

BANKING ALERT

[New Jersey Supreme Court Bars Non-Customer From Bringing Negligence Claim Against Bank](#)

In a decision that strongly reaffirms prior precedent, the New Jersey Supreme Court held that a non-customer may not assert a claim of common law negligence against a bank due to the bank's alleged failure to properly transact fund transfer requests. The case is significant as it reaffirms the principle that claims involving banking transactions are to be viewed within the context of the remedies of the UCC. Also significant is the New Jersey Supreme Court's narrow view of the term "customer," which, as the New Jersey Supreme Court noted, is found throughout Article 4A of the UCC.

In *ADS Associates Group, Inc. v. Oritani Savings Bank*, 2014 WL 4810314 (N.J. Sept. 30, 2014), one of the plaintiffs, Brendan Allen, and one of the defendants, Asnel Diaz Sanchez, created a business venture, which was operated through, ADS Associates, Inc. ("ADS"), a corporation fully owned by Mr. Sanchez. As part of this venture, Messrs. Sanchez and Allen opened a business checking account in the name of ADS at Oritani Savings Bank. Notably, ADS maintained preexisting accounts with Oritani. Pursuant to the agreement between ADS and Oritani, both Messrs. Allen's and Sanchez's signatures were required on each check drawn on the account. Unbeknownst to Mr. Allen and in alleged violation of this agreement, Mr. Sanchez linked the new account to the already-existing ADS accounts at Oritani, and began to transfer large sums of funds from the joint venture account to other ADS accounts through a series of internet transactions.

Immediately upon learning of these transactions, Mr. Allen, on behalf of himself and ADS, sued Oritani and Mr. Sanchez. While the trial court dismissed Mr. Allen's individual claims, it permitted Mr. Allen to pursue claims on behalf of ADS, despite Mr. Sanchez's passing of a corporate resolution denying Mr. Allen the authority to maintain an action on ADS's behalf. While the jury returned a verdict in favor of ADS at trial, the trial court entered a judgment notwithstanding the verdict in favor of Oritani based on an indemnification provision in the agreement between ADS and Oritani. The Appellate Division reversed the trial court and found that Sanchez's resolution did deprive Mr. Allen of the authority to maintain an

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action on ADS's behalf. However, the Appellate Division, despite noting that Mr. Allen was not a customer of Oritani, found that Mr. Allen could pursue individual claims against Oritani based on the nature of his prior communications with Oritani. The Appellate Division found that these communications, specifically those between Mr. Allen and Oritani where Mr. Allen insisted on the two-signature requirement, rose to the level of the "special relationship" discussed in the New Jersey Supreme Court's decision in *City Check Cashing, Inc. v. Manufacturers Hanover Trust Co.*, 166 N.J. 49 (2001).

The New Jersey Supreme Court reversed the Appellate Division and reinstated the trial court's decision. First, the Court noted that the internet wire transfers fell within the ambit of Article 4A of the UCC. The Court also determined that Mr. Allen, individually, did not fall within the meaning of "customer" under the UCC. The account agreement between ADS and Oritani did not, the Court noted, "confer upon Allen the status of a customer for purposes of UCC Article 4A, or otherwise support Allen's right to bring an individual claim against Oritani. Instead, the Account Agreement underscores the status of ADS as Oritani's sole customer for the purposes of the disputed account."

Turning to what the Court identified as a matter of first impression in New Jersey, the Court rejected Mr. Allen's attempt, as a non-customer, to sue Oritani for common law negligence outside the remedies provided for in Article 4A of the UCC. The Court held that Mr. Allen's proposed claim was an issue directly addressed by the UCC provision governing wire transfers. The Court also rejected the contention that the prior communications between Oritani and Mr. Allen gave rise to a "special relationship" that would permit Mr. Allen to proceed with non-UCC claims.

Arbitration Provisions In Consumer Contracts Must Contain Clear And Unambiguous Language That Consumer Is Waiving Right To Seek Relief In Court

In *Atalese v. U.S. Legal Services Group*, 2014 WL 4689318 (N.J. Sept. 23, 2014), the New Jersey Supreme Court unanimously held that an arbitration clause in a consumer contract that does not clearly and unambiguously advise that the consumer is giving up the right to litigate claims in court is unenforceable.

The plaintiff in *Atalese* contracted with defendant U.S. Legal Services Group (USLSG), a debt-adjustment organization, to manage and resolve plaintiff's financial troubles. Plaintiff alleged that USLSG misrepresented the fees it charged for its services and "knowingly omitted" that it was not a licensed debt adjuster in New Jersey. Plaintiff filed suit in state court, alleging, among other things, that USLSG violated two New Jersey consumer protection statutes.

USLSG moved to compel arbitration based on an arbitration provision in the parties' service contract, which provided:

Arbitration: In the event of any claim or dispute between Client and the USLSG related to this Agreement or related to any performance of any services related to this Agreement, the claim or dispute shall be submitted to binding arbitration upon the request of either party upon the service of that request on the other party. The parties shall agree on a single arbitrator to resolve the dispute. The matter may be arbitrated either by the Judicial Arbitration Mediation Service or American Arbitration Association, as mutually agreed upon by the parties or selected by the party filing the claim. The arbitration shall be conducted in either the county in which Client resides, or the closest metropolitan county. Any decision of the arbitrator shall be final and may be entered into any judgment in any court of competent jurisdiction.

The trial court granted USLSG's motion to compel arbitration and the Appellate Division affirmed, finding that the arbitration clause gave the "parties reasonable notice of the requirement to arbitrate all claims under the contract," and that "a reasonable person, by signing the agreement, [would have understood] that arbitration is the sole means of resolving contractual disputes."

The New Jersey Supreme Court disagreed and reversed, holding that the arbitration provision was unenforceable because it "did not clearly and unambiguously signal to plaintiff that she was surrendering her right to pursue her statutory claims in court." The Court explained that "an average member of the public may not know-without some explanatory comment-that arbitration is a substitute for the right to have one's claim adjudicated in a court of law." The Court further noted that because arbitration involves a waiver of the right to pursue a case in a judicial forum, courts must take particular care in assuring the knowing assent of both parties to arbitrate, and a clear, mutual understanding of the ramifications of that assent.

Thus, while the Court did not hold that certain "magic words" are required for arbitration provisions to be enforceable, its decision will effectively require all companies doing business in New Jersey to review the arbitration clauses in their contracts to ensure that they are abundantly clear about the waiver of the right to litigate in court.

New Law Affects A Bank's Obligations In New Jersey To Maintain Vacant Properties In Residential Foreclosures

Since 2008, New Jersey statutory law has imposed upon creditors foreclosing residential properties certain responsibilities with respect to vacant or abandoned properties. See N.J.S.A. 46:10B-51. Recently, however, New Jersey enacted a new law (L.2014, c.35 effective as of August 15, 2014) that not only amends the existing law and imposes additional responsibilities on such creditors, but also enhances the authority of municipalities to issue fines for violations of the law. See N.J.S.A. 40:48-2.12s.

With the enactment of the new law (as was the case under the previously-existing law), a creditor foreclosing on a residential property must still notify the municipal clerk of the municipality in which the property is located that an action to foreclose the mortgage has been filed against the property and, in such notice, provide contact information to the municipality for the representative of the creditor responsible for receiving complaints of property maintenance and code violations. The notice must be given within 10 days after service of the summons and complaint. The new law now requires out-of-state creditors to appoint an in-state representative or agent responsible for the "care, maintenance, security, and upkeep of the exterior of the property if it becomes vacant and abandoned."

The law authorizes the municipality to issue violations notices to a creditor that fails to maintain the exterior of the property, and a creditor receiving such notice has 30 days from receipt of the notice to correct the violation(s) (unless the violation "presents an imminent threat to public health and safety", in which case the creditor has only 10 days to remedy the violation). Importantly, the law provides for substantial fines to creditors for failure to cure violations. Creditors failing to cure violations within 30 days of receipt of notice (or 10 days in the case of violations presenting

an “imminent threat to public health and safety”) are subject to a fine of \$1,500 per day for each day of the violation, commencing on the 31st day after receipt of notice (or the 11th day after receipt of notice in the case of violations presenting an “imminent threat to public health and safety”). Similarly, out-of-state creditors that fail to appoint an in-state representative or agent are subject to an additional fine of \$2,500 per day for each day of the violation, commencing on the day after the 10-day period for providing notice to the municipality of the summons and complaint in the foreclosure action.

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