NORTH DAKOTA BANKERS ASSOCIATION

LEGAL UPDATE

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ARTICLE 4A

Check Fraud Fallout: Court Rules on Liability Between Banks [SD TX]

The payor bank's customer (the "customer") made a check payable to another bank (the "intended bank"). However, the intended bank never received the check because someone fraudulently deposited it into a corporation's account at a third-party bank (the "recipient bank"). The payor bank paid the check and credited the funds to the corporation's account, which were subsequently withdrawn. The payor bank sued the recipient bank and the corporation, alleging that these two parties had violated the UCC's transfer and presentment warranties by accepting the altered or fraudulent check and asserted various common law claims, including negligence, unjust enrichment, breach of contract, money had and received, and conversion. The recipient bank removed the case to federal court and moved for partial judgment on the pleadings and summary judgment, arguing that the payor bank lacked standing and that the UCC preempted its common law claims.

The payor bank moved for summary judgment as well. In addition, the court had before it a number of motions regarding briefing and evidence. The district court referred this case to a magistrate judge who issued his recommendation.

In **Cadence Bank v. JPMorgan Chase Bank, N.A.**, No. 4:23-CV-02678, 2024 WL 5358446, 2024 U.S. Dist. LEXIS 238581 (S.D. Tex. Dec. 5, 2024) (opinion not yet released for publication), the magistrate judge recommended that the district court grant the recipient bank's motion for partial judgment on the pleadings, grant in part and deny in part its motion for summary judgment, and deny the payor bank's motion for summary judgment. First, the magistrate judge found that the payor bank had standing because it had "presented evidence that it has suffered damages, and that it had a reasonable apprehension at the time it filed this lawsuit that it would be sued by its customer." In fact, at the time of the magistrate's decision, an action was pending in another state and the magistrate indicated that he could not predict the outcome of that action. Second, the magistrate judge concluded that UCC § 4.302 preempted the payor bank's common law claims because they would conflict with, rather than supplement, the strict liability scheme of the statute, as well as allow defenses "outside those to which the statute is limited." Next, the court examined the payor bank's claims that the recipient bank was liable under the UCC's transfer warranty and presentment warranties statutes. UCC §§ 4.207, 4.208. The court looked at the text of UCC § 4.207 and determined that this remedy explicitly excluded a "payor bank." UCC § 4.208 required the presenter to warrant "that the draft has not been altered, and that the warrantor has no knowledge" that the signature of the purported drawer is unauthorized. There, the court found no evidence that the recipient bank "had actual knowledge that the signature of the drawer of the check was unauthorized." It did find, however, there was a factual issue regarding whether the check was altered rather than counterfeit, as the recipient bank had claimed, because of competing expert testimony. Thus, the magistrate judge recommended that the district court deny the payor bank's motion for summary judgment. Further, the magistrate judge recommended that the district court grant · the recipient bank's motion for summary judgment regarding the common law claims but not regarding the presentment claim. Other motions regarding evidence and related matters were denied without prejudice on the ground that they were moot.

By Audrey Spotts audspott@ttu.edu
Edited By Jace Brown jace.brown@ttu.edu
Edited By Ashley Boyce ashboyce@ttu.edu
Edited By Hayden Mariott hayden.mariott@ttu.edu

Bad Apples: Unauthorized Transfers Rot Orchard's Finances [ND NY]

An apple orchard farm (the "customer") maintained accounts with the bank, including a checking account and a profit-sharing account, under a Cash Management Services Agreement (CMSA). The CMSA outlined fraud prevention measures and procedures for reversing unauthorized transactions. Unauthorized transfers moved significant funds from the customer's profit-sharing account to its checking account, followed by wire transfers to accounts at three other banks. The customer discovered the fraud after a recipient bank alerted it, and the customer immediately notified its bank and law enforcement. While two banks returned most of the funds, the third bank refused to return the money it received despite requests by the customer's bank. The customer sued its bank for breach of contract and negligence in failing to prevent or reverse the transfers. Further, the customer brought deceptive practices claims under New York law against both banks and alleged unjust enrichment of the third receiving bank.

In **Forrence Orchards, Inc. v. TD Bank**, No. 8:24-cv-525 (BKS/PJE), 2025 WL 472665, 2025 U.S. Dist. LEXIS 25056 (N.D.N.Y. Feb. 12, 2025) (opinion not yet released for publication), the court granted the bank's motions to dismiss and dismissed all the customer's claims. First, Article 4-A of the New York UCC, which the court reasoned exclusively governs unauthorized wire transfers, preempted the customer's common law claims against the bank. Though the customer argued that the bank failed to act before or after the fraud, the court ruled that the claims focused on the transfers themselves-a matter fully addressed by Article 4-A. The deceptive practices claim failed because the alleged misconduct of refusing to return funds only targeted the customer, not the public, as required under New York law. Finally, the court dismissed the unjust enrichment claim against the receiving bank because holding misdirected funds in a customer account did not unjustly enrich the bank-it merely created a debt. Therefore, the court dismissed the complaint in full.

By Audrey Spotts audspott@ttu.edu
Edited By Taylor O'Brien taylobri@ttu.edu
Edited By Ashley Boyce ashboyce@ttu.edu
Edited By Hayden Mariott hayden.mariott@ttu.edu

Bank's Blind Eye: Court Renews Negligence Claim After Fraudulent Wire Transfer Fiasco [7TH CIR]

A mortgage lender received payoff requests from two customers, who requested that the payments be made to a different mortgage company. However, before the mortgage lender completed the request, a third party illegally accessed the mortgage lender's system and altered the wire instructions for the two loan payoffs, changing the beneficiary of the payments from the mortgage company to a bank (the "receiving bank"). As a result, the mortgage lender unintentionally provided the altered wire instructions to the title company, who then sent the payment orders to its bank (the "sending bank"). The sending bank sent payment of over $500,000 to the receiving bank instead of the mortgage company initially listed. The receiving bank received the transfers and deposited the money into the account with the account number listed on the instructions despite no other information from the instructions matching the account (including the beneficiary name and the address listed). The receiving bank had also flagged the account for suspicious activity only a few weeks earlier. Days later, despite the "indicia of suspicious activity," the receiving bank allowed the registered agent of the account to withdraw the entire sum in cashier's checks. The mortgage lender repaid its customers out of pocket and sued the receiving bank, claiming (1) the receiving bank violated two provisions of Article 4.1 of Indiana's UCC that, as a result, entitled the mortgage lender to a refund of the misapplied funds; and (2) the receiving bank had acted negligently. The receiving bank moved to dismiss all claims, and the district court granted the motion as to all claims because the mortgage company lacked privity with the receiving bank, required for the UCC claims, and Article 4A preempted the negligence claim.

In **Approved Mortg. Corp. v. Truist Bank** 106 F.4th 582 (7th Cir. 2024), the court affirmed the district court's judgment regarding the lender's UCC claims and reversed the district court's judgment regarding the negligence claim. First, the court affirmed the district court's dismissal of the UCC claims because the creditor lacked privity with the receiving bank and, therefore, could not sue under the UCC's refund action. The mortgage lender argued that under Section 207 of Article 4.1, the receiving bank could not accept the payment order. The district court ruled privity is required for a Section 207 claim because it must look at it in connection with Section 402, which provides Section 207's consequences and remedies. Section 402(d) states that only a sender is entitled to a refund from a receiving bank. In reading the plain language of § 402(d), the district court had read in a privity requirement. The Seventh Circuit agreed, explaining that while the statute does not use "privity," the plain language "tethers the refund obligation to the payment order, not a funds transfer generally." The court also relied on Grain Traders Inc. v. Citibank, NA., 160 F.3d 97 (2d Cir. 1998), in which the Second Circuit read in a privity requirement. Therefore, the mortgage lender could not bring a Section 207 claim or receive a money-back guarantee because it had no privity with the receiving bank because the payment orders were completed by the sending bank, not the mortgage lender. Second, the court reversed the district court's dismissal of the mortgage lender's negligence claim because Article 4A of the Indiana UCC preempted it. The district court found that Article 4.1 preempted the negligence claim, concluding the harm suffered by the mortgage lender was "'in reality a direct result' of actions addressed in Article 4.1." The Seventh Circuit, however, disagreed with the district court's conclusion. The Seventh Circuit explained that "if a scenario is squarely addressed by the particular provisions of Article 4A, then allowing the plaintiff to proceed on a common law claim based on that scenario would necessarily create rights, duties, and liabilities inconsistent with those stated in Article 4A's provisions," going against the intent of Article 4A which is "to restrain common law claims only to the extent that they create rights, duties, and liabilities inconsistent with Article 4A." However, a common law claim will not be preempted "[i]f Article 4A 'does not protect against the underlying injury or misconduct alleged.'" Patco Constr. Co. v. People's United Bank, 684 F.3d 197, 215 (1st Cir. 2012). Following the rationale in Schlegel, the Seventh Circuit distinguished between the mortgage lender's negligence claim based on the different harms suffered. Schlegel v. Bank of America, NA., 628 S.E.2d 362, 368 (Va. 2006). The court reasoned the negligence claim based on the harm the mortgage lender suffered due to the receiving bank's receipt of the wire transfer and depositing of the funds was preempted. However, the harm the mortgage lender suffered due to the receiving bank's post-transfer conduct fell outside the UCC's scope and, therefore, was not preempted because Article 4.1 did not govern the later withdrawal by the account holder, regardless of whether it involved previously transferred funds. As a result, the receiving bank may be liable for its actions after the fraudulent wire transfers were completed. Specifically, for negligently allowing the account holder to withdraw the money as cashier's checks despite "indicia of suspicious activity." The court did not consider any other challenges to the negligence claim under state law but remanded the case to the district court to reconsider the negligence claim.

By Audrey Spotts audspott@ttu.edu
Edited By Kristin Meurer krmeurer@ttu.edu
Edited By Hayden Mariott hayden.mariott@ttu.edu

BANK REGULATION

Authorization for Consent Decree Granted [SD OH]

The Bureau of Consumer Financial Protection (the "Bureau") alleged that the bank violated federal consumer protection statutes in its customer dealings. Specifically, the Bureau alleged that the bank was opening accounts or adding additional products or services to existing customer accounts without authorization and collecting additional fees as a result. The parties came to a settlement contingent upon the district court approving the jointly submitted consent decree. The court addressed various concerns raised by consent decrees, including jurisdiction, equitable, and administrability concerns.

In **Bureau of Consumer Fin. Prot. v. Fifth Third Bank**, N.A., No. 1:21-cv-262, 2024 WL 3451080, 2024 U.S. Dist. LEXIS 126902 (S.D. Ohio July 18, 2024) (opinion not yet released for publication), the district court found that it had the jurisdiction to approve and enter the jointly submitted consent decree and that doing so was an appropriate exercise of its equitable remedial powers, and ultimately entered· the proposed consent decree. The court cited the Sixth Circuit's binding holding, which provides "that a court has jurisdiction to enter a consent decree in support of settlement so long as the decree (1) 'spring[s] from and serve[s] to resolve a dispute within the court's subject-matter jurisdiction,' (2) 'come[s] within the general scope of the case made by the pleadings,' and (3) 'further[s] the objective of the law upon which the complaint was based.' Benalcazar v. Genoa Twp., 1 F. 4th 421, 425 (6th Cir. 2021). The action here involved allegations that the bank violated federal statutes that the Bureau has the power to enforce; therefore, the court had subject-matter jurisdiction. 28 U.S.C. § 1331. Second, in relation to the scope of the pleadings, the court found that the proposed consent decree fell well within the scope of the case. The consent decree prohibited any bank activity that violated the Bureau's provisions and that the Bureau alleged it was wrongfully engaged in previously. The consent decree also required the bank to maintain records, conduct ongoing reporting, and provide a compliance plan, all in relation to the bank's previous activities. Finally, the court found that the consent decree furthered the objective of the law. Congress adopted the regulations at issue presumptively on the basis that they would serve customers' interests - it provided customers with fair, transparent, and competitive services and markets. The enforcement of the regulations, as the Bureau sought to do in the. settlement agreement, served to achieve those objectives. The district court, therefore, found all three requirements necessary to give it jurisdiction to enter a consent decree here. The court then noted the Sixth Circuit's holding that a court is to use "traditional equitable principals" and determine "'whether a decree is fair adequate, and reasonable, as well as' consistent with the public interest'" in its decision of whether to issue a permanent injunction (which, the court reasoned, is what a consent decree is equivalent to). United States v. Lexinton-Fayette Urb. Cnty. Gov't, 591 F.3d 484, 489 (6th Cir. 2010). The court noted that generally, the types of injuries alleged here have adequate remedy at law. However, remedies at law here would have been difficult since unknowing customers suffered the harm and because the Bureau sought to advance regulatory interests to prevent the harms from occurring in the first place. Additionally, Congress provided in the statute that the Bureau could seek injunctive relief. The court also noted that the balance of harms favored injunctive relief because both the Bureau and bank agreed to the consent decree, suggesting that both parties determined the entire settlement provided more benefits than harm. Lastly, the court concluded that the settlement agreement here was fair, equitable, and reasonable because the consent decree emerged from vigorous negotiations between the parties, indicating that each party found it fair, adequate, and reasonable. Therefore, the court ultimately found that the consent decree should be issued on the basis of traditional equitable principles. Finally, the court addressed a final issue concerning a consent decree's (or any order that requires judicial monitoring) administrability. There are two factors when weighing the administrability: definiteness and judicial ability. There must be sufficient clarity, and the order decree must describe in sufficient detail the obligations of the parties for courts to carry out a consent decree, and the court concluded the consent decree here satisfied definiteness. Next, the court stated that judges must be mindful of resources, expertise, and authority when considering their role in carrying out an order. The court found that the proposed decree did not raise any such concerns. Ultimately, the district court concluded it had the authority to enter the proposed consent decree and found in favor of entering the order.

By Olivia Lewis oliviale@ttu.edu
Edited By Kristin Meurer krmeurer@ttu.edu
Edited By Hayden Mariott hayden.mariott@ttu.edu

CHECKS

Check Cashing Services Hold No Plausible Claim of Subrogation to Depositary Banks for Recovery from Duplicate Presentment Losses [ND ILL]

As the court explained, before the Check Clearing for the 21st Century Act ("Check 21 Act"), banks had to receive actual paper checks from depositors and send those paper checks to other banks in order for the checks to be paid. Under the Check 21 Act, paper checks can be converted into electronic forms, which is called "check truncation." The bank that converts the paper check is referred to as the "truncating bank." Here, the payee remotely deposited a check with the truncating bank and then used a currency exchange service (the "check casher") to receive cash in exchange for the physical check. The check casher subsequently deposited the check into its account at its own bank (the "depositary bank"), but the check bounced because of the duplicate presentment. The depositary bank debited the check casher for the amount of the check in accordance with the terms of their agreement, which required indemnification. for any losses incurred by dishonored checks. To recover, the check casher sued the truncating bank to enforce a warranty created under the Check 21 Act on the basis that it held a subrogated claim to the depositary bank's right to indemnification. The truncating bank moved to dismiss pursuant to Fed. R. Civ. Pro. 12(b)(6).

In **Garfield-Dan Ryan Currency Exchange., Inc. v. Citibank, N.A.**, No. 23 C 5033, 2024 WL 2052077, 2024 U.S. Dist. LEXIS 83725 (N.D. Ill. May 8, 2024) (opinion not yet released for publication), the court granted the motion to dismiss without prejudice. The court held that to be entitled to indemnification; the depositary bank must receive the original paper check after another bank accepted the check electronically and truncated it. 12 C.F.R. § 229.34(t). The depository bank here received a truncated check from the check casher, which retained the original and, therefore, the depositary bank was not entitled to indemnification from the truncating bank. Without a right to indemnification, the check casher could not assume the right of indemnity as a subrogee. Further, the court analyzed the plain language of 12 C.F.R. § 229 to conclude that even if the depositary bank held a valid indemnity claim, the check casher still could not recover under equitable subrogation. The statute "require[d] a 'depositary bank' to suffer a loss" to be eligible for relief. 12 C.F.R. § 229.34(t)(2). Here, the depositary bank did not suffer a loss because it had charged the check casher's account for the same amount. Further, the court reasoned that the depositary bank did not have a claim due to the check casher's loss because the statute did not enumerate check cashing services as a type of entity that could recover losses. 12 C.F.R. § 229.34(t). Ultimately, the court concluded that the check casher "ha[d] no legally cognizable remedy under § 229.34(t)."

By Taylor O'Brien taylobri@ttu.edu
Edited By Jace Brown jace.brown@ttu.edu
Edited By Ashley Boyce ashboyce@ttu.edu
Edited By Hayden Mariott hayden.mariott@ttu.edu

Check Scam: Currency Exchange Company Does Not Receive Remote Deposit Capture Indemnity [ND IL]

An individual used mobile deposit to deposit a check with a depositary bank ("bank l"). Bank l accepted the mobile deposit and, in turn, sent the cash deposit to the individual's account. A few days later, the individual took the same check and physically deposited it with a currency exchange company (CEC). The CEC took the physical check and gave the individual cash in exchange. The CEC cashed the check with its bank, the second depositary bank ("bank 2"). Bank 2 informed the CEC that the check had been dishonored, and the CEC paid back the check amount to the bank. The CEC brought suit against bank 1 to recover the lost funds under the Check Clearing for the 21st Century Act, 12 U.S.C. §§ 5001-5018 (the "Check 21 Act"). The goal of the Check 21 Act is to protect depositary institutions that accept a physical check that another bank has already deposited. Bank 1 moved to dismiss the CEC's complaint for five reasons: (1) the CEC had no standing to bring suit because it is not a depositary institution; (2) CEC was not subrogated to the rights of bank 2; (3) bank 1 had made no warranties to the CEC; (4) any breach of warranty claims did not apply; and (5) even if the CEC was able to be subrogated to the rights of bank 2, that bank did not suffer any harm.

In **63rd & Morgan Currency Exchange, Inc. v. Citibank, National Ass'n**., No. 23 C 5048, 2024 WL 245189, 2024 U.S. Dist. LEXIS 12035 (N.D. Ill. Jan. 23, 2024) (opinion not designated for publication), the court granted bank 1's motion to dismiss, holding that the CEC did not qualify (or otherwise allege anything that would establish its qualification) for the indemnity provided for in the Check 21 Act. The court examined each of the CEC's five complaints in turn, combining the first two. First, the court reasoned that the statute did not apply to the CEC . because it was not a depositary institution. Furthermore, the court determined that the CEC did not properly allege a subrogation right to any claim that bank 2 could have brought under the statute as a depositary institution. When analyzing the subrogation argument, the court found that the CEC and bank 2 had no contractual subrogation agreement. Additionally, the court did not find any reason to enforce an equitable subrogation between the two because it found that bank 2 would not have qualified for indemnification under the statute anyway, because it never received the physical check from the individual, which is a requirement under the statute. Next, the court determined that the third and fourth points were moot because the CEC admitted it had not received any warranties from bank 1. Finally, the court explained that even if the CEC were able to be bank 2's subrogee, it would still fail because bank 2 did not experience any harm. The CEC repaid the money to bank 2, so bank 2 had nothing to recover. For these reasons, bank 1's motion to dismiss was granted.

By Maycee Redfearn maredfea@ttu.edu
Edited By Nura Elhentaty nelhenta@ttu.edu
Edited By Ashley Boyce ashboyce@ttu.edu
Edited By Hayden Mariott hayden.mariott@ttu.edu

Depositary Bank Liable for Conversion: Prejudgment Interest Allowed If Calculated with Mathematical Precision [PA SUPER]

The debtor obtained a home renovation loan from the creditor and used the funds to hire a contractor to renovate his property. The loan terms stated that the creditor would disburse checks to the debtor and contractor, but the contractor would begin the renovation project with his own funds. The contractor asked the debtor for a deposit, and the debtor agreed on the condition that he would be reimbursed from the loan funds. The creditor issued and mailed the first check to the investment property, and the debtor deposited it into his bank account. The creditor mailed further checks to the investment property, but this time, the contractor collected the checks and deposited them into his bank account with the debtor's forged signature as an endorsement. The contractor was arrested, convicted, and ordered to make restitution payments. The debtor brought a conversion claim against the bank and brought claims of unjust enrichment and conversion against the contractor. During the trial, the debtor stated that he only wanted prejudgment interest against the bank on the forged checks because he had already received full restitution from the contractor. The court found for the bank in the conversion claim and found in favor of the debtor on his claims against the contractor. The debtor appealed to the Superior Court of Pennsylvania.

In **Odedeyi v. Wells Fargo Bank**, 319 A.3d 610 (Pa. Super. Ct. 2024), the court held that the bank was liable for conversion because it had allowed the contractor to deposit checks into his account without both payees' proper endorsement. To support his claim, the debtor quoted 13 PA. CONS. STAT. § 3420, which stated, "[a]n instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment." Comment 1 to that section further stated, "[i] f Depositary Bank takes the check for deposit to John's account, Depositary Bank is liable to Jane for conversion of the check if she did not consent to the transaction." The court stated further that "where a check is paid or cashed on an unauthorized or forged endorsement, the bank is liable for conversion" as further support. Manfredi v. Dauphin Deposit Bank, 697 A.2d 1025, 1028 (Pa. Super. Ct. 1997). The court held that if a check is made out to two joint payees, it can only be properly negotiable by both payees. The court rejected the bank's argument that it did not commit conversion because it accepted the checks from the contractor, who was entitled to enforce them. The court found that the checks were made payable to two non-alternative payees and thus could not be negotiated unless both payees agreed. The bank accepted the checks without the debtor's endorsement and deposited the checks for the contractor, who was not entitled to enforce the instrument or receive payment, so the court found the bank liable for conversion. The debtor also argued that he was entitled to prejudgment interest on the checks at issue, and he sought the prejudgment interest from the time when the checks were converted to when he received full payments from the contractor. The court held that prejudgment interest was a right extended to "actions involving damages ascertainable with mathematical precision." Option One Mortg. Corp. v. Fitzgerald, 687 F.Supp. 2d 520, 529 (M.D. Pa. 2009). Pennsylvania law provided a market value and percentage per annum formula so the prejudgment interest could be determined mathematically, and the court held that the debtor was entitled to it. For these reasons, the Superior Court of Pennsylvania reversed and remanded the case for calculation of interest in accordance with the court's option.

By Nura Elhentaty nelhenta@ttu.edu
Edited By Maycee Redfearn maredfea@ttu.edu
Edited By Ashley Boyce ashboyce@ttu.edu
Edited By Hayden Mariott hayden.mariott@ttu.edu

Depository Institutions Can Be Liable for Fraudulently Deposited Checks [D NJ]

The corporation had multiple counterfeit checks drawn from its checking account and deposited into accounts at various locations of the bank. Following the deposit of the checks into the bank, a suspicious and unusual outflow of wire transfers occurred from that account, with multiple international wire transfers to foreign nations. The corporation alleged that the bank failed to exercise ordinary care and substantially contributed to its loss from the checks under Fla. Stat. § 673.4041. The corporation argued that the "facial irregularities" on the checks, unusual transaction behavior, and the amounts of money being transferred should have alerted the bank of potential fraud. At issue are eleven checks, three deposited in Florida and eight deposited in New York. The bank responded by transferring the case to federal court based on diversity of citizenship and subsequently filed a motion to dismiss.

In **Artistic Tile, Inc. v. JPMorgan Chase Bank, N.A.**, No. 24-7267 (SRC), 2024 WL 4680296, 2024 U.S. Dist. LEXIS 200859 (D. N. J. Nov. 5, 2024) (unpublished opinion), the court granted in part and denied in part the bank's motion to dismiss. First, the court applied New Jersey's choice of law statute under UCC § 4-102(b) to determine whether the adopted Uniform Commercial Code (UCC) in New York or the adopted UCC in Florida applied. UCC § 4-102(b) states that "in the case of action or non-action by or at a branch or separate office, its liability is governed by the law of the place where the branch or separate office is located." Therefore, the eight checks deposited in New York are governed by New York's UCC, and the three checks deposited in Florida are. governed by the Florida UCC. Because the corporation only brought a cause of action under Florida's UCC and did not bring a cause of action under New York's UCC, the court dismissed the corporation's cause of action with prejudice with respect to the eight checks deposited in New York. Second, the court looked to determine whether the corporation had plausibly stated a claim for relief under UCC § 3-404. The court determined that the corporation's allegations were sufficient because the bank received and deposited counterfeit checks containing both forged signatures and indorsements. The fraudsters did not intend the imposter payee to have any interest in the instruments, satisfying Florida's UCC § 3-404(b)(i) and showing that UCC § 3-404 applied. Because there was an issue of fact as to whether the bank failed to exercise ordinary care and that "failure substantially contributed to loss resulting from payment of the instrument," the court denied the motion to dismiss regarding the three checks deposited in Florida. UCC § 3-404(d).

By Jace Brown jace.brown@ttu.edu
Edited By Hayden Mariott hayden.mariott@ttu.edu
Edited By Ashley Boyce ashboyce@ttu.edu

The Depositor Has No Direct Claim Against a Depository Bank for Good Faith Acceptance of Improper Checks [SD NY]

An individual and several corporations that he owned (collectively "the depositors") were customers of the bank. The depositors claimed that an employee misappropriated company funds by writing checks to vendors, failing to deliver them, and instead depositing them at the bank. Because of this, the depositors sued the bank for negligence and breach of warranty under Rule 9 of the Electronic Check Clearing House Organization and U.C.C. § 4-207(a)(2). The bank filed Fed. R. Civ. Pro. 12(b)(5) and 12(b)(6) motions to dismiss. Thereafter, the court addressed (1) whether the bank received proper service; and (2) whether the depositors asserted a plausible claim subject to relief.

In **Null v. Bank of Am., N.A**., 734 F. Supp 3d. 269 (S.D.N.Y. 2024), the court denied the bank's Fed. R. Civ. Pro. 12(b)(5) motion to dismiss and granted the bank's Fed. R. Civ. Pro. 12(b)(6) motion. First, the bank argued that the depositors had incorrectly served the complaint by serving the wrong defendant, and the depositors had not served the bank with the amended complaint. However, counsel for the bank had represented that the bank would waive service. The court found that the bank's letter contained language that a reasonable attorney would interpret as a waiver of service for the first amended complaint. Second, with respect to the Rule 12(b)(6) motion, the court held that the New York common law defense for depository banks applied, which eliminated the cause of action for taking falsely indorsed checks. "Under the common-law rule," the court explained, "the drawer of a check does not have a direct cause of action against a depositary bank for collecting an improperly indorsed check. Lesser v. TD Bank, NA., 463 F. Supp. 3d 438, 447 (S.D.N.Y. 2020) (cleaned up) (quoting Horovitz v. Roadworks of Great Neck, Inc., 76 N.Y.2d 975,976,565 N.E.2d 484, 563 N.Y.S.2d 735 (1990))." The court explained that the bank must warrant the genuine nature of checks to subsequent transferees, not to the drawer. N.Y. U.C.C. § 4-207(2)(b). Moreover, the court rejected the drawer's negligence claim as an attempt to avoid application of the U.C.C. Therefore, the court found no plausible claims eligible for relief, so it granted the bank's Rule 12(b)(6) motion to dismiss the complaint.

By Taylor O'Brien taylobri@ttu.edu
Edited By Hayden Mariott hayden.mariott@ttu.edu
Edited By Ashley Boyce ashboyce@ttu.edu

EFTA

Scammers' Latest Scheme Lands Citibank in Hot Water [SD NY]

The State of New York initiated this proceeding against a large financial institution (the "bank") for various violations of federal and state law that "demonstrated persistent fraud or illegality in the carrying on, conducting or transaction of business." N.Y. Exec. L. § 63(12). The allegations arose from the theft of consumer funds from the bank's accounts. The bank offered its clients online banking services, including electronic money transfers. Unfortunately, the mobilization of banking has increased the sophistication and complexity of scams aimed at stealing money from consumers. Specifically, scammers had fraudulently stolen money from individuals through wire transfers. The scammers accomplished this by instructing the bank to wire money to another bank where the scammers had "dummy accounts" and then instructing the bank to debit the consumer's bank account. The State claims the bank had unsatisfactory security measures that allowed the wire transfer fraud to go unnoticed. Further, the State claimed that the bank had made inadequate investigations and had inadequate remedies for the fraud and had made "misleading statements regarding its security protocols." Therefore, the State brought an action claiming that the bank had (1) made unauthorized wire transfers; (2) made unauthorized intrabank "consolidation" transfers; (3) failed to disclose its security measures in its terms and conditions; (4) "fail[ed] to refund fraudulently initiated Payment Orders;" (5) violated New York's SHIELD Act; (6) violated the Red Flags Rule; (7) committed fraud; and (8) engaged in deceptive practices. The bank filed a motion to dismiss the State's claims in its entirety.

In **New York v. Citibank, N.A.**, 24-CV-659, 2025 WL 251302, 2025 U.S. Dist. LEXIS 10136 (S.D.N.Y. Jan. 21, 2025) (opinion not yet released for publication), the court granted the bank's motion to dismiss in part and denied it in part. First, the court denied the motion to dismiss the first claim. The State argued that the bank had violated the Electronic Funds Transfer Act of 1978 (EFTA), 15 U.S.C. § 1693 et seq, by completing the unauthorized wire transfers following the scammers' fraudulent payment orders. The bank argued that the statute was inapplicable "to transfers from a consumer's account made to pay for a wire transfer" because there is an "exemption" in the definition of an electronic fund transfer that would exclude it from liability· under the EFTA. 15 U.S.C. § 1693a(7)(B). The court began by interpreting the statutory text to determine whether "an electronic payment, initiated by a consumer and facilitated in part by an interbank wire, are regulated by the EFTA." The court found that the "exemption" in § 1693a(7)(B) limits its applicability to transfers that are "(1) 'made by a financial institution,' (2) 'on behalf of a consumer,' (3) 'by means of a service that transfers funds held at either Federal Reserve banks or other depository institutions and which is not designed primarily to transfer funds on behalf of a consumer."' The State argued that the unauthorized wire transfers do not fall within this exemption because they "do not involve consumer funds or a consumer's accounts, since only banks... have access to those networks." The court found that the "plain meaning of subsection (7)(B) does not apply to electronic transfers of funds between consumers and their financial institutions, even when made ancillary to an interbank wire." Thus, the "exemption" did not apply to the "fraudulent Payment Order resulting in a debit from a consumer account in connection with a wire transfer" that occurred here, and the bank may be liable for EFTA violations. Second, the court addressed the State's claim that a violation of the EFTA occurred "when [the] scammers 'consolidate[d] funds from multiple accounts into one account' in order to seal a larger sum of money," and denied the motion to dismiss the claim. The EFTA defines an unauthorized transfer to be a transfer "from a consumer's account initiated by a person other than the consumer without actual authority to initiate such transfer and from which the consumer receives no benefit." 15 U.S.C. § 1693(12). The bank argued that the EFTA did not apply to these transactions because its customers did not lose money during the intrabank transfer and, thus, did, in fact, "'receive the benefits' of such transfers." However, the State argued that the bank's customers were still harmed because the transfers permitted larger fraud to occur, made detecting fraud more difficult, and moved funds to an account that did not generate interest. The court concluded that the "unauthorized consolidations" of the bank's customers' funds provided no benefit. Therefore, the bank's motion to dismiss the second claim was denied. Third, the State claimed that the bank failed to adequately disclose its security protocols, in violation of 15 U.S.C. § 1693c, and had its customers waive their EFTA rights, in violation § 16931. The bank disputed both claims, arguing that it was not required to disclose its security protocols, and that the agreement did not require its customers to waive their EFTA rights. The State argued that although the EFTA does not explicitly require disclosure, it does prohibit "using insufficiently understandable terms" when the bank does disclose its protocols. The court determined that the statute did not require the bank to include security protocols "unless these protocols constitute[d] an 'element, prerequisite or limitation' on the offer to transfer," and, therefore, granted the bank's motion to dismiss. 15 U.S.C. § 1693c(a). However, the court denied the bank's motion to dismiss the claim that it violated the EFTA by requiring its customers to waive their EFTA rights. The State argued that the "language in the User Agreement changes the allocation of the burden of proof for allocating liability under the EFTA," violating § 16931. The court found that the State had "adequately alleged" that the terms limited a statutory right in violation of § 16931. Fourth, the court found that the State's claim that the bank had "fail[ed] to refund fraudulently initiated Payment Orders" in violation of UCC Article 4A-204(1) must be dismissed as it previously determined that the "allegedly fraudulent Payment Orders... are governed by the EFTA" and, thus, are excluded from Article 4A. N.Y. UCC § 4-A-

108. Next, the court found that the State's fifth and sixth claims were preempted or barred by the Fair Credit Reporting Act (FCRA). The state argued that the bank had violated the SHIELD Act, which requires businesses, including banks, to "develop, implement, and maintain reasonable safeguards to protect the security, confidentiality, and integrity of the private information" that it possesses. N.Y. Gen. Bus. L. § 899-bb. The court held that 15 U.S.C. § 1681t(b)(5)(F) of the CRA preempted application of the SHIELD act because the claims did not "concern conduct different from that underlying... FCRA claim." Manes v. JPMorgan Chase Bank, N.A., No. 20-CV-11059, 2022 WL 671631 (S.D.N.Y. Mar. 7, 2022). The court also granted the motion to dismiss the State's claim that the bank violated the Red Flags. Rule by failing to discover and prevent such "red flags." 16 C.F.R. § 681.1. The court held that the state "cannot have it both ways; either it is seeking to enforce the Rule in violation of Section 168lm(h)(8)(B), or it is seeking to enforce an identical version of the Rule encoded in New York's Executive Law." The court stated that "federal law does not permit states to redress liability imposed by regulations enacted pursuant to 15 U.S.C. § 1681m." Finally, the court addressed the State's seventh and eighth claims that the bank committed fraud and engaged in deceptive practices in violation of N.Y. Exec. L. § 63(12) and N.Y. Gen. Bus. L. § 349. The court held that the State had adequately supported its claim with evidence that the bank made "incorrect statements... to particular customers about the security of their accounts, and... their rights under their EFTA or their need to complete affidavits prior to [it] conducting an investigation or issuing... reimbursement." Therefore, the court denied the bank's motion to dismiss these claims under these circumstances.

By Hayden Mariott hayden.mariott@ttu.edu
Edited By Kristin Meurer krmeurer@ttu.edu
Edited By Ashley Boyce ashboyce@ttu.edu

LIMITATIONS

Can the Statute of Limitations for Breach of Contract Actions be Revived? [NM]

The Supreme Court of New Mexico consolidated two cases with common issues. Both cases involved debtors who had purchased and financed cars. Unfortunately, the debtors each made untimely payments. In turn, the bank invoked acceleration clauses, which required the debtor to pay off the remaining balance or forfeit their cars immediately. The debtors voluntarily returned their cars, which the creditor subsequently sold to reduce the balance of the debts. The bank sold and assigned its interest in the debts to a third-party debt collector corporation.

Later, the debtors approved a draw "from their account in a good faith effort to pay down the deficiency." Over five years after the default and eight years after the initial purchase of the cars, the debt collector brought an action to recover the remaining deficiency. The debtors responded that the four-year statute of limitations barred the suit. The Court of Appeals ruled in favor of the debtors by applying a plain language interpretation of N.M. Stat. Ann.§ 37-1-17. The debt collector then appealed to the Supreme Court of New Mexico.

In **Autovest, L.L.C. v. Agosto**, 563 P.3d 811 (N.M. 2024), the court affirmed the Court of Appeals ruling and remanded the case for further proceedings. First, the court looked at New Mexico statue's Chapter 37 exclusion provision and its application. N.M. Stat. Ann. § 37-1-17. The statute excluded any preceding provisions of the chapter, which included the provision the debt collector relied upon regarding their partial payment plan. N.M. Stat. Ann. § 37-1-16. The debt collector contended that when the legislature adopted model acts of the UCC, the intention was for the tolling provision to override the exclusion provision. The court examined the verbiage of N.M. Stat. Ann. § 55-2-725(4) and found that the use of "does not alter" in the statute indicated that the UCC does not alter or modify the law on tolling. Based on this analysis, the court determined that the legislature's intent was clear: the UCC did not change or alter the law on tolling. Alternatively, the debt collector argued that "adopting the chosen language of the Legislature would force creditors to bring suit after each missed installment payment, thereby flooding the courts with unnecessary litigation." However, the court concluded that the UCC "already provides an avenue that avoids the flood of unnecessary litigation" by allowing parties to modify an agreement without consideration and establish a new agreement. For those reasons, the court held that the partial repayment rule of N.M Stat. Ann. § 37-1-16 "does not override or otherwise supersede the mandatory terms of the exclusion provision."

By Jace Brown jace.brown@ttu.edu
Edited by Taylor O'Brien taylobri@ttu.edu
Edited By Ashley Boyce ashboyce@ttu.edu
Edited By Hayden Mariott hayden.mariott@ttu.edu

SECURITY INTERESTS

Bank's Perfected Security Interest in Accounts Receivable Beats Statutory Landlord's Lien [AZ APP]

The firm began leasing the premises from the landlord in 2010 under a written lease agreement. The lease outlined remedies in the event of the firm's default but did not expressly grant the landlord a contractual landlord's lien on the firm's property. In May 2023, the firm obtained a loan from the bank and executed a security agreement granting the bank a security interest in its property as collateral. The agreement specifically defined the collateral to include "general intangibles…including payment intangibles." A month later, the bank perfected its security interest in the collateral. Shortly afterward, the firm defaulted on the loan. The bank sued the firm for breach of contract and requested the appointment of a receiver. In response, the landlord wrote to the bank asserting it possessed a superior landlord's lien over the firm's accounts receivable. Following the superior court's order, both the landlord and the bank filed briefs asserting the priority of their respective liens on the firm's accounts receivable. The superior court found in favor of the landlord's lien, ruling it had priority over the bank's perfected security interest in "all property... placed upon or used on" the premises, which extended to the firm's general intangibles, including accounts receivable, and denied the bank's motion for summary judgment on the priority of its lien. The bank petitioned for special action relief and "argued that a statutory landlord's lien cannot attach to intangible property, such as accounts receivable."

In **PNC Bank, N.A. v. Coury**, 544 P.3d 88 (Ariz. Ct. App. 2024), the court held that the landlord's statutory landlord's lien could not attach to intangible property, specifically the firm's accounts receivable. The court interpreted Arizona's statutory landlord lien provisions in Ariz. Rev. Stat. Ann.§§ 33-361 and 33-362 by looking at the text's plain meaning. § .33-361 provides that if a tenant fails to pay rent, "the landlord shall have a lien on and may seize as much personal property located on the premises and not exempted by law" to secure payment of rent due. Ariz. Rev. Stat. Ann. § 33-36l(D) (emphasis added). Section 33-362 provides that if a tenant fails to pay rent, the landlord "'shall have a lien on all property of his tenant…placed upon or used on the leased premises, until the rent is paid." Ariz. Rev. Stat. Ann. § 33-362 (emphasis added). To determine the scope of the property subject to the landlord's lien, the court considered several definitions of terms used in the statutes beginning with "personal property," which it found may include intangible items such as "things in action" and evidences of debt. "Things in action" falls under the definition of a general intangible, as it is considered "an in personam right to recover debt, money or a thing," and "'historically refers to chattels or goods.'" Hawkland, Uniform Commercial Code Series § 2-105:2 (Oct. 2023 Update). The court agreed with the superior court "that accounts receivable constitute 'things in action,'" a form of personal property, and, therefore, accounts receivable would be included in the term "property" as used in the statutes. However, the court found that additional language in § 33-362 limited the scope of the landlord's lien to only tangible property. Under Ariz. Rev. Stat. Ann. § 33-362, a landlord's lien attaches only "to property 'placed upon or used on' the leased premises." The court agreed with the bank's argument that the accounts receivable were never "placed upon" the leased premises. It explained that a statutory landlord's lien will only attach to property when it is "'first brought on the leased premises,'" and because accounts receivable have no "physical location" and can never be "'placed upon'" the leased premises a statutory landlord's lien will never attach to them. Ex-Cell-O Corp. v. Linear Properties of Ariz., 762 P.2d 594, 596 (Ariz. Ct. App. 1988). The court went on to disagree with the superior court's finding that the firm's accounts receivable was "used on" the leased premises because the firm's "'accounting functions... occurred at the leased premises.'" It explained that even though it is arguable that the firm "used'" the accounts receivable on the premises, when read in the entirety of the statutory context, "used" does not include such a financial transaction. Rather, when looking at the broader context, "the scope of a landlord's lien is unambiguously limited to property 'located on the premises' -that which can be 'found' and 'seize[d].'" Ariz. Rev. Stat. Ann. § 33-361(0), -362(B). The court ultimately found that because accounts receivables were not physically present on the lease premises, they were not subject to the statutory landlord's lien under Arizona law.

By Callighan Ard caard@ttu.edu
Edited By Kristin Meurer krmeurer@ttu.edu
Edited By Ashley Boyce ashboyce@ttu.edu
Edited By Hayden Mariott hayden.mariott@ttu.edu

Tracy Kennedy
NDBA General Counsel

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.

To contact Tracy Kennedy, NDBA General Counsel, call 701.772.8111 or email at tracy@ndba.com.