No. 124792

IN THE
SUPREME COURT OF ILLINOIS

STANLEY M. SMITH, EXECTUOR OF THE ESTATE OF JAMES Q. WHITAKER and PATHOLOGY INSTITUTE OF MIDDLE GEORGIA, P.C.,	*Plaintiffs, Appellants,*
	v.
WEDBUSH SECURITIES, INC.,	*Defendant, Appellee*.

On Petition for Leave to Appeal from the Appellate Court of Illinois,
First District, No. 1-18-1455
On Appeal from the Circuit Court of Cook County, Illinois
Law Division, No. 2015 L 2617

REPLY BRIEF OF PLAINTIFFS-APPELLANTS, STANLEY M. SMITH, EXECTUOR OF THE ESTATE OF JAMES Q. WHITAKER and PATHOLOGY INSTITUTE OF MIDDLE GEORGIA, P.C.

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POINTS AND AUTHORITIES

ARGUMENT

Judgment entered after a bench trial on Appellants' Article 4A claims and the trial court's decision to exclude Appellants' Trial Exhibit 11 should be reversed in favor of Appellants.

I. Wedbush is engaged in the business of banking.

The root of this appeal involves the scope of Illinois' Article 4A and whether it applies to Wedbush, a futures commission merchant. Appellants deposited funds with Wedbush, Wedbush directed Appellants' funds, and Wedbush exclusively handled funds transfers directly with Appellants. Therefore, Article 4A applies to Wedbush and the several fraudulent wire transfer requests it processed out of Appellants' accounts. This Court should reverse the judgment below to correct the blatant errors made by the trial court in interpreting Article 4A, which were perpetuated by the appellate court.

A. The principles of statutory interpretation support Appellants' position that Article 4A applies to Wedbush.

The "purpose of statutory construction is to give effect to the intent of the legislature and that this intent is best ascertained from the plain language of the statute." People v. Ross, 168 Ill.2d 347, 350 (1995). If a statute's meaning is unclear, then the court must look to other sources to determine the legislative intent, such as committee comments to the statute. Id. at 352. It is "common practice for courts to refer to" comments specifically provided by a committee drafting legislation. Ketchmark v. Lynch, 107 Ill.App.2d 36, 41 (3d Dist. 1969). While statutory comments are not binding, this Court has indicated such comments are "persuasive authority." People v. Ross, 168 Ill.2d at 352.

A proper application of these statutory construction principles by reviewing the intent of the Article 4A drafters set forth in the official comments leads us directly to the

result we ask this Court to adopt. Article 4A applies to Wedbush because Wedbush is a financial institution which acted on behalf of customers in funds transfers. See, 810 ILCS 5/4A-105(a)(2); 810 ILCS 5/4A-204(a).

Following the rules of statutory construction, Appellants have always maintained that the statute itself and the official comments provide the best indication of the committee's intention for Article 4A's scope. Article 4A defines "bank" as "a person engaged in the business of banking. . . ," but it does not define what it means to be engaged in the business of banking. 810 ILCS §5/4A-105(a)(2). Language in other 4A provisions and the drafters' comments, however, provide guidance as to what that means. The scope of Article 4A is set forth in the language of the statute itself, which specifically states, "this Article applies to funds transfers." 810 ILCS §5/4A-102. The drafters of Article 4A expand, in the comments, the "bank" definition to apply to "institutions that are not commercial banks" and further state that the "definition reflects the fact that many financial institutions now perform functions previously restricted to commercial banks, including acting on behalf of customers in funds transfers." 810 ILCS §5/4A-105, Cmt. 1. Courts have concluded that using the word "including" is meant to expand or enlarge a meaning as opposed to make it more restrictive. Gem Electronics of Monmouth, Inc., 286 Ill.App.3d 660, 667 (4th Dist. 1997). As such, the language in the definition itself taken together with the comments indicate a clear direction that financial institutions other than just traditional banks were intended to be covered by Article 4A.

Appropriate consideration for a court to undertake in statutory construction is the "occasion and necessity for the law, the previous condition of the law on the subject, and the defects, if any, in the former law which were intended to be remedied." People ex rel

Cason v. Ring, 41 Ill.2d 305, 310 (1968). Further, where words appear the same or substantially the same in different parts of the same statute, they will be given a consistent meaning only where the legislative intent is not clearly expressed to the contrary. In re Tax Deed, 311 Ill.App.3d 440, 444 (5th Dist. 2000). Finally, a statute must be interpreted so as not to render any part "superfluous or meaningless." Id. at 443.

Contrary to these rules of statutory construction, Wedbush has always ignored the plain language and the official comments in an attempt to assign a much narrower scope to Article 4A. Wedbush argues that 4A does not apply here because Wedbush did not offer traditional banking services. If this limited interpretation were intended, however, the drafters would not have specifically referenced the inclusion of non-commercial banks in the comments. See, 810 ILCS §5/4A-105, Cmt. 1.

A look at Article 4A's comments addressed the "recent and developing technological changes" with funds transfers at the time of its enactment and the concern that "[j]udicial authority with respect to funds transfers [was] sparse, undeveloped and not uniform." 810 ILCS §5/4A-102, Cmt. The drafters' explain that 4A was enacted to provide a new set of rules applicable to funds transfers because existing laws under Article 4 (governing deposit accounts) were insufficient. Id. Wedbush completely disregards these comments and instead points to other definitions in other Articles in the UCC having different scopes. As further explained below, the definition "bank" is intended to be interpreted separately under each Article of the UCC.

B. An entity can be engaged in the business of banking under Article 4A but not necessarily under Article 3 or 4.

Appellants' position is founded on each Article of the UCC covering different subject matters or transactions. What constitutes a bank under Article 4A is different than

what constitutes a bank under Articles 3 and 4, so Wedbush may be considered a bank under Article 4A but not under Articles 3 and 4. Wedbush's reliance on Articles 3 and 4 is unsupported, therefore, Wedbush's mischaracterization of the purported predicate acts for Article 4A should be ignored. Wedbush cites no authority for the relevance of Articles 3 and 4 in Article 4A cases, and further Wedbush claims Appellants provide no "reasoned explanation" for supporting the different applications of "bank" in the varying UCC Articles; however, that is not the case. Appellants have always maintained that Article 4A provides the very support Wedbush claims is lacking.

In fact, 4A specifically describes that "attempts to define rights and obligations in funds transfers by general principles or ***by analogy to rights and obligations in negotiable instrument law or the law of check collection have not been satisfactory***." 810 ILCS §5/4A-102, Cmt. (emphasis added). Prior to Article 4A's enactment, judges were left to resort to "general principles of common law or equity" or "guidance in statutes such as Article 4 which are applicable to other payment methods." Id. Article 3 covers negotiable instruments and does not apply to payment orders governed by 4A (810 ILCS §5/3-102); Article 4 covers bank deposits and collections (810 ILCS §5/4-102); and Article 4A covers funds transfers (810 ILCS §5/4A-102). These three Articles govern separate and distinct types of payments and should be construed differently. The unjust result in this case is the very reason why the definition of "bank" applied in a fraudulent funds transfer case under 4A should be construed differently than the same definition in a fraudulent check indorsement case under Article 3 or 4.

The intended scope of sections 202 and 204 under Article 4A applies to unauthorized wire transfers processed by a financial institution without security procedures

in place to protect its customers, and here, we have that exact situation. Yet, Appellants are unable to recover its lost funds due to the lower court's misapplication of the law requiring "a high level of involvement in customers' financials, usually including checking. . . ." A3. Appellants agree that this Court may look to cases from other jurisdictions; however, the important difference is that Appellants find support from Article 4A cases in other jurisdictions, while Wedbush wrongly refers to Article 3 and 4 cases in other jurisdictions. Wedbush relies upon Patrick v. Wix Auto Co. for this proposition, but a close look at the case supports Appellants' view. See, 288 Ill.App.3d 846, 850 (1st Dist. 1997). There, the Illinois court found there were no Illinois cases interpreting the relevant section of Illinois' Article 9, so it looked to cases from other jurisdictions interpreting the same provision of Article 9, not other Articles of the UCC. Id.

Wedbush and both lower courts erred in looking to cases from other jurisdictions interpreting Articles 3 and 4, rather than looking to Article 4A cases from other jurisdictions. As the decisions below in this case demonstrate, reference to Articles 3 and 4 produce an entirely different, incorrect, and unjust result. An entity that is considered a "bank" under Article 4A may very well *not* be considered a "bank" under Article 3 or 4. However, per Wedbush's argument and the lower courts' reasoning, an entity can only be considered a "bank" under 4A if it is also considered a "bank" under 3 and 4.

At no time does Wedbush argue they are not a financial institution. The consequence in this case is that a financial institution such as Wedbush, which directed funds out of its customers' accounts pursuant to unauthorized wire transfer requests, is not liable to refund that money simply because it is not a traditional bank, and the lower courts should be reversed to correct this misapplication and misinterpretation of the law.

Wedbush claims that Appellants' position makes Article 4A's reach too broad because it would cover anyone processing funds transfers and uses far-fetched examples. Wedbush's position is flawed as it ignores a major prerequisite. Only financial institutions can fall within the realm of Article 4A by virtue of the definition of "bank." See, 810 ILCS §5/4A-105, Cmt. 1. Wedbush argues it does not fit into any of the enumerated examples set forth in Article 4A's "bank" definition (savings bank, savings and loan association, credit union, or trust company), but Wedbush has not argued it is not a "financial institution," which is included in the "bank" definition, because it simply cannot. Article 4A applies to *financial institutions acting on behalf of its customers* in processing wire transfers. 810 ILCS §5/4A-105, Cmt. 1.

Appellants ask this Court to interpret Article 4A in accordance with the scope and intent set forth explicitly in Article 4A's comments – "[t]he definition reflects the fact that many financial institutions now perform functions previously restricted to commercial banks, including acting on behalf of customers in funds transfers." See, 810 ILCS §5/4A-105, Cmt. 1. Even if this Court adopts a somewhat narrower viewpoint than Appellants have argued, requiring a finding that Wedbush offered more banking services other than acting on behalf of its customers in processing wire transfers, Wedbush provided those banking services as summarized on pages 21-23 of Appellants' Brief.

C. Wedbush's attempts at misdirection should be ignored.

Wedbush tries to avoid coverage under Article 4A by arguing that federal regulations do not require it to have security procedures with its customers; however, whether Wedbush is subject to federal banking regulations or whether Wedbush is required by the CFTC, FINRA, or the SEC to have security procedures has no bearing on whether

Wedbush is subject to Article 4A and liable to Appellants in this case. Article 4A only places the burden on having commercially reasonable security procedures in place with its customers if a financial institution wants to be protected by the safeguards of section 202 and 204. If a financial institution wants to shift responsibility to the customer, then the financial institution must at least offer a commercially reasonable security procedure and prove it processed an unauthorized wire transfer in good faith; in that case, a financial institution is *not* required to refund the customer's money. See, 810 ILCS §5/4A-204(a).

As summarized in Appellants' Brief on pages 23-26, a receiving bank accepting an unauthorized payment order issued in the customer's name is the party liable to refund the payment. Id. at 204(a). Wedbush incorrectly states Article 4A is not applicable if "the *transferor* is not a 'Bank.'" See, Wedbush Brief at p. 11 (emphasis added). However, section 204 requires a *receiving bank,* not a transferor, to refund a customer's money regardless of whether that receiving bank issues a further payment order to an intermediary bank. See, 810 ILCS §5/4A-204(a) (emphasis added). Wedbush received the unauthorized wire transfer requests (i.e., payment orders) from its customers (not BMO) making Wedbush the receiving bank. Therefore, Wedbush is the party liable for a refund, regardless of what federal regulations require of Wedbush. R754-755.

Wedbush's characterization of itself as an agent is dishonest, and clarification is warranted. Aside from the fact that Wedbush (not BMO) was the entity responsible for sending account statements to Appellants, Wedbush did much more than merely act as Appellants "agent by receiving the wire transfer requests and forwarding the requests to BMO Harris for processing." Wedbush Brief at p. 21. Wedbush misleadingly describes the fraudulent wire transfers as going straight from BMO Harris to bank accounts in Poland

without any involvement of Wedbush. See, Wedbush Brief at p. 1. However, this is a gross distortion of how the funds transfer process took place.

Appellants' accounts were with Wedbush after Wedbush took over KCG's futures business, and Wedbush supplied the account statements to Appellants (not BMO). E.g., E928-931. In fact, BMO had no communication whatsoever with Wedbush's customers as explained by BMO's employee who testified at trial and stated, "[O]ur customer is Wedbush, so who we interact with is Wedbush." R755. Wedbush employed three departments to oversee wire transfer requests received from its customers before any wire transfer was approved by Wedbush (not BMO). E430-445; R325-332.

Wedbush cannot hide behind its status as an FCM because custody and discretion over funds are irrelevant under Article 4A. Wedbush approved the unauthorized wire transfer requests in this case when it entered the payment orders in the online portal provided by BMO. It is notable that Article 4A focuses only on the "receiving bank" defined as "the bank to which the sender's instruction is addressed" and not on the bank which holds custody of the funds. Id. at 103(a), 204. Nowhere in these definitions is there a requirement to have custody and/or discretion to invest funds. Article 4A's examples of wire transfers depict how there may be intermediary banks, such as BMO, involved between the receiving bank and beneficiary's bank. See, 810 ILCS §5/4A-104, Cmt. 1, Case #3.

Wedbush asserts that it is not subject to federal banking regulations, but it provides no Article 4A support (either in the plain language of the statute, in the comments, or in case law) for how that is relevant to this case. In Gold v. Merrill Lynch & Co., the Arizona court applied Article 4A to Merrill Lynch, a brokerage firm, and the court did not find the

argument that Merrill Lynch was not a state chartered bank persuasive because "[t]he legislature could not have intended the definition of bank under [Arizona's Article 4A] to be so narrow as to only include state chartered banks. . . ." 2009 WL 2132698 at *6, No. 09-318-PHX-JAT (D. Ariz. Jul. 14, 2009). Similarly, Illinois' Article 4A is not limited to state or federal regulated banks as Wedbush attempts to argue here.

Finally, Wedbush's argument that other causes of action were not precluded by Article 4A fails. The cases relied upon by Wedbush provide that Article 4A does not preempt common law claims in certain situations where Article 4A does not contain a provision that is applicable. Sheerbonnet Ltd. v. American Express Bank Ltd., 951 F.Supp. 403, 406-408 (S.D.N.Y. 1995) (reasoning that Article 4A did not cover claims for conversion, tortious interference with contract, and unjust enrichment so those claims were not precluded by 4A); Regions Bank v. Provident Bank, Inc., 345 F.3d 1267 (11th Cir. 2003) (concluding that claims involving the knowing acceptance of illegally obtained funds via wire transfer were not preempted by Article 4A). Wedbush again ignores that here we have a provision of 4A that is directly applicable. See, also, Prima Donna Development Corp. v. Wells Fargo, N.A., 42 Cal.App.5th 22, (2019) (reasoning that California's Article 4A preempts common law claims for the processing of an unauthorized wire transfer relying upon Article 4A's official comments indicating 4A is "intended to be the exclusive means of determining the rights, duties and liabilities of the affected parties in any situation covered by particular provisions of the Article").

Section 204 provides the remedy for an unauthorized wire transfer wrongfully processed under section 202. 810 ILCS §5/4A-204(a). That is exactly the situation in this case. Wedbush wrongfully accepted a payment order (wire transfer request) from the

hackers purporting to be Appellants, and Wedbush processed the order by having Wedbush employees enter the information into the BMO online portal. Because we have a provision in Illinois' Article 4A that directly applies, there can be no other common law claims that apply. Wedbush's implication that there may be remedies under other laws and regulations is a distraction as they cannot be supported by the facts of this case.

II. Exhibit 11 was properly authenticated under the rules applicable to private websites, and it may be considered by this Court.

As a condition precedent to admission into evidence, a document must be authenticated "by evidence sufficient to support a finding that the matter in question is what its proponent claims." Ill. R. Evid. 901(a). An example of a method for authentication of a document is testimony from a witness "that a matter is what it is claimed to be." Ill. R. Evid. 901(b)(1). Wedbush's position that a private website may only be authenticated by the person responsible for the website or a "webmaster" is contrary to the basic rule of authentication and if adopted would drastically reduce the availability of potential evidence for use in litigation.

Appellants' Exhibit 11 was a printout of an excerpt from Wedbush's website listing the banking services offered by Wedbush, and it contained a date and uniform resource locator (URL) where the website could be accessed. E79. Appellants proffered Exhibit 11 at trial through testimony from Dr. Whitaker who testified regarding when he viewed the website (in November 2014) and when he printed the website (November 24, 2015). R196-197. Contrary to what Wedbush states, Appellants have never claimed, and do not now claim, Exhibit 11 is a screenshot, and Appellants have never claimed, and do not now claim, Exhibit 11 is self-authenticating.

Wedbush erroneously analogizes the authentication issues involved in screenshots of social media websites to printing websites. A more correct analogy, however, is set forth in In re Marriage of LaRocque, wherein a husband proffered an exhibit which consisted of printouts of text messages with his wife during their divorce proceedings. 2018 IL App (2d) 160973 at ¶29. The appellate court affirmed the trial court's admission of the exhibit. Id. at ¶78. The court reasoned that the husband had properly identified and authenticated the exhibit "by establishing that they accurately depicted messages that the parties sent each other." Id.

Here, Exhibit 11 was proffered during testimony from Dr. Whitaker who identified that he went to Wedbush's webpage and printed it out. Further, he testified regarding when he accessed the website in November 2014 versus when the website was printed on November 24, 2015, the latter of which is identified on Exhibit 11 itself. R196; E79. Appellants did not depose Wedbush's webmaster because they were not required to do so under the Illinois Rules of Evidence for authentication. Appellants did, on the other hand, meet the authentication requirements through testimony from a witness identifying that the exhibit was what he claimed it to be – a printout of a webpage he visited.

Wedbush claims this Court may not consider Exhibit 11, and in making such contention cites to an unsupportive, unpublished Order that merely states evidence not appearing in the record on appeal because it was never before the jury cannot be considered on appeal. People v. Bergamino, 2015 IL App (1st) 142387-U at ¶57 (involving a criminal sexual assault proceeding during which the defendant sought to rely upon inadmissible evidence consisting of answers to questions on an intake form at a spa visited by the victim which were submitted to the court under seal and ultimately excluded from evidence).

Here, however, Exhibit 11 was available to all of the parties involved, and the trial court ultimately ruled it was inadmissible. Exhibit 11 is rightly part of the record on appeal accessible at E79. Moreover, Appellants are appealing the admissibility of Exhibit 11, and if the exclusion of Exhibit 11 is overturned by this Court, this Court is entitled to rely upon the exhibit substantively as further evidence supporting Appellants' argument that Wedbush provides many other banking services.

III. This Court should reverse judgment under 4A and find in favor of Appellants on all issues in the interest of judicial economy.

Wedbush argues this Court should remand to the trial court to decide the disputed factual issues. In the case law relied upon by Wedbush, there are yet again distinguishing factors not applicable here.

In Village of North Aurora v. Anker, the defendant was charged with violating a vehicle-weight ordinance, but the trial court concluded the ordinance was unenforceable and did not decide the merits of the ordinance violation. 357 Ill.App.3d 1049, 1057 (2d Dist. 2005). The defendant was acquitted and did not present any evidence regarding the issues involved with the alleged ordinance violation. Id. An analogous situation here would be if the issues of commercial reasonableness, good faith, and damages were not even considered at trial because the court had initially determined 4A did not apply; however, that is not what transpired. During four full days of trial, numerous witnesses testified, and an abundance of evidence was presented on *all* issues. There is no reason for a remand given that the entire record is available.

Moreover, contrary to Wedbush's assertion, Krasnow v. Bender is supportive of our position that all issues herein may be determined by this Court. In that case, the

dismissal of the underlying action in Krasnow v. Bender had no bearing on the appeal of the issuance of sanctions for behavior during the underlying lawsuit. 78 Ill.2d 42, 47 (1979). The issue on appeal was whether sanctions were warranted and therefore did not involve the factual issues of the underlying personal injury action, which were not tried because the case had settled. Id. Other appeals to this Court have applied the interests of judicial economy. In Geary v. Dominick's Finer Foods, Inc., this Court resolved issues not addressed by the appellate court because the issues were fully addressed in brief and judicial economy was favored. 129 Ill.2d 389, 407 (1989).

Here, all factual issues were tried, and Appellants have briefed all issues.[1] Appellants cannot comprehend any rational reason to remand the issues that have already been tried.

[1] Wedbush argues Appellants have not appealed the issues of commercial reasonableness, good faith, and damages because they are not part of the issues presented. It is unclear to Appellants how an appeal of issues not decided by the trial court can be pursued other than by making the argument that the opposite result should have occurred, as addressed on pages 26-38 of Appellants' Brief.

CONCLUSION

For the reasons set forth above, Appellants request this Court to reverse the judgment entered by the trial court and affirmed by the appellate court on Appellants' Article 4A claims and enter judgment in favor of Appellants finding that Wedbush did not have a commercially reasonable security procedure and failed to prove it processed the unauthorized wire transfers in good faith and awarding all damages sustained and sought by Appellants; to reverse the trial court's exclusion of Trial Exhibit 11; and to grant such other and further relief as this Court deems just and appropriate.

STANLEY M. SMITH, EXECTUOR OF THE ESTATE OF JAMES Q. WHITAKER and PATHOLOGY INSTITUTE OF MIDDLE GEORGIA, P.C.

By: */s/ Jennifer J. Gedville*
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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, this Rule 341(c) certificate of compliance, and the certificate of service, is 14 pages.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, that on December 23, 2019, a copy of the foregoing Reply Brief of Plaintiffs-Appellants was filed and served upon the Clerk of the Illinois Supreme Court via the efileIL system through an approved electronic filing service provider and served on counsel of record below via email.

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

Additionally, upon its acceptance by the Court's electronic filing system, the undersigned will send thirteen copies of the Reply Brief to the Clerk of the Supreme Court of Illinois, Supreme Court Building, 200 East Capitol, Springfield, Illinois 62701.

/s/ Jennifer J. Gedville
Jennifer J. Gedville