The Banking Law Journal

Established 1889

An A.S. Pratt® PUBLICATION NOVEMBER/DECEMBER 2016

LexisNexis

THE BANKING LAW JOURNAL

VOLUME 133 **NUMBER 10** **November/December 2016**

LexisNexis®

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:
Matthew T. Burke at ..... (800) 252-9257
Email: ..... matthew.t.burke@lexisnexis.com
For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at . . . . . (800) 833-9844
Outside the United States and Canada, please call . . . . . (518) 487-3000
Fax Number . . . . . (518) 487-3584
Customer Service Web site . . . . . http://www.lexisnexis.com/custserv/
For information on other Matthew Bender publications, please call

Your account manager or . . . . . (800) 223-1940
Outside the United States and Canada, please call . . . . . (518) 487-3000

ISBN: 978-0-7698-7878-2 (print)
ISBN: 978-0-7698-8020-4 (eBook)
ISSN: 0005-5506 (Print)
ISSN: 2381-3512 (Online)

Cite this publication as:

The Banking Law Journal (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

An A.S. Pratt® Publication

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW BENDER

Editor-in-Chief, Editor & Board of Editors

THE BANKING LAW JOURNAL (ISBN 978-0-76987-878-2) (USPS 003-160) is published ten times a year by Matthew Bender & Company, Inc. Periodicals Postage Paid at Washington, D.C., and at additional mailing offices.

For customer support, please contact LexisNexis Matthew Bender, 1275 Broadway, Albany, NY 12204 or e-mail Customer. Support@lexisnexis.com. Direct any editorial inquires and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@meyerowitzcommunications.com, 718.224.2258 (phone). Material for publication is welcomed— articles, decisions, or other items of interest to bankers, officers of financial institutions, and their attorneys.

authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to THE BANKING LAW JOURNAL LexisNexis Matthew Bender, 230 Park Ave, 7th Floor, New York, NY 10169.

POSTMASTER: Send address changes to THE BANKING LAW JOURNAL, A.S. Pratt & Sons, 805 Fifteenth Street, NW., Third Floor, Washington, DC 20005-2207.

When Is an Unauthorized Electronic Funds Transfer Claim Time Barred? Navigating Through Article 4A's Repose and Limitation Periods

Peter P. Hargitai[*]

If a bank accepts an unauthorized order, the bank must refund the payment to the customer with interest. The bank has a few key defenses, including that the customer failed to timely object to the order. This article focuses on the timing of the customer's objection. In order to preserve its claims, by when must the customer object to the disputed transaction or bring a lawsuit?

The vast majority of banking relationships include electronic funds transfers. If a customer provides instructions to its bank, either in person or electronically, to transfer money to another account by debiting that customer's account, the transaction likely qualifies as an electronic funds transfer.[1] Article 4A of the Uniform Commercial Code defines the duties, liabilities, and rights of parties to a funds transfer and displaces inconsistent common law remedies.[2]

Generally, if a bank accepts an unauthorized order, the bank must refund the payment to the customer with interest.[3] The bank has a few key defenses, including: (i) that the customer's order was verified by the bank pursuant to a commercially reasonable security procedure, or otherwise authorized under the

---

[*] Peter P. Hargitai is a partner at Holland & Knight, LLP, focusing on financial services and real estate litigation. He may be contacted at peter.hargitai@hklaw.com.

[1] A "funds transfer" is "the series of transactions, beginning with the originator's payment order, made for the purpose of making payment to the beneficiary of the order." Fla. Stat. § 670.104(1). A "payment order" is "an instruction of a sender to a receiving bank, transmitted orally, electronically, or in writing, to pay . . . money to a beneficiary [where] the receiving bank is to be reimbursed by debiting [the sender's account]." *See* Fla. Stat. § 670.103(1)(c).

[2] For further discussion regarding Article 4A's displacement of common law negligence actions, *see* Peter P. Hargitai, *Florida's Federal Courts Are on the Verge of Getting It Wrong: UCC Article 4A Displaces Common Law Negligence Actions*, 132 Banking L.J. 211 (2015).

[3] Fla. Stat. § 670.204(1) provides as follows:

> If a receiving bank accepts a payment order issued in the name of its customer as sender which is not authorized and not effective as the order of the customer under s. 670.202 or is not enforceable, in whole or in part, against the customer under s. 670.203, the bank shall refund any payment of the payment order received from the customer to the extent the bank is not entitled to enforce payment and shall pay interest on the refundable amount calculated from the date the bank received payment to the date of the refund.

law of agency; and (ii) that the customer failed to timely object to the order. This article focuses on the timing of the customer's objection. In order to preserve its claims, by when must the customer object to the disputed transaction or bring a lawsuit?

THE FIRST HURDLE: ARTICLE 4A'S STATUTE OF REPOSE

Section 670.505, Florida Statutes, precludes a claim for refund of a funds transfer unless the customer notifies the bank of its objection within one year of receiving notice of the transfer.[4] This statute is described as a statute of repose; it is not a statute of limitations:[5]

> Statutes of repose and statutes of limitations are often confused, though they are distinct. A statute of limitations creates an affirmative defense where plaintiff failed to bring suit within a specified period of time after his cause of action accrued, often subject to tolling principles. By contrast, a statute of repose *extinguishes* a plaintiff's cause of action after the passage of a fixed period of time, usually measured from one of the defendant's acts.[6]

Under Article 4A's repose period, the "act" that triggers the one-year notice period is the bank's sending the customer a statement that reasonably identifies the disputed transfer. Once the customer has been put on notice, its claim is extinguished if it fails to timely object to a transaction. The drafters were clear that the obligation to refund may not be asserted by the customer if the customer has not objected to the debiting of the account within one year after the customer received notification of the debit.[7] Moreover, banks and their

---

[4] *See* Fla. Stat. § 670.505 & cmt.

[5] *See Ma*, 597 F.3d at 85 ("Section 4-A-505's *statute of repose* only applies where a bank has provided its customer with actual notice of the payment order underlying the wire transfer at issue"); *Zengen, Inc. v. Comerica Bank*, 158 P.3d 800, 801 (Cal. 2007) ("California Uniform Commercial Code section 11505 is not a statute of limitation but merely a statute of repose . . . It requires the customer only to notify the bank of the claim, not actually to commence the action."); *Fitts v. Amsouth Bank*, 917 So. 2d 818, 824 (Ala. 2005) (affirming trial court's displacement of common law claims based upon Article 4A's "statute of repose"); *ReAmerica v. Wells Fargo Bank Int'l*, 577 F.3d 102 (2d Cir. 2009) ("We agree with the District Court that Article 4A of the Model Uniform Commercial Code ('U.C.C.') as enacted by Minnesota, *see* Minn.Stat. § 336.4A-101 *et seq.,* governs this action, and, as a result, plaintiff's claim that Wells Fargo wrongfully debited its account is time-barred by the one-year statute of repose set forth in section 4A-505."); Fla. Stat. § 670.505 & cmt. 1 ("This section is in the nature of a statute of repose for objecting to debits made to the customer's account.").

[6] *Ma*, 597 F.3d at 85 (internal citations omitted).

[7] Fla. Stat. § 670.505 provides as follows:

customers routinely modify this repose period by contract to narrow the window within which to object.[8] It is therefore imperative that the customer review its account agreement and appreciate its obligation to timely object to disputed payment orders.[9]

THE SECOND HURDLE: THE STATUTE OF LIMITATIONS

What if the bank does not provide a statement to the customer identifying the disputed transaction? Alternatively, what if the customer did receive such statements, and timely objects? Under these scenarios, does the customer have an infinite time to file a lawsuit?

Nothing in Article 4A provides a time limit on when a lawsuit must be filed.

> If a receiving bank has received payment from its customer with respect to a payment order issued in the name of the customer as sender and accepted by the bank, and the customer received notification reasonably identifying the order, the customer is precluded from asserting that the bank is not entitled to retain the payment unless the customer notifies the bank of the customer's objection to the payment within 1 year after the notification was received by the customer.

[8] Article 4A's provision regarding variation provides: "Except as otherwise provided in this chapter, the rights and obligations of a party to a funds transfer may be varied by agreement of the affected party." Fla. Stat. § 670.501(1).

[9] Courts in Florida and other jurisdictions have uniformly held that such "cut-down" provisions are enforceable conditions precedent to suit. *Cheese & Grill Rest., Inc. v. Wachovia Bank, N.A.*, 970 So. 2d 372, 374–75 (Fla. 3d DCA 2007) (affirming summary judgment for the bank based in part on the customer's failure to satisfy a *contractual* duty to review its account statements within 30 days); *Bank of Am., N.A. v. Putnal Seed & Grain, Inc.*, 965 So. 2d 300, 301 (Fla. 1st DCA 2007) ("[R]educing the time period in which Putnal was required to notify the bank of problems or unauthorized transactions from 1 year to 60 days also does not absolve the bank of its duty to exercise ordinary care. The 60-day notice requirement only creates a condition precedent which Putnal must comply with before it may seek reimbursement."); *see also Stowell v. Cloquet Co-op Credit Union*, 557 N.W.2d 567 (Minn. 1997) (enforcing a 20-day contractual provision); *Canfield v. Bank One, Tex., N.A.*, 51 S.W.3d 828, 836 (Tex. Ct. App. 2001) (enforcing a 90-day contractual provision and stating that "[c]onditions precedent are consistent with the goals of the UCC and general public policy."); *New York Credit Men's Adjustment Bureau, Inc. v. Mfrs. Hanover Trust Co.*, 343 N.Y.S.2d 538, 540 (N.Y. App. Div. 1973) (holding that agreement requiring notification of suspected forgery within 30 days after statement was sent to customer did not serve to absolve bank of its negligence, but only provided a condition precedent to liability); *Borowski v. Firstar Bank Milwaukee, N.A.*, 579 N.W.2d 247 (Wis. Ct. App. 1998) (approving 14-day notice period); *Parent Teacher Ass'n, Pub. Sch.* 72 v. *Mfrs. Hanover Trust Co.*, 524 N.Y.S.2d 336, 340 (N.Y. Civ. Ct. 1988) ("Conditions precedent and shortened periods of limitation . . . have been routinely accepted in the banking relationship, usually without extensive analysis. Such provisions are not only compatible with statute and case law; they are in accord with public policy by limiting disputes in a society where millions of bank transactions occur every day." (internal citations omitted)).

The four-year statute of limitations set forth in Section 95.11(3)(f) applies to claims based on statutory liability, unless the statutory subsection on which the claim is based specifies a limitation period.[10] Simply put, because Article 4A does not prescribe a time period within which the customer must bring an action under the statute, the four-year statute of limitations in Section 95.11(3)(f) applies by default.[11] And since the limitations period is divorced from the repose period, careful consideration must be given to the date the customer's action accrues.

Critically, while the customer's notice of the disputed transaction, via its bank statement, is critical in calculating how much time there is to object, it is irrelevant in calculating the deadline within which to file a lawsuit. By its plain language, the bank's liability to refund is triggered if "a receiving bank accepts a payment order issued in the name of its customer as sender which is not authorized and not effective as the order of the customer under s. 670.202 or is not enforceable, in whole or in part, against the customer under s. 670.203."[12] Thus, a cause of action based upon unauthorized transfers does not accrue upon notice to the customer, but upon acceptance by the bank. And, as a matter of law, there is no discovery-based tolling of the statute of limitations.[13]

CONCLUSION

In short, notice matters when calculating the repose period, but not when calculating the limitations period. A bank customer must be mindful of both hurdles; it must preserve its claim via an objection as soon as possible, but no later than one year (or sooner depending on the terms of its account agreement) after receipt of its statement identifying the disputed transfer; and it must file its lawsuit to enforce that objection within four years of the disputed transfers.

---

[10] *Smith v. Fla. Dep't of Corr.*, 27 So. 3d 124, 127 (Fla. 1st DCA 2010) (citing *Joshua v. City of Gainesville*, 768 So. 2d 432 (Fla. 2000)); *Brown v. Nationscredit Fin. Servs. Corp.*, 32 So. 3d 661, 662 n. 1 (Fla. 1st DCA 2010).

[11] *Banca Commerciale Italiana v. N. Trust Int'l Banking Corp.*, 160 F.3d 90, 93–94 (2d Cir. 1998) (holding that Article 4A claims were time-barred by New York's default, three-year statute of limitations for actions based on statutory liability and noting that "[Article 4A] itself does not provide an express statute of limitations for claims brought pursuant to its terms.").

[12] Fla. Stat. § 670.204(1).

[13] *See David v. Monahan*, 832 So.2d 708, 711 (Fla. 2002) ("[A]side from the . . . delayed accrual of a cause of action in cases of fraud, products liability, professional and medical malpractice, and intentional torts based upon abuse, there is no other statutory basis for the delayed discovery rule.").