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THE CUTPA CONUNDRUM

High Court Ponders Whether CUTPA Applies To Banks

By THOMAS SCHEFFEY

The most persistent unsolved mystery of the state's commercial law - whether the Connecticut Unfair Trade Practices Act, or CUTPA, exempts or includes the banking business—finally came to argument last week before the one body that can put the issue to rest: the state Supreme Court.

In the case of *Normand Josef Enterprises Inc. v. Connecticut National Bank*, far more is at stake than the $21,000 judgment that the plaintiff's lawyer, Waterbury solo Raymond J. Antonacci, has been trying to collect since 1988.

Antonacci, a David in this high-court setting, is battling some of Connecticut banking's Goliaths. He wasn't looking for this fight. He had no thoughts about changing the state's commercial-law playing field five years ago, when he started simply trying to collect payment for a client, Waterbury flooring subcontractor Normand Josef Enterprises, from a West Haven general contractor, the Hogan Co.

When he won his judgment for the debt, Antonacci's real legal battle had just begun. He got a New Haven deputy sheriff to attempt to execute it against Hogan's bank account at Connecticut National Bank. Twice the deputy was told that the bank had no funds in the Hogan account. The deputy was incredulous. His office was in the bank's building and he'd actually seen Hogan officials making deposits.

In his appearance before the high court, Raymond J. Antonacci argued, "The bank was simply another creditor playing on an uneven field of play, taking advantage of its position."

Without self-protective rights like the setoff, Gerald L. Garlick (right), of Hartford's Leventhal, Krasow & Roos wrote in his brief, "The far-reaching implications to the banks, their depositors or shareholders, and ultimately, the taxpayers is obvious." Garlick is appellate counsel in the case for Donn A. Randall (left), Shawmut's vice president and managing counsel.

Records later showed that although over $100,000 had gone in and out of the account in the few days before and after the deputy's attempted executions, the bank twice beat the deputy to the draw for two "setoffs" of $4,945.82 and $31,303.86 – all the funds in the account on two different days—to repay existing CNB loans to Hogan it decided were in default. Antonacci claimed these inside bank moves, with no notice to his client, the sheriff or the court, were unfair. In a CUTPA-based suit against CNB decided in 1993 by Waterbury Superior Court Judge Joseph H. Pellegrino, he won a $21,000 judgment against CNB, plus over $13,000 in attorneys fees.

He has yet to see a cent of his fees or the judgment.

Connecticut National Bank is now, through merger, known as Shawmut National, N.A. And in its legal battles CNB has often been willing to go to the mat. CNB has contested more CUTPA-based claims to final

judgment in Connecticut's trial courts than any other bank—it has even used CUTPA itself as a legal weapon to go after a borrower—and it didn't take Antonacci's win lightly. It promptly appealed. "We take these issues very seriously," notes Donn A. Randall, Shawmut's vice president and managing counsel.

Last Tuesday, Randall shared the appellant's table at the Supreme Court with his appellate counsel, Gerald L. Garlick, of Hartford's Leventhal, Krasow & Roos, in what may prove a big day in Connecticut banking's legal history.

If Antonacci's client prevails in this case, and CUTPA is found to apply to banks, financial institutions fear they'll be exposed to new sources of consumer litigation. Unlike ordinary civil remedies, CUTPA allows courts to award punitive damages and attorneys fees, and permits recovery for "unfairness"—whether or not any specific law is violated. From the standpoint of consumer groups and the state Office of the Attorney General, represented as an *amicus curiae* in opposition to the bank's appeal, the incentive of attorneys fees can render ordinary lawyers "private attorneys general" for meritorious cases that might otherwise never see daylight. From the standpoint of the bank, joined by *amicus* Connecticut Banking Association, an important underlying issue is CUTPA's potential to render banking cases hard for a lawyer or banker to price, and they sense that the lure of legal fees may prompt unnecessary litigation.

"No one will ever admit they're bringing a case because a statute provides for an award of attorneys fees," notes Mark V. Connolly, a banking law partner at the Hartford office of New Haven's Tyler Cooper & Alcorn, who with partner David J. Wiese wrote the banking association's *amicus* brief. "But CUTPA's value, or curse, to those of us in the practice—the way it differs most obviously from the whole range of existing remedies—is in the attorneys fees."

Not the Facts, Please

When Garlick stepped to the lectern to begin his argument, he faced a panel of five justices—Joette Katz, Robert J. Callahan, David M. Borden, Richard N. Palmer and Chief Justice Ellen A. Peters. Far and away the liveliest and most vital of these for this case was Peters, who wrote virtually all the key decisions that led up to, but never quite answered, the issue now before the court.

She quickly took command of the questioning.

With a dismissive wave, she cut short Garlick's attempt to begin with a sketch of the facts. The court had done its homework, Peters assured him. So Garlick launched into his key argument—that the bank broke no law whatsoever by setting off the funds in the Hogan account. It had a common-law right to do so, Garlick said. The trial court's finding that the setoff came too late—a day after the bank's legal "midnight deadline"—was based on a misunderstanding of bank procedures.

Trial Judge Pellegrino's ruling had declared the bank's testimony self-serving and unpersuasive on this score, and Peters tried to get Garlick to drop this line of argument. "Isn't that an ordinary question of fact?" Peters asked twice, apparently eager to move on to the larger issues of the case, and unwilling to focus on a fact-based reevaluation of the trial court's job.

Borden, to illustrate that the trial judge had made a factual finding of credibility— one that Appellate Courts are loath to revisit—read from Pellegrino's opinion: "The court rejects the self-serving testimony of the bank employees who testified that the proof tickets [internal bank documents recording the allocation of funds in an account] were sufficient to debit the account."

"Why *can't* he reject the testimony?" Borden asked Garlick, who conceded, "He obviously can."

So, said Peters, "If we disagree with your view, the setoff issue is over," she half-asked, half-announced.

Garlick treated it like a question. "I don't think so, Your Honor," he replied. "Section 42a-4-303 doesn't apply to this case," he contended, referring to the state law outlining the payment priorities when a bank has to deal with an execution of judgment, checks and other demands on an account. In his brief, Garlick had argued that this law doesn't apply because the setoff does not fit anywhere in the definitions in the applicable banking laws of an "instrument," an "order" or an "item."

A Peters Playground

The discussion then shifted to one of Peters' favorite topics—

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the interplay of common-law principles and statutes, a subject on which she has written law review articles. It also had a Uniform Commercial Code context, and the UCC was Peters' specialty in her previous career as a Yale law professor.

With a hand over her mouth, she quietly mulled the matter of what the law would be here, if the statute did not apply. "Then we'd be left with the common law predating Article 4 [of the UCC] and the bank would have a finite time in which to act," Peters mused, deep in legal reverie.

Br'er Rabbit in his briar patch was never more at home than Justice Peters in this thorny topic.

"You don't end up with a nothing," Peters finally declared, "you don't end up with the bank having an infinite amount of time" to decide whether to pay checks, judgments or make a setoff to itself from an account. Garlick did not debate her, but pushed on with his argument that the statute Antonacci used against the bank does not apply.

Finally Peters had to be a little brusque. "Suppose we disagree with you on this issue," Peters said, pushing on to a larger topic. "Why, in your view, is it inappropriate for CUTPA to apply to banks," she asked Garlick.

Garlick ticked off the standard reasons cited in the 10 Superior Court decisions that have found that CUTPA doesn't apply to banks. First of all, the Federal Trade Commission Act, or FTCA which is the model for CUTPA, doesn't apply to banks. Secondly, as the Connecticut Supreme Court decided in *Russell v. Dean Witter* in 1986, the securities industry should be exempt from CUTPA because it is pervasively regulated by the Securities and Exchange Commission. *Russell* recognizes pervasive regulation by another regulatory "net" as one reason why application of CUTPA to an industry is redundant and thus unnecessary.

Peters, who wrote the opinion in *Russell*, asked Garlick how he distinguished that case from another she wrote the same year, *Mead v. Burns*, which found that CUTPA does apply to the insurance industry. "Obviously you like one of these cases," she remarked. Without waiting for an answer, Peters pressed on with her ultimate question for Garlick. What banking law covers ordinary customers—like the securities acts of the 1930s, designed to protect innocent investors? Where is the broad regulatory scheme?

Garlick came up with a patchwork quilt of laws—and acknowledged that there was no single blanket of banking regulation for consumers. He named the federal Truth In Lending Act, the Real Estate Settlement Procedures Act and the various fair-housing discrimination laws, "plus a long list in the consumer field," adding, "I don't know of one act that says banks can't commit unfair trade practices," in so many words.

Peters, with this question, was echoing a chord struck in 1991 by Litchfield Superior Court Judge Anne C. Dranginis, at the height of trial court controversy over CUTPA's application to banks. At a time when lower courts were roughly evenly split over the issue, Dranginis, on her own motion, reconsidered a quick ruling that CUTPA doesn't apply to banks with a detailed analysis of cases and statutes. In this rare *sua sponte* reconsideration, Dranginis wrote, "A review of the banking statutes, however, indicates no pervasive provisions which establish the rights and responsibil-ities of banks to their customers." Thereafter, Superior Court judges began following Dranginis' lead, many of them praising her *Economic Development Associates v. Citytrust* analysis.

But Garlick wasn't taking Dranginis' big-picture view, and had smaller fish to fry in this case. Gearing down, he shifted to one of the tiny questions: whether Antonacci was paid too much. Trial Judge Pellegrino awarded him $13,000, based on the hours worked, in addition to the $21,000 judgment against CNB, but Garlick contended that the award was wrong, in light of the fact that Antonacci had a pre-existing one-third contingency fee. It sparked little response, and Garlick's time ran out.

First and Last Arguments

At the lectern, Antonacci didn't seem nervous or rushed as he began his Supreme Court fight. He sketched the alleged CUTPA violation in simple terms: "The bank was simply another creditor playing on an uneven field of play, taking advantage of its position," he declared, adding, "They never said they did a setoff. A judgment creditor would have to subpoena bank records to know they are telling the truth."

Borden pointed out that the bank had no legal duty to make such a disclosure, and honed in on Pellegrino's trial court finding that the bank's report to the sheriff that there were no available funds "was deceptive and came close to a misrepresentation."

Borden, his brow furrowed, said, "You either misrepresent or don't,"

and without evidence of some intent to create a false impression, "it's simply an inaccurate statement."

Peters, too, probed the seriousness of the bank's alleged breach of CUTPA's unfairness doctrine. How wrong was it not to tell the deputy anything? "Suppose it had been a check the bank had paid" that drained the account, would the bank be under some duty to disclose that fact to anyone? "I don't think so," she said, answering her own query.

"There's a very, very important distinction," between the bank paying a check and the bank paying itself and not telling the judgment creditor, Antonacci responded calmly. "The bank didn't notify my client that it was a competing creditor. Everyone at the bank thought nobody will know because we're not going to tell them."

Antonacci left time for argument by Robert M. Langer, the assistant attorney general appearing as an *amicus curiae*, assisted by Neil G. Fishman and William M. Rubenstein, assistant attorneys general. Langer started his career with the AG's office in 1973, the year CUTPA was enacted. In that 20-year period he developed a national reputation as an authority in state antitrust and consumer protection law. Because he is leaving that career for private practice, last week's argument was his last as an assistant attorney general, and was a particularly apt swan song for the CUTPA specialist.

Peters asked Langer how banking is different from the securities industry, to which CUTPA has been held not to apply. Langer, as much in his element as Peters here, replied, "I've waited eight years for the chance to answer that question, and I appreciate the opportunity." In brief, Langer said, the plaintiff in *Russell v. Dean Witter* "batted 0 for 4," invoking the four-part test that Peters herself had set out for when an industry should come under CUTPA regulation.

He went on to note that the fact that the FTCA exempts banks is only part of the picture. "The FTC has regulatory oversight in terms of rules and regulations affecting commerce — and hence banking. It simply has no adjudicatory power over banking," he clarified. Then he pointed out what he saw as his opponents' weakness. "None of the parties on the other side have pointed to a comprehensive regulatory scheme" for consumer protection in banking, he said. Borden saved a potent, narrowly focused question for Langer. If the court were to agree with the argument by CNB that it violated no banking statute in this case, can the bank be found liable under CUTPA — a law not clearly applicable to banks at the time the bank acted?

"You might want to rule prospectively," suggested Langer, so only cases arising after a finding that CUTPA applies to banks are affected.

Langer pointed out how far the court had already come towards applying CUTPA to banks, in the 1993 case of *Cheshire Mortgage v. Montez*, which found that a violation of the Truth in Lending Act triggered CUTPA in the case of a mortgage company. Why *not* apply it to banks? he asked.

Garlick, on rebuttal, explained why banks need to have strong powers to collect debts, including the setoff from a depositor's account, such as the one at issue in this case. "Banks are not just another creditor," Garlick declared. "There may be reasons why it is more important that a bank pay itself than that private debts be settled."

The Goliath banking industry in 1994 is battle-scarred—after years of bank failures and financial losses. And Garlick's client, he contended, needs some understanding and protection, too. To find common-law support for the right of setoff, Garlick turned back to the 1928 Connecticut Supreme Court case of *Sullivan v. Merchants National Bank*, which intones, "The business of the bank is a private business, but one affected with a large public interest and subject to public supervision. The community is vitally interested in its solvency."

Without self-protective rights like the setoff, Garlick wrote in his brief, "The far-reaching implications to the banks, their depositors or shareholders, and ultimately, the taxpayers is obvious."

Antonacci, in his brief, characterized the actions of the bank in a far different light. "It sent a message to judgment creditors: We can act at our own whim, we can put your judgment execution at the bottom of the pile, we can pay other items received on this account at will, we can exercise our right to setoff when it is convenient to us, we need not and will not notify you of our actions in either a timely or truthful manner. We have the power to ignore the law." ■