FEATURED IN NEW JERSEY BANKER FALL 2013

Banks Not Liable

BURDEN TO DETECT FRAUD LIES WITH CUSTOMER

By Anthony J. Sylvester and Anthony C. Valenziano

In *Teichman v. Teichman, et al.*, Docket No. MID-L-4876-11, the Chancery Court for the Superior Court of New Jersey, Middlesex County Vicinage, analyzed the reach of both the "same wrongdoer" exception in Section 4-406 of the Uniform Commercial Code (UCC) (N.J.S.A. 12A:4-406) and New Jersey's Revised Durable Power of Attorney Act (N.J.S.A. 46:2B-14).

Anthony J. Sylvester

Anthony C. Valenziano

In *Teichman*, the plaintiff, an elderly widow, brought suit against several banks and car dealerships, alleging that they negligently permitted her son to conduct financial transactions pursuant to a power of attorney allegedly requiring the consent of two of her three sons.

On Jan. 8, 2009, the plaintiff executed a power of attorney, which provided, among other things, that any one of the plaintiff's three sons could "make withdrawals from any checking, savings, transaction or other deposit account in [her] name … and to do all acts regarding any checking account, savings account, savings certificate, certificate of deposit or similar instrument."

The plaintiff subsequently executed a second power of attorney, dated April 22, 2009, which did not expressly revoke the Jan. 8 power of attorney. Unlike the Jan. 8 power of attorney, the April 22 power of attorney required two of three of the plaintiff's sons' consent to any banking transaction. Over the course of two years, the plaintiff's son repeatedly made withdrawals and endorsed checks, purportedly under the authority of the April 22 power of attorney, without the consent or knowledge of either of his brothers.

According to her complaint and deposition testimony, it took more than two years for the plaintiff to uncover the improper transactions because her son intercepted the mail, preventing her from reviewing her monthly statements. The plaintiff claimed that the son stole over $500,000 from her through the use of the April 22 power of attorney.

An elderly widow brought suit against several banks and car dealerships, alleging that they negligently permitted her son to conduct financial transactions pursuant to a power of attorney allegedly requiring the consent of two of her three sons.

On the banks' respective motions for summary judgment, the court dismissed the plaintiff's claims in their entirety. In terms of the plaintiff's obligations to monitor her accounts under Section 4-406 of the UCC, the court noted that, like other jurisdictions, New Jersey law provides that "once account statements are mailed to the account holder's proper address, the risk of nonreceipt falls on the account holder and interception of the statements by a wrongdoer does not relieve the account holder of the duty to examine the statements and report unauthorized items to the bank."

Thus, the court held that the plaintiff could not avoid the one-year limitation in Section 4-406(f) by claiming that she was unable to review her monthly statements. Further, the court held that, when dealing with the "same wrongdoer" provision of the UCC, the one-year statute of repose contained in Section 4-406 "starts ticking when the first forgery is accomplished." In doing so, the court cited the official comment to the UCC regarding the "same wrongdoer" provision, which states in part that "one of the best ways to keep down losses in [the same wrongdoer] situation is for the customer to promptly examine the statement and notify the bank of an unauthorized signature or alteration so that the bank will be alerted to stop paying further items." Using this analysis, the court found that the plaintiff's claims as to checks improperly drawn on her account after April 2011 -- the date of the statement plus one year – were time-barred.

The holding in *Teichman* further confirms that under the UCC, a bank customer stands in the best position to monitor improper withdrawals and charges on his or her account, irrespective of the plaintiff's particular circumstances. The court's analysis tracks the law in several other jurisdictions, which have similarly held that a bank need only place the customer's statements in the mail or make them available in order to dispense with its obligations under the UCC and shift the responsibility of detecting potentially fraudulent activity to the customer. *See, e.g., Stowell v. Cloquet Co-op Credit Union*, 557 N.W.2d 567 (Minn. 1997); *Peters v. Riggs National Bank*, 942 A.2d 1163 (D.C. Ct. App. 2008); *Borowski v. Firstar Bank Milwaukee, N.A.*, 579 N.W.2d 247 (Wis. Ct. App. 1998); *PTA, Pub. Sch. 72 v. Mfrs. Hanover Trust Co.*, 524 N.Y.S.2d 336, 340

FEATURED IN NEW JERSEY BANKER FALL 2013

(N.Y. City Civ. Ct. 1988).

The *Teichman* court's holding that the one-year statute of limitations runs from the first withdrawal by a "same wrongdoer" is also in keeping with the above rationale. Had the plaintiff taken the necessary steps to review her statements promptly, the son's continued theft could have been thwarted before the plaintiff suffered significant losses. The *Teichman* court ultimately shifts the brunt of this loss to the customer who, again, was in the best position to quickly and easily detect suspicious banking activity.

In a matter of first impression, the court also analyzed New Jersey's Revised Durable Power of Attorney Act and found that the defendant banks could not be held liable for any improper withdrawals premised on allegations that they were negligent in failing to follow the two signature provision of the second power of attorney. The court noted that the plaintiff's complaint sounded exclusively in negligence, and, as a result, could not survive in light of the Revised Durable Power of Attorney Act's expansive language barring claims against a bank "acting in reliance on a power of attorney … unless the act or omission constitutes a crime, actual fraud, actual malice or willful misconduct."

Had the plaintiff taken the necessary steps to review her statements promptly, the son's continued theft could have been thwarted before the plaintiff suffered significant losses.

The court's analysis of the Revised Durable Power of Attorney Act provides financial institutions additional protection from claims of negligence in performing banking transactions involving powers of attorney. Under the *Teichman* analysis, financial institutions are not tasked with properly interpreting the requirements of a power of attorney so long as they act in good faith in performing banking transactions for a customer. ■

Anthony J. Sylvester is partner and Anthony C. Valenziano is an associate with Riker, Danzig, Scherer, Hyland & Perretti LLP.