Between a Rock and a Hard Place: Elder Financial Abuse and the UCC

By: J.P. McGuire Boyd, Jr.

06.14.2023

The United States District Court for the Eastern District of Virginia recently affirmed a basic principle of deposit banking, which is that in the absence of an express agreement, a depository bank owes no duty to second-guess or reject an elder customer?s payment order. *See In re Cook*, 2023 WL 3467209, at *2 (E.D. Va. May 15, 2023) (?While a bank can be liable ? for not accepting a payment order, no provision of [UCC] Section 8.4A imposes liability on a receiving bank that properly executes a duly authorized wire transfer by the sender. Further, a ?bank owes no duty to any party to the funds transfer except as provided in this title or by express agreement?? (quoting Va. Code § 8.4A-212)). The case is no outlier. Courts across the country have routinely declined to charge banks with a duty to protect elder customers from financial scams even when banks suspect fraud or customer incompetence. *See, e.g., Napoli v. Scottrade, Inc.*, 259 N.C. App. 938, 814 S.E.2d 583 (2018); *Abhyankar v. JPMorgan Chase, N.A.*, 2020 WL 4001661 (S.D.N.Y. July 15, 2020); *Millare v. Bank of Am., N.A.*, 2022 WL 1843133 (C.D. Cal. Jan. 25, 2022).

Why is that? One reason is that the Uniform Commercial Code (UCC) preempts common law principles that are inconsistent with its provisions. UCC § 1-103, Official Comment 2. Under the UCC, a bank faces liability for dishonoring a customer?s checks or rejecting a customer?s wire transfer instructions. *See* UCC § 4-402(a) (?a payor bank wrongfully dishonors an item if it dishonors an item that is properly payable?); § 4-401(a) (?An item is properly payable if it is authorized by the customer and is in accordance with any agreement between the customer and the bank?); § 4A-212 (?If a receiving bank fails to accept a payment order that it is obliged by express agreement to accept, the bank is liable for breach of the agreement to the extent provided in the agreement or in this Article?).

The UCC also presumes that a customer has the legal capacity to manage his or her own affairs until a bank knows that a court has adjudicated the customer to be incapacitated. *See* UCC § 4-405(a) (?[a] payor ? bank?s authority to ? pay ? an item ? is not rendered ineffective by the incapacity of [its] customer ? if the bank does not know of an adjudication of incapacity?). In most circumstances, this presumption, coupled with the potential of liability for rejecting transactions, compels banks to process their customers? checks and wire transfers as instructed.

Still another reason is that in the absence of a special agreement, banks are not considered to be fiduciaries who are charged with a duty to monitor their customers? account transactions. *See* UCC § 4A-212 (?A receiving bank is not the agent of the sender ? of the payment order it accepts, ? and the bank owes no duty to any party to the funds transfer except as provided in this title or by express agreement?); *Scott v. Branch Banking & Tr. Co.*, 588 F. Supp. 2d 667, 676 (W.D. Va. 2008), *aff?d*, 332 F. App?x 112 (4th Cir. 2009) (?it would simply be unworkable for a bank to monitor its customers? accounts, in the absence of an agreement, to determine whether certain conditions precedent in contracts to which the bank was not a party had or had not been met before permitting its customers to transfer or withdraw funds from accounts over which those customers possessed sole control?). While banks do have monitoring and reporting requirements under the federal Bank Secrecy Act and related anti-money laundering programs, those duties extend to the federal government, not to bank customers. *See Venture Gen. Agency, LLC v. Wells Fargo Bank, N.A.*, 2019 WL 3503109, at *7 (N.D. Cal. Aug. 1, 2019).

Financial scammers work tirelessly to exploit this situation, leaving elder bank customers and their family members with few good options for protection. An elder customer could grant a power of attorney to a trusted family member to monitor account transactions, but use of this power against sophisticated scams requires a high level of vigilance. Further, the granting of a power of attorney does not divest the principal of his or her own authority to act. So long as the principal retains legal capacity, the attorney-in-fact has no authority to contravene the principal?s wishes. Thus, a bank facing competing instructions from an elder customer and an attorney-in-fact will likely end up freezing the customer?s account. That may prevent a pending fraudulent transfer, but it will also disrupt routine bank transactions without solving the underlying problem of the elder customer?s susceptibility to financial scams.

To solve this problem going forward, either the elder customer must agree to transfer funds into a joint account that includes a dual authorization requirement for large withdrawals, or a family member must convince a court that the elder customer lacks legal capacity and requires the appointment of a guardian or conservator to take control of the customer?s bank accounts. There are no easy answers.

Related People

- J.P. McGuire Boyd, Jr. ? 804.420.6927 ? mboyd@williamsmullen.com

Related Services

- Financial Services

- Financial Services Litigation
- Banking & Finance