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Popular Community Bank Loses Bid To Dodge Overdraft Suit

By **Steven Trader**

Law360, New York (April 25, 2017, 8:13 PM EDT) -- A New York state appellate court on Tuesday rejected Popular Community Bank's request to overturn a lower court decision refusing to dismiss a consumer's claim that the financial institution violated state business law by reordering ATM transactions in order to maximize overdraft fees.
A panel of judges from New York's First Department appellate division affirmed a February 2016 ruling by Judge Anil Singh, which mostly struck down a request by the bank, which goes by the name [Banco Popular North America](#), for dismissal of the state General Business Law violation claim brought by Josefina Valle and her son Wilfredo Valle.

Contrary to BPNA's argument, the lower court judge was correct in finding that the Valles had properly stated a GBL claim by alleging that the bank employed a deceptive and misleading consumer-oriented policy, not disclosed to the consumers, of high-to-low reordering of ATM transactions that resulted in the Valles being charged an additional overdraft fee in April 2012, the appellate court said Tuesday.

"The claim is also properly supported by allegations that defendant provided plaintiffs with inaccurate balance information, often showing a positive balance when in fact their account balance was negative, and failed to provide real-time notice that a given transaction would overdraw the account, despite the feasibility of doing so, and that these practices also resulted in additional overdraft fees," the appellate panel wrote.

Counsel for the Valles and representatives for the bank could not immediately be reached for comment.

The Valles first launched their lawsuit in November 2012, alleging that since 2006, BPNA had engaged in a number of deceptive practices, including failing to disclose, prior to the completion of a transaction, that an ATM withdrawal or debit card transaction would cause the account to be overdrawn, and reordering

withdrawals from high to low to create maximum overdraft charges.

After multiple amendments, the claims were eventually whittled down to a single allegation brought under New York's General Business Law. BPNA then sought to dismiss the suit, contending that high-to-low reordering did not give rise to a GBL violation, and that New York banking regulations gave it discretion to process transactions in whatever order it chooses.

However, the lower court judge concluded that BPNA had not established that reordering of ATM transactions was sanctioned by those rules.

The bank had also argued that the claim was untimely, given that some of the transactions had occurred longer than five years before the complaint. The lower court judge was partially persuaded, saying that some of the Valles' transactions could indeed be outdated, but that at least a few of them were not.

The judge also noted that the reordering practice wasn't the only practice the Valles alleged was deceptive, but rather that the reordering practice, combined with the practice of providing false balance information, made it difficult or impossible for them to track their account balance.

"Ultimately, whether or not plaintiffs overdrew their account due to BPNA's allegedly deceptive practices raises an issue of fact not properly decided by the court on the instant motion to dismiss," Judge Singh wrote in his 2016 order.

Valle is represented by Joseph S. Tusa of Tusa PC.

Counsel information for BPNA was not immediately available.

The case is Josefina Valle et al. v. Popular Community Bank, case number 653936/12, in the Supreme Court of New York Appellate Division, First Department.

--Editing by Kelly Duncan.

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