

'Inadequate' Brief Scuttles Bank's Appeal of Verdict

Supreme Court declines to consider whether institutions can use clauses as shields

By AMARIS ELLIOTT-ENGEL

When an appeal of a six-figure verdict against Bank of America reached the Connecticut Supreme Court earlier this year, it appeared the case might have widespread implications for the state's robust financial services sector.

But the case is ending on a technicality because of what the court calls an "inadequate" appellate brief. And so the question of whether it is good public policy to allow financial institutions to use exculpatory clauses to protect them in disputes with customers will have to wait for another day.

Bank of America had sought to overturn a \$823,777 verdict returned by a jury that found the financial institution liable for the money that a Catholic school employee swindled from the school. The money had been deposited in Bank of America accounts. One of the bank's defenses was that a contractual clause required St. Bernard School in Montville to notify the bank within 30 or 60 days (the time frame shifted with ownership of the bank) of any irregularities in its accounts. The bank said the school did not report irregularities stemming from the swindle within the contractual time frames.

But at trial, New London Superior



Norwich attorneys Cassie Jameson and Michael Colonese represented a Catholic school that won a large verdict from Bank of America in a case that reached the state Supreme Court.

Court Judge James Devine declared those exculpatory clauses to be contrary to Connecticut public policy and decided that they should not be considered by the jury in assessing liability and damages. In the end, the jury found the bank 95 percent liable for the em-

bezzlement and the school 5 percent.

Bank of America appealed. The schools' counsel, Cassie Jameson and Michael Colonese of Brown Jacobson in Norwich, argued in their appellate briefs that the bank had to show that Devine's ruling regarding the con-

tractual clauses not only was improper, but that it likely affected the verdict in a way that harmed the bank.

However, the entire argument from Bank of America's counsel on the harm caused by the judge's ruling on the clauses consisted of just a few lines. "Even if there were an issue of whether the ruling that the agreements were void and unenforceable was harmful, the trial court's ruling was clearly harmful as it deprived the jury of the opportunity to even consider the deposit account agreements," wrote Gerald Garlick and Katherine Abel, of Krasow, Garlick & Hadley in Hartford.

The Supreme Court, in a unanimous opinion authored by Justice Andrew McDonald, said the brief did "nothing more than state a summary conclusion as to harm." As result, McDonald stated, the justices would not review the merits of the trial court's decision on the account agreements due to "inadequate briefing on whether the purported improper ruling was harmful."

The decision ends the case; the Supreme Court said the bank was not entitled to a new trial.

Garlick declined comment. Colonese said in an email: "We were very pleased with the decision. We thought the jury got it exactly right. We think justice has been done."

Long-Term Embezzlement

The case begins with Salvatore Licitra, who started out as a part-time bus driver at St. Bernard. Over time, his duties expanded to working in the business office; he was given access to computers and often took the school's deposits to the Bank of America branch in Montville.

Even though Licitra was never authorized to conduct any other banking business, he opened an account with the school's tax identification number without Bank of America requiring him to obtain a certificate of authority or a signature card for the account. Later, he was allowed to change the account address to his personal address without getting the school's authorization. He proceeded to deposit into that 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 to legitimate third-party vendors.

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Licitra's embezzlement continued until his position at the school was eliminated in 2006. He was arrested in July 2007 and is serving a seven-year prison sentence.

St. Bernard filed a lawsuit against Bank of America in an attempt to recoup some of its losses. After hearing the evidence, the jury found that bank was negligent, breached its contract with the plaintiff, and violated sections of Connecticut banking law and Uniform Commercial Code.

In an apparent issue of first im-

pression, Devine interpreted Connecticut General Statute §42a-4-103 to find that the Bank of America deposit agreements, which time-barred complaints about account irregularities, were unenforceable. The statute 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 Connecticut Bankers Association, which filed an amicus brief to the Supreme Court, argued that it is actually good public policy to require account holders to notify the bank of irregularities within a certain time period.

Following the Supreme Court decision, David Wiese, a Hinckley, Allen & Snyder partner and outside general counsel for the association, said that timely review of account records by customers plays "a critical role in the early detection and prevention of fraud. Other states and the federal government have recognized these important public policy concerns. We are confident that if this same issue were to be presented to the Supreme Court or another court on a future occasion, the court would recognize the importance of these provisions in the battle against fraud and uphold their enforceability." ■