

OCTOBER 3, 2014

## The New Jersey Supreme Court Holds That Article 4A Of The Uniform Commercial Code Precludes Non-Customers From Suing Banks For Allegedly Unauthorized Wire Transfers

By: David J. Libowsky, Esq.

### Introduction

The New Jersey Supreme Court has recently held that Article 4A of the New Jersey Uniform Commercial Code (“UCC”), *N.J.S.A. 12A:4A-101, et seq.* (2014), bars non-customers from asserting claims against banks for allegedly unauthorized wire transfers, whether such claims allege violation of the statute, common law negligence or some other theory of liability. In *ADS Associates Group, Inc. v. Oritani Savings Bank*, 2014 N.J. LEXIS 923 (Sup. Ct. Sept. 30, 2014), the Supreme Court (Justice Patterson authoring the majority opinion) concluded that the plaintiff, a corporate officer of the defendant bank’s customer and joint venturer of the customer’s principal, could not sue the bank for violation of Article 4A in connection with various alleged unauthorized wire transfers on the ground that the plaintiff was not a customer of the bank as defined by Article 4A. *ADS*, 2014 N.J. LEXIS 923 at \*\*11-12 and 32-34. The Supreme Court held further that the plaintiff was also precluded from asserting a common law negligence claim against the bank in light of the statutory language and the Official Comment to Article 4A. *Id.* at \*\* 11-12 and 35-45.

In this regard, the Supreme Court declined to extend its decision in *City Check Cashing v. Manufacturers Hanover Trust Co.*, 166 N.J. 49 (2001), where it held that a non-customer could assert a common law negligence claim against a bank based on its handling of a check only where the facts establish “a special relationship between the parties created by agreement, undertaking or contact, that gives rise to a duty” (*Id.* at 62), to claims by non-customers in connection with wire transfers. *ADS*, 2014

N.J. LEXIS 923 at \*\*36-38. The *ADS* decision is thus significant because unlike claims brought against a bank by a non-customer for an allegedly unauthorized check, where the Supreme Court has created an exception (albeit a very narrow one) for a non-customer to assert a negligence claim if she can establish the requisite special relationship, no such exception exists for a non-customer who asserts a claim against a bank for an allegedly unauthorized wire transfer, as *ADS* absolutely bars a non-customer from suing the bank in connection with a wire transfer under any circumstances.

### The Allegedly Unauthorized Wire Transfers And Plaintiff Non-Customer’s Claim Against Defendant Bank

In *ADS*, plaintiff Allen and defendant Sanchez agreed to engage in a joint venture to perform work in connection with the Bergen-Hudson Light Rail project (the “Project”). Allen and Sanchez agreed to operate the joint venture through Sanchez’s company, plaintiff ADS Associates, Inc. (“ADS”). *ADS*, 2014 N.J. LEXIS 923 at \*\*12-13. In October 2003, Allen and Sanchez opened a dual signature bank account in the name of ADS with defendant Oritani Savings Bank (the “Bank”), where ADS already maintained bank accounts. As a “dual signature account,” any checks issued on the account by ADS would require the signatures of both Allen and Sanchez. *Id.* at \*\*13-14.

Using a Bank form, Sanchez, acting as ADS’s Secretary, appointed Allen as Treasurer of ADS. The Bank officer with whom Allen and Sanchez dealt advised Allen that only ADS, as the account holder, would receive bank statements and that

the Bank would not separately mail statements to Allen. *Id.* at \*15. At the time the dual signature account was opened, the Bank offered customers internet banking services which were accessible to any authorized signatory on an account through a separate electronic banking application. *Id.* at \*16. Shortly after ADS commenced work on the Project, Sanchez, using the Bank's website, linked the new ADS account with two other pre-existing ADS accounts that had been approved for internet banking. *Id.* at \*18. Between October 2003 and June 2004, Sanchez effected 85 transfers, totaling \$613,972, from the dual signature account to the previously established ADS accounts. Plaintiff Allen allegedly did not discover the internet transfers of funds from the dual signature account until June 15, 2004. *Id.* at \*\*18-19.

In May 2006, Allen commenced an action against Sanchez and the Bank, alleging that the wire transfers were unauthorized. Allen subsequently filed an amended complaint in his own name as well as in the name of ADS. The amended complaint asserted various statutory and common law claims against the Bank, including a claim of negligence, in connection with the allegedly unauthorized transfers of funds from the dual signature account. *ADS*, 2014 N.J. LEXIS 923 at \*\*20-22. Prior to trial, the trial court dismissed all of Allen's claims against the Bank that he brought on his own behalf, including the negligence claim. *Id.* at \*\*22-23. The case was thereafter tried before a jury. Following the close of evidence but before the case was submitted to the jury, the trial court dismissed all of the claims brought by Allen on behalf of ADS against the Bank, except for the claim alleging violation of Article 4A of the UCC. The trial court held that the internet transfers were covered by Article 4A and that as a result, any claim for negligence or gross negligence based upon such transfers were preempted by Article 4A. *Id.* at \*\*22-23. The jury returned a verdict in favor of ADS on the claim for violation of Article

4A, finding that ADS had not authorized any of the internet transfers initiated by Sanchez and that ADS had timely objected to these transfers (*i.e.*, within one year of the date upon which it received notice of the transfers). *Id.* at \*\*23-24. The trial court subsequently granted the bank's motion for judgment notwithstanding the verdict based on an indemnification provision contained in the customer agreement requiring that ADS indemnify the Bank for losses and expenses caused by Sanchez's conduct. *Id.* at \*24.

On appeal, the Appellate Division reversed the trial court's order. The panel held that Allen could no longer pursue claims on behalf of ADS because Sanchez had signed a corporate resolution on behalf of ADS divesting Allen of the authority to litigate on behalf of ADS. *Id.* at \*24. The panel held further, however, that Allen could pursue a common law negligence claim on his own behalf against the Bank, finding that a special relationship existed between Allen and the Bank within the meaning of *City Check Cashing, ADS*, 2014 N.J. LEXIS 923 at \*\*24-25.

### The Supreme Court's Decision In ADS

The Supreme Court reversed the Appellate Division's order reinstating plaintiff's common law negligence claim against the Bank. Initially, the Supreme Court observed that Allen could not assert a claim for violation of any of the provisions of Article 4A pursuant to which a bank can be liable for an unauthorized wire transfer (*i.e.*, *N.J.S.A. 12A:4A-203* and *204*) because he was not a customer of the Bank. Thus, any remedies for allegedly unauthorized wire transfers that would be available under *N.J.S.A. 12A:4A-203* or *204* would only have been available to ADS, who was the Bank's customer. *ADS*, 2014 N.J. LEXIS 923 at \*\*32-35.

■  
**Between October 2003 and June 2004, Sanchez effected 85 transfers, totaling \$613,972, from the dual signature account to the previously established ADS accounts.**  
■

# COMMERCIAL LAW ALERT

In light of the New Jersey Legislature's determination to "unequivocally limit[ ] claims against banks under N.J.S.A. 12A:4A-203 and 204" (Id. at \*35), the Supreme Court next considered whether Allen could assert a common law negligence claim against the Bank. The Supreme Court began its analysis by examining its decision in *City Check Cashing*. In that case, the Supreme Court considered whether plaintiff check cashing company, who was not a customer of the defendant bank, could assert a common law negligence claim against defendant for allegedly failing to properly respond to the non-customer's request to authenticate a certified check that had been altered. The *City Check Cashing* court cautioned that "most courts have been reluctant to sanction common law negligence claims" in light of the "framework for check collection and payment set forth in Articles 3 and 4 of the UCC" and "the balance of interests reflected in the Legislature's enactment of the [UCC]'s provisions," adding that "[o]nly in very rare instances should a court upset the legislative scheme of loss allocation and permit a common law cause of action." *ADS*, 2014 N.J. LEXIS 923 at \*\*36-37 (quoting *City Check Cashing*, 166 N.J. at 58). Counterbalancing this concern, however, the *City Check Cashing* court held that "implicit in those expressions of the need for restraint is a recognition that a common law duty, in fact, may arise and that its breach may be actionable in spite of the existence of the [UCC]." *City Check Cashing*, 166 N.J. at 58-59. In *City Check Cashing*, the Supreme Court opened a very narrow window for the assertion of a common law negligence claim by a non-customer in connection with a disputed check, holding that "in the check collection arena, unless the facts establish a special relationship between the parties created by agreement, undertaking or contact, that gives rise to a duty, the sole remedies available are those provided in the [UCC]." *Id.* at 62. The *City Check Cashing* court concluded that there was no special relationship between the plaintiff check cashing

company and the defendant bank, which would support a common law cause of action arising from the bank's allegedly negligent handling of the plaintiff's request for verification of the authenticity of an altered certified check prior to the midnight deadline imposed by a provision of the UCC. *Id.* at 63.

The Supreme Court in *ADS* declined to extend the *City Check Cashing* exception to claims by non-customers arising out of allegedly unauthorized wire transfers, concluding that Article 4A barred all such claims. In reaching this decision, the Court relied heavily on the Official Comment to N.J.S.A. 12A:4A-102, which provides in relevant part:

In the drafting of Article 4A, a deliberate decision was made to write on a clean slate and to treat a funds transfer as a unique method of payment to be governed by unique rules that address the particular issues raised by this method of payment. A deliberate decision was also made to use precise and detailed rules to assign responsibility, define behavioral norms, allocate risks and establish limits on liability, rather than to rely on broadly stated, flexible principles. In the drafting of these rules, a critical consideration was that the various parties to funds transfers need to be able to predict risk with certainty, to ensure against risk, to adjust operational and security procedures and to price funds transfers services appropriately.

...

Funds transfers involve competing interests -- those of the banks that provide funds transfers services and the commercial and financial organizations that use the services, as well as the public interests. These competing interests

■

**The Supreme Court  
in ADS declined  
to extend the *City  
Check Cashing*  
exception to claims  
by non-customers  
arising out  
of allegedly  
unauthorized wire  
transfers....**

■

were represented in the drafting process and they were thoroughly considered. *The rules that emerged represent a careful and delicate balancing of those interests and are intended to be the exclusive means of determining the rights, duties and liabilities of the affected parties in any situation covered by particular provisions of the Article. Consequently, resort to principles of law or equity outside of Article 4A is not appropriate to create rights, duties and liabilities inconsistent with those stated in this Article.*

N.J.S.A. 12A:4A-102 cmt. 1 (2014) (emphasis added). Guided by the Official Comment, the ADS court held that “Article 4A was intended to prescribe detailed requirements for funds transfers so that parties affected by such transfers may comply with those requirements and anticipate the risks assumed” and that Article 4A thus “comprehensively governs the rights and remedies of parties affected by funds transfers.” ADS, 2014 N.J. LEXIS 923 at \* 39.

In light of the clear expression of legislative intent contained in the Official Comment, the Supreme Court held that Allen’s claim “is among the disputes for which the Legislature intended Article 4A to constitute ‘the exclusive means of determining rights, duties and liabilities of the affected parties.’” ADS, 2014 N.J. LEXIS 923 at \*\*40-41. As such, the court concluded, Allen’s common law negligence claim has no place in this clearly delineated statutory scheme, holding that “our recognition of the common law negligence action asserted by Allen in his individual capacity would contravene the essential objective of Article 4A: to provide definitive principles that allocate the risks and define the duties of banks effecting electronic transfers on behalf of their customers.”

*Id.* at \*41. Recognizing that the cause of action available under Article 4A to customers for allegedly unauthorized wire transfers “is not afforded to individual officers, directors or employees of that customer,” the Supreme Court held that “[i]f Allen were permitted to assert a common law negligence claim against Oritani, the ‘careful and delicate balancing’ of competing interests that generated Article 4A would be undermined.” *Id.* at \*\*41-42. The ADS court concluded that “[t]he recognition of a common law negligence claim -- in this case premised upon a special relationship such as that contemplated in *City Check Cashing* in the different setting of Articles 3 and 4 -- would be precisely the type of ‘resort to principles of law or equity outside of Article 4A’ that the Legislature expressly sought to avoid.” *Id.* at \*42.

The ADS majority rejected dissenting Justice Albin’s contention that Allen should be permitted to maintain a “non-customer” claim under *City Check Cashing* for negligent misrepresentation independent of Article 4A, based on the Bank’s alleged “assurance that two signatures would be required for a check to be honored without disclosing the fact that transfers among ADS’s accounts could be effected by means of internet banking.” ADS, 2014 N.J. LEXIS 923 at \*\*42-45. Initially, as the court observed, Allen never asserted a claim for negligent misrepresentation in the first place. Moreover, even if he had plead a claim for negligent misrepresentation, such claim, the court reasoned, “would directly contravene the Legislature’s stated objectives in enacting Article 4A.” *Id.* at \*43. The court held that a negligent misrepresentation claim, “devoid of any allegation that the bank failed to utilize an agreed-upon, commercially reasonable security procedure for the electronic transfer -- would seek a remedy outside of the statutory parameters.” *Id.* at \*44. The Supreme Court concluded that

■ **In light of the clear expression of legislative intent contained in the Official Comment, the Supreme Court held that Allen’s claim “is among the disputes for which the Legislature intended Article 4A to constitute ‘the exclusive means of determining rights, duties and liabilities of the affected parties.’”** ■

# COMMERCIAL LAW ALERT

---

allowing a non-customer such as Allen to assert a negligence claim “would contravene the purpose and the terms of Article 4A.” *Id.* at \*44.

Finally, the Supreme Court held that even if Article 4A did not preclude the assertion of a negligence claim by a non-customer, no duty of care premised upon a “special relationship” as contemplated in *City Check Cashing* could be found in this case. The court concluded that there was no evidence of any agreement, undertaking or contact between Allen and the Bank which could give rise to the requisite special relationship. *ADS*, 2014 N.J. LEXIS 923 at \*\*45-49.

## Conclusion

The New Jersey Supreme Court’s decision in *ADS* is consistent with Article 4A’s stated objective of ensuring that banks are able to “predict risk with certainty, to ensure against risk, to adjust operational and security procedures, and to price funds transfer services appropriately.” *N.J.S.A. 12A:4A-102 cmt. 1 (2014)*. *ADS* affords banks greater protection from claims by non-customers arising out of allegedly unauthorized wire transfers than *City Check Cashing* provides to banks with regard to allegedly unauthorized checks. Under *ADS*, no claim of any kind can be asserted against a bank by a non-customer in connection with an unauthorized wire transfer. When it comes to an unauthorized check, by contrast, the non-customer -- at least theoretically -- has the ability to assert a negligence claim against a bank if (and only if) she proves a special relationship. The Supreme Court’s seemingly disparate treatment of checks and wire transfers results directly from the fact that the Official Comment to Articles 3 and 4 do not contain the same type of language as set forth in the Official

Comment to *N.J.S.A. 12A:4A-102* regarding the exclusivity of the statutory remedy that the *ADS* Court found to be determinative. The legislative determination that “resort to principles of law or equity outside of Article 4A is not appropriate to create rights, duties and liabilities inconsistent with those stated in this Article” (*N.J.S.A. 12A:4A-102 cmt. 1 (2014)*) thus confirms that the New Jersey Legislature intended to immunize banks from liability to non-customers who assert claims for unauthorized wire transfers. ■

*For more information about any of the topics covered in this issue of the Commercial Law Alert, please contact:*

*David J. Libowsky, Esq.  
973-660-4423*

The information contained in this Client Alert is for general informational purposes only and is neither presented nor intended to constitute legal advice or a legal opinion as to any particular matter. The reader should not act on the basis of any information contained herein without consulting first with his or her legal or other professional advisor with respect to the advisability of any specific course of action and the applicable law.

The views presented herein reflect the views of the individual author(s). They do not necessarily reflect the views of Bressler, Amery & Ross, P.C. or any of its other attorneys or clients.