

**UNAUTHORIZED WITHDRAWAL OF MONEY FROM CUSTOMER'S ACCOUNT IN
NIGERIA: THE LEGAL IMPLICATIONS FOR THE BANKER/CUSTOMER
RELATIONSHIP**

Dr. Adebayo, Williams Adewumi

LL.B,LL.M, BL., Ph.D

Senior Lecturer, Department of Business and Industrial Law
Faculty of Law, Ekiti State University, Ado-Ekiti, Nigeria

Dr. Filani, Alfred Oluropo

LL.B,LL.M, BL., Ph.D

Senior Lecturer, Faculty of Law, Ekiti State University, Ado-Ekiti

ABSTRACT: *The relationship between Commercial banks and their Customers in Nigeria imposes some duties and obligations on both the banks and the customers. The fundamental duty of a banker to the customer is to ensure the security of the money in the account operated by the customer. The reality in Nigeria is that customer's accounts are daily endangered by the activities of fraudsters facilitated by the use of technological devices. The study examined the liability of parties and how to combat the challenges. The study is doctrinal and the data are obtained from statutes, judicial decisions, textbooks, journal articles, newspapers and materials from the internet. The study found out that unauthorized withdrawal is a breach of the trust of the customer in the banker/customer relationship with severe consequence of destroying the goodwill of the banker and loss of customers. The study concluded that the challenge can be combated by the banks through the use of sophisticated devices to forestall the activities of fraudsters and the detection of the culprits.*

KEYWORDS: banker, recapitalization, countermand, garnishee, cybercrime

INTRODUCTION

The relationship between a banker and a customer is essentially a contractual relationship which prohibits the interference of a third party in the transactions. The relationship is also fiduciary, it is sometime called confidential relationship; when the customer chooses to operate an account with a bank, he/she does so based on the trust and confidence he reposed on that bank. The bank has a duty to exercise a high standard of care in managing the customer's account.¹ The relationship imposes certain duties and obligations on the parties. The bank is required to put in

¹ . *Okobiemen v. Union Bank of Nigeria Plc.* (2018) 21 WRN 170

place adequate facilities, technical expertise and skilled personnel to ensure a hitch-free operation. Unauthorised withdrawal from customer's account has continued to be on the rise as a result of the transition from analog to digital banking, a fact that reduced to the barest minimum the need for physical contact between the customer and the bank. A customer can dispense with the need to visit the banking hall for as long as the relationship lasts because of the digital devices that have made the whole business of banking less cumbersome. The danger inherent in this is that the determination of whether a transaction is mandated or authorized by the customer becomes an arduous task especially where fraudsters have accessed the relevant digital information of a customer from the website of the bank. The fact that withdrawal of money with cards can be done in any Automated Teller Machine(ATM) outlet of any bank and not necessarily from the machine of the issuing bank; and the fact that withdrawal can be made in any location; and the introduction of Point of Sales (POS) through which payment can be made with cards have cumulative effects of imposing upon the banker additional requirement of vigilance to protect the interest of the customers especially in a developing country like Nigeria. The objective of this paper is to fix the liability of the parties and at the same time chart the course for combating the menace. This paper has, therefore, structured the issue for consideration from the perspective of commercial banking operations in Nigeria into the following parts: The first part examined the Commercial banks in Nigeria and the type of accounts prone to unauthorized withdrawals. The legal basis of the relationship between the banker and customer are discussed in the second part. The third part discussed unauthorized withdrawal with a view of identifying the channels and what a victim must do in order to get remedy. The liability of parties and the remedies for unauthorized withdrawal are discussed in part four while the final part is the conclusion and recommendation.

Commercial Banks in Nigeria and Types of Customer's Accounts

The 2005 recapitalization policy of the banking industry in Nigeria scaled down the number of commercial banks in Nigeria to twenty five (25) from eighty nine (89) at the end of the policy which lasted for eighteen months from June 2004 to December 2005. The policy, according to the then Governor of the Central Bank of Nigeria, Professor Charles Chukwuma Soludo was to enable the commercial banks have strong financial base. By the policy, the banks were required to increase their authorized share capital to twenty-five billion Naira (N25b) from the capital base of two and half billion Naira (N2.5b). At the end of the exercise, the operational licences of the banks that were not able to recapitalize were revoked by the Federal Government. Some of the banks that could not mobilise the needed fund from the capital market were either acquired by other stronger banks while some decided to merge to form one strong bank. It was reported that before the exercise, only ten of the banks that existed then were sound. The evaluation showed that the performance of sixty-two(62) of the banks were satisfactory; fourteen (14) were rated as marginal while eleven (11) were rated as unsound while two did not render returns. The banks rated as

marginal and/or unsound were alleged to have exhibited such weaknesses as undercapitalization, illiquidity, weak/poor asset quality, poor earnings.² Twenty-five banks scaled the hurdle at the end of the exercise and later reduced to twenty-three (23). The reduction was due to the merger of First Atlantic Bank Plc. and Inland Bank to form Fin Bank Plc.; Stanbic Bank Limited and IBTC Chartered Bank Plc. merged to form Stanbic-IBTC Bank Plc. The entry of Citibank Nigeria Limited increased the banks to twenty-four (24). The number of banks further reduced with the merger of Access Bank Plc. with Intercontinental Bank Plc.; merger of Ecobank Transnational Incorporated with Oceanic Bank Plc.; merger of First City Monument Bank Plc. with Fin Bank. The Central Bank of Nigeria in 2011 revoked the licences of Bank PHB, Afribank and Spring Bank and transferred their assets to three newly created nationalized banks namely: Keystone Bank, Enterprise Bank and Heritage Bank Plc. As at the first quarter of year 2020, the following are the commercial banks operating in Nigeria:

1. Access Bank Plc.
2. Fidelity Bank Plc.
3. First City Monument Bank Ltd
4. First Bank of Nigeria Plc.
5. Guaranty Trust Bank Plc.
6. Union Bank of (Nig.) Plc.
7. United Bank for Africa Plc.
8. Zenith Bank Plc
9. Citibank Nigeria Ltd
10. Ecobank (Nig.) Plc.
11. Heritage Bank Ltd
12. Keystone Bank Ltd
13. Polaris Bank Ltd
14. Stanbic IBTC Bank Plc
15. Sterling Bank Plc.
16. Standard Chartered Bank
17. Titan Trust Bank Ltd
18. Unity Bank Plc.
19. Wema Bank Plc.
20. Globus Bank Ltd
21. Sun Trust Bank Ltd

² Chukwuma Soludo, *Consolidating the Nigeria Banking Industry to meet the Developmental Challenges of the 21st Century*. Address delivered to the Banker's Committee on 6 July, 2004. Soludo was the Governor of the Central Bank of Nigeria at that time. www.bis.org.> review PDF <accessed 15/12/2020>

22. Providus Bank Ltd

The first eight banks on the list operate as international banks as they have branches in other countries while the next eleven banks are licensed to operate as national banks as they have national spread through branches in many states of Nigeria. The last three on the list are regional banks as their operations are limited within a particular geopolitical zone. Apart from then list of banks above, there are two other commercial banks which are non-interest banks and they are- (a) Jaiz Bank Plc. and (b)TAJ Bank Ltd. There are also merchant banks in the banking sector of the economy apart from the commercial banks. Merchant banks do not provide services to the general public. Merchant banks provide services such as loan services, fund raising, underwriting to corporations and merchants. Merchant bank is defined by the Act³ to mean a bank whose business includes receiving deposits on deposit account, provision of finance, consultancy and advisory services relating to corporate and investment matters, making or managing investment on behalf of any person. By the Act, merchant banks are prohibited from accepting any deposit withdrawable by cheque. They are also not allowed to accept any deposit below an amount prescribed by the Central Bank of Nigeria. They are also prohibited from holding for more than six months any equity interest acquired in a company while managing an equity issue except as stipulated under the Act.⁴ The following are the Merchant Banks in Nigeria:

- (a) Coronation Merchant Bank
- (b) FBN Quest Merchant Bank
- (c) FSDH Merchant Bank
- (d) Rand Merchant Bank
- (e) Nova Merchant Bank

Commercial banks in Nigeria offer services to the general public whether individual, groups, organisations, corporate bodies and government. Individual commercial banks offer different banking products through specialized accounts, however, the following types of accounts are available in all the banks for the safe keeping of monies and other valuables of the customers:

- (a) Savings Account
- (b) Current Account , and
- (c) Deposit Account.

³ .Banks and Other Financial Institutions Act, Cap B1 Laws of the Federation of Nigeria,s.58 (2004)

⁴ . ibid, Section 22

Savings account, conventionally, is the earliest form of account in the banking business in Nigeria. It is an account embraced by low income earners and the common man. The earliest form of savings account was operated with the use of passbook issued to the account owner. The customer presents the passbook to the cashier at the counter after filling the withdrawal or deposit form each time he/she approaches the bank for withdrawal or deposit of money. Information Communication Technology (ICT) has obviated the need for the use of passbook. On the opening of the savings account, the information pertaining to the customer's transaction is now stored in the computer, hence the customer is relieved of the rigour of carrying about a passbook. The customer is notified of the details of transaction through an alert system in which the message is sent to the electronic mail or the cellphone message system. The account can be opened by an individual or jointly by groups of people or an organization. The account was a popular choice in the past because of the interest payable on the outstanding balance usually on monthly basis. Opening of account of any kind is a task handled by the customer's service section. At the section, printed forms are handed over to the prospective customer to fill. One of the forms is the general form like the proposal form which contains questions about the particulars of the customer. Some of the questions relate to the identity of the customer (name, age, sex, occupation, marital status, next of kin, parental information etc.), address, referees, cell phone number, and electronic mail address. Another vital form is the specimen signature form/card where the prospective customer will indicate the acceptable signature that serves as authority to the bank to honour the demand for payment where withdrawal is to be made across the counter. A savings account that is a joint account will also require the mandate as to how many of the signatories should sign before payments can be made. The passport photograph of the applicant or the authorized signatories is usually affixed to the form or scanned for storage in the computer. The information supplied in the forms filled by the customer becomes the terms of contract between the banker and customer. Every account is allotted an account number unique to the customer. At the request of the customer, an automated teller machine (ATM) card may be issued to facilitate withdrawal at any outlet for withdrawal.

A current account is the type of account operated primarily with the use of cheques. Funds in the account are available to the account holder "on demand". The account is available for frequent and immediate access by the account holder. He/she is at liberty to withdraw his/her money or may order the payment of money from the account to a third party. Access may take the form of cash withdrawal or deposit across the counter; unfettered right to withdraw at any Teller Machine with the debit card; electronic transfer of funds and issuance of standing order. The procedure for opening a current account is similar to that

of Savings account except that a customer is issued a booklet of cheque leaves for withdrawal.

Applicants requesting to open any type of account with the bank in Nigeria are required to furnish means of identification such as a valid driving licence, voter's card, international passport, National Identity Card etc. Applicants are also required to supply the electricity bill of their residence. Every applicant is required to fill a referee form which at least two account holders must sign recommending the applicant.

A Fixed Deposit Account is available for depositors of substantial sum of money which is required to be kept for a fixed period of time. The money in the account cannot be withdrawn until the period agreed by the customer and the bank. The account attracts a higher percentage of interest payable upfront or at the end of the agreed period. The account is ideal for employees or businessmen who have a plan in the future for the money.

The banker cannot deal with the customer's account in a way contrary to the contractual terms agreed upon at the period of opening the account. Apart from the conventional accounts, banks have devised different banking products to cater for interest of customers. The underlying basis for whichever account that a customer operates is the protection of the interest of the customer against unauthorized withdrawal from the account. The banker has a duty just as the customer is under certain obligations to ensure that the account is not endangered by the activities of a stranger.

The Legal Basis of the Relationship Between a Banker and a Customer

The relationship between a banker and a customer is basically contractual and fundamentally that of a debtor and a creditor.⁵ The relationship that subsists between the parties can be viewed from other legal angles but in all cases, the relationship of the parties can be interpreted and has been interpreted severally by the courts using the nature of the transaction as parameter. The following are some of the relationship which subsists between a banker and a customer:

3.1.1 The Relationship of Debtor and Creditor- The relationship between a banker and a customer is that of a debtor and a creditor and it is founded on a simple contract. It is now settled that the relationship between a banker and a customer where a bank accepts money either in current or deposit account from its customer is a relationship of debtor and

⁵ .K.I. Igweike, Law of Banking and Negotiable Instruments 73.(Rev .ed. African First Publishers Ltd 2005)

creditor. The relationship is essentially contractual.⁶ The money of the customer with the bank is deemed to be owed and the customer has the right to demand the money from the bank whenever he needs it and the banker must repay the sum including the accrued interest.

The relationship is sometimes reversible with the banker becoming a creditor and the customer a debtor and this is so where the customer has been granted a loan or overdraft facility.

The Relationship of Pledgor and Pledgee- A customer becomes a pledgor/mortgagor where the customer has executed a deed of pledge or mortgage in favour of the bank over his property as collateral for a loan. In this situation, the bank becomes the pledgee or mortgagee. By this arrangement, the asset furnished as security or collateral will remain with the banker until the customer has repaid the sum obtained as loan. On the repayment of the loan, the banker has a duty to execute a 'Deed of Release' of the document to the customer.

Bailor and Bailee- A bailment is the relationship established when someone entrusts his property temporarily to someone else without intending to give up title. It is the rightful possession of goods by one who is not the owner. For instance the courier companies are considered as bailees for the period they are in possession of the goods in their possession while the owner of the goods is the bailor under the contract of bailment. Apart from the money kept with the bank by a customer, documents such as title deeds, share certificates, academic certificate etc. may be deposited with the bank for safe-keeping. The bailee is under obligation to take reasonable care of the property.

Agent and Principal- The relationship between a banker and a customer may be interpreted as that of the agent and the principal. The customer is the principal and the banker as the agent. A banker is an agent to the customer while performing some services on behalf of the customer such as standing order for a periodic payment of wages and salaries; collection of payments on behalf of the customer; discounting of bills; sale or purchase of securities on behalf of the customer etc.

Donor and Donee- A customer may grant a power of attorney to the banker to manage or dispose of a real property on his behalf. The customer under the circumstance is the donor while the banker is the donee.

⁶. *Union Bank of Nigeria Plc. V. Victor Olaitan Idowu* (2017) 2WRN 168 (Nigeria); *Ekpenyong v. The State* (1967)1 A.N.L.R 28(Nigeria); *Balogun v. The National Bank of Nigeria Ltd* (1978)3 S.C 155(Nigeria)

The relationship between a banker and a customer creates duties and rights for the parties. The banker enjoys some rights while at the same time certain duties are imposed on him by virtue of the relationship. The following are some of the duties of the banker to the customer:

Secrecy- The relationship between the banker and customer is strictly between the parties; hence the banker has a duty to keep secret the details of the relationship. The details of transaction and other particulars of the relationship are to be kept from public domain. It is an implied term of the contract between a banker and his customer that the banker will not divulge to a third party the state of the customer's account and the information relating to the customer acquired through the keeping of the account.⁷ The duty is not absolute but qualified as it admits of some exceptions in the following circumstances:

Disclosure required under the law-The banker may be compelled under the law to disclose certain information about the account of a customer. This is the case where there is the need to prevent fraud or other criminal activities. The Money Laundering Act⁸ provides

(1)A transfer to or from a foreign country of funds or securities by a person or body corporate including a Money Service Business of a sum exceeding US\$10,000 or its equivalent shall be reported to the Central Bank of Nigeria, Securities and Exchange Commission in writing within 7 days from the date of the transaction.

(2)A report made under sub-section (1) of this section shall indicate the nature and amount of the transfer, the names and addresses of the sender and the receiver of the funds or securities.

(3) Transportation of cash or negotiable instruments in excess of US\$10,000 or its equivalent by individuals in or out of the country shall be declared to the Nigerian Customs Service.

The disclosure required by the Money Laundering Act is not limited to foreign transactions. A financial institutions and designated non-financial institutions are obliged

⁷ . *Tournier v. National Provincial Bank and Union Bank of England (1924) 1 KB 461. See also Igweike (supra)p.83; Contemporary Issues in Law of Banking and Negotiable Instrument, 45-49 B. Abegunde and W. Adebayo (eds.)*

⁸ . Money Laundering (Prohibition) Act No. 11, s.2 (2011)

to report to the Economic and Financial Crimes Commission (EFCC) any single transaction, lodgment or transfer of funds by an individual in excess of Five Million Naira within 7 days, and in the case of a body corporate, a report must be made to the Commission within 30 days of a transaction in excess of Ten Million Naira.⁹

The Commission, Agency, Central Bank of Nigeria or other regulatory authorities pursuant to an order of the Federal High Court obtained upon an *ex-parte* application supported by a sworn declaration made by the Chairman of the Commission or an authorized officer of the Central Bank of Nigeria or other regulatory authorities justifying the request, may in order to identify and locate proceeds, properties, objects or other things related to the Commission of an offence under the Act, the Economic and Financial Commission (Establishment) Act or any other law place any bank account or any other account comparable to a bank account under surveillance; obtain access to any suspected computer system; obtain communication of any authentic instrument or private contract, together with all bank, financial and commercial records, when the account, telephone line or computer system is used by any person suspected of taking part in a transaction involving the proceeds of a financial or other crime.¹⁰

Disclosure required by the order of court- A banker may be compelled by the order of the court in civil or criminal proceedings to disclose information pertaining to a customer's account. A Police officer or an officer of any of the security agencies empowered to that effect may in the course of investigation of an alleged crime obtain the order of the court to access the information relating to the account of a customer. Also, a party in a civil proceeding, as to whether a contractual debt has been liquidated or not, may obtain the order of the court to enable him/her access the information on the account of a customer.

Where the bank owes a duty to the public to do so- The duty a banker owes to the public overrides the duty to the customer. National security, public safety and order, and the need to eliminate corrupt practices from the system are among some of the factors for the enactment of the Money Laundering (prohibition) Act, the Economic and Financial Crimes Commission Act¹¹, Advanced Fee Fraud Act¹² etc.

Disclosure in the interest of the bank- The duty to keep secret the information of a customer's account may be waived where the duty conflicts with the interest of the bank. For instance where there is a dispute between the bank and the customer on the repayment

⁹ . MLA,s.10(1)

¹⁰ .MLA,s.13

¹¹ . Cap E.1 LFN, 2004

¹² Cap A6 LFN 2004

of facility granted by the bank, the bank may disclose the information in the course of the proceeding before the court. The statement of account and the evidence of transactions on the particular account will be necessary to resolve the issue. A guarantor or a surety has the right to know the extent to which his guarantee is being relied upon.

Express or implied consent of the customer to disclose- A banker may disclose the information of a customer's account where the customer has authorized or consented to the disclosure. For instance, in Nigeria, a prospective customer seeking to open a bank account would be required to indicate in the application form the names and account number of at least two referees who have bank accounts. The referees are also required to endorse the forms supplied by the bank to the customer. The details of the referees voluntarily given are considered as authority to investigate or verify the account of the referees.

Duty to honour customer's cheque- A banker has a duty to honour the cheque drawn by a customer who is a current account holder provided the cheque is validly drawn and there is sufficient credit to meet the demand of the customer.¹³ Therefore, when there is sufficient and available fund in customer's account and a cheque is presented but payment is refused, the holder is entitled to treat the cheque as dishonoured, even if requested to represent¹⁴. Furthermore, the right is exercisable where the cheque does not suffer any disability such as discrepancy between the amount in words and figures, irregular signature, unendorsed material alteration etc. The following are the exceptions to the duty:

Countermand of payment- This is an official instruction by the customer after a cheque has been validly issued and before presentation at the counter, directing the bank not to honour the cheque. The instruction must be communicated verbally or in a written form. It is required after the verbal information for a written message to be forwarded either through electronic means or by a letter posted. The countermand instruction must state the particulars fully, that is, the name on the cheque, the cheque numbers, the amount, the date. In *Nwandu v. Barclays Bank DCO*¹⁵, the plaintiff issued a post-dated cheque for a certain amount of money but before presentment, he made valid countermand of the cheque. The bank negligently honoured the cheque on presentment and the plaintiff demanded for the refund of the sum paid by the bank and to be re-credited to his account. The court held that the countermand was valid and that the bank was liable. Information Communication Technology (ICT) and its application to the banking business in Nigeria have cast a doubt as to the efficacy of countermand order nowadays. This is because countermand is effective

¹³ .*Onyechi v. National Bank of Nig. Ltd* (1977) 1 A.N.L.R 296

¹⁴ . *UBN v. Chimaeze* (2016) 20 WRN 77

¹⁵ . (1962) 6 ENLR 191 at 194

where the cheque is issued for presentment at the primary branch of the bank of the customer. The modern system of banking today makes it possible for a cheque drawn in one part of the country to be presented in another part of the country. It is possible for the cheque to have been cashed before the receipt of the countermand order.

Notice of Customer's death- The duty of a bank to honour a cheque drawn by a customer will be displaced once the bank has notice of the death of the customer. A cheque issued by a customer to a third party and not presented in the life time of the customer commands no probative value and therefore, there is no duty imposed on the banker to honour such a cheque. The notice may be given orally or in a written form, and the notice does not need to come directly to the banker from the estate of the customer. The notice may come through a third party. A cheque honoured after the receipt of the notice of death of the customer will be construed as payment made without authority in which the bank will be liable to re-credit the customer's account with the amount wrongfully paid.

Notice of Customer's Mental Incapacity- A banker is under no duty to honour a cheque issued by a customer that is afflicted by insanity. The banker whether on notice or from observation has a reasonable ground to believe that the customer who issued the cheque presented for payment is suffering from mental incapacity, the bank will not be liable for dishonouring the cheque. The bank, however, will be liable if the cheque issued by a sane person is paid after the receipt of the notice of insanity.

Order of the court- A cheque validly issued by a customer may be dishonoured on the receipt of the order of the court stopping any transaction on the account or directing the amount in the account to be paid in satisfaction of a lawful obligation. A garnishee order affecting a particular account of the customer with the bank is a sufficient ground not to honour the cheque issued on that account. The bank will also not be liable for dishonouring a cheque where an embargo has been placed on the account by the government. The bank will not be liable once the order is a lawful order. A lawful order *is the order that emanates from the competent court of law with jurisdiction on the subject matter*. A cheque dishonoured at the instance of a security agency without the backing of the court is invalid. In Nigeria, the practice by the Economic and Financial Crime Commission of freezing a customer's account without the order of the court is a violation of the right of the customer.

Duty of the bank not to pay without authority- It is a fundamental term of the contractual relationship between the banker and the customer that the banker must only act with the authority of the customer. Payment made without the authority of the customer will be tantamount to acting without the authority of the customer. The consequence is that the banker will be liable to refund the sum withdrawn. This duty imposes additional burden on

the banker to be more vigilant in matters affecting the account of the customer. The duty goes beyond current account but to other accounts operated without the use of cheque but with funds which can be withdrawn by any method of withdrawal. A payment is deemed to be made without authority where the signature on the withdrawal slip or cheque is a forged signature. In *UBA v. Savannah Bank Ltd*¹⁶, the court held that *a banker cannot debit his customer's account on the basis of a forged signature*. The money paid on a forged cheque is recoverable at the instance of the banker. In *State v. Udoeka*¹⁷, the court held that *once a payee is not entitled to what he demanded and get by his cheque from the bank, the taking becomes unlawful and without the consent of the owner*. Where there were forgeries which were not due to a customer's negligence, it is the duty of the Banker to credit the account of such a customer whose cheques had been forged.¹⁸ A customer has a duty to take reasonable and ordinary precaution against fraud and if as a direct result of the neglect of such precaution loss is sustained, he must bear the loss as between himself and the banker.¹⁹

Duty to render statement of account- This is a sacrosanct duty and it is fundamental to the sustenance of the relationship between the banker and the customer. The customer has the right to know the details about the inflow and outflow of funds from his/her account through a regular transaction alert forwarded to the customer through his mobile number or e-mail address. Charges on customer's account such as Cost of Transaction (COT), Value Added Tax (VAT) etc. must be brought to the notice of the customer from time to time. The bank must also honour every special request for a comprehensive statement of account.

Duty to give notice before closing a credit account- The banker must notify the customer before taking any decision to close the customer's account that is in credit. Unless precluded by agreement express or implied from the course of business, the banker is entitled to combine different accounts kept by the customer in his own right even though at different branches of the same bank, and to treat the balance, if any, as the only amount really standing to his credit.²⁰ The customer must be given a reasonable notice so that the customer can make alternative arrangement. The decision to close a customer's account with credit balance implies that the banker cannot hold on to the credit balance in the account. Such amount must be handed over immediately to the customer. The

¹⁶ (1979) 10-12 C.C.H.J 255

¹⁷ . (1982) 2FNLR 239 at 244

¹⁸ .*The Nigeria Advertising Service Ltd. v. United Bank for Africa Ltd* (1965) 1.L.L.R 84 (Nigeria)

¹⁹ .*Salawu.v. Union Bank Ltd* (1986) 4 N.W.L.R (pt.38) 701 (Nigeria)

²⁰ .*British and French Bank Ltd .v. Opaleye* (1959) L.L.R 133 (Nigeria)

circumstances that can warrant the closure of a credit account include where a bank is distressed; where the particular account is operated contrary to public policy or where the account is used for illegal purpose.

Duty to exercise reasonable care and skill- A banker has a duty to exercise reasonable care and skill in performing its part in the contractual relationship. The banker is deemed to be an expert and should deploy such expertise towards the protection of the customer's interest. The banker should put in place technological and other reasonable measures that will ensure that the customer's account is not exposed to the activities of fraudsters. A signature expert should be available to prevent unauthorized withdrawal of fund through forged cheques. The banker should be meticulous when giving information as to the customer's credit; when giving financial advice and in the payment of customer's cheques or bills or when collecting customer's cheques or bills²¹. The banker should handle discreetly the documents usually filled by customers in any transaction with the bank. Documents such as withdrawal slips, transfer forms, etc. should be discarded in such a way that a third party will not have access to the information of customers. It has also been noted that some of the fraudulent activities perpetrated in the commercial banks are made possible because of the involvement of insider colluding with the external force. The banker should screen thoroughly potential applicants before their recruitment as employees in order to avoid the employment of fraudsters.

The banker enjoys the following rights in the contractual relationship with the customer:

- (a) Right to consolidate customer's account- The right is made possible where a customer operates more than one account with the banker and where one of the accounts has a debit balance. The banker is entitled to settle an overdrawn balance on one account by transferring money from the credit account to the other unless it is precluded by agreement.
- (b) Right of lien- A lien is a right to retain the goods of a debtor until he discharges his indebtedness to the person in possession of the goods. A banker has a general lien on all securities in their hands until the debtor has paid the amount outstanding as debt. The banker can sell the property concerned after giving due and proper notice of its intention to exercise its right of lien over the goods.
- (c) Right to claim charges- The banker has unfettered right to charge the customer for certain services performed for the customer. Apart from the normal bank charges such as Cost of Transaction (COT); Value Added Tax (VAT), Transfer Charges; Stamp Duty Charges; SMS alert charges etc., the bank is entitled to impose charges for special services performed as agent of the customer.

²¹ .Igweike, K.I .op. cit. p.85

- (d) The banker has the right to refuse payment of cheque or other instruments where the cheque or instrument suffers some deficiencies.

The Customer is to perform some duties under the contractual relationship which are:

- (a) The customer must keep secret vital information and documents in his possession that relate to the bank account. The customer must not allow a third party to have access to the Automated Teller Machine (ATM) card and the number; Bank Verification Number (BVN); Transfer code; cheque book as well as his mode of signature. The duty is fundamental to the protection of the interest of the customer by the bank and where the customer is negligent in the performance of this duty, the bank will be exonerated from any unauthorized withdrawal.
- (b) The banker should notify the customer promptly where there is a reasonable suspicion or ground that his signature is being forged. The customer must also report promptly any loss or theft of the ATM card/cheque books.
- (c) The customer must be diligent and consistent in the drawing of cheques in order to avoid mistakes that can cause the bank to dishonor the cheque issued. The bank has the right not to dishonour a stale cheque or cheque with discrepancy between the amount in words and the amount in figures. A cheque with alteration must be endorsed otherwise the bank may validly refuse payment on such a cheque.

Unauthorized Withdrawal from Customer's Account

The Specimen Signature Card and the Mandate Form are the compass charting the path of how the customer can withdraw or transfer money from the bank account. The banker must comply strictly with the terms as agreed upon on the management of the customer's fund in the account. In a joint account with more than one signatory, the mandate form should state whether all the signatories must sign or who among the signatories should be a principal signatory. A principal signatory is the signatory whose signature is compulsory before withdrawal in a joint account. Any agreement for online transaction must also indicate the transfer limit. Withdrawal from the counter must be in accordance with the specimen signature. The payment cashier must be familiar with the signature of each of the signatories in order to prevent payment on a forged cheque. Verification of the signature will not be a problem where the drawer is also the payee but where the drawer is not the payee, the paying cashier must take extra measure to ensure that the cheque presented originates from the drawer. This is usually done by placing a call to the drawer to ascertain whether he/she has knowledge of the cheque presented for payment. The banker in a situation where the payee is not the drawer of the cheque must obtain from the payee the means of identification such as the national Identification card, driving licence,

international passport, voter's card etc. The following are the means of unauthorized withdrawal from customer's account:

ATM Fraud- ATM fraud is facilitated by skimming or card cloning through the installation of a magnetic card reader over the real ATM's card slot and the use of a wireless surveillance camera or a modified digital camera to observe the user's PIN. The card data is then cloned onto a second card and the criminal attempts a standard cash withdrawal. Banks have taken steps to overcome this cloning through the use of smart cards which cannot be copied. Unauthorised withdrawal can also be carried out by trapping the card inside the ATM's card reader with a device often referred to as Lebanese loop. In this circumstance, when the customer walks away from the machine, the fraudster that has been hanging around will easily remove the card with which withdrawal can be made. Fraudsters that are familiar with the details of a customer sometimes may impersonate the customer and trick the bank to issue a new card. Upon the issuance of the card, unauthorized withdrawal can easily be made on a customer's account. ATM is one of the fastest means of unauthorized withdrawal from customer's account in Nigeria with the consequence of frustrating the use of ATM cards by the customers.

Fraudulent Internet Site- Electronic banking is a unique innovation in the banking industry in Nigeria and it has contributed to the growth of banking business in Nigeria. Electronic transfer of funds has facilitated the payment for goods and services in both local and international transactions. With electronic transfer of funds, buyers and sellers do not need to have physical contact. Fraudsters have taken advantage of this means of payments for goods and services to create fraudulent site through which unsuspecting customers are easily defrauded. Unauthorised withdrawals are made through the fake internet site. Websites created resemble the original genuine sites of existing veritable company or financial institutions and the details obtained are used to carry out unauthorized withdrawal from the customer's account.

Forged Cheque- This is the earliest form of unauthorised withdrawal of money from the customer's account. The use of forged cheque for withdrawal is usually perpetrated by people that have access to the cheque and the signature mode of the customer. The forged cheque usually bears signature that cannot be differentiated from the original signature of the customer when presented at the counter. In some instances, the signature on the cheque may not be a forged one but the actual signature of the customer and still, the withdrawal will still be unauthorized. This will be so in circumstances where a customer is in the habit of having a signed cheque but leaving other space blank. The fraudster that has access to the cheque merely completes the cheque by filling in the blank spaces. Withdrawal of fund through the use of a forged cheque can be prevented through the exercise of due diligence and utmost care by the cashier. This can be averted where the cashier is familiar with the trend of withdrawal and the

maximum amount normally withdrawn by the customer through a payee other than the drawer. A cashier should try to verify the identity of the payee each time a cheque is presented by a third party other than the customer.

Diversion of Fund- Diversion of fund occurs where a specified amount of money meant for a particular account is transferred wholly or partly into the account of another customer. This specie of unauthorised withdrawal is executed by bank officials by deliberately diverting the fund meant for an account to another account. The owner of the account used for diversion is later invited by the bank official with a request to issue a cheque for the amount credited to his account. The owners of such account are informed that the amount credited was an account error. This type of illegality is possible with account that receives a regular and substantial inflow of cash. A customer can prevent this unauthorised withdrawal through regular bank reconciliation and the proper monitoring of transactions in the account.

Periodic Minimal Withdrawal- This form of unauthorised withdrawal is carried out by computer programmer in the banks on accounts of employees opened for wages and salaries. A token deduction that cannot easily be noticed is made from the account of the customer while the amount deducted is diverted to the account of the bank official. For instance, the amount deducted may be as little as One Hundred Naira(N100) deducted from one hundred customers and at the end of the month, the customer would have raked a total sum of Ten Thousand Naira (#10,000)

Account Hacking- Account hacking is another method of carrying out unauthorised withdrawal. Account hacking occurs where fraudsters have access to security details of a customer's account. The details include the names of the customer, account number, date of birth, password, Bank Verification Number (BVN). Access to the details is usually facilitated by insider within the banking system or through tricks by the fraudsters. In Nigeria, fraudsters usually send or call customers disguising as a bank official asking the customer to upgrade their account details within a specified time to avoid blockage. The details once supplied ignorantly can be used to withdraw huge amount of money from the account. In some cases the fraudsters would notify the customer that he has won a prize and that the customer should supply his account details to enable them credit his account with the prize. Another method which is the latest is by offer for investment in which customers are requested to invest a particular sum in a venture for one hundred percent repayment within specific hours.

Liability for Unauthorised Withdrawal

The banker and the customer in the contractual relationship both have a duty to prevent unauthorised withdrawal from the customer's account. A greater duty is, however, imposed

upon the banker as the gateman of the treasury house. The banker must exercise due diligence to prevent unauthorised withdrawal amounting to civil wrong or fraud. Financial institutions are enjoined to put in place effective counter-fraud measures to safeguard their sensitive information. Where a security breach occurs, the proof of negligence lies on the customer; to prove that the financial institution in question could have done more to safeguard its information integrity.²² The law provides further that any person authorized by any financial institution and charged with the responsibility of using computer or other electronic devices for financial transactions such as posting of debit and credit, issuance of electronic instructions as they relate to sending of electronic debit and credit messages or charged with the duty of confirmation of electronic fund transfer, unlawfully with the intent to defraud, issues false electronic , or verbal messages commits an offence and is liable on conviction to imprisonment for a term of seven years.²³

The use of ATM cards in banking transactions imposes additional burden of monitoring the outflow of cash from the customer's account. The cashless banking policy of the Central Bank of Nigeria has the goal of minimizing the risk faced by customers moving out with cash and also to minimize the spate of armed robbery. It is paradoxical that as the customers are being safeguarded from the risk associated with the handling of physical cash, they are exposed to another sophisticated crime of electronic fraud. Online banking is a window of opportunity for fraudsters in Nigeria to perpetrate fraud on bank customers. The law has also been put in place to block the avenue of fraud. Every financial institution is required to verify the identity of its customers carrying out electronic financial transactions by requiring the customers to present documents bearing their names, addresses and other relevant information before issuance of ATM cards, credit cards, debit cards and other related electronic devices.²⁴ This provision is sacrosanct and imperative in view of the fact that many of the customers are fraudsters as the purpose of opening a bank account is to have an account to facilitate the transfer of funds obtained illegally. This provision makes it easy to trace the destination of money fraudulently withdrawn from customer's account. The underlying principle is to enable the banker knows with certainty the details of every account holder.

A banker is *prima facie* liable for every unauthorised debit on a customer's account. The Act²⁵ provides that a financial institution that makes an unauthorised debit on a customer's account shall, upon written notification by the customer, provide clear legal authorization for such debit to the customer or reverse such debit within 72 hours and any financial institution that fails to

²² . Cybercrime (Prohibition, prevention etc.)Act,(2015)

²³ . *ibid.* s.20

²⁴ .CCA,s.37(1)

²⁵ .CCA,,s.37(3) (2015)

reverse such debit within 72 hours commits an offence and is liable on conviction to restitution of the debit and a fine of Five Million Naira (N5,000,000). The principal offender or the fraudster in a crime of unauthorised withdrawal of fund if apprehended is liable and on conviction may be sentenced to imprisonment for terms of imprisonment depending on the nature of the crime committed. The Act provides further that a person who with intent to defraud, possesses counterfeit cards, invoices, vouchers, sales draft, or other representations or manifestations of counterfeit cards, or card account numbers of another person, commits an offence and is liable on conviction to imprisonment for a term of not more than Three Million (N3,000,000) or both.²⁶ A person who uses a counterfeit access device; an unauthorised access device; an access device issued to another person resulting in a loss or gain, commits an offence and is liable on conviction to imprisonment of not more than seven (7) years or not more than Five Million Naira (N5,000, 000) and forfeiture of the advantage or value derived from his act.²⁷ A person who steals an electronic card commits an offence and is liable on conviction to imprisonment for a term of not more than three years or to a fine of not more than One Million Naira(N1,000,000) and is further liable to repay in monetary terms the value of loss sustained by the card holder or forfeit the assets or goods acquired with the funds from the account of the cardholder.²⁸ A bank official who conspires or aids unauthorised withdrawal of fund from a customer's account is a *particeps criminis* in the crime. It is a notorious fact in Nigeria that insiders are usually implicated in the cases of unauthorised withdrawal or cases of bank robbery. The law, in a bid, to checkmate this ugly incident provides that an employee of a financial institution found to have connived with another person or group of persons to perpetrate fraud using an ATM or point of sales device commits an offence and is liable on conviction to imprisonment for a term of seven (7) years without an option of fine.²⁹ A person who manipulates an ATM machine or point of sales terminals with the intention to defraud commits an offence and is liable on conviction to imprisonment for a term of five (5) years or Five Million Naira(N5,000,000) or both.³⁰

A customer who is a victim of unauthorised withdrawal may lose his right to relief if any of the following circumstances is established by the banker:

- (i) the customer acted fraudulently;
- (ii) the customer did not keep his (Personal Identification Number) PIN or password secret;
- (iii) the customer did not notify the banker promptly the loss or theft of his card, or

²⁶ .CCA, s.33(2)

²⁷ .CCA,s.33(2)

²⁸ *Ibid.* s.33(3)

²⁹ .*ibid* s.31(2)

³⁰ .s.31(1)

(iv) the customer fails to report promptly that the card has been trapped in the ATM.

A banker acting as an agent of a disclosed principal may be liable in an action at the instance of a person who is not a customer for negligence in the payment of money. This is usually the case where a banker carries out instruction negligently to the detriment of a beneficiary. This happens frequently in foreign transfer of funds such as **Western Union**. A beneficiary will succeed where the action is predicated on tort and not on contract since only a party to a contract can seek relief for breach of contract. In *UBA v. Ogundokun*³¹, the respondent at the lower court sued the appellant for negligent and wrongful payment of the sum of \$4,200 US Dollars to another person contrary to the instruction of the sender, Ivona Williams. The sum of money in issue was sent by Mrs. Ivona Williams resident in Belgium to her friend, Mrs. Victoria Funmilayo Ogundokun through **Western Union**. Mrs. Ogundokun visited the Ilorin branch of the bank on the 16th of November, 2005 to claim the money only to be told that another Mrs. Funmilayo Ogundokun had showed up at the Surulere, Lagos branch of the bank to collect the same amount on the 15th November, 2005. After all efforts to trace the amount or the other claimant proved abortive, the respondent sued the bank. At the lower court, the appellant contended that the respondent had no *locus standi* to institute the action as the initial contract was between Ivona Williams and Western Union. The bank contended that the respondent should have sued Western Union as the disclosed principal of the bank which is only an agent of the Western Union. The court granted the relief sought for refund and for damages and held that the action of the respondent was not dependent on any contract between Ivona Williams and Western Union. The Court of Appeal affirmed the decision of the lower court and dismissed the appeal. The appellate court held that the respondent sued in tort for negligence and that where agent represents a foreign company, it can be made liable for the acts and omissions of that company.

A banker has no authority to accede to the request of a third party for the purpose of withdrawing money from the account of a customer except where the withdrawal has been ordered by the court. In *Okobiemen v. UBN*³², the appellant, a customer operating a current account with the respondent, Union Bank of Nigeria Plc. Sued the bank for unauthorised withdrawal or removal of the sum of Two Million Naira (N2,000,000) from the current account. The sum in issue was paid into the account of the appellant by a third party, Unity Supermarket, Jalingo in Taraba State on the 18th February, 2013 for the supply of assorted soft drinks. A truck load of assorted drinks was instantly sent to the supermarket but the supermarket refused to take delivery. The supermarket later on that same day, that is, 18th February, 2013 approached the bank and the bank reversed the transaction and debited the account of the

³¹ .(2009)31WRN 21

³² (2018) 21WRN 170

customer. The appellant instituted this action and contended *inter-alia* that the withdrawal of the sum of N2, 000, 000 without his consent and approval was unlawful, improper and illegal. Even though the claim of the appellant was dismissed both at the lower court and the appellate court, the court notwithstanding deprecated the conduct of the bank which it described as below standard, condemnable and unorthodox. The court held that unless and until a cheque is drawn on the banker by the customer directing or requesting the bank to pay out of the money held in his account for payment to the payee, the bank as agent of the customer had no authority to act in the way it acted.. The procedure employed by the bank to reverse the payment was, however, described as irregular but not unlawful.

CONCLUSION

The banker/customer relationship being a contractual relationship does not recognize the influence or interference of a third party acting to the detriment of the customer. Unauthorised withdrawal from a customer's bank account is not only a criminal act but also a civil wrong for which the banker will be held liable where the bank has acted negligently. The spate of unauthorised withdrawal from a customer's bank account has risen to an embarrassing level because of the cashless banking system warranting the use of ATM cards and electronic fund transfer. Electronic banking system and the use of ATM impose a stricter duty upon the banker to ensure that a third party does not destroy the banker/customer's relationship through unauthorised withdrawal. The study has revealed that a large chunk of unauthorised withdrawal is usually facilitated by insider with the banking sector. This study has also revealed that parties to the contractual relationship have duties to perform to prevent unauthorised withdrawal. The Cybercrime Act (CCA) has provided for the liability of the banker and officials in the event of unauthorised withdrawal. The banking industry should continue to strengthen their technology to ensure the protection of the interest of the customer from the activities of fraudsters that can also paralyse banking operations.