NANCY Z. PALEY,

Appellant,

v.

BANK OF AMERICA, FORMERLY FLEET BANK, FIRST JERSEY BANK, FORMERLY WESTMINSTER BANK, FORMERLY SUMMIT BANK; ANGELA SENTORE; AND DOES ONE THROUGH FIFTY (FICTITIOUS PARTIES),

Respondent/Cross-Appellant.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-004391-07T3
DOCKET NO. A-005519-07T2
DOCKET NO. A-005864-07T2

CIVIL ACTION

ON APPEAL FROM:
Superior Court of New Jersey
Union County, Law Division

SAT BELOW:
Hon. Katherine R. Dupuis, J.S.C.

BRIEF AMICI CURIAE OF AARP AND NEW JERSEY ASSOCIATION FOR JUSTICE IN SUPPORT OF APPELLANT

David M. Cedar
100 Century Parkway
Suite 305
Mt. Laurel, NJ 08054
(856) 702-6630
dcedar@mcglegal.com

Michael D. Halbfish, Esq.
Tunney & Halbfish
208 Main St.
PO Box 876
Woodbridge, NJ 07095
(732) 636-4900
michaelhalbfish@gmail.com

Attorneys for NJAJ

Julie Nepveu
AARP Foundation Litigation
601 E Street, NW
Washington, DC 20049
(202) 434-2060
jnepveu@aarp.org

Fred Shahrooz Scampato
Attorney at Law
445 East Broad Street
Westfield, New Jersey 07090
(908) 301-9095
Scampato@aol.com

Attorneys for AARP

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Legislative History

Regulations

Statutes

Other Authorities

STATEMENT OF INTEREST OF AMICI CURIAE

This case arises out of the theft of the entire life savings of a 75-year-old woman by her home health care worker; it is not limited to issues of the bank's handling of forged checks. This case is about the interplay of laws within the statutory scheme designed to protect consumers from financial fraud.

Mrs. Paley, who suffers from diabetes, uses a wheelchair following the amputation of one leg. She could not remain in her home without assistance, so she hired a home health aide. The aide stole Mrs. Paley's checkbook for her BOA money market account. Over a two-and-a-half year period, the aide forged signatures on and cashed 188 stolen checks, wiping out Mrs. Paley's life savings. The aide also intercepted the bank statements to conceal her fraud.

Financial fraud is a pervasive problem that has a ripple effect throughout society and the economy. It threatens not only the financial security of individuals, but also of institutions and the public. It increases the cost of services and products. Consumers are harmed by financial establishments that do not deliver the services promised, including security for their savings. Indeed, the safety and soundness of financial institutions may also be threatened by such fraud as consumers lose trust in those institutions, especially in these times of economic turmoil.

Financial fraud threatens the ability of people to live independently in their homes as they age and develop physical, mental, and functional limitations. Successful aging encompasses "aging in place," i.e., remaining in one's home so as to maintain social networks and community connections. Loss of one's home results in a loss of important community ties or in institutionalization, which is linked to a decline in physical and mental health. For many, aging in place requires the trade-off of entrusting their personal needs and affairs to a home health aide or a family member.

In order to guard against the threat of financial fraud, the risk of individual harm, and the accompanying erosion of the health of financial institutions, an effective and comprehensive response is required. Individuals, financial institutions, and governments all bear a share of this responsibility. With an increasingly complex financial services landscape, it is imperative that financial institutions respond to the evolving challenges presented by financial fraud and protect the funds entrusted to them. State consumer protection laws must keep pace to enhance the safety of the marketplace.

Amici curiae have an interest in ensuring that consumers are protected from financial fraud and abuse. An effective and comprehensive statutory scheme to protect consumers in the marketplace must both deter practices that are harmful to consumers and provide redress for injuries caused by such practices. Victims of financial fraud should have adequate remedies for injuries not only from perpetrators of fraud, but also from unfair or deceptive business practices that enable perpetrators to succeed.

AARP is a nonpartisan, nonprofit membership organization of nearly 40 million people aged 50 and older dedicated to enhancing the quality of life for older people. AARP has approximately 1.4 million members in New Jersey. AARP’s key social impact goals are to protect the health and financial security of older people. Many people approach retirement age with very little in the form of private savings and assets. Those who have savings have worked their entire lives to provide for a financially secure retirement. It is essential to protect the limited resources that people have to sustain them when they no longer work.

AARP regularly engages in advocacy to protect the financial security of older people. It has worked for many years to protect people from identity theft and, in particular, advocates for strong state consumer protection to provide redress for unfair or deceptive business practices. In addition, AARP Foundation sponsors a variety of consumer fraud prevention programs. The Consumer Fraud Prevention program engages peer volunteers in alerting older consumers in New Jersey and nationwide to fraudulent telemarketing and other types of fraud. The Money Management Program helps low-income older individuals remain independent by providing daily money management services to those with difficulty budgeting, paying routine bills, and keeping track of financial matters. The program also offers financial education resources and tools to older adults and their caregivers.

Founded in the late 1940s and incorporated in 1976, the New Jersey Association for Justice (NJAJ) is headquartered in Trenton, New Jersey. NJAJ is a statewide association of nearly 2,300 members in private practice and public service, paralegals, law clerks, law students, and law school graduates not yet admitted to the bar. NJAJ is dedicated to protecting New Jersey’s families by working to preserve and strengthen the laws for safer products and workplaces, a cleaner environment, quality health care, and consumer protection. NJAJ’s objectives are to uphold and defend the Constitution of the United States and of the State of New Jersey; to advance the science of jurisprudence; to educate and train in all fields and phases of advocacy; to promote the administration of justice for the public good; to uphold the honor and dignity of the profession of the law; and especially to advance the cause of those who are damaged in person or property and who must seek redress therefor; to encourage brotherhood among the members of the bar; and to uphold and improve the adversary system and trial by jury.

STATEMENT OF FACTS

Amici Curiae AARP and NJAJ adopt the statement of facts as provided in Plaintiff-Appellant's brief.

ARGUMENT

I. The CFA And The UCC Apply To Banks To Protect Consumers

According to Bank of America ("BOA"), Mrs. Paley and her family "got what [they] deserved – nothing." (Pb 18 n.7) (emphasis added). Mrs. Paley does not deserve nothing. BOA's assertion is outrageous not only for being insensitive to the plight of Mrs. Paley but also because, as the country's largest bank, millions of account holders depend on BOA to keep their money safe. With the aging of the population, it is not acceptable that anyone deserves to have their entire life savings stolen from their bank account one check at a time by a home health aide. Moreover, Mrs. Paley and her family should not be castigated for hiring a home health aide. What Mrs. Paley deserved was protection of her life savings from financial fraud; or, at least, the protection that she expected based on the bank's representations. Her attempt to seek redress for a cause of action provided by the legislature under the Consumer Fraud Act ("CFA") for such injuries does not amount to extortion, as BOA implies.

A. Mrs. Paley Raises CFA Claims With Respect To Her Customer Agreement That Are Distinct From Her UCC Claims

Mrs. Paley brought claims against BOA under, inter alia, the Uniform Commercial Code ("UCC") and the CFA. The injuries that Mrs. Paley alleges are not limited to injuries resulting from BOA's handling of forged checks, which are governed by the UCC. See N.J.S.A. 12A:4-406. Rather, Mrs. Paley alleges additional injuries arising from BOA's obligations with respect to the customer agreement, which is governed by the CFA. See N.J.S.A. 56:8-2.13. The trial court ultimately dismissed the CFA claims, deciding that the UCC controls exclusively. This result ignores Mrs. Paley's injuries arising under the CFA, which are distinct from injuries relating to BOA's payment of forged checks. The court's holding is contrary to the plain language of the UCC and CFA, established case law, and the underlying policy goals advanced by the legislature's enactment of the statutes.

BOA predictably – but erroneously – seeks to limit this Court's consideration of its activities to those that relate to the bank's handling of the forged checks. Contrary to BOA's assertion, Mrs. Paley's CFA claims are completely independent of claims relating to the bank's handling of negotiable instruments, because her CFA claims arise from representations relating to entering into and maintaining a customer relationship, not the bank's payment of forged checks.

When a bank advertises its fraud prevention measures to potential and current customers, it is inducing them to deposit their savings there; it tells them that using this bank is safer than hiding their money at home. Before a consumer ever makes a deposit, writes a check, or receives a statement, the bank and consumer enter into an agreement that sets forth the terms of the bank's service. The services provided by a bank are conceptually identical to those of a storage center. People who require off-site storage of their belongings — in this case their money — for a period of time consume the storage services of the bank. The services involved in the storage and release of these items are subject to the CFA.[1] "Services" are included among the items listed in the CFA's definition of "merchandise." N.J.S.A. 56:8-1(c) (2009). Furthermore, bank services are not categorically excluded from the definition of "merchandise," as securities are. Lee v. First Union Nat'l Bank, __ A 2.d __, 2009 WL 1585889 *4, (Case No A-58-08) (N.J. Jun. 3, 2009).

Mrs. Paley's evidence establishes that she signed a signature card when she first opened her account approximately 35 years ago (Pb 18). When she did so, she was told that the bank would compare any checks drawn on her account against her signature in order to prevent forgeries (id.). Indeed, at one time "most banks reviewed nearly 100% of the signatures of check

---

[1] While BOA seeks to avoid application of the CFA by suggesting it does not offer "services" and that Mrs. Paley is not a "consumer" as those terms are defined by the CFA, BOA elsewhere boasts that it is "one of the world's largest financial institutions, serving individual consumers . . . with a full range of banking, investing, asset management and other financial and risk-management products and services. The company provides unmatched convenience in the United States, serving 33 million consumer relationships." Letter from Kathryn D. Kohler, Assist. Gen. Counsel, Bank of America, to Fed. Trade Comm'n (Jun. 15, 2004), available at http://www.ftc.gov/os/comments/ factaidt/EREG-000021.htm.

makers." Am. Bankers Ass'n, Signature Verification Evolution to Exception Check Review (2000), NR/rdonlyres/34AE858F-09B6-11D5-AB75-00508B95258D/30733/ SigVerWhitePaper.pdf. Although such review is no longer the industry practice, based on when she opened her account, Ms. Paley was justified in believing that her bank would protect her savings by verifying checks drawn on her account against her signature card. See id. In fact, the evidence shows that this was a material term in her customer agreement, and that she would not have remained a customer of BOA if she had known that BOA had lost her signature card and no longer verified signatures (Pb 28).

Despite the customer agreement, BOA admits it does not verify signatures on checks under $500 and that it intentionally withholds this monetary threshold information from its customers. Ironically, BOA contends that disclosing such information will increase the incidence of check fraud (Pb 28-29). In addition, Mrs. Paley alleges that BOA failed to notify her of increased account activity that was markedly inconsistent with her established patterns of usage, failed to respond to her complaints that she was not receiving her mailed statements, and converted her money market account into a checking account without authorization or proper verification (Pb 19, 24).

BOA seeks to distract the Court from the focus of Mrs. Paley's claims, which do not solely concern the quality of the care but also alleged misrepresentations about such care. Mrs. Paley's CFA allegations clearly do not relate to the payment of forged checks, but rather, the representations by the bank of the measures it would take, pursuant to the customer agreement, to keep her money safe. The allegations of consumer fraud - including the representations, warranties, and actions associated with the safe storage and release of the consumer's money - involve areas that are separate from and unregulated by the UCC. They are, however, the focus of the CFA.

The standard of conduct contemplated by the CFA is "'good faith, honesty in fact and observance of fair dealing[,]' and the need for application of that standard 'is most acute when the professional seller is seeking the trade of those most subject to exploitation - the uneducated, the inexperienced and the people of low incomes.'" Assoc. Home Equity Serv., Inc. v. Troup, 343 N.J. Super. 254, 278-79 (App. Div. 2001) (citing Kugler v. Romain, 58 N.J. 522, 543, (1971)) (noting that a reasonable jury could find that consumer credit practices of defendants constituted unconscionable business practices).

BOA's argument that the CFA conflicts with the UCC's provisions concerning the exercise of "ordinary care" is inapposite. The UCC defines "ordinary care" as "the observance of reasonable commercial standards, prevailing in the area in which the person is located, with respect to the business in which the person is engaged." N.J.S.A. 12A:3-103a(7) (2009).[2] The observance of a particular standard for handling of negotiable instruments, however, does not resolve what is contained within the scope of Mrs. Paley's claims. For a standard of care to

[2] As the nation's largest bank, BOA's practices may well "prevail" making it likely that they may disproportionately influence what is viewed as "reasonable commercial standards" under the UCC.

conflict, it would have to relate to the same activities, but as already discussed, the UCC and CFA regulated activities are distinct. See Lor-Mar/Toto, Inc. v. 1st Constitution Bank, 376 N.J. Super. 520, 533 (App. Div. 2005) (noting that the issue of the Bank's ordinary care in processing the forged checks is not implicated where the bank's care in handling check is not at issue).

Regardless of whether BOA met the standard of ordinary care for handling Mrs. Paley's checks, it has an independent responsibility not to make misrepresentations or misstatements that induce a consumer to open an account or which lull a consumer into a false sense of safety and security that ultimately enables fraud and loss to occur. Such alleged misrepresentations are clearly within the purview of the CFA. See Daaleman v. Elizabethtown Gas Co., 77 N.J. 267, 270 (1978)(noting that "The Consumer Fraud Act, originally enacted in 1960, is aimed basically at unlawful sales and advertising practices designed to induce consumers to purchase merchandise or real estate.").

Moreover, the UCC standard of care does not preclude the application of other standards of care to banks. City Check Cashing, Inc., v. Mfr. Hanover Trust Co., 166 N.J. 49, 58-59 (2001) (noting "[a] common law duty, in fact, may arise and [ ] its breach may be actionable in spite of the existence of the UCC."). UCC liability is independent of liability arising from tort or CFA claims. See Penn. Nat'l Turf Club v. Bank of West Jersey, 158 N.J. Super. 196, 203 (App. Div. 1978) (stating that "although a bank has complied with Uniform Commercial Code provisions, such compliance does not necessarily immunize it from ordinary tort liability.").

Indeed, "customers justifiably expect" financial institutions "to exercise due care and good faith." Hy-Grade Oil Co. v. New Jersey Bank, 138 N.J. Super. 112, 118-119 (App. Div. 1975) (holding "an agreement such as the one now before us, which exculpates the bank from all responsibility without reference to any standard of care, we hold to be contrary to public policy and invalid."). When a bank makes representations about the services it will provide, as set forth in the customer agreement, the CFA does not dictate what services the bank must provide. See Hood v. Santa Barbara Bank & Trust, 49 Cal. Rptr. 3d. 369, 381 (Cal. Ct. App. 2006) (noting that "while the state cannot dictate to respondents how they can or cannot operate, it can insist that, however respondents choose to operate, they do so without violating debt collection laws and using deceptive business practices."). It does, however, hold a bank to a standard of fair dealing. A bank may not make misrepresentations or omit material information from the customer agreement. Lor-Mar/Toto, supra, 376 N.J. Super. at 536 (noting that when a customer waives his rights, he must have "full knowledge of the right and an intentional surrender."). In interpreting the role of the UCC in bank regulation, New Jersey courts have held that the UCC allows for modification of the allocation of risk, "provided the bank does not attempt to disclaim its statutory duty of good faith." Id. at 533. Courts have also viewed attempts by banks to take unfair advantage of consumers with skepticism, reasoning that when "a party to the agreement is under a public duty entailing the exercise of care" and there is "unequal bargaining power or the existence of public interest," public policy may require courts to reject such exculpatory clauses. Id. at 116. Thus, to the extent BOA makes representations or seeks to limit its own losses or obligations at the expense of a consumer, it must do so under the constraints imposed by the CFA and common law.

B. The CFA And UCC Provide Cumulative Coverage

The New Jersey Supreme Court has held that the New Jersey Department of Banking and Insurance's regulations can be applied in conjunction with the CFA. Prior decisions have determined that the CFA does protect consumers against certain deceptive practices in the regulated world of the financial industry, particularly in connection with loans and consumer credit. See Lemelledo v. Beneficial Mgmt. Corp. of Am., 150 N.J. 255, 259-60, 266 (1997) (holding that CFA applies to loan-packing, which is "a practice on the part of commercial lenders that involves increasing the principal amount of a loan by combining the loan with loan-related services, such as credit insurance, that the borrower does not want."); Troup, supra, 343 N.J. Super. at 278-79 (noting that a reasonable jury could find that consumer credit practices of defendants constituted unconscionable business practices).

There is clear statutory authority establishing that the protections of the CFA and other law - in this case, the UCC - are cumulative. The CFA provides:

> The rights, remedies and prohibitions accorded by the provisions of this act are hereby declared to be in addition to and cumulative of any other right, remedy or prohibition accorded by the common law or statutes of this State, and nothing contained herein shall be construed to deny, abrogate or impair any such common law or statutory right, remedy or prohibition.

N.J.S.A. 56:8-2.13 (emphasis added). The Supreme Court has clarified that "[t]he presumption that the CFA applies to covered practices, even in the face of other existing sources of regulation, preserves the Legislature's determination to effect a broad delegation of enforcement authority to combat consumer fraud." Lemelledo, supra, 150 N.J. at 270.

Defendant asserts that the UCC's provisions are exclusive to interactions between banks and its customers because the current version of New Jersey's UCC was ratified in 1995, after the CFA was passed in 1971. The holding of Lemelledo exposes the flaw in this rationale. Mere timing is insufficient to establish preemption. The Supreme Court explained that "a court must look to whether a 'real possibility' of conflict would exist if the CFA were to apply to a particular practice, regardless of the number of agencies with regulatory jurisdiction over that practice." Lemelledo, supra, 150 N.J. at 268. That conclusion is informed by two seemingly competing concerns. First, the Supreme Court acknowledged "that the Legislature does not intentionally subject regulated entities to clearly conflicting administrative regimes." Id. Second, as a matter of statutory construction, the Court has noted that "[i]n determining whether the existence of other regulations creates an exception to the CFA for particular conduct that otherwise would fall within its provisions, it should ordinarily be assumed that the CFA applies to the covered practice." Id. When determining whether activity presumptively within the ambit of the CFA nevertheless is exempt from its reach, the governing precept is as follows:

> In order to overcome the presumption that the CFA applies to a covered activity, a court must be satisfied . . . that a direct and unavoidable conflict exists between application of the CFA and application of the other regulatory scheme or schemes. It must be convinced that the other source or sources of regulation deal specifically, concretely, and pervasively with the particular activity, implying a legislative intent not to subject parties to multiple regulations that, as applied, will work at cross-purposes. We stress that the conflict must be patent and sharp, and must not simply constitute a mere possibility of incompatibility. If the hurdle for rebutting the basic assumption of applicability of the CFA to covered conduct is too easily overcome, the statute's remedial measures may be rendered impotent as primary weapons in [combating] clear forms of fraud simply because those fraudulent practices happen also to be covered by some other statute or regulation.

Id. at 270.

This context requires the recognition that, "[i]n the modern administrative state, regulation is frequently complementary, overlapping, and comprehensive." Id. at 271. Furthermore, because the current version of the UCC was ratified after the CFA, the legislature was aware of the cumulative remedies of the CFA at the time of UCC ratification. If the legislature intended the UCC to be the exclusive remedy in all banking matters, the legislature would have so specified. It did not, so rules of statutory construction require that the two regulations must be read as complementary to one another.

In fact, the purpose of consumer protection statutes generally is to provide consumers with additional judicial remedies even when entities are regulated by other statutes. Courts across the country have held that banks are subject to state consumer protection acts, notwithstanding other regulatory requirements. See, e.g., Normand Josef Enters., Inc. v. Conn. Nat'l. Bank, 646 A.2d 1289, 1301-02 (Conn. 1994) (holding that bank was subject to the Connecticut Uniform Trade Practices Act (CUTPA), in addition to the UCC, reasoning that banks were not recognized within the exceptions to CUTPA and "[c]ourts should not create exemptions that the legislature has not enacted."); Morse v. Mut. Fed. Sav. & Loan Ass'n of Whitman, 536 F.Supp. 1271 (Mass. Dist. Ct. 1972) (applying Massachusetts consumer protection statute to savings and loan association); Raymer v. Bay State Nat'l Bank, 424 N.E.2d 515 (Mass. 1981) (applying the Massachusetts consumer protection statute to national banks); Farmers & Merchant State Bank v. Ferguson, 605 S.W.2d 918 (Tex. Civ. App. 1980), modified on other grounds, 617 S.W.2d 918 (Tex. 1981) (same); Gibson v. World Sav. & Loan Ass'n, 128 Cal. Rptr. 2d 19 (Cal. Ct. App. 2002) (finding that claims under state consumer protection statute were not preempted because they were predicated not on regulated activities, but on a contracting party's duties to comply with its contractual obligations, to reasonably mitigate in the event of the other party's breach, to not misrepresent material facts, and to refrain from unfair or deceptive business practices); Madsen v. Western Am. Mortg. Co., 694 P.2d 1228, 1234-35 (Ariz. Ct. App. 1985) (the state mortgage brokers act not preclude claims under the consumer fraud statute because the mortgage brokers act "is not comprehensive and detailed legislation designed to provide omnibus consumer protection"); Villegas v. Transamerica Fin. Servs., 708 P.2d 781 (Ariz. Ct. App. 1985) (same); State ex. rel. Bryant v. R&A Inv., 985 S.W.2d 299, 303 (Ark. 1999) (the consumer fraud statute supplements and in fact gives effect to anti-usury provisions in the state constitution); Safeguard Inv. Corp. v. Colville, 404 A.2d 720, 721 (Pa. 1979) (the anti-usury law does not provide comprehensive remedies and should be supplemented with consumer protection legislation); Commonwealth ex rel. Zimmerman v. Nickel, 26 Pa. D. & C.3d 115 (C.P. Mercer City, 1983) (Truth in Lending Act does not prevent application of UDAP statute to creditor).

C. The CFA's Fee-Shifting Provisions Make The Marketplace Safer

The Court should decline BOA's invitation to second-guess the will of the legislature or the motives of Mrs. Paley's attorneys. The additional judicial remedy provided by the CFA — shifting of attorney's fees — is critical to its enforcement. Attorney's fees arise from and cannot be viewed as independent of the underlying substantive rights that are being enforced. Plaintiffs litigating their own claims using fee-shifting provisions further the public interest while seeking a remedy for their own injuries. By enforcing the law, a litigant acts as a "private attorney general, vindicating a policy that Congress considered of the highest priority." Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402, (1968) (quotation and citation omitted).

The New Jersey legislature intentionally assigned the cost of enforcement for consumer protection to defendants who violated the law rather than burden taxpayers or consumers. Skeer v. EMK Motors, Inc., 187 N.J. Super. 465 (1982) (concluding that the legislature mandated treble damages, costs, and attorneys' fees for private actions under the CFA in order to deter wrongdoing and to encourage attorneys to take on consumer suits, while suits commenced by the Attorney General would by their public nature have enough deterrence effect without awarding fees and damages to the plaintiff). See also Gramatan Home Investors Corp. v. Starling, 470 A.2d 1157, 1162 (Vt. 1983) (noting "The interests of both the business community and the public at large are best served by shifting the burden of the expense of consumer fraud litigation onto the shoulders of those whose unfair or fraudulent acts are responsible for the litigation in the first place."). If "plaintiffs were routinely forced to bear their own attorney's fees, few aggrieved parties would be in a position to advance the public interest." Newman, supra, 390 U.S. at 402. Increased enforcement helps curb marketplace abuses by deterring illegal conduct and promoting high standards of compliance with the law, particularly in cases that would otherwise be uneconomical to bring. See Barrow v. Falck, 977 F.2d 1100, 1103 (7th Cir. 1992) (noting fee-shifting "helps to discourage petty tyranny" because people "would not invest more in litigation than the stakes of the case"). The remedies provided by the CFA help ensure that companies that follow the law are not competitively disadvantaged by "less honorable" companies. S. Rep. No. 93-151, as reprinted in 1974 U.S.C.C.A.N. 7702, 7709 (explaining "It is difficult for a company to conform to high standards and practices if it has competitors who continue to reap greater profits by pursuing less honorable tactics.").

After complaining of extortion and the exclusive remedies available under the UCC, it is incongruous for BOA to claim it is entitled to attorney's fees from Mrs. Paley. The UCC does not provide a remedy of attorney's fees. First Atlantic Fed. Credit Union v. Perez, 391 N.J. Super. 419, 432 (2007) (denying fees to BOA for defending UCC claims). Moreover, BOA is not entitled to fees under any other provision. See id. A defendant's entitlement to fees under R. 1:4-8, for example, provides that attorney's fees may be awarded by a court to a prevailing party against attorneys for pursuing frivolous claims. The rule defines frivolous claims as claims presented for an improper purpose, "such as to harass or to cause unnecessary delay or needless increase in the cost of litigation," R. 1:4-8(a)(1), or claims that are not "warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law[.]" R. 1:4-8(a)(2). The nature of conduct warranting sanction under R. 1:4-8 has been strictly construed, Wyche v. Unsatisfied Claim & Judgment Fund, 383 N.J. Super. 554, 560 (App. Div. 2006).

An award of attorney fees to BOA will chill the enforcement of important consumer protections, having the effect of restricting access to the court system. McKeown Brand v. Trump Castle Hotel & Casino, 132 N.J. 546, 561-62 (1993) (finding "the term 'frivolous' should be given a restrictive interpretation" to avoid limiting access to the court system). BOA is not entitled to attorneys fees in this case. See Carozza v. Bank Of Am., Not Reported in A.2d, 2008 WL 4964001 *2, (Nov. 24, 2008) (concurring in the conclusion of the trial court that plaintiff's suit was not motivated by purposes of harassment. Plaintiff felt he had been ill-served by the bank, to his financial detriment, and he sought to be made whole, not to cause harm to defendant.)

II. The CFA Is An Important Tool To Combat The Growing Problem Of Identity Theft

BOA further denies that Mrs. Paley is a victim of identity theft. This attempt to narrow the claims is related to BOA's overly narrow characterization of Mrs. Paley's claim to avoid liability for alleged misrepresentations in its customer agreement. BOA's motivation for doing so is clear. The check fraud Mrs. Paley experienced, if understood in the context of the growing problem of identity theft, triggers significant additional obligations on BOA to prevent and mitigate the impact of the identity theft which the UCC does not impose. Furthermore, while the CFA does not itself trigger such additional obligations, it is an important tool in the arsenal to fight identity theft. The CFA serves to deter a bank from misrepresenting the measures it will take to protect consumers and provides a remedy to those injured by a bank's misrepresentation, omission, unfair, unconscionable, or deceptive business practice.

Check fraud is one type of identity theft, which is statutorily defined as "a fraud committed or attempted using the identifying information of another person without authority." 16 C.F.R. § 603.2(a) (2009). Ms. Paley is a victim of identity theft because her home health aide stole her checkbook, forged her signature at least 188 times, intercepted bank statements mailed to her home, converted her money market account into a checking account, and ordered two additional checkbooks without her knowledge (Pb 20-21, 24-25). Mrs. Paley's "identifying information" - her checkbooks and bank statements - were "used, along or in conjunction with any other information, to identify" Mrs. Paley by the home health aide to eventually clean out Mrs. Paley's entire life savings. Id. § 603.2(b).

The stakes for BOA in limiting the definition of "identity theft" are high. In comments submitted to the Federal Trade Commission BOA previously expressed concern that defining "identity theft" to include what it views to be traditional fraud, such as presented in this case, would unnecessarily "broaden the scope of identity theft covered by the [Fair and Accurate Credit Transactions] Act and all of the resulting obligations" such as the prevention and mitigation of the effects of identity theft. Letter from Kathryn D. Kohler, Assist. Gen. Counsel, Bank of America, to Fed. Trade Comm'n (Jun. 15, 2004), available at http://www.ftc.gov/os/ comments/factaidt/EREG-000021.htm. BOA's position was supported in part by its representation that "[t]here are already in place many statutory, regulatory and industry protections for this type of fraud and they should not be covered under the definition of 'identity theft.'" Id.

BOA's comments to the FTC call into question its position in this case that the UCC is an exclusive remedy. At a minimum, the comment contradicts its argument that any additional obligations beyond those imposed by the UCC would necessarily conflict. Moreover, the contradiction exposes BOA's motivation to avoid the imposition of additional obligations to ensure that people do not lose their life's savings to identity theft. It is essential that the myriad protections acknowledged by BOA, which in New Jersey include those provided by the CFA, be broadly construed to ensure that banks share in the responsibility to prevent and mitigate identity theft.

A. Identity Theft Is A Growing Problem That Threatens Public Trust In The Banking System

Identity theft is a growing problem that carries huge financial and emotional losses, including the loss of individuals' savings and the loss of confidence in the banking industry. See, e.g., U.S. Gen. Accounting Office, Identity Theft: Prevalence and Cost Appear to be Growing 2, 8 (2002), available at http://www.gao.gov/new.items/d02363.pdf ("[i]dentity theft can cause . . . potentially severe emotional or other nonmonetary harm, as well as economic harm."). In 2008, the Federal Trade Commission reported that identity theft, with 313,982 reports to that agency alone, topped the list of consumer complaints for the ninth year in a row. Press Release, Fed.

Trade Comm'n, FTC Releases List of Top Consumer Complaints in 2008 (Feb. 26, 2009), http://www.ftc.gov/opa/2009/02/2008 cmpts.shtm. This was a 20-percent increase over the previous year. Id. Moreover, the number did not take into account underreporting or discrepancies due to the lack of central reporting; the actual incidence was likely higher. See U.S. Gen. Accounting Office, supra at 2 (prevalence of identity theft is difficult comprehensively to quantify because of underreporting and lack of centralized data collection).

Research shows that annual monetary losses are in the billions and that businesses suffer most of the direct losses. President's Identity Theft Task Force, Combating Identity Theft: A Strategic Plan 11 (2007), available at http://www.idtheft. gov/reports/StrategicPlan.pdf. Nevertheless, financial losses borne by victims are staggering, amounting to an estimated $1.2 billion in 2007. Sheyna Steiner, The Costs of ID Theft, Bankrate.com, April 21, 2008, http://www.bankrate. com/brm/news/Financial_Literacy/identity_theft/costs_of_ identity_theft_a1.asp?caret=92a. Monetary losses suffered by victims of check fraud, as in Ms. Paley's case, were $969 million in 2006. Press Release, Am. Banking Ass'n, Attempted Check Fraud Doubles to $12.2 Billion According to ABA Survey (Nov. 27, 2007), http://www.aba.com/Press+Room/112707Deposit +FraudSurvey.htmm. Forgeries on checks were the second most common type of check fraud. Id.

Customers of BOA are not immune from the growing problem of identity theft. In fact, in a limited survey of FTC complaints, BOA ranked as having the highest total number of identity theft events compared to other major banks and telecommunications carriers. Chris Hoofnagle, Measuring Identity Theft at Top Banks (Version 1.5), Berkeley Center for Law and Technology 18 (2008), available at http://repositories.cdlib.org/bclt/lts/45. Over the three months tracked in the survey, over seven percent of all identity theft events reported to the FTC related to BOA, making it the biggest institutional target for identity theft criminals. Id. at 19. Factoring in the number of fraud events for every billion in deposits, the FTC received more complaints from only one bank other than BOA. Id. at 22.

In response to these findings, a BOA spokesperson "referr[ed] to the fact that a BOA customer experiencing identity theft could have had their mail stolen..." Ryan Singel, Bank of America, HSBC Most Prone to I.D. Theft, Report Says – Updated, Wired, Feb. 27, 2008, http://www.wired.com/threatlevel/2008/02/bank-of-america. BOA's admission that they are aware of the relationship between identity theft and mail theft is highly relevant in Mrs. Paley's case: Ms. Paley alleged she called BOA multiple times to report that she was not receiving her account statements (Pb 19).

Considering BOA's apparent failure to protect its customers from identity theft, BOA's feigned indignation at Mrs. Paley's efforts to seek a remedy for her injuries rings hollow. A bank's responsibilities to detect identity theft, particularly in light of any prior representations, are independent of a customer's responsibilities to do so. Blaming the victim does not resolve the question of whether a customer has a cause of action for alleged misrepresentations about the measures that a bank would take to protect her funds, given the known risks and the information available that should have independently alerted the bank to the identity theft.

B. Older People Are Uniquely Vulnerable To Identity Theft

Older people are "uniquely vulnerable" to identity theft. Identity Theft: The Nation's Fastest Growing Crime Wave Hits Seniors, 107th Cong. 1 (2002), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_senate_hearings&docid=f:82327.pdf (statement of Larry Craig, Ranking Member, Special Comm. on Aging). Perpetrators of identity theft target older people "because senior citizens are more likely than most of us to have significant assets, savings, investments, paid-up mortgages, good credit, and Federal entitlement checks." Id. at 24 (statement of James G. Huse, Jr., Inspector Gen., Soc. Sec. Admin.). Older people "are also easier and safer to rob," partly because they are more trusting of others. Id.

Older people tend to be more reliant on postal service, which puts them at greater risk of mail theft. Elderly Vulnerable to ID Thieves, http://www.identitytheft.com/index.php/article/elderly_vulnerable_id_thieves (last visited Jun. 18, 2009). Thieves can "wipe out entire bank accounts" over a period of time without an older victim becoming aware of the theft, because "[m]ost retirees know exactly what they have in their savings accounts and don't feel the need to check balances on a regular basis." Id.

Furthermore, older victims of identity theft "may hesitate to take action if they do find something wrong because they are afraid a relative is responsible for robbing them, or because they are afraid they will make their families feel they can no longer be trusted to live independently." Id. at 26. Criminals take advantage of this unique vulnerability, evidenced by increasing incidents of identity theft targeting those 60 and over. Id. (noting a threefold increase in reported incidents from 2000 to 2001).

Dependency on caregivers contributes to the incidence of identity theft among older people. The Nation's Fastest Growing Crime Wave Hits Seniors, supra at 85 (testimony of Mari J. Frank, Esq.). Caregivers have positions of trust and access to personal information including bank accounts, federal identification numbers, trusts, and insurance. Id. Most identity theft occurs "through traditional methods, when a criminal has direct, physical access to the victim's information." Javelin Strategy & Research, 2009 Identity Fraud Survey Report: Consumer Version 7 (2009), available at http://www.idsafety.net/901.R_IdentityFraudSurveyConsumerReport.pdf. Thirteen percent of victims report that identity theft was perpetrated by "friends, family or in-home employees." Id. at 7.

Rapidly evolving banking industry practices also make older people — and everyone — more vulnerable to check fraud. For example, as in this case, they may justifiably be under the impression that banks verify signatures on individual checks to prevent fraud.

BOA is well aware that older people may be particularly vulnerable to identity theft from trusted and even authorized users. In comments submitted to the Federal Trade Commission, BOA stated, "elderly consumers may know that another individual is using their information, but not understand that it is being used fraudulently." Letter from Kohler, supra.

C. Financial Institutions Have A Duty To Protect Against Identity Theft

BOA fails to acknowledge that specific federal regulations already require it to conform to standards beyond those imposed by the UCC. Congress requires that financial institutions take responsibility to protect consumers through an independent duty to mitigate losses resulting from identity theft. It directed federal agencies to prescribe "red flag" guidelines and regulations to detect and respond to identity theft risks. Fair and Accurate Credit Transactions Act, Pub. L. No. 108-159, § 114, 117 Stat. 1960 (2003) (codified as amended at 15 U.S.C.A. § 1681m(b)(2)(e)). In promulgating the red flag rules, federal banking regulators specified the measures a bank must take to protect customers, such as Mrs. Paley, from identity theft. These rules further belie BOA's argument that being subject to the additional constraints of the CFA will conflict with its UCC obligations.

Specifically, the regulations — which apply to BOA — require financial institutions and creditors with covered accounts to establish an "identity theft prevention program" which includes "reasonable policies and procedures" to "identify," "detect," and "respond appropriately" to "red flags." 16 C.F.R. § 681.2(d). Covered accounts include personal savings accounts. Id. § 681.2(b)(3)(i).

Enumerated practices that should raise "red flags" include the use of identification that "is not consistent with readily accessible information that is on file with the financial institution or creditor, such as a signature card"; use of "[a] covered account . . . in a manner that is not consistent with established patterns of activity on the account"; and notification to "[t]he financial institution or creditor . . . that the customer is not receiving paper account statements." Id. § 681, Supp. A to App. A (2009) (examples 8, 22, and 24). Thus, many of the failures alleged by Mrs. Paley fall within the scope of red flags that BOA is required by federal regulation to "identify" and "detect," and to which it should "respond appropriately." 16 C.F.R. § 681.2(d).

Moreover, the banking industry has long recognized that such measures are important to combat the growing problem of identity theft. In 2002, a representative from the American Banking Association ("ABA") announced to the Senate Special Committee on Aging that "[t]here [wa]s no better way to protect against fraud and terrorism than by improving the identification documents used to complete financial transactions." The Nation's Fastest Growing Crime Wave Hits Seniors, supra at 100 (statement of Boris F. Melnikoff, Consultant to the Regional President, Am. Bankers Ass'n). In 2005, the ABA stated that check fraud detection based only on the dollar amount of the check – called "risk-based fraud detection systems" – is often ineffective. Am. Bankers Ass'n, Industry Practices: Risk Based Fraud Detection Systems 1 (2005), http://www.aba.com/NR/ rdonlyres/34AE858F-09B6-11D5-AB75-00508B95258D/39073/ wprulesbasedsystems05.pdf. Rather, the ABA recommended supplementing the practice of verifying signatures on checks with high dollar amounts with another "rules-based" technique that detects out-of-pattern activity by comparing the check in question with the customer's check-writing history. Id.

Thus, BOA is unquestionably obligated to protect its customers from identity theft, including check fraud. Protection is not limited to that provided by the UCC. The CFA's protection addresses, inter alia, the representations the bank makes with regard to its customer agreement and the measures it will take to keep a customer's money safe. In light of the obligation banks have to protect against identity theft, and on alleged representations made to her when she opened her account, Mrs. Paley was justified in believing that BOA would do so.

CONCLUSION

Banks are not exempt from the mandate of the CFA to refrain from misrepresentation, omission, fraud, unfair, or deceptive business practices merely because they are regulated by other statutes as well. The CFA applies to activities relating to agreements between banks and their customers. The UCC is not an exclusive remedy for bank customers alleging injuries for misrepresentation.

Respectfully submitted,

____
Fred Shahrooz Scampato
Julie Nepveu

Attorneys for AARP

David Cedar
Michael Halbfish

Attorneys for NJAJ

Dated: June 25, 2009