Connecticut Law Tribune

April 11, 2014

ctlawtribune.com

An ALM Publication

Supreme Court To Decide Bank's Liability In Catholic School Scam

By AMARIS ELLIOTT-ENGEL

Nine years ago, the Connecticut Supreme Court ruled that a ski resort couldn't limit its liability through contractual clauses. Now the court has to decide if the banking industry can be permitted to do what the winter recreational industry cannot.

The justices heard oral arguments last month in a case, the banking industry says, could have profound influence on its future financial health. Bank of America is seeking to overturn a $823,777 verdict returned by a jury that found the financial institution liable for the money a Catholic school employee swindled from the school.

The case begins with Salvatore Licitra, who started out as a part-time bus driver at St. Bernard School of Montville. Over time, his duties expanded to making bank deposits, working on accounts payable and accessing the school's computer system to prepare checks from the school's account. He had access to third-party checks written to the school and blank checks in the school's name.

Licitra's duties expanded, Bank of America said in court papers, even though the school never ran a background check on him and his criminal record "includes several convictions for forgery, larceny, altering prescriptions, issuing bad checks, improper use of credit cards, and burglary."

He continued his criminal activities in 2002 by opening an account with the school's tax identification number. He proceeded to deposit into the account, over the course of four years, more than 1,000 checks, some payable to the school and others drawn on the school's operating fund account.

"Bank employees knew him and came over to shake his hand and joke around with him when he visited the branch," according to the school's court papers. "In the years to follow, the defendant [Bank of America] sent statements for the account to Licitra's home address; issued Licitra an ATM card; and processed hundreds of transactions on the account for Licitra."

Licitra's embezzlement continued until his position at the school was eliminated in 2006. He was arrested in July 2007, after officials at the Diocese of Norwich discovered the scam, and is currently serving a seven-year prison sentence.

In the meantime, St. Bernard filed a civil lawsuit in an attempt to recoup some of its losses.

The school, noting that it was a longtime customer of Bank of America, argued that the bank violated its own policies and let Licitra open a checking account in the school's name even though he was not an authorized signer of documents for the school's accounts. The bank even failed to disclose the existence of the illicit account to the school's accountants for four years in a row, the school complains.

After hearing all of the evidence, the jury found that Bank of America was negligent, breached its contract with the plaintiff, and violated sections of Connecticut banking law and Uniform Commercial Code. Jurors found Bank of America 95 percent liable for Licitra's actions and St. Bernard 5 percent liable.

Bank of America's legal position has been that the lawsuit should have been thrown out because St. Bernard officials took too long to notify the bank about the unauthorized transactions. The bank has deposit account agreements which require customers to review monthly bank statements and to report any questionable transactions within 60 days. Any customer not acting within this time frame, according to the agreements, is barred from bringing "any legal proceeding or action against us to recover any amount alleged to have been improperly paid out of your account."

During the trial, New London Superior Court Judge James Devine declared that those exculpatory clauses—requiring St. Bernard to notify

Bank of America about problems within 60 days in order to be able to sue the bank—were contrary to Connecticut public policy. He cited the 1995 case of *Hanks v. Powder Ridge Restaurant Corp.*, in which the Supreme Court held that it was against the public interest to allow a ski resort to limit its liability through an exculpatory contract clause.

And so, in an apparent issue of first impression, Devine interpreted Connecticut General Statute Section 42a-4-103 to find that the Bank of America deposit agreements were unenforceable. The law states: "Parties to the agreement cannot disclaim a bank's responsibility for its lack of good faith or failure to exercise ordinary care or limit the measure of damages for the lack of failure. However, the parties may determine by agreement the standards by which the bank's responsibility is to be measured if those standards are not manifestly unreasonable."

Devine reasoned that the "exculpatory language in the agreement affects the public interest adversely, and, therefore, it is unenforceable because it violates public policy."

The result of the judge's ruling, Bank of America said, was that the trial jury was not permitted to see the deposit account agreements that were in effect at the time.

In appealing the trial court ruling, Bank of America says that the point of the deposit account agreement is not to absolve the bank of liability if it fails to operate in good faith and with ordinary care. Instead, the bank argues, the agreement is just setting out a procedure that customers—including the school—must follow in order to make a legal claim.

Other jurisdictions allow banks to have similar-length notice periods, Bank of America further argued.

The Connecticut Bankers Association has filed an amicus brief in the case. That brief argues that public policy *does* support exculpatory clauses in the contractual relationship between banks and their depositors. The organization said the bank's exculpatory clause isn't really comparable to that of the ski resort, which is designed to limit liability for physical injuries sustained by customers who are invited onto the resort's property.

"While the invitee to the ski area may have no ability to control the risk they take in using the ski area, the depositor has control over its deposits insofar as it can review activity in its account on a monthly basis," Jeffrey Mirman and David Wiese, of Hinckley, Allen & Snyder in Hartford, wrote in the bankers' amicus brief.

Contractual provisions limiting the amount of time account holders have to notify banks of account irregularities are vital to detecting fraudulent activity early on. If the trial court decision is not overturned, the association said Connecticut will become an outlier in fraud prevention in the United States. Fraud losses will skyrocket, the association warns.

St. Bernard counters that the reason for barring exculpatory clauses exists outside of the context of winter recreation. Exculpatory clauses have no place in the banking industry, the school countered, because account agreements are "contracts of adhesion," meaning banks have "a decisive advantage of bargaining strength" over their patrons.

To allow exculpatory clauses, such as the one used by Bank of America, "would allow banks to run roughshod over our legislature and their customers alike," St. Bernard's lawyers said.

Further, the school's lawyers argue, even if St. Bernard had a responsibility to review its bank statements for suspect transactions, that requirement applied only to the bank officials operating a fund account, not a fraudulent account that school officials had no idea even existed.

Gerald Garlick, of Krasow, Garlick & Hadley in Hartford, is representing Bank of America. He declined comment. Cassie Jameson and Michael Colonese, of Brown Jacobson in Norwich, are representing the school. They, too, declined comment.

But Ryan Barry, of Barry and Barall in Manchester, and former cochairman of the General Assembly's Banks Committee, said that Devine is a well-regarded judge and his reasoning could be persuasive to the Supreme Court. Even though Connecticut would be in the minority of states in barring banks from putting contractual limits on how much time depositors have to flag fraudulent account transactions, Connecticut does not have to follow the majority rule, said Barry, who has no role in the case.

"The courts in our state sometimes lead the way in many areas of the law," Barry said. ■

Reprinted with permission from the April 11, 2014 edition of CONNECTICUT LAW TRIBUNE © 2014 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited.
For information, contact 877-257-3382 or reprints@alm.com. # 301-09-14-08

BROWN JACOBSON
attorneys