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COURT OF APPEALS

STATE OF NEW YORK

GARY CRUZ and CLAUDE PAIN, et al.,

Appellants,

-against-

TD BANK, N.A.,

No. 191

Respondent.

GERALDO F. MARTINEZ and JOSEPH
CUMMINGS, et al.,

Appellants,

-against-

CAPITAL ONE BANK, N.A.,

Respondent.

20 Eagle Street
Albany, New York 12207
October 15, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

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Appearances:

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1 CHIEF JUDGE LIPPMAN: Number 191, Cruz v. TD
2 Bank.

3 Counselor, would you like any rebuttal time?

4 MR. KOPPELL: Oh, yes, Your Honor. I'd
5 appreciate three minutes.

6 CHIEF JUDGE LIPPMAN: Three minutes. Go ahead.
7 You're on.

8 MR. KOPPELL: May it please the Court, I'm
9 Oliver Koppell. I represent plaintiffs Martinez,
10 Cummings, Cruz, and Pain in two putative class actions
11 that are before Your Honors.

12 CHIEF JUDGE LIPPMAN: Counsel, let me ask you a
13 question. What does the statute say about all of this?
14 In other words, is there - - - is there any particular
15 provision in the statute that gives us a hint about a
16 private cause of action?

17 MR. KOPPELL: Well, what's important in the
18 statute is that it says, "Nothing in this section" - - -
19 we're talking about the EIPA law, the Exempt Income
20 Protect - - -

21 CHIEF JUDGE LIPPMAN: Right.

22 MR. KOPPELL: "Nothing in this section shall in
23 any way restrict the rights and remedies otherwise
24 available to a judgment debtor." And why that's important
25 is that there's a long line of cases, Your Honors, in

1 which damages in plenary actions have been sought in
2 connection with restraints. Now, most of those actions
3 admittedly have been by creditors against banks. The
4 Aspen case is - - - perhaps the leading case, comes from
5 this Court. And in Aspen, in connection with an action by
6 a creditor against a bank, this Court said you not only
7 have the right of contempt but you also can bring a
8 plenary action or a special proceeding.

9 CHIEF JUDGE LIPPMAN: What do the federal cases
10 tell us? No private right, right?

11 MR. KOPPELL: The federal cases are most
12 surprising, Your Honor, because they ignore the fact that
13 private rights have been asserted and approved of by the
14 courts of the state of New York for decades. And there's
15 nothing specifically saying that a creditor has a private
16 right - - - right of action for damages - - -

17 JUDGE PIGOTT: Can you make a distinction - - -

18 MR. KOPPELL: - - - in the statute.

19 JUDGE PIGOTT: I'm sorry, Mr. Koppell, but can
20 you make a distinction between a statute that's in our
21 civil practice law and rules which says we're granting to
22 judgment debtors this break, this exemption, this
23 protection with respect to certain monies they have,
24 particularly in banks - - -

25 MR. KOPPELL: Right.

1 JUDGE PIGOTT: - - - that your remedy then is to
2 exercise whatever rights you've got under the CPLR?
3 Whether or not there's a plenary action is separate and
4 apart from the whole procedure there which says, you know,
5 that you can go to court and you can assert your rights,
6 but there's no - - - there's no cause of action against
7 the bank under - - - under 52. Does that make sense?

8 MR. KOPPELL: Well, not really. 5239 - - - we
9 have a split between the banks and the judges because in
10 the Martinez case they say you have a right under 5239,
11 which is a special proceeding, but you don't have a
12 plenary right. On the other hand, TD Bank says you don't
13 have a right at all under 5239 or a plenary right.

14 JUDGE PIGOTT: Given the choice, I take it you
15 prefer the former to the latter.

16 MR. KOPPELL: Yes, but it's not totally - - -

17 JUDGE PIGOTT: But you want both.

18 MR. KOPPELL: Yes. And it's not totally
19 satisfactory. Why? First of all, 5239 can only be
20 brought until the monies are transferred from the bank,
21 let's say, to the judgment - - - to the judgment creditor.
22 Once the monies are transferred from the bank to the
23 judgment creditors, you can't bring a 52 - - -

24 CHIEF JUDGE LIPPMAN: Counselor, why would we -
25 - - if it doesn't explicitly say in the statute that

1 there's a private right, why would we imply that there's -
2 - - in this particular area, why would we imply a private
3 right?

4 MR. KOPPELL: Well, first of all, because
5 historically, as I already said, private rights with
6 respect to banks improperly restraining funds have been
7 recognized - - -

8 CHIEF JUDGE LIPPMAN: But is there - - - are
9 there things in the statute - - -

10 MR. KOPPELL: Yes, there's a - - -

11 CHIEF JUDGE LIPPMAN: - - - that would lead us
12 to - - - to say, even if it's not expressed, that it's
13 implied?

14 MR. KOPPELL: Absolutely. And that is - - - you
15 know, the phrase where it said - - - where the statute
16 says that the inadvertent failure by the bank to give
17 notice, the inadvertent failure to give notice shall not
18 give rise to damages. And you apply the Latin expression
19 - - - I always misstate it, so let me read it - - -
20 expressio unius est exclusio alterius.

21 JUDGE PIGOTT: You're talking about 5222? Is
22 that - - -

23 MR. KOPPELL: Yes, yes.

24 JUDGE PIGOTT: - - - just so I can focus on it.

25 MR. KOPPELL: Yes. What I'm - - -

1 JUDGE PIGOTT: But what - - - what - - -

2 MR. KOPPELL: That's in subdivision (h). And
3 what that says is that - - - I'm sorry - - - not
4 subdivision (h). That provision, which says that
5 inadvertent failure shall not give rise to liability, not
6 only suggests, but if you look at the Supreme Court
7 rulings with respect to that maxim, particularly Cipollone
8 and Shady Grove, specifically, if you exclude one thing,
9 you can assume that others are not excluded so - - -

10 JUDGE GRAFFEO: From a policy perspective - - -

11 MR. KOPPELL: Yes.

12 JUDGE GRAFFEO: - - - why should we imply this
13 in 5222 when this is really a dispute between judgment
14 creditors and judgment debtors? The banks are kind of
15 caught in the middle. They get this restraining notice.
16 The statute kind of uses them as a conduit to send notices
17 to the judgment debtor. But why should they be subject to
18 plenary action? I mean, a state like Connecticut, they
19 put actual language in their statute allowing that. Our
20 legislature didn't do that.

21 MR. KOPPELL: No, but this - - - that's exactly
22 why we should do it, because until this statute passed in
23 2008, banks basically were, in some sense, just a
24 middleman. They got a restraining notice; they had to
25 restrain the account. The fight was between the judgment

1 debtor and the judgment creditor. 5220 - - - 222-a and
2 the whole EIPS statute changed all that and now made - - -
3 gave the banks a very active role. The banks now have
4 very specific obligations. They've got to determine
5 whether there are exempt funds in the account. If there
6 are exempt - - -

7 JUDGE GRAFFEO: But what in the legislative
8 history indicates that the legislature intended the banks
9 to be subject to money damages?

10 MR. KOPPELL: If you read the - - - if you read
11 the memoranda of Assemblywoman Weinstein and Senator
12 Volker, it makes it clear that what's attempting - - -
13 what is being attempted here is to require the banks to be
14 involved in the process. And as indicate - - -

15 JUDGE SMITH: If the - - - go ahead.

16 MR. KOPPELL: I just want to say, if - - - if
17 you don't give people a remedy, the banks won't be forced
18 to do it. There is no comprehensive administrative scheme
19 to enforce this law.

20 JUDGE SMITH: If they - - -

21 JUDGE GRAFFEO: 5240 doesn't apply? Doesn't 52
22 - - -

23 MR. KOPPELL: No, it - - - it does not apply.
24 5240 only applies basically to dealing with the - - - with
25 the creditor's rights to the money. It doesn't really

1 apply to a debtor's right to deal with the money. The
2 fact of the matter is - - -

3 JUDGE SMITH: If you did not have in it - - -

4 MR. KOPPELL: Yes.

5 JUDGE SMITH: - - - the clause that you rely on
6 that says "inadvertent failure shall not subject the bank
7 to liability", would you have a weaker case then?

8 MR. KOPPELL: Maybe a little bit, but again I
9 want to stress - - -

10 JUDGE SMITH: I mean, my question is when the
11 legislature put that in - - -

12 MR. KOPPELL: Right.

13 JUDGE SMITH: - - - did they think that by doing
14 that they were exposing the banks to liability? It looks
15 like a protective provision to me.

16 MR. KOPPELL: No. Very interesting, because if
17 you read the amicus brief - - - and I wanted to say I very
18 much appreciate the support of really important legal
19 services organizations which talk about how important this
20 is, including the AARP, the Legal Aid Society, and a whole
21 bunch of public interest law firms - - - they point out,
22 because they were involved - - - and you can see in their
23 brief, they were involved in the negotiations. Initially,
24 the banks opposed this legislation because they didn't
25 want to have excessive obligations placed on them. And

1 then in the negotiations, they managed to get that
2 exclusion that the inadvertent failure would not give rise
3 to liability. When they got that - - -

4 JUDGE SMITH: Let me ask you one more question.

5 MR. KOPPELL: Just - - - just let me - - -

6 JUDGE SMITH: Go ahead.

7 MR. KOPPELL: No, I'm sorry. Go ahead.

8 JUDGE SMITH: Well, finish what you were saying.

9 I'll - - -

10 MR. KOPPELL: I was just going to say that it
11 was that exclusion that convinced the banks to withdraw
12 their objection.

13 JUDGE SMITH: Okay. The - - - a different
14 question. What kind of damages is your client looking for
15 here? What - - - what is the wrong he suffered or that he
16 - - -

17 MR. KOPPELL: Right. Well, basically, what the
18 banks have done is to take fees which they weren't
19 entitled to take.

20 JUDGE SMITH: You want the fees back?

21 MR. KOPPELL: I want the fees back.

22 JUDGE SMITH: Is that it?

23 MR. KOPPELL: I also want an injunction. After
24 all, we're suing on behalf of a class.

25 JUDGE SMITH: Is that - - - I get the idea. Is

1 that all you're asking for is the fees back and an
2 injunction?

3 MR. KOPPELL: No, not necessarily.

4 JUDGE SMITH: Suppose your guy couldn't pay the
5 electric bill and he caught pneumonia, do you get - - - do
6 you get personal injury damages for that?

7 MR. KOPPELL: I think that's up to courts in the
8 future to decide. I could say that we might claim such
9 damages. Whether - - - whether - - -

10 JUDGE SMITH: I mean, it seems - - - but isn't
11 there a difference between looking for the fee back, and I
12 can sort of see the logic of your getting your fee back,
13 than looking for personal injury damages or if you had to
14 finance your - - - if you had to make a loan somewhere
15 else and pay more interest. Is that - - - are you looking
16 for that sort of thing?

17 MR. KOPPELL: Well, I can't say what plaintiffs'
18 lawyers might ask for, what we might even ask for. But I
19 think that that's - - - the issue is that proximate cause
20 - - - that proximately caused damages should be
21 recoverable. I'm not able to say here how far that will
22 go. Obviously, it could go too far from it. You could -
23 - - I mean, you can't, for instance, say, well, if those
24 judgment - - - if those funds had not been restrained, I
25 would have invested in a business and the business would

1 have earned millions of dollars, so I get millions of
2 dollars in damages.

3 CHIEF JUDGE LIPPMAN: Okay, counselor.

4 MR. KOPPELL: That - - - that would be too
5 remote.

6 CHIEF JUDGE LIPPMAN: You'll have your rebuttal
7 time. Thank you, counselor.

8 MR. KOPPELL: Thank you.

9 CHIEF JUDGE LIPPMAN: Counselor.

10 MR. BONO: Good afternoon, Your Honors. I'm
11 Alexander Bono on behalf of TD Bank. At the Court's
12 request, we were asked to divide our time up, so my
13 friend, Mr. Plotkin is going to deal with question number
14 2 that was certified, and I'll deal with question number 1
15 which is, is there implied right of action.

16 JUDGE SMITH: Do you take - - - when you say
17 "implied right of action", do you mean - - - are you
18 saying he doesn't get his fee back?

19 MR. BONO: I'm saying he gets nothing back from
20 the bank. If he wants to get his fee back - - -

21 JUDGE SMITH: Suppose - - - there's a section in
22 there, I forget which one, which says you shall not charge
23 a fee. You're saying you've charged the fee, you get to
24 keep the money?

25 MR. BONO: Your Honor, what I'm saying is he

1 gets to go after the person who caused the mess-up, the
2 judgment creditor.

3 JUDGE SMITH: So you're saying yes. You're
4 saying you get to keep the money. He has no claim against
5 - - -

6 MR. BONO: We get the keep the money because he
7 gets - - -

8 JUDGE SMITH: But when you're specifically
9 forbidden from charging a fee, you can charge the fee and
10 retain it?

11 MR. BONO: Well, Your Honor, we're forbidden to
12 charge a fee if there's been a determination that the
13 restraining notice that the bank gets is void.

14 JUDGE SMITH: No. As I read it, you're
15 forbidden to charge a fee if there's nothing you can
16 properly restrain. So suppose - - - and suppose it's
17 under the 1700 or whatever it is. There's nothing in the
18 account you can restrain and you charge the fee anyway,
19 and he says to you, hey, you weren't supposed to charge
20 that fee, give me back my money. Do you have to give him
21 back his money?

22 MR. BONO: The bank doesn't have to give it back
23 because there's no claim against the bank under this
24 statute. The claim is against - - -

25 JUDGE SMITH: So you get to keep the money?

1 That just doesn't sit right.

2 MR. BONO: Your Honor, that's the way the
3 legislation is written.

4 JUDGE PIGOTT: Well, how about - - -

5 MR. BONO: The claim is against - - - and there
6 are lots of statutes that are written - - - written
7 without a remedy against a party.

8 JUDGE PIGOTT: Can't - - -

9 JUDGE ABDUS-SALAAM: Don't you have to provide
10 the notice before you can even collect any fee or even
11 restrain the money - - -

12 MR. BONO: Exactly, Your Honor.

13 JUDGE ABDUS-SALAAM: - - - assuming you got the
14 notices?

15 MR. BONO: Exactly, Your Honor. The notice has
16 to be sent to the bank. That was one of the duties - - -

17 JUDGE SMITH: Suppose you violate that; suppose
18 you don't do it?

19 JUDGE ABDUS-SALAAM: - - - forward to the
20 debtor. Don't you have to forward the notices to the
21 debtor before you can even - - -

22 MR. BONO: The statute says - - -

23 JUDGE ABDUS-SALAAM: - - - restrain the money?

24 MR. BONO: - - - that the bank gets it from the
25 debtor, and then the bank mails it - - - I'm sorry.

1 JUDGE ABDUS-SALAAM: From the creditor.

2 MR. BONO: The bank gets it from the creditor,
3 and then the bank mails it to the debtor. That's exactly
4 right.

5 JUDGE ABDUS-SALAAM: In the case where you
6 haven't forwarded it to the debtor and you keep the fee or
7 you charge them a fee as well as restrain their money and
8 disburse it, you're saying you don't have to pay them back
9 anything?

10 MR. BONO: That's correct, Your Honor. In fact,
11 there's a special carve-out for banks that inadvertent
12 failures in connection with the transaction of sending the
13 debtor's notice - - - and the debtor - - - I'm sorry - - -
14 the creditor - - -

15 JUDGE ABDUS-SALAAM: Unless it's intentional.

16 MR. BONO: - - - creditor used to send the
17 notice, and they imposed that burden on the bank because
18 the legislature believed there was a better opportunity
19 for the bank to hit their customer than the creditors
20 because the creditors weren't getting the notices to them.
21 But to protect the bank - - -

22 JUDGE ABDUS-SALAAM: So are you saying that
23 every time the notice isn't forwarded to the debtor it's
24 inadvertent and therefore you don't have - - - you're not
25 liable? What if the bank, because it wants to generate

1 fees, doesn't forward the notice?

2 MR. BONO: Your Honor, I'm not aware of any bank
3 that operates that - - - in that fashion.

4 JUDGE SMITH: Well, maybe it's because they
5 haven't heard your interpretation of this law. If they
6 knew they could keep the money, it's quite a temptation.

7 MR. BONO: Well, Your Honor, it's not a
8 temptation to banks to be involved in the process.

9 JUDGE PIGOTT: Well, here's - - -

10 MR. BONO: As Judge Graffeo said, they're a
11 middleman. I'm sorry, sir.

12 JUDGE PIGOTT: That's okay. I was going to say,
13 there's situations, and I think one of them was described
14 in here, of almost a vortex where, because you don't
15 advertently or inadvertently exempt the money, three, four
16 or five of their checks or automatic deposits bounce for
17 which you then charge them a fee, and because you charge
18 the fee, now they have less money, and it just continues.
19 And there's the insufficient funds fees and then there are
20 these other ones, and they keep - - - they just keep
21 going. And what - - - as I understand Mr. Koppell's
22 argument, separate and apart from whether 52 provides a
23 cause of action, there ought to be a cause of action
24 against the bank separate and apart from whatever 52 says
25 with respect to the bank's conduct in situations like

1 that. Would you agree?

2 MR. BONO: I would disagree. In fact, Your
3 Honor, there were two bills introduced this year in the
4 Assembly and in the Senate, and they're both included
5 actually in the Bank of - - - New York Bankers Association
6 appendix, 234 - - - at 234 and page 237. And those are
7 express private rights of action, and the Senate version
8 says, "except against banks". They carved out because
9 they understood banks are middlemen. The Assembly's
10 version says, "an express private right of action against
11 everyone".

12 JUDGE SMITH: I can understand why you want to
13 protect the middleman and you don't want to expose him to
14 liability, but aren't you - - - isn't it kind of an
15 extreme interpretation to say that the middleman is
16 entitled to take fees forbidden if - - - specifically
17 forbidden by the statute and keep them?

18 MR. BONO: Your Honor, I'm not saying they're
19 taking them because they're forbidden by the statute. I'm
20 saying there's been no determination made.

21 JUDGE SMITH: There is a statute that
22 specifically forbids you from taking fees, and I'm saying
23 what if you violate that statute, don't you have to give
24 the money back. It seems so obvious.

25 MR. BONO: Your Honor, I say no, the money comes

1 back through the judgment creditor who caused the problem
2 in the first place.

3 JUDGE SMITH: What if it's the bank's fault?
4 What if the judgment creditor - - - all the judgment
5 creditor does is serve a restraining notice. He doesn't
6 know how much he's restraining.

7 MR. BONO: Your Honor - - -

8 JUDGE SMITH: But the bank makes the mistake.
9 The bank looks and says there's a restraint here, and
10 there isn't and it charges a fee. Why shouldn't the bank
11 have to give its fee back?

12 MR. BONO: Because the legislature has not
13 imposed that obligation, that liability on any bank
14 involved in this process. The legislature has chosen who
15 gets liability. And if you look under the statute,
16 there's liability for employers, there's liability for
17 third parties that are involved in property transfers,
18 there are liabilities for third parties that hold debt of
19 judgment creditors - - -

20 JUDGE PIGOTT: But before you - - -

21 MR. BONO: - - - but there's no liability for a
22 bank.

23 JUDGE PIGOTT: Before you go, because I know
24 your red light's on, let's concede for a minute that
25 you're right, there's no cause of action under CPLR

1 Article 52. Is there a common law right, in your view?

2 MR. BONO: Absolutely not. And again, I would
3 recommend that the panel review the Bankers Association's
4 appendix because four of the amici testified at the
5 hearings that there is no private right of action.

6 JUDGE PIGOTT: Under 52 - - -

7 MR. BONO: Assemblywoman Pheffer as well said
8 there is no private right of action.

9 JUDGE PIGOTT: I concede that they make that
10 argument under CPLR Article 52, and there's a lot to lend
11 you because it's - - - there's no - - - you can't say
12 because you violated Article 31 discovery, somebody can
13 sue you - - -

14 MR. BONO: Right.

15 JUDGE PIGOTT: - - - because you - - - CPLR is
16 not that kind of a statute. But there is a common law
17 right any time somebody is harmed to pursue the person who
18 they claim harmed them. And are you arguing that Article
19 52, by its nature, took away that common law right?

20 MR. BONO: Your Honor, I'm saying you can't sue
21 under Article 52 - - -

22 JUDGE PIGOTT: Right.

23 MR. BONO: - - - for a violation of Article 52
24 because the case law is - - - sorry?

25 JUDGE SMITH: What about - - - I think Judge

1 Pigott's question essentially is, suppose you convert the
2 - - - your customer's money by taking money out of his
3 account that you were clearly not entitled to. Can he sue
4 you in conversion?

5 MR. BONO: Well, Your Honor, conversion - - -
6 there was a conversion claim filed in this and the six
7 other lawsuits that were filed. They were all thrown out
8 because the law is very clear that you can't bring a
9 common law tort action predicated on a violation of a
10 statute that doesn't give you a cause of action.

11 JUDGE SMITH: There's no way for me to get my
12 money back when the bank takes it even though it's my
13 money?

14 MR. BONO: Not from the bank. You get it back
15 from the judgment creditor.

16 JUDGE SMITH: Even though he didn't do anything?

17 MR. BONO: That's the way the statute - - -
18 that's the remedy that the legislature has given to the
19 debtor.

20 CHIEF JUDGE LIPPMAN: Okay, counselor.

21 MR. BONO: The remedy is go after that creditor.

22 CHIEF JUDGE LIPPMAN: Thank you, counselor.

23 Counselor.

24 MR. PLOTKIN: Good afternoon, Your Honor. My
25 name is Robert Plotkin. I'm for the Respondent Capital

1 One Bank. And I'm here to discuss question number 2 from
2 the - - - of the certified questions. And in our case,
3 the Martinez case, the judge in that case found that
4 Article 52 provided the sort of remedy that Your Honor has
5 been asking about. Article 52, I think it's important to
6 look back at Article 52 because the EIPA is an amendment
7 to - - -

8 JUDGE SMITH: Is that implicitly a disagreement
9 with your co-counsel? You said a bank does have to give
10 the money back?

11 MR. PLOTKIN: Well, I'm saying if there is no -
12 - - if there - - - if you find negatively with regard to
13 question 1, then the alternative is that rather than a
14 plenary tort action, there would be an action under 5239
15 or 40 under Article 52.

16 JUDGE SMITH: So you're making an alternative
17 argument.

18 MR. PLOTKIN: Yes.

19 JUDGE SMITH: You're saying he's right, but in
20 case he's wrong, here's the remedy.

21 MR. PLOTKIN: That's right, yeah. And that's
22 how the district court in our case saw it as well. And I
23 think where we start is with Article 52 which has been in
24 existence for fifty years, and if you look at the
25 legislative history of that, it makes it very clear that

1 it was chaos, I think was the word that they used in the
2 area of judgment enforcement, and they were trying to come
3 up with a way that would both expedite and keep at low
4 costs the different procedures that were being used for -
5 - - to enforce judgments. And they put into Article 52
6 5239 and 5240 which we think, based on, if you will, the
7 legislative history that's accompanied it through the
8 committee that did the original drafting and also from the
9 language of those statutes, if you look at the language,
10 they are written in a very broad way. They're not limited
11 to creditors or debtors.

12 JUDGE ABDUS-SALAAM: Counsel, what is the
13 proceeding that a debtor could bring under Article 52 to
14 get back either the money that was restrained or the fees?

15 MR. PLOTKIN: Under - - - well, it would be a
16 specific proceeding under 5239 or under 5240. 522-a
17 (sic), the amendment, specifically says that if there's a
18 dispute about an entitlement - - - not an entitlement,
19 about the freezing of the funds, you go - - - you use 5240
20 and you have a special proceeding that talks about it.

21 JUDGE ABDUS-SALAAM: Well, what if the money has
22 already been disbursed, then what?

23 MR. PLOTKIN: 5240 says that it can be done at
24 any time, and we're talking about funds. If the bank took
25 the funds wrongfully, if it's determined it was wrongfully

1 taken, then the bank would be required to repay it. And
2 if - - - and presumably, if there were any other direct
3 damages that might have flown from that, they would also
4 be required - - - they could be required to take care of
5 that.

6 JUDGE GRAFFEO: Would that encompass the fees?

7 MR. PLOTKIN: I'm sorry.

8 CHIEF JUDGE LIPPMAN: Judge Graffeo.

9 JUDGE GRAFFEO: Would that encompass the fees
10 that would - - -

11 MR. PLOTKIN: I believe that it would, yeah. I
12 mean, 5239 specifically says you can get damages.

13 JUDGE GRAFFEO: The 5239 special proceeding has
14 to be brought while the bank still holds the funds, so
15 you'd have to use 40.

16 MR. PLOTKIN: Then you can use 40, and 40 - - -
17 again, the language is - - - it's intended to avoid any
18 abuse of the enforcement process, and the debtor can go in
19 there, it's written in extremely broad language, and it
20 allows the court considerable leeway to have a special
21 proceeding or to have a hearing. I mean, you could have a
22 trial by jury.

23 JUDGE SMITH: Suppose there's a levy on an
24 account that has less than the - - - whatever that number
25 is, that minimum wage number in it, so the levy never

1 becomes effective, but the bank - - - and no funds are
2 ever restrained but the bank mistakenly or greedily or
3 whatever, charges a fee and I don't find out about it
4 until the end of the month and the levy - - - by that
5 time, the levy is gone and there's no judgment creditor
6 anywhere in the picture. What's my remedy?

7 MR. PLOTKIN: I believe it would be 5240.

8 JUDGE SMITH: I can still go in under 5240 - - -

9 MR. PLOTKIN: Yes.

10 JUDGE SMITH: - - - and say because this arose
11 from a levy make the bank give me my money back.

12 MR. PLOTKIN: Yes. And I believe the statute
13 requires notice to the debtor even of a levy so - - -

14 JUDGE SMITH: Yeah, but of course, we're talk -
15 - - we're - - -

16 MR. PLOTKIN: The absence - - -

17 JUDGE SMITH: - - - we're assuming a violation
18 of the statute.

19 MR. PLOTKIN: Yes. And I believe - - - that's
20 why I believe that 5240 backs up 5239 because one is time
21 limited; the other one is not. And I think in those
22 circumstances, 5240 would allow the debtor the opportunity
23 to at least bring the matter to the attention of the
24 presiding judge.

25 Yes, Judge, I'm sorry.

1 JUDGE PIGOTT: So giving an example, you
2 inadvertently execute and as a result the debtor bounces
3 five checks, you would say that any fee that you charge
4 for insufficient funds and all that other stuff, he or she
5 could get back in a 5240?

6 MR. PLOTKIN: I think that they would have the
7 right to ask for that, and if the facts of the case
8 justified it, I believe the court would have the authority
9 to authorize that under the statute.

10 JUDGE PIGOTT: And you said direct damages, so
11 if that happened and the insufficient fund check was used
12 to pay the electric bill which didn't get paid and
13 therefore there's a late charge on the electric bill,
14 would that fall within the penumbra of what you think are
15 direct damages under 5240?

16 MR. PLOTKIN: I don't know where you would draw
17 the line, Your Honor, but I don't - - - I think my point
18 is I don't know that it would be limited just to the fee,
19 that there - - - if they're - - - depending on the
20 connection and the proximity and the proximate cause and
21 the facts of the particular case, there might be.

22 JUDGE SMITH: You would draw the line somewhere
23 short of my case of pneumonia?

24 MR. PLOTKIN: I would probably come short of
25 pneumonia, yes, Your Honor. But I do think it's a

1 question of kind of proximate cause and how far you can
2 draw it out. And I think we would also - - -

3 JUDGE SMITH: Are you really saying - - - I
4 mean, are you agreeing with your adversary that any
5 damages proximately caused by a breach of the statute are
6 recoverable under Article 52?

7 MR. PLOTKIN: Again, they might be. I think it
8 depends on exactly what the connectivity is.

9 JUDGE SMITH: Well, aren't you then - - - you're
10 saying there is a private right of action; it's just under
11 Article 52.

12 MR. PLOTKIN: Yes, it's the - - - we're saying
13 that it's the exclusive right so that you don't initiate a
14 brand new plenary action in a court and - - -

15 JUDGE SMITH: So if he changes the caption of
16 his complaint to be a proceeding under Article 52, the
17 complaint's good?

18 MR. PLOTKIN: It might be; I'd have to read the
19 rest of it. But he might at least be in the area where
20 there would be a private right of action. And with regard
21 to a plenary, I mean, I think you need to look at some of
22 the - - - the Schlessinger case and the Caruso case in
23 which this Court found that but for the statute there was
24 no tort, but for the EIPA there is no notice requirement.
25 And so I don't know that there could have been a plenary

1 action because, just like in the Martin Act, which created
2 certain disclosure obligations, this Court held that at
3 common law there were no such disclosure obligations.

4 CHIEF JUDGE LIPPMAN: Okay, counselor. Thanks,
5 counselor. Appreciate it.

6 Counselor, rebuttal.

7 MR. KOPPELL: Yes, Your Honor.

8 CHIEF JUDGE LIPPMAN: What's wrong with 5240?

9 MR. KOPPELL: Well, 5240, first of all, relates
10 to a proceeding between - - - it's really a proceeding
11 brought by the creditor. It's not - - - it doesn't
12 involve the debtor - - - it doesn't involve the bank. I'm
13 sorry. It's the creditor and the debtor; it doesn't
14 involve the bank so that the bank is really not part of
15 that proceeding. And here, we're talking about action
16 against the bank. And by the way - - -

17 JUDGE SMITH: How do you know from reading 5240
18 that it has nothing to do with banks?

19 MR. KOPPELL: Because 5240 talks about actions
20 within the proceeding between the creditor and the debtor.
21 And incidentally, Professor Siegel points out that even if
22 5240 does apply it's not exclusive; it doesn't prevent
23 there to be a common law right, if you will, or a general
24 right under 5222.

25 And I just would like to refer to Court to the

1 opinion of Judge Velasquez in the state court. The state
2 court had it right. The federal courts have it all wrong.
3 The state court had it right. And he says here, "The
4 Court finds plaintiffs have an implied right of action to
5 seek a remedy where all the protection provided plaintiff
6 and all others similarly situated have been violated, no
7 detailed scheme for administrative enforcement exists, and
8 plaintiffs have suffered harm as a direct result of said
9 violations."

10 JUDGE PIGOTT: But you do see - - - I mean, when
11 you look at that form and you look at what they're trying
12 to do, I mean, they must have twelve or fourteen different
13 income streams - - -

14 MR. KOPPELL: Right.

15 JUDGE PIGOTT: - - - black lung to everything
16 else.

17 MR. KOPPELL: Right, right.

18 JUDGE PIGOTT: The bank doesn't know most of
19 that, if any of it, so I mean, all they know is they got
20 money in the bank and somebody wants it and they send out
21 these notices, and whatever happens in between, whether
22 somebody died or there was a divorce or - - -

23 MR. KOPPELL: Right.

24 JUDGE PIGOTT: - - - they don't know any of
25 that. And so you can understand the inadvertent part, can

1 you not? I mean - - -

2 MR. KOPPELL: Yeah, but that's out. The
3 inadvertent failure to send the notices doesn't imply any
4 liability against the bank. What happens here is the bank
5 - - - if the bank - - - first of all, the bank has to
6 leave 1,740 dollars alone; that's number 1. That's very
7 simple. Now, that wasn't true before. That's why I say
8 now the bank has more - - -

9 JUDGE PIGOTT: But, Mr. Koppell, it's more than
10 just what I described. For example, let's assume that the
11 notice - - - notices that the creditor sends to you are
12 defective, you're going to send them out anyway - - - or
13 they're going to send them out anyway. I mean, these - -
14 -

15 MR. KOPPELL: But that would be the creditor's
16 responsibility, maybe not the bank.

17 JUDGE PIGOTT: Right. So again, it's not a - -
18 - you don't sue the bank over that even though they got
19 the wrong party, they listed the wrong account number.

20 MR. KOPPELL: No. You sue the bank if they
21 violated the - - - there's very specific provisions. They
22 got to keep 1,740 there. Incidentally, in the Jackson
23 case, it's very interesting - - - you know what the bank
24 did in the Jackson case, Bank of America? They didn't
25 keep the bank account open at all. They sent the 1,740

1 dollars to the depositor. Now, that's inappropriate and
2 we should get - - - be able to get an injunction to
3 prevent that kind of activity. That's exactly what the
4 sponsor said they didn't want, that people wouldn't be
5 able to use their bank accounts anymore to pay their daily
6 expenses. So there's a series - - - it's very different
7 than before this statute passed. The bank now has some
8 very specific responsibilities.

9 JUDGE SMITH: You're saying you can sue them for
10 sending you money?

11 MR. KOPPELL: You can sue - - - well, you can
12 see them for - - - yes, because they didn't keep your bank
13 account open. That's correct. If they send you the money
14 and you have paid by check, let's say, to somebody, then
15 they'll get - - -

16 JUDGE SMITH: And what's the remedy you get?
17 They sent you your money, so your bank account wasn't
18 open, so what do you get? You get the expense of using a
19 check-cashing service?

20 MR. KOPPELL: You might, you might get that, and
21 you certainly, if they then didn't bounce the check
22 because they closed your account, you'd get the bounced
23 check fee back so - - -

24 JUDGE PIGOTT: But all that's - - -

25 MR. KOPPELL: But most important, we would be

1 able to get an injunction. After all, this is a class
2 action. And that's another point with respect to the - -
3 - to the use of a special proceeding, that the special
4 proceeding has very narrow venue provisions. And if you
5 tried to bring it on behalf of all the depositors of, say,
6 Citibank or Chase, even all the depositors in New York
7 state, you couldn't do it because the venue provisions
8 limit you to only the particular county in which the
9 account is located. So it makes it a problem to bring a
10 general class action. And we go back again to the
11 temporal problem. You can only bring a 5239 before the
12 money is transferred.

13 CHIEF JUDGE LIPPMAN: Okay. Thank you, counsel.

14 Thank you all. Appreciate it.

15 (Court is adjourned)

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C E R T I F I C A T I O N

I, David Rutt, certify that the foregoing transcript of proceedings in the Court of Appeals of Cruz v. TD Bank, N.A., and Martinez v. Capital One Bank, No. 181, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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