2018 IL App (1st) 180320-U

FIRST DIVISION
December 24, 2018

No. 1-18-0320

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

ALEX LOZADA and GREG KRASICK, individually and on behalf of all others similarly situated; PIERRE PETRICH, individually, and as mother and next of friend to AMARA PETRICH, a minor, and on behalf of all others similarly situated; ARTHUR PIESIEWICZ, URSZULA WYSOCK PIESIEWICZ, and SCOTT BERNARD on behalf of themselves and others similarly situated; HEATHER WANDERSKI and SHARON LEWERT, individually and on behalf of all others similarly situated; MARQUITA COOK and JASON COOK, individually and on behalf of all others similarly situated; LARRY MUSGRAVE, DINA CHERIN, CELIA STASHEVSKIY, individually and on behalf of a class of all others similarly situated; IRMA BOBROFF and LUIS GARCIA, individually and on behalf of all others similarly situated; JAMES A. TALBERT and MICHAEL SIEGEL individually and on behalf of all others similarly situated; and KAREN J. NANCE, individually and on behalf of all others similarly situated,	Appeal from the Circuit Court of Cook County
Plaintiffs,	Nos. 13 CH 20390, 13 L 9984, 13 CH 20828, 13 CH 20915, 13 L 10200, 13 CH 21165, 13 CH 22475, 13 CH 22744, & 13 CH 23005 (cons.)
v.	
ADVOCATE HEALTH & HOSPITALS CORPORATION d/b/a Advocate Medical Group, d/b/a Advocate Health Care,	
Defendant-Appellee	
(Marquita Cook, Greg Krasick, and Irma Bobroff, Plaintiffs-Appellants).	The Honorable Rodolfo Garcia, Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justices Griffin and Walker concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court is affirmed in part and reversed in part. We affirm the circuit court's dismissal of plaintiffs' breach of express contract claim for failure to state a claim. We reverse the circuit court's dismissal of plaintiffs' breach of implied contract claim and count for unjust enrichment, and remand for further proceedings.

¶ 2 Plaintiffs Marquita Cook, Greg Krasick, and Irma Bobroff, each individually and on behalf of all others similarly situated, appeal from the circuit court of Cook County's dismissal pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2014)) of their breach of express and implied contract claims and theory of unjust enrichment against defendant Advocate Health & Hospitals Corporation d/b/a Advocate Medical Group d/b/a Advocate Health Care (Advocate). For the reasons that follow, we affirm the circuit court's dismissal of plaintiffs' breach of express contract claim, but we reverse the circuit court's dismissal of plaintiffs' breach of implied contract claim and the dismissal of plaintiffs' unjust enrichment count, and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 For the purposes of this appeal, we accept as true all the well-pleaded facts in plaintiffs' amended consolidated class action complaint and draw all reasonable inference in their favor. *Edelman, Combs & Latturner v. Hinshaw & Culbertson*, 338 Ill. App. 3d 156, 164 (2003).

¶ 5 In July 2013, burglars broke into an Advocate administrative office in Park Ridge, Illinois, and stole four desktop computers (July 2013 data breach). The stolen computers' hard drives were unencrypted and contained the full names, addresses, birthdates, telephone numbers, social security numbers, medical histories, medical diagnoses, and health insurance information

(sensitive information) for approximately four million Advocate patients. Numerous class action complaints were filed against Advocate in the circuit court of Cook County premised on the July 2013 data breach and Advocate's failure to protect its patients' sensitive information. The circuit court consolidated all of the actions under case No. 13 CH 20390. In January 2014, plaintiffs[1] filed a consolidated class action complaint. The circuit court dismissed the consolidated complaint without prejudice.

¶ 6 In December 2014, Cook, Krasick, and Bobroff, "on behalf of themselves and three classes," filed a first amended consolidated class action complaint (amended complaint), which is the operative complaint on appeal.[2] The amended complaint defined three classes: (1) the Identity Theft Class, represented by all plaintiffs, which included all persons whose sensitive information was stored on the computers stolen in the July 2013 data breach who experienced identity theft as a result; (2) the Overpayment Class, represented by Cook and Krasic, which included all persons who were Advocate patients who "paid money to Advocate in connection with the services they received," and whose sensitive information was stored on the computers stolen in the July 2013 data breach; and (3) the Co-Payment Class, represented by Bobroff, which included all persons who were Advocate patients who received medical services from Advocate between September 2009 and July 2013 who "paid money to Advocate for a percentage of such services pursuant to the terms of a [p]ayor policy or contract."[3]

¶ 7 Only three counts from the amended complaint are at issue in this appeal: breach of an express contract on behalf of all plaintiffs and classes (count II); breach of an implied contract on

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[1]The initial consolidated class action complaint identified three named plaintiffs—Alex Lozada, Marquita Cook, and Greg Krasick—individually and on behalf of two classes.

[2]The notice of appeal and the parties' briefs in this court list all of the plaintiffs in the consolidated action as appellants. However, the operative complaint in this appeal and the appellants' brief only identifies Cook, Krasick, and Bobroff as the appellants.

[3]The members of the Co-Payment Class were specifically excluded from the Overpayment Class.

behalf of all plaintiffs and classes (count III); and unjust enrichment on behalf of the plaintiffs and the Overpayment and Co-Payment Classes (count IV). Plaintiffs also asserted claims of negligence on behalf of plaintiffs and the Identity Theft Class (count I), which plaintiffs ultimately voluntarily dismissed in order to appeal the dismissal of counts II, III, and IV. Plaintiff's additional claims for money had and received on behalf of the plaintiffs and the Overpayment and Co-Payment Classes (count V), and for breach of fiduciary duty on behalf of the plaintiffs and the Identity Theft Class (count VI), were ultimately dismissed with prejudice and are not at issue in this appeal.

¶ 8 Plaintiffs alleged that they were required to provide their sensitive information to Advocate in order to receive medical services, that Advocate was required to protect its patients' sensitive information under federal and state laws, and that Advocate "expressly and impliedly promise[d] to provide these data protections to its patients, including in its patient agreements, on its website, in the press, and through agreements with [p]ayors, including insurance companies." Plaintiffs alleged that all Advocate patients are given and required to acknowledge receipt of and sign Advocate's patient agreement in connection with receiving health care services, and that plaintiffs agreed to pay money for those health care services as well as for data protection services.

¶ 9 Plaintiffs' breach of express contract claim asserted that Advocate's "written services contracts, patients' rights statements, and privacy policies *** expressly promised [p]laintiffs and the [c]lasses that [Advocate] would comply with all HIPPA standards, protect [p]laintiffs' and the [c]lasses' [s]enstive [i]nformation, and only disclose their health information when required by law." In exchange, plaintiffs provided their personal and family health information and paid Advocate to "among other things, protect their [s]ensitive [i]nformation." Plaintiffs

alleged that they and the Identity Theft Class suffered actual damages in the form of credit monitoring expenses, identity theft insurance, expenses related to initiating fraud alerts, decreased credit scores, and increased risk of future harm, as well as related noneconomic damages. Furthermore, plaintiffs alleged that by failing to properly secure plaintiffs' sensitive information, the Overpayment and Co-Payment Classes did "not receiv[e] services that they paid money for." Finally, plaintiffs alleged that Advocate was able to artificially inflate the rates that it charged by concealing its true data protection practices, causing members of the Co-Payment Class to pay more for health care services than they otherwise would have paid, entitling the Co-Payment Class to the difference between the price they paid and the price they would have paid had Advocate not concealed its actual data protection practices.

¶ 10 Plaintiffs' breach of implied contract claim, pleaded in the alternative, asserted the existence of an implied contract based on plaintiffs' provision of their sensitive information to Advocate and Advocate's acceptance of that information, which obligated Advocate to take reasonable steps to secure the sensitive information. Finally, and in the alternative to the breach of express and implied contract claims, plaintiffs asserted that part of the fees they paid to Advocate was for the administrative costs of data management and security of their sensitive information. Plaintiffs asserted that Advocate "should not be permitted to retain the amount of money that [p]laintiffs *** overpaid" under a theory of unjust enrichment because Advocate did not implement adequate data security measures and concealed its inadequate data security polices from the public "in order to drive up its rates."

¶ 11 Advocate moved to dismiss the amended complaint pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2014)). The motion was fully briefed and the circuit court heard oral argument. On September 10, 2015, the circuit court entered a handwritten order granting

Advocate's motion to dismiss the breach of express and implied contract claims (counts II and III, respectively) as well as the unjust enrichment and money had and received counts (counts IV and V, respectively) with prejudice. The circuit court denied Advocate's motion to dismiss the Identity Theft Class's negligence claim in count I and ordered Advocate to answer count I. On January 19, 2018, plaintiffs voluntarily dismissed the negligence claim in count I of the amended complaint, and subsequently filed a timely notice of appeal from the circuit court's September 10, 2015, dismissal of the breach of express and implied contract claims and the unjust enrichment count.

¶ 12 II. ANALYSIS

¶ 13 On appeal, plaintiffs first contend that the amended complaint stated a claim for breach of either an express or implied contract because plaintiffs adequately alleged an express or implied promise by Advocate to provide data security, and that their "overpayment" theory of damages is a cognizable injury stemming from Advocate's breach of that promise. Second, plaintiffs argue that absent the existence of an enforceable express or implied promise by Advocate to provide data security, the amended complaint properly stated a theory of unjust enrichment. We address these arguments in turn.

¶ 14 A motion to dismiss pursuant to section 2-615 of the Code challenges the legal sufficiency of a complaint. *Bonhomme v. St. James*, 2012 IL 112393, ¶ 34. We accept as true all well-pleaded facts in the complaint. *Id.* "The critical inquiry is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted." *Id.* Our review of a dismissal under section 2-615 of the Code is *de novo*. *Id.*

¶ 15 Plaintiff first argues that the amended complaint stated a claim for either breach of an express or implied contract. To support their contention of an express promise by Advocate to provide data security services, plaintiffs rely primarily on a section of Advocate's patient agreement titled "Notice of Privacy Practices" (privacy notice), which provides,

> "We understand that medical information about you and your health is personal. *We are committed to protecting your medical information*. Each time you visit a hospital, physician, or other health care provider, they document information about you and your visit. *** This Medical Information is used to provide you with quality care and to comply with certain legal requirements.
>
> * * *
>
> We are required by law to:
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> - Maintain the privacy of your Medical Information.
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> * * *
>
> - Follow the terms of this Notice or a Notice that is in effect at the time Advocate Health Care uses or discloses your Medical Information." (Emphasis added.)

¶ 16 Plaintiffs argue that Advocate's representation that "[w]e are committed to protecting your medical information" demonstrates that Advocate committed to using reasonable measures to safeguard plaintiffs' sensitive information and expressly agreed to take basic steps to protect that sensitive information from disclosure to unauthorized third parties. Advocate responds that the language in its privacy notice is "standardless" and provides no basis for ascertaining what level of security or what specific security measures are required. It argues that the language is a "vague, aspirational statement" that relates to patient privacy, not data protection.

¶ 17 A valid contract comprises an offer, acceptance, and consideration, and must be "sufficiently definite so that its terms are reasonably certain and able to be determined." *Halloran v. Dickerson*, 287 Ill. App. 3d 857, 867-68 (1997). "A contract is sufficiently definite and certain to be enforceable if the court is able from its terms and provisions to ascertain what the parties intended, under proper rules of construction and applicable principles of equity." *Id.* at 868 (citing *Midland Hotel Corp. v. Reuben H. Donnelley Corp.*, 118 Ill. 2d 306, 314 (1987)). In construing a contract, the primary objective is to give effect to the intentions of the parties. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011). We first look to the plain language of the contract in order to ascertain the parties' intent. *Id.* We construe a contract as a whole and view each provision in light of the other provisions. *Id.* The interpretation of a contract is a question of law. *Avery v. State Farm Mutual Auto Insurance Co.*, 216 Ill. 2d 100, 129 (2005). There can be no contract if essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken. *Halloran*, 287 Ill. App. 3d at 868.

¶ 18 Here, Advocate represented to patients that it would protect its patients' sensitive information, but the privacy disclosure is silent as to what measures it would take to secure that information. The privacy notice advises patients on how Advocate would use and disclose sensitive information for the purposes of treatment, billing, and health care operations. It also advised how certain information might be used for hospital directories and research purposes, be disclosed to individuals involved in a patient's medical care such as family members, or be used to prevent serious threats to the health and safety of the patient or others. It further advised that some information might be shared with Advocate's business associates and charitable organizations, or in special situations such as lawsuits, law enforcement activities, situations involving coroners, medical examiners, funeral directors, organ and tissue donations, or in

situations involving the military or veterans, inmates, workers compensation benefits, or public health activities. In other words, the privacy policy outlines how a patients' sensitive information may be used or disclosed in a number of situations, but made no mention as to how Advocate would store or maintain its patients' data. We find that the privacy policy does not amount to an express agreement for data security as it contains no terms or promises related to Advocate's maintenance or storage of it patients' data, and thus provides no sufficient basis from which we might ascertain what the parties expressly agreed to or whether Advocate performed or failed to perform as expected under the agreement.

¶ 19 The parties discuss several federal district court decisions (many of which are unpublished) on motions to dismiss breach of contract claims involving data breaches, and one federal court of appeals case. Specifically, the parties cite *Dolmage v. Combined Insurance Co. of America*, No. 14 C 3809, 2016 WL 754731 (N.D. Ill. Feb. 23, 2016), *Smith v. Triad of Alabama, LLC*, No. 1:14-CV-324-WKW, 2015 WL 5793318 (M.D. Ala. Sept. 29, 2015) (*Triad*), *In re Anthem, Inc. Data Breach Litigation*, No. 15-MD-02617-LHK, 2016 WL 3029783 (N.D. Cal. May 27, 2016) (*Anthem*), *In re: Premera Blue Cross Customer Data Security Breach Litigation*, No. 3:15-MD-2633-SI, 2017 WL 539578 (D. Or. Feb. 9, 2017) (*Premera*), *In re Yahoo! Inc. Customer Data Security Breach Litigation*, No. 16-MD-02752-LHK, 2017 WL 3727318 (N.D. Cal. Aug. 30, 2017) (*Yahoo!*), *In re Adobe Systems, Inc. Privacy Litigation*, 66 F. Supp. 3d 1197 (N.D. Cal. 2014) (*Adobe*), *Smith v. Trusted Universal Standards in Electronic Transactions, Inc.*, No. 09-CV-4567, 2010 WL 1799456 (D.N.J. May 4, 2010) (*Trusted Universal*), and *Resnick v. AvMed, Inc.*, 693 F.3d 1317 (11th Cir. 2012).[4]

[4]We emphasize that federal district court and court of appeals decisions are not binding on this court, and are at best persuasive authority. We also emphasize that Illinois is a fact-pleading jurisdiction, which requires a plaintiff to allege sufficient facts from which we might infer that their claim falls within a recognized cause of action (*City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 368 (2004)),

¶ 20 Unlike here, the statements giving rise to plausible breach of express contract claims in *Dolmage*, *Anthem*, *Premera*, *Yahoo!*, and *Adobe* specifically addressed data security measures. See, *e.g.*, *Dolmage*, 2016 WL 754731, at *1 ("[Defendant's] Privacy Pledge further states that Defendant maintain[s] physical, electronic and procedural safeguards that comply with federal regulations to guard your personal information[.]"); *Anthem*, 2016 WL 3029783, at *2 ("Anthem *** safeguards Social Security numbers and other personal information by having physical, technical, and administrative safeguards in place."); *Premera*, 2017 WL 539578, at *6 ("[Premera] take[s] steps to secure our buildings and electronic systems from unauthorized access[.]"); *Yahoo!*, 2017 WL 3727318, at *44 ("We have physical, electronic, and procedural safeguards that comply with federal regulations to protect personal information about you."); *Adobe*, 66 F. Supp. 3d 1197, 1206 ("[Adobe] provide[s] reasonable administrative, technical, and physical security controls to protect your information."). The policies in each of those cases make definite representations regarding how the defendants actually stored or maintained data, whereas the privacy policy here did not, but instead made representations about the manner in which patients' data was used or shared for health care or administrative purposes.

¶ 21 The remaining cases relied on by the parties are distinguishable for other reasons. In *Triad*, the district court adopted a magistrate judge's recommendation that the plaintiffs' breach of express contract claim proceed to discovery where the plaintiffs alleged in their complaint that the defendant "had a written understanding with the Plaintiffs [***] as set forth in [its] Notice of Privacy Practices that [it] would not disclose Plaintiffs' [***] confidential information in a manner not authorized by applicable law or industry standards." *Triad*, 2015 WL 5793318, at *14. The plaintiffs there, however, did not attach a copy of the defendant's privacy policy to

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whereas federal courts employ notice-pleading standards and evaluate motions to dismiss for failure to state a claim under a facial plausibility standard (*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 622, 678 (2009)).

their complaint, and the magistrate judge refused to consider the copy of the defendant's privacy policy that was attached to the defendant's motion to dismiss. *Id.* In addition to being an unpublished federal district court decision applying federal standards to a motion to dismiss, the rationale in *Triad* is not compatible with pleading standards for breach of contract actions in Illinois, which requires a party whose claim is founded on a written instrument to attach that instrument to its complaint as an exhibit or to recite the instrument in its complaint. 735 ILCS 5/2-606 (West 2016). Thus we find that *Triad* has no persuasive value to this court in evaluating the sufficiency of plaintiffs' pleading here.

¶ 22 *Trusted Universal* is readily distinguishable, because the district court found that the plaintiff had failed to plead any loss to support a breach of contract claim, and the district court assumed, without deciding, that a privacy policy could form the basis of a contractual agreement. 2010 WL 1799456, at *9-10. Finally, in *Resnick*, the Court of Appeals for the Eleventh Circuit, applying Florida law, was primarily focused on whether the plaintiffs' complaint plausibly alleged that the defendant's data breach was the proximate cause of the plaintiffs' injury to support a breach of contract claim. 693 F.3d at 1325-28. The court of appeals did not discuss the language of the defendant's privacy policy or engage in any analysis as to whether the policy language was sufficient to create an express contract. Neither *Trusted Universal* nor *Resnick* are of any help in evaluating the sufficiency of claims before us.

¶ 23 In sum, we conclude that the circuit court properly dismissed count II of the amended complaint because, as pleaded, the privacy policy that plaintiffs rely on does not establish an express contract for data security between Advocate and plaintiffs.

¶ 24 Plaintiffs next argue that their amended complaint stated a claim for breach of implied contract. Plaintiffs argue that the complaint alleges a meeting of the minds between Advocate

and its patients because Advocate required its patients to provide their sensitive information in order to receive health care services, which "gave rise to an enforceable, implied promise on the part of Advocate to protect [p]laintiffs' confidential health information." Plaintiffs again rely on the privacy policy to support this implied promise, and to other "public-facing documents," including Advocate's online "notice of privacy practices/HIPPA document," and a press release from Advocate following a similar 2009 data breach in which an unencrypted computer was stolen from an Advocate office, and in response to which Advocate stated it uses or would use encryption to protect patients' stored sensitive information.

¶ 25 Advocate responds that plaintiffs have failed to allege a meeting of the minds. It argues that there are no allegations that plaintiffs had any communications with Advocate regarding data security or ever inquired about or reviewed Advocate's data security practices, or any allegations to adequately establish that there was any meeting of the minds regarding a definite set of data security terms. Advocate further contends that there are no allegations that any plaintiff ever read the online notice of privacy or was aware of Advocate's press release following the 2009 data breach. Therefore, Advocate argues, there are no facts to show that Advocate made any direct representations to plaintiffs regarding data security or that plaintiffs relied on any public representations made by Advocate.

¶ 26 "An implied contract is created as a result of the parties' acts." *People ex rel. Hartigan v. Knecht Services, Inc.*, 216 Ill. App. 3d 843, 851 (1991). A contract implied in fact is a true contract and arises "from a promissory expression that may be inferred from the facts and circumstances that demonstrate the parties' intent to be bound." *Trapani Construction Co., Inc. v. Elliot Group, Inc.*, 2016 IL App (1st) 143734, ¶ 41 (citing *Heavey v. Ehret*, 166 Ill. App. 3d

347, 354 (1988)). An implied contract contains all of the elements of an express contract, including a meeting of the minds. *Id.*

¶ 27 We agree with plaintiffs that they have sufficiently alleged the existence of an implied contract. Plaintiffs alleged that "[i]n order to benefit from Advocate's services, [p]laintiffs *** were required to disclose" their sensitive information. Advocate's privacy policy sets forth numerous ways in which Advocate acknowledges that patients' "medical information about you and your health is personal" and that Advocate was "committed to protecting" that medical information. By accepting Advocate's privacy policy in exchange for providing their sensitive information, plaintiffs accepted Advocate implicit and inescapable representations that Advocate would do *something* to protect that information. It can be implied from the parties' relationship that Advocate would take some steps to ensure that plaintiffs' sensitive information would be shielded in some manner to prevent unauthorized disclosure of that information. While the parties may not have expressly agreed on the manner in which plaintiffs' data would be protected from disclosure, plaintiffs have sufficiently alleged that the parties agreed that plaintiffs' sensitive information would remain protected and private. Plaintiffs' complaint alleges that Advocate failed to honor that promise by failing to take certain steps to ensure that their information would be adequately protected. In other words, plaintiffs' allege that there was a meeting of the minds that plaintiffs' sensitive information was sensitive and would be kept safe. The facts and circumstances surrounding the exchange of plaintiffs' sensitive information could give rise to a contract implied in fact that Advocate would take some measures to ensure that plaintiffs' sensitive information would not be disclosed to unauthorized third parties.

¶ 28 Having determined that plaintiffs have sufficiently pleaded the existence of a contract implied in fact, we must next consider whether plaintiffs sufficiently alleged damages arising

from Advocate's alleged breach. The named plaintiffs in the amended complaint each alleged that they suffered actual damages in the form of identity theft as a result of Advocate's failure to adequately secure their sensitive information. Additionally, Cook and Krasic asserted that that they did not receive the data security services for which they paid, and therefore did not receive the full benefit of their bargain with Advocate. Bobroff alleged that the rates Advocate charged were artificially inflated because Advocate concealed the true nature of its data protection practices, and therefore she sought to recover, as money damages, the difference between what she actually paid for Advocate's services and what she would have paid had Advocate not concealed its true data protection practices. Plaintiffs insist that these "overpayment" damages are appropriate contract damages and that they do not seek restitution.

¶ 29 Advocate responds that if plaintiffs can prove the existence of a contract and that they suffered identity theft as a result, they are entitled to seek actual damages arising from Advocate's breach. Advocate, however, challenges whether plaintiffs' "overpayment" theory is a cognizable measure of contract damages, as that theory is not designed to put plaintiffs in the same position they would have been had the contract been performed, but is in fact an attempt to partially disgorge amounts paid to Advocate under the contract, *i.e.*, recover damages in the nature of partial restitution or a refund. Advocate contends that plaintiffs "were not injured by the payment they supposedly made for data security; rather, they were injured (if at all) by the computer theft."

¶ 30 The basic theory of damages in a breach of contract action requires that a plaintiff "establish an actual loss or measurable damages resulting from the breach in order to recover." *Avery*, 216 Ill. 2d at 149. The proper measure of damages for a breach of contract is the amount of money necessary to place the plaintiff in a position as if the contract had been performed.

InsureOne Independent Insurance Agency, LLC v. Hallberg, 2012 IL App (1st) 092385, ¶ 82. Damages which "naturally and generally result from a breach are recoverable." *Id.* ¶ 89 (quoting *Midland Hotel Corp. v. Reuben H. Donnelley Corp.*, 118 Ill. 2d 306, 318 (1987)). Damages which are not the proximate result of the breach are not allowed. *Feldstein v. Guinan*, 148 Ill. App. 3d 610, 613 (1986).

¶ 31 We first agree with the parties that plaintiffs have sufficiently alleged actual damages in the form of compensation for identity theft, as those alleged damages arise out of Advocate's alleged breach of the implied contract to protect plaintiffs' sensitive information. The alleged identity theft damages naturally and generally result from a breach of an agreement to keep sensitive data secure. Therefore, plaintiffs have stated a claim for breach of implied contract. As such, the circuit court's dismissal of count III of the amended complaint must be reversed in part.

¶ 32 However, we agree with Advocate that plaintiffs' "overpayment" theory of damages is not a cognizable measure of a breach of contract damages in Illinois. Plaintiffs essentially argue that they paid Advocate for data security, Advocate failed to spend that money on data security resulting in the data breach, and plaintiffs' damages are equal to what they paid Advocate for data security that was not provided. The damages plaintiffs are seeking under their "overpayment" theory are effectively a refund, and the remedy they seek is restitution. See *Raintree Homes Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 257 (2004) ("[The] plaintiffs' requested relief of a refund may be properly designated as seeking an award of restitution."). This court has observed that the alternative remedies of damages and restitution are "facially inconsistent and may, under certain circumstances, be mutually inconsistent, requiring an election of remedies." *MC Baldwin Financial Co. v. DiMaggio, Rosario & Veraja, LLC*, 364 Ill. App. 3d 6, 18 (2006) (citing Restatement (Second) of Contracts § 341 (1984)). We observed in

MC Baldwin that "[a]n action for restitution generally requires rescission and disaffirmance of the contract and involves restoring the plaintiff to his original position" (*id.* (citing R. Lord, Williston on Contracts § 68:2, at 37 (2003); Restatement (Second) of Contracts § 373 (1981))), while "an action for damages is consistent with affirmation of the contract, which would have entitled the promisee to its performance and correspondingly to damages incurred by its breach (*id.* (citing Restatement (Second) of Contracts § 344 (1981)).

¶ 33 Here, Advocate would not have been in a position to provide plaintiffs with data security services at all were it not for the alleged implied contract resulting from plaintiffs' disclosure of their sensitive information to Advocate in connection with seeking health care services. Plaintiffs cannot have it both ways: plaintiffs cannot seek to enforce the implied contract in order to recover actual damages due to Advocate's breach, *and* simultaneously seek a refund of the money they paid for data security that was not provided, which would effectively put the parties in the same position that they would have been in had there been no contract at all. Plaintiffs have not directed us to any authority from our supreme court or this court that directly or impliedly recognizes awarding both forms of relief in a breach of contract action. We find that the restitutionary overpayment damages sought by plaintiffs are not recoverable in a breach of contract action where plaintiffs are seeking actual compensatory damages arising from allegations that Advocate breached the parties' implied contract.

¶ 34 Finally, plaintiffs argue that their amended complaint properly stated a theory of unjust enrichment. They argue that the complaint alleged that plaintiffs paid Advocate for data security services that Advocate did not provide, and that in fairness, the money plaintiffs paid should be returned. Advocate responds that while pleading an unjust enrichment claim in the alternative to a breach of contract claim is permitted, plaintiffs cannot assert an unjust enrichment claim where

a contract for health care services exists between the parties. Advocate's contention is premised on the fact that there was indisputably a contract for the provision of healthcare-related services. Advocate argues that if plaintiffs paid for health care services that did not include data security, then plaintiffs cannot allege that Advocate received and unjustly retained any benefit.

¶ 35 "To state a cause of action based on a theory of 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." *HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc.*, 131 Ill. 2d 145, 160 (1989). Unjust enrichment is not an independent cause of action. *Martis v. Grinnell Mutual Reinsurance Co.*, 388 Ill. App. 3d 1017, 1024 (1989). Rather, "it is condition that may be brought about by unlawful or improper conduct as defined by law, such as fraud, duress, or undue influence" (internal quotation marks omitted) (*Alliance Acceptance Co. v. Yale Insurance Agency, Inc., 271 Ill. App*. 3d 483, 492 (1995)), or, alternatively, it may be based on contracts which are implied in law (*Perez v. Citicorp Mortgage, Inc.*, 301 Ill. App. 3d 413, 425 (1998)). While a plaintiff is permitted to plead unjust enrichment in the alternative to a breach of contract claim, unjust enrichment "is inapplicable where an express contract, oral or written, governs the parties' relationship." *Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶ 25. "[A]lthough a plaintiff may plead claims alternatively based on express contract and an unjust enrichment, the unjust enrichment claim cannot include allegations of an express contract." *Id.*

¶ 36 We first observe that plaintiffs' unjust enrichment count suffers from a simple pleading defect. In the amended complaint, each plaintiff alleged, "As part of the patient-admission process, [plaintiff] was required to provide Advocate with [plaintiff's] Sensitive Information *in exchange for an agreement* with Advocate to receive health care services and to protect

[plaintiff's] Sensitive Information in accordance with HIPAA and industry standards." (Emphasis added.) Cook and Crasick further alleged "As such, [plaintiff] paid Advocate for [plaintiff's] medical care and, among other services connected to [plaintiff's] treatment, the protection of [plaintiff's] Sensitive Information." Bobroff similarly alleged,

> "Bobroff directly paid Advocate for her medical care pursuant to the terms of a coinsurance requirement of a Payor plan (i.e., Bobroff paid 20% of the medical bill, and her insurance paid 80% of the bill). As such, Bobroff directly paid Advocate twenty percent (20%) of the contract rate that her insurance company negotiated with Advocate."

In other words, plaintiffs alleged the existence of an agreement to provide their sensitive information and in exchange paid for Advocate's medical and administrative services. These allegations were expressly incorporated into count IV for unjust enrichment, which runs afoul of the principle that a properly pleaded count for unjust enrichment cannot include allegations of an express contract. *Id.*

¶ 37 However, we find that absent the technical defect, count IV of the amended complaint sufficiently alleges a theory of unjust enrichment. Plaintiffs alleged that they conferred a benefit on Advocate by paying for data security services; Advocate accepted payment but did not to provide those services; it would be unjust for Advocate to retain the conferred benefit; and Advocate's retention of the conferred benefit violates principles of justice, equity, and good conscience. As an issue of pleading, we find that plaintiffs have sufficiently alleged, in the alternative to their breach of implied contract claim, a theory of unjust enrichment. Whether plaintiffs can prove unjust enrichment is yet to be seen. We therefore reverse the circuit court's

judgment dismissing count IV of the amended complaint, and allow plaintiff to replead their theory of unjust enrichment if they choose to do so.

¶ 38 CONCLUSION

¶ 39 For the foregoing reasons, the judgment of the circuit court dismissing plaintiffs' breach of express contract claim in count II of the amended complaint is affirmed. The circuit court's judgment dismissing plaintiffs' breach of implied contract claim in count III and plaintiffs' theory of unjust enrichment in count IV is reversed, and we remand to the circuit court for further proceedings consistent with this order.

¶ 40 Affirmed in part; reversed in part; remanded.