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NJ High Court Frees TD Bank From Forged Checks Suit

By **Bill Wichert**

Law360 (June 18, 2020, 2:38 PM EDT) -- TD Bank escaped a dentist's suit over its acceptance of checks fraudulently deposited by his then-employees after the New Jersey Supreme Court said he could not pursue a state Uniform Fiduciaries Law claim since that statute does not permit an affirmative cause of action against banks but instead provides them with limited immunity.

The Supreme Court issued that ruling Wednesday in upending a state appellate decision last year that revived Dr. Dominick A. Lembo's action on the grounds that the complaint suggested an affirmative cause of action against TD Bank under the UFL. But the appellate panel "misconstrued the purpose" of the statute, the justices reasoned.

"The Legislature enacted the UFL not to create an affirmative cause of action against a bank but to provide a defense when the bank is sued for failing to take notice of and action on the breach of a fiduciary's obligation," Justice Barry T. Albin wrote in the unanimous opinion.

"The UFL confers a limited immunity on a bank, unless the bank acts in bad faith or has actual knowledge of a fiduciary breach," the justice added.

Lembo could have gone after TD Bank under the Uniform Commercial Code, but he did not file such a conversion claim within the requisite three-year statute of limitations period, the court said.

The dentist has said he learned in December 2011 that Karen Wright, a dental hygienist, and Arlene Marchese, an office manager, had taken checks totaling "several hundred thousand dollars," forged his endorsement on them and deposited them in their TD Bank accounts, according to the appellate opinion. The checks were issued to Lembo and his practice, the opinion said.

Lembo and his practice filed the current action in February 2015 against Wright, Marchese and TD Bank. He filed common law claims against the financial institution for conversion and negligence.

In April 2019, the appellate panel partially reversed a trial court ruling dismissing Lembo's cause of action against TD Bank. The panel concurred that Lembo could not pursue the common law claims, but found that he should be allowed to amend his suit and plead a UFL claim.

The panel said the UFL "provides that a bank is liable where it takes a check from a fiduciary under certain circumstances, the fiduciary breaches his or her fiduciary obligations to the principal and the bank 'takes the instrument with actual knowledge of the breach or with knowledge of facts that [its] action in taking the instrument amounts to bad faith.'"

On **TD Bank's challenge** to that decision, Lembo's attorney told the Supreme Court during oral arguments that Wright and Marchese became "**constructive trustees**" of the funds and thus fiduciaries under the UFL after depositing the checks.

The justices didn't reach that argument Wednesday after accepting TD Bank's position that the UFL did not create such an affirmative cause of action.

"Nothing in the plain language of the UFL suggests that the UFL is itself the basis for an affirmative

cause of action," the justices said. "The UFL does not provide for a recovery through a private action or set forth remedies or a statute of limitations — all indicia of a statutory cause of action."

Instead, the UFL provides that a bank does not have to inquire about whether a fiduciary is in violation of his or her obligation — "with two exceptions," the justices said.

"If the bank deposits or pays on a check 'with actual knowledge that the fiduciary is committing a breach of his obligation ... or with knowledge of facts that its action in receiving the deposit of paying the check amounts to bad faith,' then the bank faces legal liability," the court said.

The plain language of the statute and its legislative history "evidence a legislative intent to provide a limited immunity to banks from common law causes of action — not to provide a new affirmative cause of action against a bank," the court said.

The Supreme Court agreed with the appellate panel that Lembo's common law conversion claim is preempted by the UCC and that his common law negligence claim fell short in the absence of a "'special relationship'" between him and TD Bank.

"That Marchese and Wright had personal accounts at TD Bank where the forged checks were cashed and deposited did not establish a 'special relationship' between TD Bank and Lembo," the justices said.

Counsel for the parties did not immediately respond to requests for comment Thursday.

Lembo is represented by Michael P. De Marco of De Marco & De Marco.

TD Bank is represented by Caitlin T. Shadek and Anthony J. Sylvester of Sherman Wells Sylvester & Stamelman LLP.

The case is Lembo et al. v. Marchese et al., case number 082930, in the New Jersey Supreme Court.

--Editing by Abbie Sarfo.