

February 20, 2007

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**Re: *Commerce Bank/Delaware v. Natasha J. Brown***  
**Case No.: 2005-10-490**

**Date Submitted: Monday, February 12, 2007**  
**Date Decided: February 20, 2007**

**LETTER OPINION**

Dear Counsel:

Trial in the above captioned matter took place on Monday, February, 12, 2007 in the Court of Common Pleas, New Castle County, State of Delaware. Following the receipt of evidence and testimony the Court reserved decision. This is the Court's Final Decision and Order.

**I. PROCEDURAL POSTURE**

Plaintiff, Commerce Bank/Delaware North America ("Commerce") initially filed a civil complaint against defendant Natasha J. Brown ("Brown") on October 28, 2005. Commerce seeks judgment in the amount of \$4,020.11 plus costs and interest and alleges that Brown

maintained a checking account with Commerce and has been unjustly enriched by \$4,020.11<sup>1</sup>. this amount purportedly represents a check tendered to the plaintiff by defendant and was allegedly returned unpaid for a stop payment order for insufficient funds (Complaint, ¶ 3-5).

The defendant, Brown, in an Amended Answer dated May 8, 2006 denied all allegations of the complaint. As an affirmative defense Brown claims the transaction for which plaintiff seeks to recover a money judgment were made by means of an ATM Machine using a debit card issued by the defendant. On January 16, 2005 Brown asserts that she became aware of the fraudulent transactions and timely informed the plaintiff of the facts on January 16, 2005. Brown asserts that she also requested Commerce in her answer to investigate the matter and to close her account. Based upon these facts, Brown asserts a maximum liability on her own part from \$50.00 to \$500.00 in accordance with the Electronic Funds Transfer Act (“EFTA”) 15 U.S.C. §1693(g) and regulation (e), 12 CFR 205.6.

Defendant Brown asserts and as part of her counter-claim alleging defendant failed to investigate and violated EFTA and is therefore liable to the plaintiff for money damages citing 15 U.S.C. §1693(a) as well as attorney’s fees, 15 U.S.C. §1693(m)(f).

## **II. THE FACTS**

Brown was the only witness called at trial. Brown is twenty-seven (27) years old and has been employed by Wilmington Trust as an Administrative Assistant for the past three (3) years. Brown previously opened a checking account with Commerce and was issued a debit/ATM card by Commerce which was in her possession in December 2004. Brown, on or about January 14, 2005 went to Commerce to charge a \$5.00 debit to the card at her lunch-break was informed that there was a deficiency balance in the checking account. Brown went to the Talleyville branch of

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<sup>1</sup> As noted below, Commerce withdrew its complaint in writing prior to trial but reserved at trial the right to assert the admission in defendant’s amended answer admitting liability between \$50.00 and \$500.00. The Court therefore proceeded to trial on defendant’s counter-claim only.

Commerce Bank and spoke with “Carla” who agreed to investigate these unauthorized charges, as well as honor her request to close the account. Defendant’s Exhibit No.: 1 was moved into evidence without objection. Defendant’s Exhibit No.: 1 is a Commerce Bank electronic filing and/or e-mail which details a visit by defendant on January 16, 2005 to report her card loss. The “Description of Claim” indicates as follows:

Customer came into speak with a CSR “Carla Bernard” on January 16, 2005 to report her card loss. At this time her account was only showing a negative \$50.00 balance. She told Ms. Bernard that this was not her transaction and to please close this account. Ms. Bernard said that she would do this and that there would be an investigation on the unauthorized transactions. At was at this time also that she had Ms. Bernard change her address. In the meantime, several transactions posted to the account causing a balance of negative \$3,948.11 and this amount has since been charged off on 1/27/05. Natasha Brown never received any notification of this until she received a letter from one of our collection agencies. She is now here to get this resolved.

On the back of defendant’s Exhibit No.: 1 were 26 separate unauthorized transactions at different Mercantile establishments detailing debits with the pin number used on Brown’s debit card charged to Commerce Bank. The first charge was \$501.75 on January 13, 2005 at the W. 9<sup>th</sup> Street branch, Wilmington, Delaware. The Description of the Claim above indicates that Brown arrived at Commerce branch in Talleyville on January 16, 2005 to close her account after the first unauthorized transfer to her checking account on January 14, 2004. Brown asserts at trial that she therefore timely gave notice to Commerce to investigate and requested Commerce to close the debit checking account on January 16, 2004.

At trial Brown also testified she “never heard” from Commerce again until she received a letter in the December 2005 citing a \$4,000.00 deficiency balance.

Brown testified she has encountered numerous difficulties in opening a new checking account at local branches. She married in September 2006. When Brown tried to open a joint

account with her husband at a local Credit Union she was “flagged” at that institution as well as several other local banks which she sought to open a checking account. Brown has now, however, managed to open a Federal Credit Union account, as well as a Wilmington Trust checking account.

On cross-examination Brown testified she received a PIN number from Commerce and “gave the PIN number to no other person”. In December 2004 she resided with Charles Williams, who is now her husband. Brown testified on cross-examination that she was the only person authorized as a PIN user and no one else knew of the card, ‘used the card’, or was provided orally or in writing of the PIN number. Brown spoke with Carla Bernard at the Commerce Bank at the Talleyville branch. Although Brown did not initially fill out a formal report, she did visit Commerce on January 16, 2005 the Talleyville branch and changed her address with Carla. Brown does not recall the last time she ever received a statement from Commerce Bank on her checking account. Brown made no further purchases with the account and she was unaware of the all the “incidents of unauthorized debit charges on her checking account” until she was actually sued by Commerce Bank in the Court of Common Pleas.

### **III. THE LAW**

#### **15 U.S.C. § 1693(g). Consumer Liability:**

(a) Unauthorized electronic fund transfers; limit. A consumer shall be liable for any unauthorized electronic fund transfer involving the account of such consumer only if the card or other means of access utilized for such transfer was an accepted card or other means [means] of access and if the issuer of such card, code, or other means of access has provided a means whereby the user of such card, code, or other means of access can be identified as the person authorized to use it, such as by signature, photograph, or fingerprint or by electronic or mechanical confirmation. In no event, however, shall a consumer's liability for an unauthorized transfer exceed the lesser of—

(1) \$ 50; or

(2) the amount of money or value of property or services obtained in such unauthorized electronic fund transfer prior to the time the financial institution is notified of, or otherwise becomes aware of, circumstances which lead to the reasonable belief that an unauthorized electronic fund transfer involving the consumer's account has been or may be affected. Notice under this paragraph is sufficient when such steps have been taken as may be reasonably required in the ordinary course of business to provide the financial institution with the pertinent information, whether or not any particular officer, employee, or agent of the financial institution does in fact receive such information.

**15 U.S.C. §1693(m) Civil Liability:**

(a) Individual or class action for damages; amount of award. Except as otherwise provided by this section and section 910 [[15 USCS § 1693h](#)], any person who fails to comply with any provision of this [title \[15 USCS §§ 1693 et seq.\]](#) with respect to any consumer, except for an error resolved in accordance with section 908 [[15 USCS § 1693f](#)], is liable to such consumer in an amount equal to the sum of--

(1) any actual damage sustained by such consumer as a result of such failure;

(2) (A) in the case of an individual action, an amount not less than \$ 100 nor greater than \$ 1,000; or

(B) in the case of a class action, such amount as the court may allow, except that (i) as to each member of the class no minimum recovery shall be applicable, and (ii) the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same person shall not be more than the lesser of \$ 500,000 or 1 per centum of the net worth of the defendant; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

**12 C.F.R. § 205.6 Liability of consumer for unauthorized transfers.**

(a) Conditions for liability. A consumer may be held liable, within the limitations described in paragraph (b) of this section, for an unauthorized electronic fund transfer involving the consumer's account only if the financial institution has provided the disclosures required by § 205.7(b)(1), (2), and (3). If the unauthorized transfer involved an access device, it must be an accepted access device and the financial institution must have provided a means to identify the consumer to whom it was issued.

(b) Limitations on amount of liability. A consumer's liability for an unauthorized electronic fund transfer or a series of related unauthorized transfers shall be determined as follows:

(1) Timely notice given. If the consumer notifies the financial institution within two business days after learning of the loss or theft of the access device, the consumer's liability shall not exceed the lesser of \$ 50 or the amount of unauthorized transfers that occur before notice to the financial institution.

(2) Timely notice not given. If the consumer fails to notify the financial institution within two business days after learning of the loss or theft of the access device, the consumer's liability shall not exceed the lesser of \$ 500 or the sum of:

(i) \$ 50 or the amount of unauthorized transfers that occur within the two business days, whichever is less; and

(ii) The amount of unauthorized transfers that occur after the close of two business days and before notice to the institution, provided the institution establishes that these transfers would not have occurred had the consumer notified the institution within that two-day period.

#### **IV. OPINION AND ORDER**

The Court finds based upon the testimony presented herein that defendant in her counter-claim has proven by a preponderance of evidence damages in the amount of \$1,000.00 plus an award of attorney's fees. Clearly, Commerce failed to investigate the unauthorized charges pursuant to 15 U.S.C. §1693(h). Nor did Commerce close the account as detailed in Defendant's Exhibit No. 1. Instead, Commerce sued Brown and then withdrew its claim at trial.<sup>2</sup> The Court finds \$50.00 is the appropriate liability for Brown for the monies charged on her account as set forth within the above statute because she timely notified, in person, Commerce on January 16, 2005. Brown, according to Defendant's Exhibit No.: 1 which is a Commerce E-mail and/or memorandum also requested Commerce to close her checking account. Based upon the trial record, defendant has proven by a preponderance of the evidence damages of \$1,000.00 as set forth in the above statute, 15 U.S.C. §1693(m).

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<sup>2</sup> Plaintiff withdrew its case-in-chief except for the reservation as stated in defendant's counter-claim that liability could exceed \$50.00 to \$500.00.

Mr. Bernstein is requested to file an affidavit of attorney's fees within ten (10) calendar days. Mr. Doughty will then be granted ten (10) calendar days to file a responsive pleading to Mr. Bernstein's application as to whether Mr. Bernstein's fees are reasonable. The Court will then enter a separate Order on Mr. Bernstein's petition for attorney's fees. The Court therefore enters judgment against Commerce in favor of Brown in the amount of \$1,000.00 plus pre and post judgment interest at the legal rate, 6 *Del. C.* §2301 *et seq.* plus costs. Judgment is offset in the amount of \$50.00 in favor of Commerce against Brown's judgment.

**IT IS SO ORDERED** this 20<sup>th</sup> day of February, 2007.

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John K. Welch  
Judge

/jb

cc: Rebecca Dutton, Case Processor  
CCP, Civil Division