NORTH DAKOTA BANKERS ASSOCIATION

LEGAL UPDATE

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FRAUD

Checking for Fraud and Check Fraud: Obligations of Banks Responding to Fraud [SDNY]

An elderly couple (the "depositors") held accounts in two banks ("Bank 1" and "Bank 2"). In February 2023, the depositors discovered that their personal assistant had fraudulently used their accounts to obtain nearly three million dollars. Bank 1 had first alerted the depositors to the assistant's suspicious activity in January 2021; however, at that time, the depositors had found no irregular transactions. During a call with Bank 2 in February 2023, Bank 2 and the depositors identified fraudulent transactions totaling nearly $700,000. Later in February 2023, the depositors contacted Bank 2 requesting a fraud check. Bank 1 reviewed the depositors' accounts and informed them that "no suspicious activity had been found." Three days later, after several requests from the depositors, Bank 1 provided the depositors with twelve months of their account statements. These statements revealed that Bank 1 had been mailing the depositors' statements to an old, invalid address, which explained why the depositors had been unaware of the transactions. Additionally, these statements showed that approximately $2.4 million had been transferred to various accounts without authorization, and the depositors had never received a fraud alert. The depositors sued both banks, alleging fraudulent misrepresentation and violations of the Uniform Commercial Code (UCC), the Truth in Lending Act (TILA), and the Electronic Funds Transfer Act (EFTA) based on the banks' failure to alert the depositors .to the fraud. The depositors also alleged a violation of the New York State General Business Law § 349 (GBL § 349).

In **Bernstein v. JPMorgan Chase Bank, N.A.**, 775 F. Supp. 3d 701 (S.D.N.Y. 2025), the court dismissed all claims except the GBL § 349 claim. For the fraudulent misrepresentation claim, the first element is "(1) the defendant had a duty, as a result of a special relationship, to give correct information." Hydro Investors, Inc. v. Trafalgar Power Inc., 227 F.3d 8, 20 (2d Cir. 2000). The court found that the depositors failed on the first element, reasoning that special relationships typically exist in scientific or technical contexts. The court further explained that a long-term lender-borrower relationship in private banking does not create a special relationship. The court dismissed the claims for violations of UCC Articles 4-406 and 4-A, finding that those articles do not apply to credit card transactions. Article 4-406 relates to bank deposits, while Article 4-A relates to commercial electronic transfers. For similar reasons, the court dismissed the UCC Article 4 claim against Bank 1. Moreover, the UCC Article 4 claim failed to provide adequate notice to the banks because the depositors did not allege which checks and transactions the claim referred to, nor did the depositors provide dates or dollar amounts. Lastly, the court ruled the UCC Article 4 claim and the EFTA claim were time-barred. The court found equitable tolling unwarranted, specifically because the depositors had always possessed the ability to seek legal recourse yet did not pursue it. Additionally, the depositors attempted to excuse the delay due to their mental capacity. However, the depositors' sons' power of attorney over the depositors eliminated the need for equitable tolling of the timeframe. The court held, however, that the GBL § 349 claim adequately pled an injury. The court found that both banks ran marketing campaigns advertising extensive fraud protections and monitoring for clients and ruled that the banks' primary conduct was consumer-related. The court found that the campaigns could plausibly mislead consumers. To plead a GBL § 349 claim, the plaintiff must see the advertisements before entering into a banking relationship. The court inferred that the depositors had continued their banking relationship because they believed the banks had protected their accounts from fraud.

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ARBITRATION

Equitable Estoppel Compels Arbitration [10TH CIR]

The state contracted with the bank to assist with a state benefits program by delivering state benefits to qualifying recipients through prepaid debit cards. The bank subcontracted with a third-party company (the "program manager") to administer the program and delegated nearly all of its obligations that the bank had to the state program manager. The program manager oversaw consumer-focused functions, including complaints of fraud or unauthorized use. The program manager also provided the materials to new recipients of the benefits, which included the physical debit card and the debit card terms and the conditions of the program (the "program terms"). The program terms provided that they were governed by South Dakota state law. After discovering large, unauthorized transactions tha.t depleted the funds on their debit cards, two cardholders (the "cardholders") reported the transactions to the program manager and sought reimbursement. The program manager denied the requests. The cardholders then filed a putative class action against the bank and the program manager for alleged violations of the Electronic Fund Transfer Act ("EFTA") and the New Mexico Unfair Practices Act ("UPA"). Both the bank and program manager moved to compel arbitration based on the arbitration provision contained in the program terms, which had "commit[ed] the [c]ardholders' disputes with [the bank] to arbitration." The district court granted the bank's motion but denied the program manager's motion to compel arbitration. The program manager appealed the district court decision, arguing it had erred by "denying that equitable estoppel should compel arbitration of the claims."

In **Munoz v. Wells Fargo Bank, N.A**., No. 24-2044, 2025 WL 799482, 2025 U.S. App. LEXIS 5852 (10th Cir. Mar. 13, 2025) (unpublished opinion), the court reversed the district court's denial of the program manager's motion to compel arbitration, finding that equitable estoppel should compel arbitration. Applying South Dakota law, the court explained that a nonsignatory may compel arbitration when "'all the claims [brought by the signatory] against the nonsignatory defendants are based on alleged substantially interdependent and concerted misconduct by both the nonsignatories." Rossi Fine Jewelers, Inc. v. Gunderson, 648 N.W. 2d 812, 815 (S.D. 2002). Rejecting the district court's narrow interpretation of the law, the court predicted that the South Dakota Supreme Court would adopt a broad approach, allowing implicit or collective allegations of misconduct rather than requiring explicit claims of coordinated behavior or conspiracy. The court found the cardholders had alleged interdependent and concerted misconduct of both the bank and the program manager because the cardholders' amended complaint had referred to the bank and the program manager collectively as "the defendants," and the claims were based on identical facts. Therefore, the court held that equity favored compelling arbitration because the claims against the bank and the program manager were so interdependent, and compelling arbitration would avoid inconsistent outcomes between arbitration and litigation.

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BANKRUPTCY

Bank Did Not Violate Automatic Stay [5TH CIR]

The borrower entered into a loan agreement with the bank. The loan was secured by used equipment and 200 head of cattle (the "collateral"). In September 2019, the bank conducted an inspection of its collateral and found that some of it was no longer in the borrower's possession (the borrower later acknowledged that it had sold some of the collateral). The bank then demanded repayment of the loan in full on November 22, 2019. A few days later, the borrower filed for Chapter 7 bankruptcy. In January 2020, while the automatic stay was in place, the bank contacted the special ranger of the Texas and Southwestern Cattle Raisers Association (TSCRA) about the theft of its collateral, which the special ranger investigated. The bankruptcy court entered a discharge order in February 2020. A few months later (in the summer of 2020), the special ranger arrested the borrower "on charges of hindering a secured creditor" pursuant to Tex. Penal Code§ 32.33(b). The borrower then initiated an adversary proceeding in bankruptcy court against the bank for violations of the automatic stay and the discharge injunction as a result of the bank contacting the TSCRA. The bank moved for summary judgment, arguing under the safe harbor provision of 31 U.S.C. § 5318(g)(3), it was not liable for either claim. The bankruptcy court granted summary judgment in favor of the bank. The borrower appealed to the district court, which affirmed the bankruptcy court. The borrower then appealed to the Fifth Circuit.

In **Kerns v. First State Bank of Ben Wheeler (In Re Kerns),** 130 F.4th 455 (5th Cir. 2025), the Fifth Circuit affirmed the bankruptcy court and district court. The Annuzio-Wylie Act allows financial institutions to report any "suspicious transactions that may violate any law or regulation." 106 Stat. 3672, Title XV, §§ 1504(d)(l). Additionally, Congress included a safe harbor provision to limit liability from such disclosures. The safe

harbor provision provides that "[a]ny financial institution that makes a voluntary disclosure of any possible violation of law or regulation... shall not be liable to any person under any law or regulation of the United States...for such disclosure or for failure to provide notice of such disclosure." 31 U.S.C. § 5318(g)(3). The court held that the safe harbor provision of the Annuzio-Wylie Act applied here because the bank was a financial institution that "made a voluntary report of a possible crime to local law enforcement that would have otherwise made the bank liable for a violation of the automatic stay and discharge of debt." Moreover, the court reasoned that it considered the TSCRA special ranger to be law enforcement because special rangers hold the "same powers as peace officers when investigating their area of authority (theft of livestock or related property)." The court concluded that, in this instance, the agent acted within his authority. Finally, the borrower raised, for the first time, on appeal, that the bankruptcy judge should have recused himself from the proceeding. The court, however, held that, because the borrower knew or should have known of the bankruptcy judge's involvement in his underlying bankruptcy case, and failed to raise the issue, the borrower had forfeited that argument. Therefore, the Fifth Circuit affirmed the bankruptcy court's decision to grant summary judgment in favor of the bank.

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EMPLOYMENT LAW

It's Just a Joke: Difference Between an Offensive Utterance and Harassment [5TH CIR]

An employee filed a Title VII claim alleging a hostile work environment, constructive discharge, retaliation, and disparate treatment after his coworkers laughed at a disparaging comment about his masculinity during a staff meeting, that he had not attended. The employee's supervisor took no corrective action, and the employee resigned five days later. After his resignation, the employer sent a letter accusing the employee of allegedly violating Health Insurance Portability and Accountability Act, regulations and warning of potential consequences. The employer then filed a Rule 12(c) motion for judgment on the pleadings, asserting that the employee had failed to plead facts sufficient to support his claim, and the district court granted the motion, dismissing the claim. The employee appealed to the Fifth Circuit.

In **Gaudette v. Angel Heart Hospice, L.L.C.**, No. 24-50523, 2025 WL 1419720, 2025 U.S. App. LEXIS 11945 (5th Cir. May 16, 2025) (unpublished opinion), the Fifth Circuit affirmed. The court held that a single, isolated offensive remark did not rise to the level of severity or pervasiveness required to establish a hostile work environment. Conversely, the employee argued that because the employer took no corrective action and stayed silent when the offensive comment was made, the employer effectively condoned the conduct. However, the court rejected this argument. It determined that the comment was "a mere offensive utterance" and Title VII did not function as a general civility code. Similarly, the employee failed to allege any facts showing intolerable working conditions necessary to support a claim for constructive discharge. The employee failed to meet the burden of proving that a reasonable person would be compelled to resign due to the intolerable working conditions. The court also found that the employer's letter merely reminded the employee of his legal obligations and would not dissuade a reasonable worker from pursuing a discrimination claim. Therefore, the court found the employee had failed to meet the requirements of a retaliation claim. Finally, the court determined that the employee had failed to plead disparate treatment because he alleged no facts indicating that similarly situated coworkers were treated more favorably, and the facts alleged were not equivalent to the kinds of discrimination the court has held to support a disparate treatment claim. Therefore, the Fifth Circuit affirmed the district court judgment.

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INTEREST

Actually Actuarial: Texas Supreme Court Rejects Outdated Interest Calculation [TX]

A borrower in Texas sued its lender, alleging that the terms of its commercial loan violated Texas usury laws because the lender calculated the loan's interest using a method other than the one mandated by state statute. The lender had extended the loan to be repaid over a 42-month period, with fixed principal payments and escalating interest components. The borrower argued that when interest was calculated based on the full. Principal amount over the 42-month repayment period, as the lender had done (using the "equal parts" method), the resulting effective interest rate exceeded the maximum rate

allowed by the Texas Finance Code. The borrower contended that the statute requires interest to be calculated on a declining principal balance using the "actuarial method." The district court, interpreting similar loan structures, rejected the borrower's argument and held that the "equal parts" method remained acceptable for complying with usury limits in Texas. Thus, the district court dismissed the borrower's claim. On appeal, the Fifth Circuit certified the question to the Texas Supreme Court, seeking clarification of the proper method for calculating the proper interest under Tex. Fin. Code § 306.004(a). The certified question asked whether the statute required the use of only the actuarial method based on the declining balance method or if it also permitted the use of the equal parts method.

In **Am. Pearl Grp., L.L.C. v. Nat'l Payment Sys., L.L.C.**, 715 S.W.3d 383 (Tex. 2025), the court held that Tex. Fin. Code § 306.004(a) requires use of the actuarial method based on a declining principal balance, not the outdated "equal parts" method. Using legislative history, the court concluded that the legislature had intentionally replaced the "equal parts" method with the "actuarial method," a deliberate alteration for which the distinction was not merely semantic. Additionally, it found that policy arguments favoring simplicity did not override clear statutory text. Thus, the lender's calculation method led to an excessive rate, and the borrower's claim could proceed.

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NOTES

Possession of Note Establishes Standing Despite Defective Allonges [2D CIR]

The borrower took out a home loan and signed a promissory note and mortgage, giving the lender a security interest in the property. The mortgage was later transferred several times and eventually assigned to the foreclosing party, which claimed to hold both the note and the mortgage. In the meantime, the borrower transferred the property by deed (subject to the mortgage) to a new owner (the "property owner"). There was no evidence that the property owner assumed liability or was added as a party to the note or mortgage. The property owner failed to comply with the mortgage. As a result, the foreclosing party filed a foreclosure action against him as the holder of the deed and moved for summary judgment. The property owner opposed summary judgment and moved to dismiss, arguing that the foreclosing party lacked standing to foreclose because the allonges with the endorsements were not "firmly affixed" to the note and therefore did not prove holder status under N.Y. U.C.C. Article 3 ("Article 3"). The property owner also argued, in the alternative, that the notice of default was improper. The district court denied the property owner's motion to dismiss and granted the foreclosing party's summary judgment motion, finding the foreclosing party had standing and entered a judgment of foreclosure and sale. The property owner appealed.

In **Courchevel 1850 LLC v. Koznitz I LLC.**, No. 23-7263-cv, 2025 WL 1512953, 2025 U.S. App. LEXIS 12891 (2d Cir. May 28, 2025) (unpublished opinion), the Second Circuit affirmed the district court's judgment of foreclosure and sale. The court explained that, under New York law, a foreclosing plaintiff must establish its standing by demonstrating that it was either the holder or assignee of the promissory note at the time the action was commenced. Actual possession of the original note before filing is sufficient to confer standing, even where the endorsements may be technically deficient or not_ truly "firmly affixed." Accordingly, the foreclosing party here had demonstrated a complete and continuous chain of title producing the original note containing special endorsements tracing ownership from the original lender through each transfer, and providing evidence of possession before filing suit. Because the foreclosing party satisfied the requirements under Article 3, it had standing to enforce the instrument and pursue the foreclosure action. Finally, the court rejected the property owner's affirmative defense challenging the adequacy of the notice of default. Under New York law "an entity that is 'not a party to either the note' or mortgage [ ] lacks standing to raise as a defense to [a foreclosure] action the [foreclosing party]'s alleged failure to serve a notice of default in accordance with the terms of the note or mortgage." Bank of NY Mellon Tr. Co., NA. v. Obadia, 111 N.Y.S.3d 59 (N.Y. App. 2019). The court emphasized that the property owner could not provide any evidence that he had been substituted or added to the note or mortgage; therefore, he lacked standing to raise this defense.

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SECURITY INTERESTS

Got a Security Interest? Need Evidence. [AR APP]

After the recreational vehicle ("RV") owner was found guilty and sentenced for drug-related charges (including transporting drugs with the RV), the state filed a complaint for forfeiture of the RV. According to the RV owner, he had borrowed money from his father to purchase the RV, and still owed a significant amount

on the loan. At the hearing, the RV owner agreed that the RV was subject to forfeiture but argued that the forfeiture should be subject to his father's alleged security interest. The RV owner presented a loan agreement, which identified the RV owner as a "borrower" and his father as the "loaner," and provided that the loan was to be paid in monthly installments. The RV owner also testified that the father had filed a security interest. The lower court found the evidence of the loan "insufficient" and held that the RV should be forfeited to the state, and was not subject to the father's alleged security interest. The RV owner appealed, arguing that the Arkansas Code "is clear that the forfeiture of a conveyance is subject to any existing security agreement."

In **Stalik v. State**, 2025 Ark. App. 235 (Ark. Ct. App. 2025), the court affirmed the lower court. The court reviewed the plain language of the relevant statute, which provides that a forfeiture "encumbered by a bona fide security interest is subject to the interest of the secured party if the secured party neither had knowledge of nor consented to the act or omission." Arkansas Code Ann. § 5-64-505(a)(4)(D). The court applied Black's Law Dictionary's definition of "bona fide": "made in good faith; without fraud or deceit." It found that the lower court did not err in finding the evidence presented insufficient to prove that the father had a bona fide security interest in the RV. Specifically, the court noted that there was no evidence other than the RV owner's own testimony to support his claims, "such as a title showing [the father]'s security interest or proof of payments he allegedly made," or testimony from the father. The court also noted that even if there had been evidence of a bona fide security interest, no evidence had been presented regarding the father's lack of knowledge or consent to the drug activity.

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No Need to Allege All Elements in Complaint [GA APP]

The lender had a security interest in the borrower's farm products. It alleged that a purchaser (the "buyer") of some of the farm products "bought and paid for those products without protecting the [lender]'s rights as a secured party." The lender's complaint stated that it had delivered a notice of its security interest in the farm products to the buyer, which identified the buyer as a purchaser of farm products subject to the security interest and the lender as a secured party. The buyer had delivered the checks to the borrower, who had failed to turn over the proceeds to the lender. As a result, the lender brought a breach-of-contract claim. The buyer moved to dismiss for failure to state a claim, arguing that the lender had failed to allege the required elements. The lender subsequently amended its complaint to add some facts. The trial court granted the motion to dismiss with prejudice, and the lender appealed.

In **AG Res. Mgmt., LLC v. Mundy, Inc.,** 920 S.E.2d 486 (Ga. Ct. App. 2025), the court reversed the order granting the motion to dismiss, finding "it [did] not appear with certainty that the lender would be entitled to no relief under any set of facts that could be proven in support of its claim." The court emphasized that a motion to dismiss should not be granted for failure to state a claim unless (1) under the complaint's allegations, it is certain that "the claimant would not be entitled to relief under any state of provable facts asserted in support thereof' and (2) the movant .shows that "the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought." Norman v. Xytex Corp., 310 Ga. 127 (Ga. 2020). The court also explained that it is not necessary to allege all elements of a cause of action to avoid dismissal for failure to state a claim. Instead, the question is whether a complaint gives "'fair notice of the claim and a general indication of the type of litigation involved.'" Walker v. Gowen Stores, 322 Ga. App. 376 (Ga. 2013). Construing doubts in favor of the plaintiff, the court found that the lender could introduce evidence to support its allegations, such as proving the existence of a valid security agreement and the sale of property, that the lender lacked authorization for the sale, and damages. Finally, the court rejected the buyer's argument that (1) the trial court had to rule on the motion based only on the original complaint; and (2) the lender could not appeal the order granting the motion to dismiss. The court found that because the amended complaint had been filed the day before the trial court entered its order granting the motion, the record at the time, which the trial court must use to resolve the motion, included the amended complaint. The court also found that the lender's failure to file a response to the buyer's motion to dismiss did not constitute a waiver of its arguments on appeal. It distinguished between appeals from a decision on a motion to dismiss and appeals from a final judgment entered after claims have been fully litigated on their merits-the question in the former being whether, as a matter of law, the trial court erred.

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WIRE TRANSFERS

Article 4A Preemption Has Limits [SD TX]

The account holder held both checking and savings accounts with the bank. The account holder alleged that fraudsters accessed their accounts and initiated unauthorized wire transfers. The account holder claimed the bank had promised "standard fraud protections and additional protections" under the account agreements, but failed to provide them. The account holder sued the bank for breach of contract and negligence. The bank filed a motion to dismiss, arguing that Article 4A of the Texas Business & Commerce Code preempted the account holder's claims. The magistrate judge recommended dismissal, and the account holder objected, arguing that Article 4A does not contain a blanket preemption provision for "all common law claims between parties to funds transfer," but instead preempts only common law claims that contradict Article 4A.

In **Henderson v. Wells Fargo Bank, N.A.,** 779 F.Supp.3d 910 (S.D. Tex. 2025), the court found that Article 4A did not preempt the account holder's claims. The court held that Article 4A's preemption capabilities depend on whether the actions and facts giving rise to the claim are "squarely covered" by Article 4A. The court distinguished between pre-wire transfer and post-wire transfer conduct in terms of obligations. It concluded that Article 4A did not preempt contractual or negligence claims related to pre-wire transfer duties of the bank, such as providing agreed-upon. fraud prevention services or properly training employees. The court found that the pre-wire transfer duties alleged by the account holder fell outside the statutory framework for issuing and executing wire transfers under Article 4A. On the other hand, negligence related to post-wire transfer duties, such as canceling or recalling a wire, is preempted under Article 4A.211.

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Crossed Wires: No Negligence Action Where Article 4-A Provides Remedy [ED NY]

A New York bank customer (the "account holder") was defrauded out of nearly a quarter of a million dollars, after being convinced by scammers that his accounts were compromised and that his funds needed to be "secured" through urgent wire transfers. Over a series of in-person visits to his bank, the account holder made several large wire transfers to overseas accounts controlled by the fraudsters. When requesting each wire transfer, the account holder informed the bank employee "that he had been instructed to wire money to Thailand." After he discovered that the funds were lost, he brought suit against the bank in federal court. The account holder alleged the bank "knew or should have known" that there was a "substantial probability" he was being scammed and did nothing to warn him, contending that it had a duty to warn or halt the transactions (seemingly asserting a negligence claim under New York common law, although the complaint did not specifically assert a cause of action). A contractual relationship existed between the account holder and the bank through various account agreements and wire transfer agreements. The bank moved to dismiss the complaint, arguing primarily that the claim was preempted by New York UCC Article 4-A ("Article 4-A"). The bank contended that Article 4-A provides an exclusive statutory structure that governs the duties and liabilities of parties involved in facilitating and initiating wire transfers, meaning that because each payment order was authorized and properly executed separately and in accordance with Article 4-A, it had fulfilled its obligations under the statute. Therefore, it owed no common law duty to intervene or warn of suspicious activity. The account holder did not dispute the bank's presentation of Article 4-A but asked the court to nonetheless "impose 'a duty to warn'" on the bank before completing the transfers, which he argued would bring the claim outside of Article 4-A's scope.

In **McCarthy v. JP Morgan Chase Bank**, 772 F. Supp. 3d 298 (E.D.N.Y. 2025), the court held that Article 4-A preempted the common law claim, and that even if the claim was not preempted, it had failed to state a negligence claim under New York tort law, and no "duty to warn" was created by any agreements between the bank and the account holder. First, the court held that Article 4-A preempts common law claims when they arise from the execution of funds transfers (which are "commonly referred to... as a wholesale wire transfer") because Article 4-A was designed to be the "'exclusive means of determining the rights, duties, and liabilities'" of parties engaged in activity covered by Article 4-A. N.Y. U.C.C. § 4-A-102; Fischer & Mandell LLP v. Citibank, NA., 632 F.3d 793, 797 (2d Cir. 2011). It further found the account holder's claim fell completely within the scope of a funds transfer governed by Article 4-A because the wire transfers were ordered in-person, and, therefore, "authorized" under Article 4-A-202(1). Next, the court, relying on Article 4-A-212, rejected the account holder's attempt to avoid preemption by framing his claim as a pre-transaction "duty to warn" negligence action. Article 4-A-212 limits a bank's duties to those specifically in Article 4-A, which do not include a duty to warn. Next, the court found that even if the claim was not preempted, the account holder had failed to state a claim for negligence under New York law. To

successfully bring a claim for negligence under New York law, a plaintiff must allege that "the defendant owed the plaintiff a cognizable duty of care as a matter of law." Serengeti Express, LLC v. JPMorgan Chase Bank, NA., No. 19-cv-5487, 2020 U.S. Dist. LEXIS 81151, 2020 WL 2216661 *1, *3 (S.D.N.Y. May 7, 2020). The duty of care must arise under New York tort law. Fillmore East BS Subsidiary LLC v. Capmark Bank, 552 F. App'x 13 (2d Cir. 2014). The court noted that New York courts have consistently refused to impose extra-statutory duties on institutions facilitating a wire transfer. Therefore, the court similarly refused to impose any "duty to warn" on the bank here. Finally, the court found that there was no contractual duty to warn created by any of the agreements, and the account holder had failed to allege that the bank failed to comply with any of the agreements' terms. Ultimately, the court found the account holder's claims were preempted by Article 4-A, and all alternate arguments raised by the account holder attempting to bring his claims out of the scope of Article 4-A had failed.

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Role of NDBA General Counsel

NDBA's general counsel serves as the attorney for the association. Although Tracy is pleased to be able to serve as a resource for NDBA members in responding to their questions, she is providing general information, not legal advice. Banks must obtain legal advice from counsel who has been retained by the bank to represent the bank's interests in a specific matter.

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