suing Target to
4 recover the losses they incurred -- or -- they claim to have
5 incurred from the criminal activity from the counterfeiting
6 of the payment cards that they had issued and from the
7 fraudulent charges that were made on those accounts. So in
8 regard to the negligence claim, as your Honor knows from the
9 briefing, we believe this circumstance brings into play the
10 general rule of Minnesota law that a person -- here, Target
11 -- has no duty under Minnesota law to protect another party
12 -- here, the bank that issued the payment cards in
13 question -- from harmful conduct, including criminal conduct
14 of a third person. That's a black-letter, general principle
15 of Minnesota law that has been recognized repeatedly by the
16 Supreme Court, and even last year in the *RKL Landholding* case
17 that we cite in our brief, that we think is probably the most
18 recent learning from the Minnesota Court of Appeals on the
19 topic and deals with a lot of the issues that we're talking
20 about today, recognizes that that's an absolute, flat,
21 general rule of Minnesota law. Now, if that general rule
22 applies here, then there can't be any negligence claim that
23 would survive a motion to dismiss because this is that
24 circumstance. This is a circumstance where the plaintiffs
25 are claiming that Target, in fact, had a duty to protect them

1 from this criminal activity. The only way around the
2 application of that general rule here would be the special
3 relationship exception that Minnesota cases talk about. And
4 that is discussed at length in the briefs to your Honor.
5 Under the special relationship exception, as is set forth in
6 the briefs -- and I think the parties agree that this is the
7 standard for the special relationship exception -- there are
8 two prongs to make the exception apply, one prong is that the
9 injury from the criminal activity has to be reasonably
10 foreseeable. But there's a second prong -- and that's the
11 prong that the briefing centers on and that's the prong that
12 our argument centers on -- is that the special relationship
13 also -- that there also has to be a special relationship
14 between the parties in the lawsuit, between the victim --
15 here, the banks -- and the alleged tortfeasor -- here,
16 Target. Absent a special relationship of the sort that the
17 Minnesota courts have recognized, the exception doesn't apply
18 and the general rule then will apply, and the negligence
19 claim would be dismissed as a matter of law. It's
20 interesting because, as your Honor will have seen from the
21 briefs, there's actually a lot of learning and case law out
22 there in regard to this special relationship exception,
23 particularly in regard to what constitutes the sort of
24 special relationship between two parties that would lead a
25 court to impose a duty on one party to protect the dependent

1 party against a criminal attack. One really important point,
2 I think, the cases guide that the question of whether a
3 special relationship exists is a question of law, it's a
4 question of policy. It's not a question of fact. So it is a
5 question that is absolutely ripe and appropriate for
6 resolution at the motion to dismiss stage.

7 THE COURT: Well, Counsel, I think that's correct,
8 but, at the same token, sometimes you really have to develop
9 the factual relationship in order to make the legal ruling.
10 In other words, there can be a lot of things out there that
11 -- at this stage of the proceedings, you know, allegations
12 have been made. You're saying, "No, that's all there is."
13 Judges have to rule as a matter of law. I'm not saying that
14 I don't, but I'd better know what I'm talking about. I'm a
15 little concerned that the factual record here is pretty slim
16 to be saying that I know what I'm talking about.

17 MR. MEAL: I think in regard to the special
18 relationship issue, that issue, I think -- and we'll chat
19 about it -- but I think the record there -- accepting the
20 allegations in the Complaint as true -- demonstrate that what
21 we have here in no way even remotely resembles the sort of
22 special relationship -- or -- the sort of relationship that
23 the Minnesota courts have recognized as a special
24 relationship that could result in the imposition of the duty
25 that the plaintiffs are seeking to impose here. Again, the

1 guidance from the Minnesota Supreme Court is that this
2 exception is a very narrow exception, is to be invoked only
3 in the most limited circumstances, and that courts are to
4 think about extending it very, very reluctantly.

5 THE COURT: I think that's accepted --

6 MR. MEAL: Yes.

7 THE COURT: -- that it is very narrow.

8 MR. MEAL: Yes

9 THE COURT: The trouble is that, you know, the
10 narrow exceptions were probably written in 1970 and nobody
11 even had a computer. We've got a lot of technological change
12 that's occurred during the years. I don't know, I suppose
13 there were credit cards back then, but the whole idea of
14 hacking these things I don't think was even in consideration.

15 MR. MEAL: That's right, in terms of the 1970s.
16 Although it's interesting, your Honor, when you -- the
17 Minnesota courts actually consider this issue a lot. And
18 there's a lot of recent case law on this issue. As I
19 mentioned, the *RKL* case is a case from just last year. And
20 while I agree that there isn't a special relationship case
21 that arises in the context of a -- at least not from
22 Minnesota. There is one case that we cited to you from Maine
23 that does look at the special relationship issue under Maine
24 law, but under the same test, and that's the *BancFirst* case.
25 But there is a lot of recent case law from the Minnesota

1 courts that gives us a tremendous amount of guidance as to
2 whether the Minnesota Supreme Court -- because that's
3 actually the issue you confront here. You've got to rule
4 based on what you would expect the Minnesota Supreme Court to
5 rule on this issue, a lot of recent case law indicating that
6 a special relationship would not be found in these
7 circumstances. And part of that case law goes to this issue
8 you alluded to, your Honor, of how you apply this special
9 relationship test in the business commercial context. And
10 this is a business commercial context. And what *RKL* says,
11 from just last year, is that "Applying the exception" -- I'm
12 quoting now -- "is especially problematic in cases with
13 parties who are engaged in a business relationship." That's
14 *RKL*. And the reason for that, *RKL* says, is that "A business
15 relationship" -- again, quoting from *RKL* -- "naturally
16 provides an opportunity to allocate duties and risks through
17 contract." So in the commercial context -- what the teaching
18 of the Minnesota Court of Appeals and the Minnesota Supreme
19 Court is is that in a commercial context -- whatever the
20 context -- credit cards, any kind of commercial context --
21 where there's an opportunity to allocate the risk by
22 contract, that is a very powerful reason to think that you
23 wouldn't find a special relationship between the parties in
24 question. So what you find in the cases, first of all, in
25 terms of who's going to be subjected to the duty that the

1 courts -- and this is cited both in the *Erickson* case and the
2 *Errico* case that we cite in our brief -- and the plaintiffs
3 rely on the very same cases -- that they're very reluctant to
4 impose a duty to protect, arising from a special
5 relationship, upon a business entity, upon an entity like
6 Target. It's very, very unusual for that to occur and will
7 only occur in extreme circumstances. And that's what the
8 Minnesota Supreme Court has ruled. But even more than that,
9 jumping even beyond that, what you see in the cases is an
10 absolute -- not just reluctance but a nonexistence of any
11 willingness of the Minnesota courts to find a special
12 relationship in favor of a commercial entity. And the reason
13 for that is -- and I'm quoting here from the *Superior*
14 *Construction* case that we cite in our brief -- the reason for
15 that is that "Business enterprises" -- I'm quoting now from
16 the case, *Superior Construction* -- "are not the types of
17 parties deemed to be vulnerable that would require
18 protection." And, so, that's why I think, actually, your
19 Honor, it's absolutely appropriate at this juncture for you
20 to decide the special relationship issue because we have here
21 two commercial enterprises. No Minnesota case ever has found
22 a special relationship between two commercial enterprises.
23 It has never happened. This case will be the first ever case
24 to do that. And that's what is being asked of you by the
25 plaintiffs in this case is to be the first judge in Minnesota

1 ever to find a special relationship in favor of a commercial
2 enterprise. It's never happened. As I said, there's a lot
3 of Minnesota case law on this issue. They give us some
4 general principles that the Court should look to in deciding
5 the special relationship issue. As I mentioned, a key
6 element for a special relationship in this context is there
7 must be some sort of dependence relationship in place, where
8 the entity in whose favor the special relationship will be
9 found is dependent on or vulnerable in a way -- dependent on
10 the other party in a significant way and vulnerable in a way
11 that it can look to the party to protect it. The *Clark* case
12 holds that, and lots of Minnesota cases say that. But it's
13 not just a situation of dependence -- and this is really
14 important, your Honor, we submit, in terms of thinking about
15 this issue here. A dependence relationship, while it's a
16 necessary condition for a special relationship, it's not
17 sufficient. Because what the cases teach is that "The
18 dependent party must have" -- and, again, I'm quoting here
19 now from *Errico* -- "in some way entrusted her safety to the
20 other party." Very important. And as we discuss this,
21 you'll see, your Honor, that that becomes a guiding light in
22 terms of where a special relationship would be found. Third,
23 the other party -- here, it would be Target -- must have
24 accepted that entrustment of the dependent party's safety.
25 Again, that's from *Errico*. And fourth, the criminal act in

1 question must be something that the other party, the
2 nondependant party -- here, who would be Target -- is in a
3 unique position to, and should be expected to, protect the
4 dependent party against. So it's got to be the sort of crime
5 that only -- and here, Target -- a merchant could protect
6 against in order for the test to apply.

7 So what does all of that tell us, your Honor, in
8 terms of when a special relationship will be found in a
9 commercial context? Well, the cases are clear, and several
10 Minnesota cases have held, that certainly not every
11 merchant-customer relationship qualifies. Now, here, of
12 course, your Honor, we don't have a merchant-customer
13 relationship. We're here today on the issuing-bank cases.
14 The issuing banks, these plaintiffs, were not customers of
15 Target. There was no direct interaction between the banks
16 and Target. They never came into Target stores, they
17 never paid Target any money. So this isn't even a
18 merchant-customer relationship. And what the case law
19 teaches that even when there is a merchant-customer
20 relationship, that isn't enough to find a special
21 relationship. And the categories of commercial relationship
22 that have been found to satisfy the special relationship test
23 are very limited. And as you tick through them, you see
24 right away that this situation bears no resemblance to the
25 special relationship situations that the Minnesota courts

1 have recognized. So you've got innkeeper-guest, you've got
2 common carrier-passenger, you've got hospital-patient, you've
3 got daycare provider-child, you've got prison-prisoner. In a
4 very interesting case, the *Erickson* case, you've got
5 parking-garage operator and customer, where the *Erickson*
6 court goes at extreme length to say parking garages are sort
7 of inherent criminal nests, almost, is what the court says --
8 if you read the case, it's quite interesting -- and we're
9 going to create a very, very unique category here that, yes,
10 we're going to find if you're running a parking garage that
11 is poorly lit and people have to go in there by themselves,
12 you do have a duty in that limited circumstance. But that
13 court said, but we're not saying this means that every
14 merchant has a duty to everybody who comes into their stores.
15 We're not saying that. And the very next year, I think it
16 was, in *Errico*, the court of appeals read *Erickson* very
17 narrowly and found, in a very analogous situation, where it
18 wasn't a parking garage but a parking lot --

19 THE COURT: Counsel --

20 MR. MEAL: Yes.

21 THE COURT: -- what's the difference between a
22 poorly lit parking garage and a credit-card system, where the
23 commercial entity has opened the floodgates of information to
24 third parties to be able to commit the crime, just like a
25 poorly lit garage opens a criminal entity to commit the

1 crime? Now, one crime is a commercial crime, the other crime
2 is a physical crime. But what's the difference?

3 MR. MEAL: Well, that is one of the differences.
4 That's one of the differences that the Minnesota courts have
5 recognized repeatedly, that it makes a difference whether
6 what's at risk is someone's safety -- someone's physical
7 safety on the one hand or an economic loss on the other hand.
8 And every single one of these cases, including the parking-
9 garage case -- what was driving the Court to find the duty
10 was that the harm that was being protected against was a
11 physical harm. And, again, that's right in the test. The
12 dependent party has to have entrusted its safety to the other
13 party in order for there to be a special relationship. And
14 every single Minnesota case that has ever found a special
15 relationship has found it in the context of where the harm
16 was one of physical injury, physical safety. And every
17 single time someone has come before a Minnesota court and
18 sought a different sort of protection, whether it's economic
19 protection or property protection, the special relationship
20 has not been found. There has never been a case where a
21 special relationship was found where the harm was an economic
22 harm. Never happened. And there's good reason for that.
23 Because, remember, we're talking about an exception now to
24 the general rule that you don't have any duty to protect a
25 third party against the consequences of a criminal act by a

1 third party. That's the general rule. So if it made no
2 difference, your Honor, whether it was economic harm or
3 physical safety, physical injury -- if it made no difference,
4 if it wasn't just a safety issue but any kind of harm issue,
5 well, the exception would swallow the rule; right? So it's
6 supposed to be a very, very limited exception. And one way
7 in which the Minnesota courts have clearly limited it is to
8 situations where there's an issue of physical safety. And
9 that's right in the first prong of the test, that the
10 dependent party has to entrust her safety to the other party
11 in order for there to even be the possibility of a special
12 relationship. So that's the difference. And that's why we
13 don't find any cases in Minnesota that find a special
14 relationship in favor of a commercial enterprise. You don't
15 find any cases in Minnesota where a special relationship is
16 found in order to protect against anything other than
17 physical harm. Every case where a special relationship has
18 been found -- and, again, I'm quoting from *RKL* again --
19 there's a common thread -- and *RKL* recognizes the common
20 thread. Quoting from *RKL*, "Every case is a situation where
21 one person has 'custody' of another person" -- "another
22 person" -- "under circumstances where the other person is
23 deprived of normal opportunities of self-protection." That's
24 the common thread. Now, that has nothing to do with this
25 situation. We didn't have custody of the banks or any human

1 being that was injured here. There's no resemblance
2 whatsoever to the cases that have been identified as
3 qualifying for special relationship. And the duty that is
4 recognized when a special relationship is found is
5 consistently that the custodian of the person must protect
6 that person who's in custody against physical harm resulting
7 from a criminal attack. That's what has happened in every
8 single case where a special relationship has been recognized.
9 As I say, no case has ever found a special relationship
10 sufficient to support a duty to protect when the dependent
11 party was a business; this case would be the first ever in
12 Minnesota history to do that. When the plaintiff suffered a
13 purely economic harm; this case would be the first case in
14 Minnesota history to do that. In *Superior Construction*, the
15 plaintiff tried to do that and the court said no. The court
16 said no. And the court said no for exactly the reason that
17 I'm saying. The court said no because -- again, reading from
18 *Superior Construction* now -- this was a case of two
19 commercial enterprises on either side. And the court said
20 no. There was a contractor there that was claiming to be the
21 beneficiary of a special relationship. The court said no.
22 "The contractor did not entrust his safety to the bank." And
23 they went on to say, in *Superior Construction*, "This is a
24 business enterprise situation. These are not the types of
25 parties deemed to be vulnerable that would require

1 protection." So it's not like this hasn't been tried before,
2 your Honor. It's been tried before and it's failed. And,
3 again, this case would be the first case ever to do that.
4 Also, in every case where special relationship has been
5 found, the dependent party and the other party had some sort
6 of direct interaction. In every one of these cases -- the
7 parking-garage case, for example, your Honor, there was a
8 direct interaction between the parking-garage operator and
9 the person who was injured in the criminal attack. That
10 person had come into the parking garage, paid a fee to the
11 parking-garage operator, and gone into the parking garage and
12 then was attacked. And in every single case -- and you can
13 see it, you know, innkeeper-guest, common carry-passenger,
14 hospital-patient, prison-prisoner -- every one of those cases
15 there was direct interaction between the two parties. There
16 was no direct interaction here whatsoever between the banks
17 and Target. They paid us no money. The information in
18 question that was stolen wasn't given to us by the banks. It
19 was given to us by our customers. So there was no
20 interaction at all. And, so, this would -- again, this would
21 be the first time in Minnesota history where a court found a
22 special relationship where there was no direct interaction
23 between the two parties to the special relationship. Not
24 only is this not a special relationship, there isn't a
25 relationship, period. And, again, it would be the first case

1 ever in Minnesota history to find a duty to protect somebody
2 against something other than physical harm. Never happened.

3 THE COURT: Counsel, you've spent a lot of time
4 talking about special relationships. I understand that. The
5 problem is I'm going to have Mr. Zimmerman standing up in a
6 few minutes, right behind you, and he's going to say, "This
7 doesn't have anything to do with special relationships. This
8 is a straightforward negligence case."

9 MR. MEAL: He may say that, and I hope he does,
10 because I think that means we'll win, because, I mean, this
11 case falls squarely in that general rule. This is a case
12 involving a situation where what is alleged is that there was
13 harm suffered by the plaintiffs, these banks, as a result of
14 criminal activity. It's criminal activity that occurred when
15 these payment cards were counterfeited and fraudulent charges
16 were made on the accounts. The injury here is a result of
17 criminals fraudulently charging -- making fraudulent charges
18 on accounts issued by these banks. So this case falls smack
19 within that general rule of Minnesota law. So I think it's
20 actually going to be Mr. Cambronne. But whoever stands up
21 after me can say that this isn't that sort of case, but it
22 is. And, again, you don't -- this is squarely in the
23 Complaint. The Complaint is rife with acknowledgement that
24 the harm here resulted from this criminal activity. So this
25 hits dead on point the general rule of Minnesota law. So the

1 only way, we submit, your Honor, that the negligence claim
2 can survive is if there were a special relationship, and we
3 believe that they're asking your Honor to go into -- not just
4 because of one reason, but because I think I ticked off five
5 -- an area where no Minnesota court has gone before, and
6 where a Minnesota court shouldn't, and wouldn't, go. Because,
7 as I mentioned earlier, the whole notion in the special
8 relationship is that the dependent party is in a circumstance
9 where it can't be expected to protect itself against the
10 harm. The person walks into the parking garage all by
11 herself. There's no one there to protect her. She suffers a
12 criminal attack. And that's the theme again and again in
13 these cases, that they can't be expected to protect
14 themselves against the injury. Well, that is not the case
15 here in any way, shape or form. Not only could the banks
16 have protected themselves contractually against this harm,
17 they did protect themselves contractually against this harm.
18 And that's shown in case after case from around the country
19 that has considered negligence claims like this have relied
20 on these regulations in dismissing negligence claims. There
21 is -- and it's not disputed before your Honor -- there is
22 under both the Visa and MasterCard rules provisions for these
23 very banks contractually to have an opportunity, by contract,
24 to recover the very losses they're seeking to recover here by
25 means of this negligence claim. And, so, this harm is

1 exactly the sort of harm that you don't need to create a tort
2 duty to protect against. Because, as I say, not only is
3 there an opportunity to protect against injuries like this
4 contractually, it happened. They availed themselves of the
5 opportunity to have that contractual protection. And you'll
6 see -- and we cited the cases from around the country where
7 courts have looked to those very regulations and dismissed
8 negligence claims, saying, basically, "We're not going to" --
9 "I am not going to be the first judge ever to find a tort
10 duty here where there's contractual protection already in
11 place." And there's many Minnesota cases on this. One of
12 the main delineators of the line between tort and contract is
13 exactly that. Is this a circumstance where the parties have,
14 or at least have had, the opportunity to protect themselves
15 contractually. And that goes back to the question that you
16 asked earlier, you know, "What's the difference between an
17 economic injury and a physical injury?" Well, that's the
18 core difference, ultimately, is the economic injury in these
19 contexts can be protected against by contract. And that's
20 what the courts focus on in saying, "Yes, it does make a
21 difference." There's also a difference that the law has long
22 recognized that there's just a fundamental difference between
23 a physical injury -- between people being killed, a helpless
24 woman being raped. Those kinds of physical injuries warrant
25 greater protection. They warrant imposition of a special

1 duty. But economic injuries that could be protected against
2 by contract, they're a completely different category of
3 injury and no Minnesota court has gone there. And there's no
4 reason for your Honor to go there here, we submit.

5 I think that's pretty much what I had to say on --
6 I may have already burned up my time, but I did want to say a
7 few words on the other Counts, if I may.

8 THE COURT: Sure, go ahead.

9 MR. MEAL: Let me turn now to the negligent
10 misrepresentation Count. I think the briefs are pretty
11 straightforward on this, and the issues are pretty clearly
12 laid out. The *Williams* case is really the leading Minnesota
13 case on negligent misrepresentation. It sets forth the
14 four-prong test for a valid negligent misrepresentation
15 claim. First prong is there has to be a duty of the
16 defendant to avoid negligent misrepresentations being made to
17 the plaintiff. So you have to have the duty. There has to
18 have been false information supplied to the plaintiff by the
19 defendant; second element. There has to have been reliance
20 on that false information by the plaintiff; third element.
21 And there has to have been an absence of reasonable care on
22 the part of the defendant in supplying the information in
23 question. So as you saw in our briefs, we believe, in terms
24 of those four elements, none of the first three of those
25 elements has been, or could be, pleaded here.

1 The *Mack* case that we cite in our brief from last
2 year in this court -- not your Honor. I think it was -- I'm
3 blanking on it. I apologize. But a very, very --

4 THE COURT: I think it's Judge Nelson's case.

5 MR. MEAL: Nelson's case -- yes, Judge Nelson's
6 case. Thank you, your Honor. Very, Very illustrative of the
7 points that we think require dismissal of the negligent
8 misrepresentation claim here.

9 What the *Mack* case says -- and it just is echoing
10 *Williams* in saying this -- is that in terms of duty, you only
11 have a duty to avoid making a negligent misrepresentation
12 where you as the defendant are in the business or profession
13 of providing guidance to the plaintiff -- providing guidance
14 in general, and then that duty only extends to those to whom
15 you provide such guidance. So the kinds of situations where
16 a negligent misrepresentation claim will lie where the duty
17 will exist are attorney-client, accountant-client, a
18 fiduciary beneficiary type of relationship and only there to
19 the person to whom you're providing the guidance. Arm's
20 length commercial relationships don't qualify. *Mack* holds
21 that, *Williams* holds that. Here, not only is there no
22 relationship of guidance that existed between the banks on
23 the one hand and Target on the other hand, there's no
24 relationship in terms of a legal relationship, like an
25 attorney-client relationship or some other kind of

1 contractual or legally based relationship, between the
2 parties at all. Now, what is attempted in the opposition
3 brief is to sort of get around this by saying, "Well, wait a
4 minute, wait a minute, wait a minute, there's another way to
5 impose a duty here and that is a so-called 'special
6 circumstances test.'" And, you know, with respect, we just
7 think that that's wrong as a matter of law.

8 In arguing for the special circumstances test, the
9 plaintiffs' brief cites *Graphic Communications*. If you read
10 *Graphic Communications* -- or -- when you read *Graphic*
11 *Communications*, one sees immediately that that isn't even a
12 negligent misrepresentation case. That's a Consumer Fraud
13 Act case. Completely different standard. So it just has --
14 you know, frankly, it's just inapposite to the negligent
15 misrepresentation scenario. *Graphic Communications* cites to
16 the *Klein* case. *Klein* is a common-law fraud case. So there
17 may be a special circumstances test under some bodies of
18 Minnesota law, like the Consumer Fraud Act, like common-law
19 fraud, but there isn't any special circumstances test under
20 Minnesota negligent misrepresentation law. What there is is
21 the requirement of a relationship of guidance. And there
22 isn't any relationship of guidance here. Even if there had
23 been a commercial arm's length transaction relationship
24 between the banks and Target, that wouldn't suffice here.
25 That's what *Williams* holds, that's what *Mack* holds. But

1 that's just one of the reasons why the negligence
2 misrepresentation claim fails.

3 Because the second element is, in the context of
4 this relationship of guidance that gives rise to the duty,
5 the defendant has to have provided false information to the
6 plaintiff. That's the second prong of the test. Here, the
7 only information that is pleaded in the Complaint with any
8 specificity that Target is alleged to have provided to anyone
9 is the information contained in Target's privacy policy.
10 Now, the privacy policy is alluded to in the Complaint but
11 not attached. But it was submitted to the Court. And when
12 one reads the privacy policy, it's crystal clear reading it
13 that the privacy policy was provided to Target's guests or
14 customers. The privacy policy has a defined term "you." And
15 that's defined to be the guests. So nothing in the privacy
16 policy was, or can be, alleged with even remote plausibility
17 to have been provided to issuing banks. So for that reason,
18 the second prong can't be met here either.

19 But fundamentally what isn't pleaded here -- and I
20 think in the briefs, the plaintiffs, to their credit,
21 acknowledge that they haven't pleaded here any reliance by
22 them on any information that was provided to them by Target.
23 And their position is, "We don't need to plead reliance."
24 But we submit, your Honor, that the Minnesota law is directly
25 contra to that position and that reliance is required even --

1 in every negligent misrepresentation case, you must plead
2 that you relied on the information that was provided to you.
3 That's a fundamental requirement. There's an argument that
4 the plaintiffs make that, "Well, what we're claiming here is
5 that you omitted things from the information. And, so, this
6 is really an omissions case. We don't need to show
7 reliance." But that doesn't change it. You still have to
8 have relied on what was provided to you and they haven't
9 pleaded that. And there is a case, your Honor, *Illinois*
10 *Farmers* that was handed down after we submitted our brief in
11 support of our motion to dismiss. It's from Judge Schiltz in
12 this court. And I can hand it up, if your Honor would like,
13 or submit it afterwards, if you'd like, or whatever. But it
14 goes to --

15 THE COURT: Just give me a cite, if you have it.

16 MR. MEAL: I have a cite, your Honor. It's 2014
17 U.S. District. LEXIS 114745, from late August of this year.
18 And that specifically addresses this very point, and says:
19 "Even when what you're alleging is misrepresentation by
20 omission" --

21 THE COURT: I take it you don't have the Westlaw?

22 MR. MEAL: I don't, but I'll be happy to get it for
23 you, your Honor.

24 THE COURT: Okay. When you get a chance, please
25 do.

1 MR. MEAL: But it specifically says in the case
2 when you're alleging misrepresentation by omission, you do
3 need to plead reliance. And, so, there isn't any reliance
4 pleaded here, so that would dispose of the -- for that third
5 reason dispose of the negligent misrepresentation claim.

6 Briefly on the Plastic Card Security Act, that
7 statute focuses not on payment-card data generally, just so
8 we're clear, it focuses on three particular sort of
9 categories of payment-card data; one is the so-called "CVV
10 code." That's the card verification value code. That's the
11 code that's embedded in the magnetic stripe on the back of
12 your card that's there to prove that it's really the genuine
13 card when your card is swiped. That's something that a
14 criminal needs in order to create a counterfeit of your card.
15 He needs that CVV code. Your card number itself doesn't get
16 it done. So that's one category is the CVV code. The second
17 is your pin, and the third is -- going back to the magnetic
18 stripe is if you're storing or retaining the full stripe on a
19 magnet stripe on the back of your card, that also is in the
20 category of what's protected. So a payment-card number
21 standing alone doesn't bring into play the statute. Now,
22 that's important because that means that a claim under this
23 statute can only be pleaded if you plead two things. You
24 have to plead, number one, that the defendant retained not
25 just payment-card data generally but the protected payment-

1 card data, the card data that the statute actually protects,
2 number one. And number two, you have to plead that there was
3 a data security breach in which that retained protected data
4 was stolen. Here, the Complaint doesn't do either thing.
5 And this is where it does become important to really parse
6 the Complaint carefully. There's a lot of allegations in the
7 Complaint, but there's one and only one place in the
8 Complaint where there's any allegation made relative to
9 these three categories of protected card data. That's
10 paragraph 82. And what's mentioned in paragraph 82 is the
11 CVV. And what the Complaint does is it quotes some analyst
12 somewhere who says, "Well, CVVs were stolen from Target. The
13 only way to steal a CVV is if the CVV is stored, retained.
14 Therefore, Target must have been storing CVVs." And that's
15 the only time there's any allegation in the Complaint of an
16 actual retention by Target of this protected card data.

17 THE COURT: Maybe it's true.

18 MR. MEAL: Well, maybe. Except when you read
19 paragraphs 49 and 56 of the Complaint, in terms of what data
20 was affected in this breach, those paragraphs are crystal
21 clear in saying that what was stolen here was live data, data
22 that was in transit through the network as the data got sent
23 to them, to the issuing banks, for approval of transactions
24 in question. So you could say "Maybe it's true" if the
25 Complaint's own allegations didn't negate that -- which they

1 do. Paragraphs 45 and 56 are dead on in saying, in terms of
2 the data that was actually stolen and the attack, it wasn't
3 any retained data, it was live data that was stolen. And
4 your Honor has seen --

5 THE COURT: But, actually, there are references to
6 other places that there was retained data.

7 MR. MEAL: Not retained protected data. If you go
8 through the paragraphs of the complaint, there's one and only
9 one place where there's any reference to a retention of one
10 of the three categories of protected data and that's
11 paragraph 82, where there's the reference to the CVV. And
12 the argument is this inferential argument. "Well, Target
13 conceded that CVVs were stolen." And that's true, CVVs were
14 stolen. We don't dispute that for purposes of this motion.
15 "The only way to steal CVVs is if they're stored. Therefore,
16 Target must have stored CVVs." That's the argument that's
17 made in paragraph 82. But paragraphs 49 and 56 make clear
18 that it's just not true that the only way to steal a CVV is
19 if it's stored. Because paragraphs 49 and 56 state: These
20 CVVs weren't stolen from storage. These CVVs were stolen
21 while they were live in transit being sent to the banks for
22 approval of a transaction. So the inference that the
23 Complaint would have you draw, your Honor, that a CVV was
24 stolen; ergo, a CVV was stored, is not a plausible inference,
25 as shown by their own Complaint, that, in fact, you can steal

1 a CVV that's not stored. So the "Maybe it's true" is not a
2 plausible "maybe." And, therefore, since they haven't
3 pleaded, plausibly, retention of any of the protected data,
4 and they certainly haven't pleaded that any retained data was
5 stolen. The only data they've pleaded was stolen was live
6 data. So for those two reasons, they haven't stated, and
7 can't state, because everybody here knows that the reality is
8 that what was stolen in this attack was live data, not
9 retained data. That claim, we submit, should be dismissed,
10 as well. And I think there is agreement -- the one point of
11 clear agreement in the briefs, your Honor, is if the Plastic
12 Card Act claim is dismissed, the negligence per se claim
13 should be dismissed, as well, since that's predicated on the
14 viability of a statutory claim here.

15 I may have burned up my rebuttal time. Hopefully
16 not. But if there are no other questions from your Honor,
17 I'll yield the floor.

18 THE COURT: Okay. Very well. Thank you very much.

19 MR. MEAL: Thank you.

20 THE COURT: Mr. Cambronne.

21 MR. CAMBRONNE: Good morning, your Honor. Karl
22 Cambronne appearing on behalf of the bank plaintiffs in this
23 action. Your Honor, we had the benefit, in pleading this
24 case, of a Senate investigation and a subsequent report from
25 the Senate about what happened in this Target data breach.

1 And what we were able to glean from that was the obvious --
2 that is, the point that Mr. Meal wants to emphasize
3 continuously that there were criminals or bad guys out there
4 that found their way into our network and stole data. But,
5 your Honor, it said a lot more than that, and we've pled a
6 lot more than that. And that's why we've meticulously
7 annotated the brief we have before you citing to the
8 allegations of fact that give rise to all the claims that we
9 have here.

10 I will proceed, your Honor, in this matter along
11 similar lines that Mr. Meal did, just so I can be responsive
12 to what he said. But, your Honor, this case, indeed, on the
13 whole matter of negligence and whether you need to prove a
14 special duty or is general negligence sufficient in a case of
15 this sort, your Honor, I think that difference is stark as
16 these two sides come before you. We reject the notion, your
17 Honor, and our Complaint rejects the notion, that this case
18 is all about the obvious; that is, there are bad guys out
19 there who hacked into a system. We focus instead, your
20 Honor, in our Complaint on what Target's actions were
21 subsequent to the event of bad guys being involved in this
22 matter. And when we do that focusing, your Honor, we find
23 the following, that pre the event of last year, twice the
24 Visa, MasterCard system had warned Target that this
25 particular type of malware was out there and you ought guard

1 against it. We know, your Honor, that Target had installed,
2 through its software company called FireEye a malware
3 detection device and ability, your Honor, for that malware
4 detection software to automatically, automatically delete
5 from its computer system the malware, should it become
6 infected or be found on the system of Target. We find, your
7 Honor, that three times during the course of -- you know,
8 this is just a two-week period we're talking about before
9 Christmas last year -- three times they were warned, Target
10 was internally, that you have a malware worming its way into
11 your system. And three times, your Honor, that was ignored
12 internally by Target. So our focus in our Complaint, your
13 Honor, is to state the obvious would mean there are criminals
14 and the bad guys out there who are intentionally trying to do
15 dirty deeds and steal people's credit-card information. But
16 the focus of our Complaint is what did Target do in order to
17 avoid that particular problem. And that, your Honor, gives
18 rise to the issue of negligence in this particular case.

19 Now, you, just a year ago, decided the *Fetterly*
20 decision. In that case, you applied a general negligence
21 standard to determine whether or not, in any context, a duty
22 arises in a relationship between people or, in this case,
23 entities such as Target and the banks.

24 THE COURT: What case is that?

25 MR. CAMBRONNE: The *Fetterly* decision, your Honor.

1 THE COURT: You know I can't remember anything for
2 a year, so...

3 MR. CAMBRONNE: Yes, it's too long ago. Right,
4 your Honor. But it's cited in our brief, your Honor --

5 THE COURT: Okay. That's fine.

6 MR. CAMBRONNE: -- on page 18 or 19, I believe.
7 But, in any event, you said, "How do you determine the
8 existence of a duty? Is it something foreseeable?" And, of
9 course, it's obvious this was foreseeable. Target had taken
10 some steps, anyway, to make sure this cataclysmic sort of
11 event would not happen. They had been warned by outside
12 people that this is a foreseeable event. The statute in
13 Minnesota had warned them that, in the event certain things
14 occur, you're going to be responsible to financial
15 institutions if data is stolen. So it's a no-brainer in the
16 sense that everybody, including Target, knew prior to the
17 data breach that something like this could happen.

18 Then there's the next issue of whether or not
19 there's a relationship between what Target did and the
20 damages. And, of course, what Target did or did not do is
21 what caused the damages, so we allege, in the context of our
22 Complaint.

23 And, then, there's three lesser factors, moral
24 blame, the policy for prohibiting or trying to stop future
25 harm, and whether or not there's a burden on the defendant to

1 comply. There was a burden on the defendant to comply, your
2 Honor, by virtue of the Minnesota statute. There is a policy
3 encased within that statute that says that you have to, as a
4 merchant, guard against this very type of thing. So when you
5 consider the negligence claim in the context of general
6 negligence, your Honor, certainly there is a duty that is
7 given rise to by virtue of the factors that you articulated
8 in your decision of last year. Now, what Target wants to do
9 -- and I don't blame them for trying to do this -- is focus
10 entirely on the fact of the crime itself. "Somebody did
11 dirty deeds within us and, therefore, no harm, no foul,
12 because they're a third party to the relationship." Well,
13 your Honor, if you look at this context, I think there is no
14 doubt that there is a relationship that gives rise -- the
15 relationship that is foreseeable, as Mr. Meal pointed out,
16 and that the risk of injury is foreseeable. We have a
17 defendant here who has acknowledged prior to the data breach
18 that, in the event these things happen, there's going to be
19 economic fallout in the form of loss to financial
20 institutions. And the other foreseeability aspect of this is
21 the conduct foreseeable. The conduct of course was
22 foreseeable; that is, somebody trying to hack into your
23 system and steal what's not theirs. You can walk either
24 path, as far as we're concerned, the general negligence path
25 or the special relationship path. And we find both of those

1 situations lead to the conclusion -- and this is what we have
2 alleged and that's what's important for purposes of the Rule
3 12 motion -- either of those paths will lead to the same
4 conclusion; that is, negligence was committed here by Target
5 and, therefore, the consequences of that negligence should be
6 left to Target to resolve.

7 The other thing, your Honor, that is important, I
8 think, is that what Target is attempting to do here is say:
9 "We can take advantage of commerce as it exists in the new
10 millennium here." As you say, we didn't have these issues 25
11 years ago and, hence, there's perhaps not much of a surprise
12 that a lot of case law hasn't addressed it. New case law,
13 your Honor, that has addressed these matters in the context
14 of data breaches -- for instance, the *Heartland* decision out
15 of the Fifth Circuit, and the *Sovereign* decision, both of
16 which are -- I believe that's out of First Circuit -- but
17 both of which, your Honor, conclude that under general
18 negligence jurisprudence, those claims of general negligence
19 survive against merchants like Target in favor of banks, like
20 the plaintiffs' putative class in this particular case. So
21 we do have a developing body of case law that is saying
22 exactly what we're saying here in this particular case.

23 Your Honor, I'm going to jump to, because I think
24 it solves a lot of your analysis issues, the card-act claim
25 that we have made. And we focused on that, your Honor,

1 because it is a clear indication of a policy adopted by the
2 state of Minnesota with respect to what's going to happen in
3 the event of a data breach. And what's going to happen in
4 the event of a data breach, and certain things having been
5 demonstrated, is that merchants -- i.e., Target -- owes banks
6 -- that is, the putative class here -- for a variety of
7 different things; that is, the cost of replacing cards, the
8 cost of having to pay for fraudulent charges, the cost of
9 notifying customers, and the like. So we have existing at
10 the time of this data breach a very succinct statute that
11 kind of solves the problem about whether or not there's a
12 duty owed to banks here. Now, Mr. Meal would have you
13 believe, your Honor, that we ought to dance on the head of a
14 pin and talk about retention of data. We have alleged -- and
15 it's annotated precisely in our Complaint -- that this was a
16 situation where Target had retained data. And we say this in
17 two ways, frankly. We say that Target has historically, and
18 has been criticized, frankly, for mining customer data and
19 retaining it on their system -- and this is alleged in the
20 Complaint -- because it helps them in their marketing. And
21 so be it, that's what they've decided to do. But we've also
22 said that you can't steal these various things that the
23 Senate report has concluded were stolen without having them
24 then retained on the system at Target, because they were
25 there and they were stolen. And we've alleged that they held

1 the data -- the data was held on the system, retained on the
2 system for more than the requisite period of time required by
3 the statute. That leads, inescapably, to the conclusion that
4 the standard set forth in the statute gives rise to the
5 statutory claim. Importantly, your Honor, that very statute
6 also says that we have -- we as the plaintiff class here have
7 a right to other remedies too. It's not an exclusive remedy.
8 It's one of all of those that we've asserted in this
9 particular Complaint. So we have a statute that kind of
10 focuses on all fours on this particular matter. And if this
11 statute applies, a violation of that statute is per se
12 negligence, as we've alleged in the Complaint.

13 Finally, your Honor, we have an allegation that
14 somehow regulations between -- these regulations somehow
15 trump everything else and the only remedy that these banks
16 have is to go to some sort of a system within the arcane and
17 very complex Visa regulations. That's where the remedy is.
18 Of course, that's not what the state of Minnesota says.
19 Minnesota says that is not your only remedy. In fact, your
20 Honor, we don't think it's any remedy at all. It's not
21 mandatory, it doesn't necessarily give any benefit of the
22 sort that is discussed in the statute. All it is, your
23 Honor, is a voluntary system Visa has set up that could
24 possibly, under certain circumstances that we don't even know
25 exist in this particular case, provide an opportunity or an

1 avenue for recovery. So the bottom line is we have a statute
2 that says Target, under the allegations of the Complaint, is
3 responsible here. We have a negligence theory, your Honor.
4 And we can walk either path, the general negligence path or
5 the path of special duty. It leads to the same conclusion.
6 We have Target's conduct in this matter being assailed and
7 Target's conduct, as articulated in the Complaint, is all
8 that is important for purposes of deciding this motion.

9 Thank you, your Honor.

10 THE COURT: Okay. Thank you.

11 Mr. Zimmerman has got more advice for you.

12 MR. CAMBRONNE: Yes. Now, the *Fetterly* cite, your
13 Honor --

14 THE COURT: I knew he was going to argue.

15 MR. CAMBRONNE: He was. He was. He's good at
16 this. Westlaw 6175181.

17 THE COURT: Will you repeat that.

18 MR. CAMBRONNE: Westlaw 6175181.

19 THE COURT: Okay.

20 MR. CAMBRONNE: Thank you.

21 MR. MEAL: Very briefly, if I may, your Honor.

22 THE COURT: Sure.

23 MR. MEAL: Thank you, your Honor. I appreciate
24 that. So *Fetterly*, when your Honor refreshes your
25 recollection in that case, you'll recall that *Fetterly* is a

1 *respondeat superior* case.

2 THE COURT: I will when I refresh my memory.

3 MR. MEAL: Right, exactly. I just refreshed my
4 recollection while Mr. Cambronne was speaking. It's a
5 *respondeat superior* case. It didn't involve any issue of a
6 claim that the defendant had failed to protect the plaintiff
7 against a criminal act of a third party. So it didn't
8 implicate any of the law that we're relying on for this
9 special relationship test. And your Honor quite
10 appropriately in a *respondeant superior* case applied the
11 general Minnesota law standard for finding a duty. Now, we
12 don't think your Honor gets to that standard here because of
13 all the reasons I spoke about earlier around the special
14 relationship test that applies in these circumstances. And
15 we've briefed this and I won't belabor it. We do think that
16 even under that standard there wouldn't be a duty found here.
17 But we don't think you get there here. So that's one point.

18 Mr. Cambronne said that there's actually an
19 emerging body of law around the country recognizing a duty of
20 a merchant to an issuing bank in these circumstances, in
21 tort. I'd respectfully disagree with him on that. He
22 mentioned the *Heartland* case as being part of this emerging
23 body of law. In fact, the Fifth Circuit in *Heartland* did not
24 find a duty to exist. I'll grant you -- it's actually my
25 case. But I'll grant you -- and I've read that case many

1 times -- the Fifth Circuit said: "There may be a duty." And
2 the Fifth Circuit then remanded the case to Judge Rosenthal,
3 who was handling that MDL. And currently that issue is being
4 briefed to Judge Rosenthal right now. And that will be
5 argued before her next month. So *Heartland* doesn't represent
6 part of any such body of law.

7 THE COURT: Thank you for filling me in on that. I
8 was curious as to where she was with that case.

9 MR. MEAL: Yes. It originally had been scheduled
10 to be argued yesterday, interestingly, but it's now scheduled
11 for argument on the 18th. And the duty issue is being
12 briefed to her there. So *Heartland* isn't part of any such
13 body of law. I grant -- absolutely grant that -- and we cite
14 this in our brief, acknowledge it in our brief -- the
15 *Sovereign* case on a motion to dismiss found a duty. It is,
16 and remains, the one and only decision of any court in the
17 country to find a duty of a merchant to an issuing bank in
18 these circumstances. The emerging body of law actually goes
19 the other way and we've cited these cases in our brief.
20 There are three other cases that have ruled on the duty
21 issue. That would be the *BancFirst* case that I mentioned in
22 my opening comments. There's also the *Merrick* case that we
23 cite, which refused to find a duty in these circumstances.
24 And the *Hannaford* case -- the *DFCU* case in Maine. Notably,
25 *Sovereign*, by the way, your Honor, while a duty was not found

1 on a motion to dismiss, the negligence claim in that case was
2 ultimately thrown out, as a matter of law, on the economic
3 loss doctrine. So there still isn't any negligence claim
4 anywhere in the issuing bank-merchant context that has
5 survived. None has ever survived. So I just want to make
6 that point quickly. And, then, again, I'm sure -- I'm not
7 saying this was intentional, but when Mr. Cambronne was
8 talking about the Complaint's allegations of retained data,
9 he said, "We allege throughout our Complaint that Target had
10 a practice of retaining" -- and his words -- "customer data."
11 That's what he said. And that's what is alleged. But, as I
12 said earlier, alleging retention of customer data, things
13 like address, name, e-mail, that doesn't state a claim under
14 this statute. The statute is very limited. It bites on
15 three, and only three, subcategories of payment-card data.
16 So what needs to be alleged here, and what isn't alleged
17 here, is that. And then that goes to paragraph 82. You can
18 read all those --

19 THE COURT: Well, aren't those three things, at
20 least arguably, included in customer data?

21 MR. MEAL: Arguably?

22 THE COURT: Yes.

23 MR. MEAL: Not if you read what is disclosed.

24 The customer data that was alleged was retained was data like
25 I just alluded to, e-mail address, things like that. I mean

1 since the statute requires you -- and I have to admit I could
2 imagine a situation where you might give leave to amend here.
3 But the statute requires you to plead not customer data but
4 one of these three categories. And it's no accident, your
5 Honor, that that isn't really pleaded, because everybody in
6 this room knows that what was attacked here was data in
7 flight, not data that had been retained. That is the fact.
8 And maybe your Honor would grant leave to amend. I
9 acknowledge that, in terms of that particular claim, to see
10 if they can allege it. I predict if you were to do that,
11 they won't be able to because they know they don't have the
12 basis for alleging an attack on retained data.

13 That's all, your Honor. Thank you.

14 THE COURT: Okay. Very well. Thank you very much.

15 MR. CAMBRONNE: May I?

16 THE COURT: Sure.

17 MR. CAMBRONNE: All right. Your Honor, we allege
18 in the Complaint, at paragraph 75, that Target stored
19 information from card transactions including "account
20 numbers, the expiration date, the cardholder's name, as well
21 as the CVV codes." Paragraph 75. That statute, your Honor,
22 creates a duty here. And unlike all of the other cases
23 Mr. Meal is involved in around the country, he doesn't have a
24 statute that says: "Under these circumstances merchant pays
25 bank." And that makes this a very different ballpark we're

1 in today. Thank you.

2 THE COURT: Thank you. Okay. Counsel, we thank
3 you very much for the submissions today. I obviously will
4 take the matter under advisement. We'll let you know just as
5 soon as we can. We're now going to pretend this is all
6 denied and proceed to a status conference with respect to the
7 matter.

8 (Court stood in recess at approximately 11:15 a.m.,
9 on November 21st, 2014).

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CERTIFICATE PAGE

I, Ronald J. Moen, an Official Court Reporter for the District of Minnesota, CSR, RMR, and a Notary Public in and for the County of Hennepin, in the State of Minnesota, do hereby certify:

That the said MOTIONS HEARING was taken before me as an Official Court Reporter for the District of Minnesota, CSR, RMR, and a Notary Public at the said time and place and was taken down in shorthand writing by me;

That said MOTIONS HEARING was thereafter under my direction transcribed into computer-assisted transcription, and that the foregoing transcript constitutes a full, true and correct report of the MOTIONS HEARING which then and there took place;

That I am a disinterested third person to the said action;

That the cost of the original has been charged to the Plaintiffs and Defendants equally.

That I reported pages 1 through 42.

IN WITNESS THEREOF, I have hereto subscribed my hand this 24th day of November, 2014.

s/Ronald J. Moen
Ronald J. Moen,
Official Court Reporter,
CSR, RMR, NP