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## Bank That Restricted Its Customers' Cash Machine Privileges Without Prior Notice Did Not Violate the Electronic Fund Transfers Act

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## Misleading Advertising

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a threshold issue, whether to characterize as commercial the speech in question. Commercial speech is less central to the first amendment than other forms of speech and therefore receives less constitutional protection. According to the court, there was "no question" that the advertisements were commercial. In applying the factors used to determine whether particular speech is commercial, the court first noted that the advertisements were part of an expensive marketing strategy to extol one competing product over another and were prompted by economic self-interest. Second, the court concluded that affording the parties' speech less constitutional protection would not "chill" freedom of speech. Given the highly competitive nature of the health care industry, an advertising restriction would not deter the companies from appropriately touting the relative merits of their products and services in the future. Moreover, both U.S. Healthcare and Blue Cross-Blue Shield were uniquely situated to verify the truthfulness of their own statements. Third, the information disseminated in the various advertisements added little to the "marketplace of ideas" so vital to a market economy.

Blue Cross-Blue Shield argued that even if the speech at issue was characterized as commercial, it should be afforded a heightened degree of protection because the subject of the advertisements—quality health care—was at the center of public debate. The court disagreed and held that advertisers should not be immunized from defamation actions merely by cloaking their objectionable speech in terms of public interest. Even though the advertisements concerned the quality and availability of health care, their primary aim was to sell a product. Because the statements were advertisements "pure and simple," the court concluded that a heightened evidentiary standard should not apply.

**"Public" Versus "Private" Figure Protection.** Next, the court con-

sidered the nature and weight of the state's interest in compensating the parties for injury to reputation. Blue Cross-Blue Shield argued that U.S. Healthcare was a "public figure" and therefore the state had a limited interest in protecting U.S. Healthcare's reputation. In determining whether the parties were "public" or "private" figures, two factors weighed heavily: the parties' access to the media and the manner in which the risk of defamation came about. With regard to the first factor, the companies had the ability to engage in extensive advertising and therefore lacked the vulnerability associated with private citizens. With regard to the second factor, because of their aggressive advertising, both companies had thrust themselves into a situation in which they invited controversy and reaction. Although both of these facts would support finding that the parties were "limited purpose public figures," the court concluded that the companies were not public figures. Because the parties were motivated by profit rather than a public figure's desire to resolve an issue of public debate, the speech did not warrant the heightened protection afforded comment on "public figures." Thus, the first amendment did not require a greater burden of proof than that required under the applicable state and federal laws.

As a final matter, the court held that the trial judge improperly had reconstituted the deadlocked jury after declaring a mistrial. The jurors, on the assumption that they would not be required to deliberate further, revealed why they were deadlocked. The court therefore vacated the jury's subsequent verdict and reinstated Blue Cross-Blue Shield's counterclaim.

Eileen B. Libby

## BANK THAT RESTRICTED ITS CUSTOMERS' CASH MACHINE PRIVILEGES WITHOUT PRIOR NOTICE DID NOT VIOLATE THE ELECTRONIC FUND TRANSFERS ACT

In *Feinman v. Bank of Delaware*, 728 F. Supp. 1105 (D. Del. 1990), the United States District Court for the District of Delaware held that a bank did not violate the Electronic Fund Transfers Act, 15 U.S.C. §§ 1693a-1693r (1988) ("the Act"), when it temporarily restricted without notification customers' access to their account through automatic teller machines. The court also held that although the bank did violate the Act by failing to remove the restriction after the reasons for imposing it no longer existed, the customers could not recover damages because they failed to prove actual injury.

### Background

Jeff and Consuela Feinman ("the Feinmans") maintained a Big Plus Account ("the account") at the Bank of Delaware ("the Bank"), which included a checking and savings account. The Feinmans could make withdrawals, deposits, and other transactions through automatic teller machines ("ATMs"), commonly known as cash machines, subject to certain terms and conditions of the account. The bank included these conditions in an initial statement the Feinmans received when they opened the account. The Feinmans' account also included overdraft protection, which permitted the bank to transfer funds from the Feinmans' savings account to their checking account to cover overdrafts. The Feinmans overdrew their checking account eight times in the fourteen months preceding the incident in question.

On Friday, February 19, 1988, the Feinmans cashed four checks and made two ATM withdrawals resulting in an overdraft of over

**ANNOUNCEMENT****Toll-Free Consumer Hotlines**

Nader's Raiders, the consumer advocacy group founded by Ralph Nader, has published a new booklet, the *Consumer's Guide to Toll-Free Hotlines*. The 28 page booklet is available by sending \$1.00 (check or money order) and a business size, self-addressed, stamped envelope to:

Hotlines  
P.O. Box 19405  
Washington D.C., 20036

\$100. The next working day, February 22, a bank employee restricted the Feinmans' access to their account through ATMs by placing a "deny cash" restriction on their account. That same day the Feinmans made a deposit that gave the account a positive balance of almost \$400. The bank employee did not know of the February 22 deposit when she decided to impose the "deny cash" restriction on the Feinmans' account.

This "deny cash" restriction prevented the Feinmans from using ATMs for deposits or to cash checks directly with the bank's tellers. Claiming the restriction was imposed for security reasons, the bank did not give the Feinmans prior notice of the "deny cash" restriction.

On February 27, the Feinmans and their children drove from their home in Newark, Delaware, to Philadelphia for dinner. Jeff Feinman attempted to withdraw cash from an ATM in Philadelphia but could not do so because of the "deny cash" restriction. The Feinmans then drove to the home of Jeff Feinman's brother to borrow money and spend the night. The next day, Jeff Feinman made several unsuccessful attempts to withdraw cash from ATMs. These repeated failures prompted the brother to tease the Feinmans, which allegedly embarrassed and humiliated them.

On February 29, Jeff Feinman contacted the bank and requested that the restriction be removed. The bank counseled Feinman about the consequences of ATM

overdrafts and, after confirming a positive balance in their account, agreed to remove the restriction. A bank employee ordered the restriction removed. However, due to a processing error, the restriction remained in effect. On March 2, Jeff Feinman again contacted the bank and requested that the restriction be removed. The bank removed the restriction later that day.

The Feinmans sued the bank in the United States District Court for the District of Delaware, alleging that the bank violated the Act by (1) failing to notify them before placing the restriction on the account; (2) issuing a "deny cash" restriction when their account actually had a positive balance; and (3) failing to remove the restriction on February 29, when Jeff Feinman first requested the removal. The Feinmans requested statutory, actual, and punitive damages, as well as costs and attorney fees.

**Prior Notice Was Not Required  
Because a Valid Security Risk  
Existed**

The court first addressed whether the bank's failure to notify the Feinmans prior to restricting access to their account violated the Electronic Fund Transfer Act. The Act provided, in part:

A financial institution shall notify a consumer in writing at least twenty-one days prior to the effective date of any change in any term or condition of the consumer's account . . . if such change would result in . . . decreased access to the consumer's account. A financial institution may, however, implement a change in the terms or conditions of an account without prior notice when such change is immediately necessary to maintain or restore the security of an electronic fund transfer system or a consumer's account.

15 U.S.C. § 1693c(b).

The bank, upon opening the account, warned the Feinmans that access to their account could be limited without notice for security reasons. Although the Feinmans had overdraft protection on their account, the court noted that ATMs could not accurately determine the current balance of ac-

counts covered by the overdraft protection. Thus, the Feinmans conceivably could have withdrawn up to \$500 (the daily ATM withdrawal limit) in excess of the account's actual balance. Also, the Feinmans had a history of overdrafts. Based on these facts, the court concluded that a security risk existed that justified the bank's restriction of the Feinmans' account without prior notice.

**Decision to Restrict the Account  
Was Properly Based on  
Information Available at That Time**

The court then analyzed the Feinmans' claim that the restriction on their account was unjustified because their account had a positive balance when the bank implemented the restriction. The bank employee who decided on February 22 to restrict the Feinmans' access to their account relied on a notice of overdraft issued the previous business day, February 19. However, the court found that by 3:30 p.m. on February 22, the Feinmans had deposited funds into their account, giving it a positive balance of nearly \$400. Thus, at the time the bank actually implemented the "deny access" restriction on February 23, the Feinmans' account was not overdrawn.

The court rejected the Feinmans' claim that the bank should have checked their account status between the time of the bank's decision and the time the bank implemented the decision. According to the court, this practice would create an onerous duty on the bank that needlessly would increase costs to the consumer. The bank also would lose the opportunity to reduce improper use of ATMs in the future by counseling consumers about ATM overdraft abuses. The court cautioned that had the period between the decision and the implementation been longer than a single day, the court might have insisted that the bank check the account status again before implementing the restriction. The court held that the bank did not act illegally by failing to consider the deposit that returned the Feinmans' account to a positive balance because that deposit occurred

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**Electronic Fund Transfer Act**

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after the bank made its decision to restrict the Feinmans' ATM privileges.

**Bank Violated Act by Failing to Remove Restriction Promptly, But Customers Failed to Prove Actual Damages**

The court next considered the Feinmans' claim that the bank violated their rights under the Act by failing to remove the restriction on February 29 when Jeff Feinman first requested that the restriction be removed. The Act stated that a bank would be liable if it failed "to make an electronic fund transfer . . . in the correct amount or in a timely manner when properly instructed to do so by the consumer." 15 U.S.C § 1693h(a)(1). The bank routinely lifted "deny access" restrictions after the account holder contacted the bank, corrected the imbalance, and convinced the bank that no future ATM overdrafts would occur. Jeff Feinman contacted the bank and made these assurances on February 29. However, due to a bank error, the restriction remained in effect until Jeff Feinman's second request on March 2.

The court found the bank's failure to remove the restriction on February 29 amounted to a clear, but unintentional, violation of the Act. The court noted that section 1693h(c) of the Act limited recovery for the unintentional violations to actual damages. The court held that because the Feinmans had failed to prove that they suffered any actual damages during the two days between their first request and the day their ATM privileges were restored, they could not recover.

**Mark G. Sheridan**

**FLORIDA SUPREME COURT LIMITS DEFENSES AVAILABLE TO BANKS IN REFUSING TO HONOR THEIR CASHIER'S CHECKS**

In *Warren Finance v. Barnett Bank of Jacksonville*, 552 So. 2d 194 (Fla. 1989), the Florida Supreme Court held that a bank may assert only its real and personal defenses in refusing payment upon presentation of a cashier's check that it has issued. The bank may not assert the defenses of a third party to the check. The court stated that, in order to preserve the cash-like attributes of cashier's checks, a bank should not be required to evaluate the validity of the third party's defenses and thereby act as an intermediary between parties disputing ownership rights to cashier's checks.

**Background**

Pursuant to a finance agreement, Warren Finance, Inc. ("Warren") advanced funds to Redan Engineering ("Redan"), in return, for which Redan assigned to Warren the rights to payments due Redan under construction contracts Redan held with Blossam Contractors, Inc. ("Blossam"). Blossam issued checks to Redan, and Redan tendered the checks to Warren. Warren then asked to receive cashier's checks instead of personal checks, to avoid collection problems. Redan and Warren went to Blossam's depository bank, Barnett Bank of Jacksonville ("Barnett bank"), and exchanged Blossam's checks for cashier's checks that named Redan as the payee. Redan endorsed the checks over to Warren, and Warren deposited them in its account in another bank.

Redan claimed that, in exchange for assigning the Blossam checks to Warren, Warren had promised to forward additional funds to Redan to cover checks Redan had written to suppliers. Warren subsequently refused to advance these additional funds to Redan, and Redan

sought to stop payment on the cashier's checks. Redan contacted Blossam, and Blossam, as purchaser of the cashier's checks, telephoned Barnett bank to stop payment on the checks. Barnett bank refused to honor the cashier's checks when they were tendered by Warren.

Warren brought an action against Barnett bank in the Circuit Court of Duval County, Florida, alleging that Barnett bank had wrongfully dishonored the cashier's checks. Barnett bank defended its refusal to honor the cashier's checks on the grounds that (1) Warren was not a holder in due course, and (2) Warren committed fraud against Redan in the underlying transaction. The trial court ruled in favor of Warren.

**The First District Court of Appeal**

Reversing the trial court, the First District Court of Appeal stated that if Warren was not a holder in due course, Barnett bank properly refused to pay the checks based upon Barnett bank's assertion of fraud. The court remanded the case for the trial court to determine whether Warren qualified as a holder in due course. The First District certified to the Florida Supreme Court the question of whether the issuing bank may assert the defenses of a payee against the right of a subsequent endorsee to receive payment on a cashier's check.

**The Florida Supreme Court Decision**

The supreme court initially noted that the purpose of cashier's checks was to act as a cash substitute. Unlike a personal check, which requires that the individual have adequate funds, the bank is personally liable for paying on its cashier's checks. Parties desire cashier's checks to avoid the risk of nonpayment due to insufficient funds in the account, a stop payment order, or insolvency. The court then discussed two theories developed under common law to identify and analyze these circumstances. They are the "cash equivalent theory" and the "note theory."

Most courts have adopted the