Case Note: Supreme Court of South Carolina Rejects Tort of Negligent Enablement

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By Alvin C. Harrell

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I. Introduction

The recent emergence of lawsuits alleging that a creditor negligently enabled an identity thief to utilize the identity of an innocent victim, thereby facilitating a scheme to fraudulently obtain credit in the victim's name, has become an important factor in the developing law of privacy, and has also called into question long-standing principles governing the duties of commercial enterprises to non-customers and the public at-large.

Creditors who have been found to extend credit to imposters in bogus transactions must surely feel frustrated when their credit losses are compounded by litigation expenses and potential liability to the persons whose identities were used by the imposters. Yet the consumer whose identity was stolen may feel even more frustrated at the time and expense needed to reconstruct his or her financial affairs after the devastation caused by an identity thief.

Various causes of action and other remedies are available to the consumer whose identity was stolen, and among the most creative and (from the plaintiff's perspective) promising has been the tort of negligent enlargement. This action potentially overcomes a primary hurdle for plaintiffs seeking to recover tort damages from creditors with whom the plaintiff has not dealt. The lack of any general duty of a business to protect the finances of non-customers. This is an issue that arises periodically in other contexts, e.g., lawsuits against banks to recover money wrongfully appropriated from third parties by bank customers using checking accounts or other banking transactions.

In the latter context, the Uniform Commercial Code provides an extensive structure of rules governing forgeries, alterations, and risk allocations for various types of wrongfulness actions and transactions. But these are largely limited to transactions created by contract. Courts have been reluctant to extend duties of care beyond this, e.g., to broadly cover non-customers. This reluctance continues to the present day, and (as noted below) is evident in a review of the case law. So the impact of newly-emergent identity theft cases has been closely watched by many observers, in an effort to answer the question: Will the compelling facts and plight of identity theft victims lead the courts to reverse time-honored principles of law and impose a broad new duty of care in favor of non-customers?

II. Recent Case Law, Traditional Rules

A brief review of some recent cases will serve to summarize the traditional state of the law. One of the best recent cases is , where a bank customer opened a fraudulent deposit account in the name of a large finance company, e.g., lawsuits against banks to recover money wrongfully appropriated from third parties by bank customers using checking accounts or other banking transactions.


In the Fourth Circuit, the U.S. Court of Appeals held that Federal Reserve Board Regulation J (essentially incorporating UCC Article 4A) did not limit an investor's negligence claims, because Regulation J governed only the wire transfer and not the bank customer's deposit account relationship. Since the investor's claims related to the opening of the deposit account, they were outside Regulation J and there was no pre-emption. However, the investor's claims related to the bank's duty of care, and the Fourth Circuit was very clear in recognizing that the bank has no such duty as to third parties who are not customers of the bank.

A recent case from the U.S. District Court for the Southern District of New York, , is likewise clearly recognized that a bank owes no duty to a noncustomer, this time in the context of a UCC Article 4A funds transfer.

This case was argued by an attorney with the American Bankers Association, a member of the ABA National Council, and a member of the governing committee for the American Bankruptcy Institute.

In conclusion, it is clear that the law still is not clear on this issue, and that further development is likely to come from the courts.

Patrick decision does not adequately address the great mass of authority to the contrary, cites no compelling authority in support of allowing improper checks on the Cleary and cited a variety of other contextualities, considering the issue of Western's liability and the lack of loan for the imposition of a duty of care. The decision continues effect as legal precedent, at least outside Alabama.
to adopt policies designed to identify and, (2) adopted policies designed to result in the issuance of cards without any verification of identity, and (4) attempted to collect the debts from an innocent victim (Huggins). As a result, Huggins asserted, his credit was damaged, and he was "hounded by collection agencies," distressed, and embarrassed.13

The case was filed in the district court, and the Banks moved a motion on grounds on which Huggins was not their customer and they have no duty to protect customers from fraud by third parties. As a question of state law, that issue was certified to the Supreme Court of South Carolina. The Supreme Court agreed to determine, in a summary manner, whether the Banks owed a duty of care to the noncustomer plaintiff.14

The South Carolina Supreme Court considered the case law and other authorities defining the basic nature of a "duty" in the law of torts, noting that a negligence duty cannot arise without some legal or recognized relationship between the parties. Forbiddance alone is not sufficient. The Court cited with approval cases holding that credit card issuers are not liable to noncustomers for losses caused by an identity thief.15 While noting that identity theft is a growing problem and (noting various alternative statutory remedies), the Court was unwilling to create a new sort to shift the financial loss to the Banks, who were also victimized and had no duty to protect the plaintiff. Thus, the Court specifically held that South Carolina does not recognize the tort of negligent enforcement of improper credit card use.16

IV. The Murray Case

It is ironic, in view of the clear and well-supported decision by the Supreme Court of South Carolina in Huggins, that only months earlier the court of appeals of South Carolina had reached a contrary result on indisputable facts, in Murray v Bank of America.17

In Murray, the identity theft victim (Murray) suffered damages when he lost her driver's license and social security card and these were used by an impostor to open a bank account in Murray's name. Murray had no customer or other relationship with the bank at that time. When he discovered the fraud, he contacted the bank and the Murray court addressed this issue, but resolved it in a manner that can only be viewed as extraordinary, reasoning that a sufficient relationship was created between Murray and the bank when she notified the bank of the identity theft and demanded that the bank close the impostor's account.18

This may be the first case where a plaintiff's demand for a refund constituted a relationship sufficient to create a substantive duty of care, as a basis for the remedy. If this is upheld, it would seem that any prospective plaintiff could create a duty of care simply by demanding compensation. In view of Huggins and similar caselaw elsewhere, as well as obvious weaknesses in the Murray line of reasoning, it seems unlikely the Murray rationale will withstand further scrutiny. It may well be that Murray prompted the South Carolina Supreme Court to set the record straight in Huggins.

V. Conclusion

Huggins is undoubtedly a major disappointment for those who view banks and other creditors as a deep pocket to compensate the victims of identity theft. The banks have no duty to care to noncustomers, and the damages and frustration that can be inflicted on identity theft victims. But the tougher question is whether the lack of substantive duty of care for banks to protect their customers, in whom some cases already suffered losses greater than the person whose identity was stolen. At a more fundamental level, should the courts reject the prevailing-basically practical basis that a private entity does not owe a duty of care to protect its customers from fraud by third parties?

Many of the eighty-two thieves whose RALs were issued in Alaska had also secured RALs in one or more previous years. The Seventh Circuit had no trouble concluding that these taxpayers had indeed obtained RALs in a legitimate course. All RALs at issue had been involved in the procedure explained above, as for these report winners, the thirty-day limit was easily satisfied. It was with regard to the first district entity issues that the Seventh Circuit had a problem. Since the Seventh Circuit decided that ordinary course is established by the terms of the agreement between the borrower and the card issuer. Because the first district entities' payments at issue followed the terms of the applicable contract, the Seventh Circuit concluded that such payments did not amount to avoidable preferences.

On the remaining issue, the critical question was whether the banks' participation in a credit card purchase was an "arm's-length" transaction. The Seventh Circuit ruled that the banks' performance was not an arm's-length transaction because the banks' involvement in the purchase was not independent of the borrower's personal relationship with the borrower, nor was it independent of the bank's own benefit from the transaction. Thus, the Seventh Circuit held that the banks were not entitled to avoidable preferences. The Seventh Circuit's ruling in Huggins addressed all three issues. For Issues 2 and 3, these doctrines of the applicability law must be considered in an understanding of the importance of the Seventh Circuit's ruling.

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