

# Federal Court Finds Depository Bank Not Liable to Third Party for Mobile Remote

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A recent federal court case in Illinois has addressed whether a depository bank can be held liable for negligence when its customer deposits a check by mobile remote deposit capture, and the bank fails to prevent the customer from then cashing the same check elsewhere. The court held that the depository bank was not liable, because the bank (1) owed no duty to the party making the claim, and (2) since the bank in question was a national bank, the state law negligence claim was preempted under federal law.

In *1409 West Diversey Corporation v. JPMorgan Chase Bank, N.A.*, No. 16 C 256, 2016 WL 4124293 (N.D. Ill. August 3, 2016), the plaintiff hotel issued an employee two payroll checks that the employee deposited into her JP Morgan Chase Bank account using the bank's Mobile Check Capture App on her smartphone. Shortly thereafter, the employee cashed the checks at a currency exchange business and received the amount of the checks in cash. The hotel's bank would not pay the currency exchange since the checks were already deposited; however, the hotel was obligated to pay the currency exchange for the amount of the checks as a holder in due course under Illinois law.

The hotel filed a putative class action in Illinois state court for negligence against Chase. Chase removed the action to federal court and argued that it could not be held liable to a third party for negligence and that the claim was further preempted by federal banking law. The Illinois federal court dismissed the hotel's claims on the grounds discussed below.

## Negligence Claim

The hotel argued that the bank should be held responsible for not preventing the employee from cashing the payroll checks after the checks were deposited remotely. Chase argued that it cannot be held liable for negligence to the hotel since the hotel was never a customer of the bank and had no contractual relationship with the bank.

The court agreed that the bank had no relationship with the hotel and that the hotel did not have a negligence claim against the bank under Illinois law because the bank owed no duty to the hotel. The court stated that the hotel's recourse should be with its employee for the alleged fraud.

## Federal Preemption

The bank also argued that the hotel's claim was preempted by the National Bank Act ("NBA"). The NBA gives national banks the authority to exercise "all such incidental powers as shall be necessary to carry on the business of banking," which includes receiving deposits. The Comptroller of the Currency's regulations, implementing the NBA, also regulate deposits and services by electronic means. The NBA preempts any state law that substantially interferes with its provisions or regulations.

The court found the hotel's negligence claim would significantly interfere with the bank's authorized power to take deposits under the NBA. The court further stated that "allowing a state common law to micro-manage the deposit procedures of banks would intrude far into the realm reserved for federal law when regulating national banking institutions" and would create a "myriad of conflicting laws across this country relating to deposit procedures."

On August 29, 2016, the hotel filed an appeal of the District Court's ruling with the 7<sup>th</sup> Circuit United States Court of Appeals. We will monitor this appeal and issue an advisory regarding any significant developments in this case.

Please also note that the Federal Financial Institutions Examination Council's Risk Management of Remote Deposit Guide ("FFIEC Guide") reminds financial institutions that risks associated with fraud are not unique to remote deposit capture, but certain aspects of fraud risk do become elevated in the remote deposit capture environment. The FFIEC Guide indicates that the "duplicate presentment of checks and images at the institution or another depository institution represents both a business process and a fraud risk." The FFIEC Guide can be found here: [https://www.ffiec.gov/pdf/pr011409\\_rdc\\_guidance.pdf](https://www.ffiec.gov/pdf/pr011409_rdc_guidance.pdf).

If you have any questions regarding this Illinois case, the FFIEC Guide, or remote deposit capture practices and agreements in general, please feel free to contact Joseph D. Simon at 516-357-3710 or via email at [jsimon@cullenanddykman.com](mailto:jsimon@cullenanddykman.com), Kevin Patterson at 516-296-9196 or via email at [kpatterson@cullenanddykman.com](mailto:kpatterson@cullenanddykman.com), or Diana Acosta at 516-357-3739 or via email at [dacosta@cullenanddykman.com](mailto:dacosta@cullenanddykman.com).

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