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# Credit Union Attorney

## Law Letter

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### A Law Letter for Credit Unions, Financial Institutions, and Attorneys

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### **Bank Owed ATM User a Duty of Reasonable Care in Selecting ATM Location**

In *Rawls v. Marsh Supermarket, Inc.*, No. 34A05-0306-CV-274 (Indiana App. Jan. 28, 2004), the Court of Appeals of Indiana held that a bank has a duty to use reasonable care not to locate an Automated Teller Machine ("ATM") where a person using it could be injured by a dangerous condition of the sidewalk under the ATM, even though the bank did not create the dangerous condition, own or lease the sidewalk, or have any actual control over the premises other than the initial selection of the location.

#### Facts

First National Bank & Trust owned an Automated Teller Machine ("ATM") at a Marsh Supermarket. First National mounted the ATM on an exterior wall of the building near the east entrance of the supermarket. The ATM was situated on property owned exclusively by Marsh, and First National leased from Marsh a small area (approximately eight by ten feet) directly behind the ATM, in the interior of the store.

On February 5, 1999, Mildred Rawls stepped onto a narrow sidewalk in front of the ATM and withdrew

cash from First National's ATM. After completing her transaction, Rawls turned to leave and her foot hit the curb, causing her to fall forward to the ground.

Rawls filed a negligence action against Marsh and First National. The basis of her claim was that the sidewalk in front of the ATM was not wide enough for her to safely turn around and leave the area.

#### **First National Argued No Duty Owed to Rawls and Trial Court Agreed**

First National argued that it owed Rawls no duty with regard to the condition of the sidewalk because it did not own or lease that space. The only space it leased was inside the store, behind the ATM. The trial court agreed with First National and entered a summary judgment without a trial in favor of First National. Rawls appealed.

#### **Appeals Court Finds a Duty**

On appeal, the Indiana Court of Appeals reversed. It held that traditional principles of premises-owner liability governed First National's liability to Rawls (an invitee) in this case, because, while First National was not the owner or even the lessee of the sidewalk in front of the ATM, it had an easement over the sidewalk for its customers to stand there to conduct business at

the ATM. Therefore, the court held, "First National owed Rawls a duty of reasonable care in selecting the location of its ATM."

#### **Possible Future Exception to Duty**

The court expressly declined to hold that First National had a continuing duty to inspect the sidewalk for a temporary dangerous condition like water, debris, and ice, because, the court reasoned, a temporary condition was not at issue in this case. Rather, the condition that Rawls alleged as dangerous (the width of the sidewalk) existed when First National selected the location of the ATM.

The appeals court reversed for a trial, so that a jury could decide the factual issue of whether the sidewalk was dangerous.

\* \* \*

## **Florida's Uniform Fraudulent Transfer Act Does Not Create a Cause of Action for Damages Against an Aider and Abetter Not the Recipient of a Fraudulent Transaction**

In *Freeman v. First Union National Bank*, No.SC03-896 (Fla. Jan. 29, 2004), the Florida Supreme Court held that the creditors of a company guilty of fraudulently transferring funds had no right under the Florida Uniform Fraudulent Transfer Act ("FUFTA") to recover damages from a bank that was not a recipient of the funds but who allegedly aided and abetted the fraudulent transfers. However, the court noted, the creditors may have other theories under which they could recover damages from the bank.

#### **Facts**

A company called "Unique Gems" was engaged in a pyramid or Ponzi scheme involving the assembly of necklaces. Unique Gems had its primary checking account at First Union Bank.

The State of Florida sued Unique Gems over the legality of its necklace-assembly operation. After the

State initiated suit, First Union allowed Unique Gems to wire transfer money to Liechtenstein. On or about February 21, 1997, First Union notified Unique Gems by written letter that it would be closing Unique Gems' account in 10 days, though First Union never took the threatened action. On March 5, 1997, a Florida court issued an injunction ordering First Union to freeze Unique Gems' bank account. In spite of the injunction, First Union allowed Unique Gems to wire transfer \$2 million to Liechtenstein, which was in addition to \$6.6 million that Unique Gems has transferred since February 21, 1997.

#### **Creditors Sue Bank Over Wire Transfers**

People to whom Unique Gems owed money (hereafter "the Creditors") filed suit in a federal district court against First Union alleging that First Union, by allowing Unique Gems to make wire transfers to Liechtenstien, had aided and abetted fraudulent transfers and that, under section 726.108 of the FUFTA, the Creditors should have a right to recover damages from First Union.

#### **Creditor's FUFTA Remedies**

Section 726.108 of the FUFTA sets forth the remedies of creditors when a debtor has engaged in a fraudulent transfer. It provides for the following remedies:

- "(a) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;
- "(b) An attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with applicable law;
- "(c) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure:
  - "1. An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;
  - "2. Appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or
  - "3. *Any other relief the circumstances may require.*"

The Creditors of Unique Gems argued that under paragraph (c)(3) of 726.108, a court could award them damages from First Union as a form of relief. The federal district court rejected the Creditors' argument. They appealed.

#### **Certified Question Regarding Bank's Liability**

On appeal, the Eleventh Circuit Court of Appeals decided that, since the Creditor's argument was governed by Florida law, Florida's Supreme Court should rule on the argument. To obtain a ruling from the Florida court, the Eleventh Circuit certified this question: "Under Florida law, is there a cause of action for aiding and abetting a fraudulent transfer when the alleged aider-abettor is not a transferee?"

The Florida Supreme Court answered "No." The court reasoned that, even though Section 726.108(c)(3) was a "catch-all" that would appear to authorize any relief a court might fashion, "[t]here simply is no language in FUFTA that suggests the creation of a distinct cause of action for aiding-abetting claims against non- transferees," like First Union.

#### **Court's Warning to Bank**

While ruling in favor of First Union on the question presented, the Florida Supreme Court warned First Union and encouraged the Creditors that they might nonetheless be entitled to recover damages from First Union under some other theory, stating in a footnote:

"We caution that our answer to the certified question in this case is confined to the context of FUFTA. We do not address whether relief is available under any other theory of liability or cause of action. *See, e.g., Bankfirst v. UBS Paine Webber, Inc.*, 842 So.2d 155, 157 (5th Cir. 2003) (Harris, Senior Judge, dissenting) (stating that the non-transferee defendants "devised and implemented a plan by which the debtor was able to transfer his money" and opining, "I believe BankFirst stated a cause of action for civil conspiracy").

\* \* \*

## **Lack of Property Insurance on Vehicle Securing Loan Did Not Automatically Authorize Bank's Repossession of Vehicle**

In *Johnson County Auto Credit v. Green*, No. 88,204 (Kan. Jan. 30, 2004), the Supreme Court of Kansas reversed an appeals court decision holding that a borrower's failure to insure a vehicle as required by the terms of the loan, as a matter of law, authorized the bank to repossess the vehicle.

#### **Facts**

In February 1996, David and Ronda Green purchased a 1989 Ford Aerostar van. They financed \$7,598.18 of the purchase price through Auto Credit, Inc. The Greens executed a promissory note and security agreement, granting Auto Credit a security interest in the van. The terms of these agreements required the Greens to carry insurance on the van.

On November 6, 1997, the insurer of the Green's van gave notice to Auto Credit of its intention to cancel the van's insurance in 15 days for nonpayment of the premium. The notice provided that cancellation was rescindable if the "Premium Due" was paid by November 21. Auto Credit received no further notice of whether the Greens' insurance was canceled or continued and made no inquiry of the Greens or of the Greens' insurer. The Greens later acknowledged their van's insurance coverage terminated on November 21 for nonpayment of premium.

Per one of the signed agreements, Auto Credit had reserved the option to purchase insurance coverage and to add the cost to the Greens' payment obligation. Despite the notice from the Greens' van insurer of imminent insurance cancellation, Auto Credit declined to purchase insurance for the van because its usual practice was not to do so for uninsured vehicles in which it holds a security interest.

The Greens had also fallen behind on their loan payments. As a result, the Greens and Auto Credit executed an extension agreement providing for payment

of past due interest and an extension of time to make the next installment payment. In the extension agreement, Auto Credit made no demand on the Greens to provide additional proof of insurance coverage.

The Greens made five more loan payments under the extension agreement, but missed a payment due December 22, 1997. On January 7, 1998, Auto Credit received the following undated, handwritten note from Mrs. Green:

"Johnson County Auto Credit  
"...[H]ere we are again! Our financial situation is falling fast. I am so sorry. We really appreciate all the work you've done for us. We have an appointment on Jan. 12th concerning these issues. We'll be back in contact then!  
"Thanks & Sorry again  
"Mrs. Ronda Green."

The same day that Auto Credit received Mrs. Green's note, it ordered a recovery service to repossess the Greens' van. The special instructions from Auto Credit on the repossession order stated: "We think these folks are going to file bankruptcy." The van was repossessed from the Greens' residence the next day.

### **Suit Over Deficiency & Legality of Repossession**

Following repossession, Auto Credit sold the van for \$1,400 and sued the Greens for the amount of the deficiency on the loan. The Greens counterclaimed, alleging that Auto Credit's repossession of the van violated Kansas Uniform Consumer Credit Code ("UCCC"), K.S.A. 16a-5-109.

Under the Kansas UCCC, "a creditor seeking to enforce the terms of a consumer credit transaction against a consumer who has defaulted on those terms can do so only if either (1) the consumer fails to make

a payment required by the agreement or (2) the prospect of payment, performance, or realization of collateral is significantly impaired. Confining default to these scenarios is designed to prevent abuse of the consumer by the creditor."

In response to the Greens' claim of illegal repossession, Auto Credit argued that, given the facts and circumstances existing when Auto Credit repossessed the van, it was reasonable for Auto Credit to believe that its prospect of payment from the Greens was significantly impaired.

The district court, sitting as a finder of fact, disagreed with Auto Credit holding that a belief of significant impairment was not reasonable under the circumstances. Auto Credit appealed.

### **Appeals**

A Kansas intermediate appellate court reversed., ruling:

"[W]hen the terms of the promissory note or security agreement for a loan to purchase an automobile require the borrower to insure the vehicle and the borrower defaults on this provision, the collateral is significantly impaired *as a matter of law* pursuant to K.S.A. 16a-5-109(2) and the automobile may be attached by the lender."

After this ruling, the Greens appealed to the Kansas Supreme Court.

The Kansas Supreme Court reversed the intermediate appellate court's ruling and affirmed the trial court ruling that it was unreasonable for Auto Credit to repossess the van under the circumstances. The court reasoned that, while failure to insure a vehicle *could* be a factor leading to a finding that collateral was significantly impaired, it is not determinative of substantial impairment as a matter of

law.

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