

BANKING ALERT

February 2016

[New York Court Dismisses Claims Arising From Unauthorized Electronic Transfers](#)

In *Schochet v. Bank of America*, Index No. 652058/2013 (N.Y. Sup. Ct. Jan. 7, 2016), the Supreme Court, New York County, dismissed claims brought by plaintiffs Brian and Claire Schochet (“Plaintiffs”) against Bank of America (“BOA”) for alleged violation of the Electronic Funds Transfer Act (“EFTA”), negligence and breach of contract.

Plaintiffs, a husband and wife, alleged that over the course of two years beginning in January 2010, approximately \$250,000 was transferred without authorization from Plaintiffs’ account at BOA. Each of the unauthorized transfers appeared on the monthly statements Plaintiffs received from BOA; however, Plaintiffs admittedly failed to review their statements and did not notice the unauthorized transfers until more than two years after the first one. In June 2012, Plaintiffs provided BOA written notice of the unauthorized transfers. Despite the fact BOA was under no obligation to do so, BOA re-credited Plaintiffs’ account with approximately \$185,000 of the \$250,000 Plaintiffs claimed was stolen. Based on BOA’s refusal to repay the remaining \$65,000, Plaintiffs brought suit against BOA seeking the balance of the remaining funds, as well as statutory penalties in the amount of \$2,000,000 for BOA’s failure to timely provisionally re-credit the account.

The Court held that Plaintiffs, *not* BOA, stood in the best position to detect possible fraud on the accounts. The Court labeled Plaintiffs’ failure to inspect their statements as “gross negligence,” and rejected Plaintiffs’ contention that BOA had “constructive notice” of the unauthorized nature of the transactions at issue. The Court also rejected the contract claim on the grounds that Plaintiffs failed to abide by the contract themselves, the deposit agreement, which required Plaintiffs to give notice of any unauthorized withdrawals within 60 days of receiving a statement identifying the unauthorized transaction. As for the negligence claim, the Court found that Plaintiffs failed to allege an extra-contractual duty on the part of BOA.

Finally, the Court limited the statutory penalty for the EFTA violation to \$100, finding that BOA went “above and beyond” in re-crediting Plaintiffs a significant amount of the unauthorized transfers when BOA was under no obligation to do so.

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District Court Dismisses Pro Se Complaint Based on Colorado River Abstention Doctrine

In *Patel v. PNC Bank*, No. 15-3432 (D.N.J. Jan 28, 2016), the District Court for the District of New Jersey dismissed the Complaint of *pro se* plaintiffs Narendra and Nuri Patel (together, “Plaintiffs”) for failure to state a claim against defendant PNC Bank (the “Bank”). In 2006, Plaintiffs obtained a home equity line of credit loan from the Bank, which was secured by a mortgage on property in Morris Plains, New Jersey. In 2013, the Bank initiated foreclosure proceedings against Plaintiffs in the Superior Court of New Jersey, Chancery Division, alleging Plaintiffs defaulted by failing to make the loan payments. Plaintiffs filed a contesting answer and the Bank moved to strike. The Bank’s motion to strike the answer was granted and the action was referred to the Office of Foreclosure to proceed as uncontested. Subsequently, Plaintiffs filed an action in the Court against the Bank for breach of contract, wrongful foreclosure, quiet title, negligence and violation of RESPA, alleging that the Bank sold the loan to a securitized trust and did not assign the mortgage and, thus, unlawfully separated the mortgage and note.

The Bank moved to dismiss and the Court found that application of the *Colorado River* Abstention Doctrine barred all but Plaintiffs’ RESPA claim, which, in any event, failed to state a claim. The Court explained that the *Colorado River* Abstention Doctrine applies when there is a parallel state court proceeding and “extraordinary circumstances” exist to merit abstention. The Court found that the foreclosure proceeding was a parallel proceeding, involved the same parties and Plaintiffs should have asserted the state law claims in that action.

The Court then found that application of the *Colorado River* Abstention Doctrine favored abstention. First, the state court has jurisdiction over Plaintiffs’ home. Second, neither forum is inconvenient for the parties. Third, a ruling by the Court on Plaintiffs’ claim could potentially undermine the judgment in the state court proceeding. Fourth, the state court obtained jurisdiction first. Fifth, state law controls the majority of Plaintiffs’ claims. Sixth, Plaintiffs’ claims may still be litigated in the state court proceeding, which has not yet become final. Thus, the Court held it would abstain from a hearing on Plaintiffs’ state law claims and dismissed Plaintiffs’ Complaint.

Appellate Division Finds Mandatory Arbitration Provision in Employee Handbook Unenforceable

In *Morgan v. Raymours Furniture Co., Inc.*, 443 N.J. Super. 338 (App. Div. 2016), the New Jersey Appellate Division held that an employee’s acknowledgment that he received a copy of an employee handbook that contained a mandatory arbitration agreement did not result in a waiver of his right to sue in court for employment discrimination, where the handbook contained a disclaimer stating that nothing in the handbook created a contract.

Plaintiff complained about age discrimination at the workplace to defendants, his former employer, Raymours Furniture Company, and two of its representatives. Following his complaints, plaintiff alleged that defendants “confronted him with an ultimatum—that he either sign a stand-alone arbitration agreement or defendants would terminate his employment.” Plaintiff refused to sign the agreement and defendants carried out their threat. After his termination, plaintiff commenced an action alleging age discrimination under the New Jersey Law Against Discrimination. Defendants moved to compel arbitration pursuant to a mandatory arbitration agreement in an employee handbook that plaintiff acknowledged he received a copy of. The trial court denied the motion and defendants appealed.

On appeal, defendants argued, among other things, that the arbitration agreement in the handbook should be enforced since it satisfied “all of the customary contract formation elements. In rejecting defendants’ argument that plaintiff should be compelled to arbitrate, the Appellate Division noted that the handbook is prefaced with a disclaimer stating: “*Nothing in this Handbook or any other Company practice or communication or document, including benefit plan descriptions, creates a promise of continued employment, [an] employment contract, term or*

obligation of any kind on the part of the Company. (Emphasis added.) In addition, when electronically acknowledging receipt of the handbook, plaintiff signified that he understood “that the rules, regulations, procedures and benefits contained therein are *not promissory or contractual* in nature and are subject to change by the Company.” (Emphasis added.) The Court explained that these disclaimers were likely included because of the New Jersey Supreme Court’s decision in *Wolley v. Hoffman-La Roche, Inc.*, 99 N.J. 309 (1985), where the Court determined that company manuals may create implied contractual rights and duties, but that employers—to avoid this possibility—could include a prominent disclaimer of the contractual nature of a handbook.

The Appellate Division also criticized defendants for seeking both the benefit of its disclaimers while insisting that the handbook was contractual with regard to the arbitration provision. “In this setting, it is simply inequitable for an employer to assert that, during its dealings with its employee, its written rules and regulations were not contractual and then argue, through reference to the same materials, that the employee contracted away a particular right.”

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