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MARK D. DEAN, P.S.C.,

APPELLANT

v. On Appeal From Court Of Appeals, No. 2010-CA-2152-MR
And Shelby Circuit Court, No. 09-CI-00050

COMMONWEALTH BANK & TRUST COMPANY,

APPELLEE

Amicus Curiae Brief
Of The Kentucky Bankers Association

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Certificate of Service

I certify that the record on appeal was not withdrawn by the Kentucky Bankers Association and that copies hereof together with the accompanying "Motion Of Kentucky Bankers Association For Leave To File A Brief As *Amicus Curiae*" and a proposed order were mailed, first-class, postage pre-paid, this 25th day of February, 2013, to: (1) **Hon. Charles R. Hickman**, Judge, Shelby Circuit Court, 501 Main Street, Shelbyville, KY 40065; (2) **Samuel P. Givens, Jr.**, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; (3) **Laurence J. Zielke**, Zielke Law Firm, PLLC, 462 S. Fourth Street, Suite 1250, Louisville, KY 40202, *Counsel for Appellant*; and (4) **John T. McGarvey**, Morgan & Pottinger, P.S.C., 601 W. Main Street, Louisville, KY 40202, *Counsel for Appellee*.

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The Kentucky Bankers Association (the “KBA”), as *amicus curiae*, submits the following brief addressing two important issues raised by this case concerning a customer’s duty to monitor activity in its checking account.

INTRODUCTION

This is a case about how Section 4-406 of the Uniform Commercial Code (KRS 355.4-406) allocates duties and responsibilities to monitor activity in a checking account. On the one hand, the underlying facts are all too common – a trusted business employee with day-to-day control over the business’ checking account abuses that power to steal from the business. In Concrete Materials Corp. v. Bank of Danville, 938 S.W.2d 254 (Ky. 1997), this Court cited to published decisions from five other states discussing such situations.

On the other hand, the underlying facts are disturbing. The checking account at Appellee, Commonwealth Bank & Trust Company (“Commonwealth Bank”), is a law firm’s escrow account. The law firm, Appellant, Mark D. Dean, P.S.C. (“Dean P.S.C.”), had a single lawyer, Mark Dean, whose practice was primarily handling real estate transactions. This Court’s Rules Of Professional Conduct required that Mr. Dean be able to “render a full accounting” of funds in the escrow account. See SCR 3.130(1.15(b)). The Official Comment to this rule states that Mr. Dean “should hold property of others with the care required of a professional fiduciary.” The firm’s bookkeeper and secretary, Jody Wills (“Ms. Wills”), was identified as an authorized signer on the account, and the signature card expressly stated that only one signature was required. Mr. Dean was obligated by SCR 3.130(5.3(b)) to “make reasonable efforts to ensure that [Ms. Wills’] conduct is compatible with the professional obligations of the lawyer.” Despite this, Ms. Wills was allowed to engage in a check kiting scheme resulting in losses of approximately \$800,000. This misconduct began in September 2003 and continued until early 2005. When Commonwealth Bank’s Market President,

Belinda Nichols, had a meeting with Mr. Dean on February 1, 2005, to apprise him of concerns of Commonwealth Bank about possible check kiting using the account, Mr. Dean assured Commonwealth Bank that there were no problems. Mr. Dean claims he did not become aware of Ms. Wills' misconduct until September 2008. Incredibly, Mr. Dean even states in his Appellant's Brief to this Court that he never reviewed the monthly bank account statements because "Wills diverted bank statements arriving from CBT." See Brief Of Appellant at p. 3.

Despite Mr. Dean assuring Commonwealth Bank at a face-to-face meeting in February 2005 that all was proper with regard to the account, Dean P.S.C. sued Commonwealth Bank on January 23, 2009, alleging five causes of action. Count 1 of Dean P.S.C.'s complaint alleged violations by Commonwealth Bank of two provisions of Articles 3 and 4 of the Uniform Commercial Code (the "UCC") -- KRS 355.3-405 and KRS 355.4-406.¹ The other four counts were common law claims of aiding and abetting fraud, negligence, breach of contract, and for punitive damages.

In two orders, the Shelby Circuit Court ruled in favor of Commonwealth Bank on a number of grounds. In its February 17, 2010, Opinion and Order, the Shelby Circuit Court concluded that the UCC claims were barred by the three year limitations periods set out in KRS 355.3-118(7) and KRS 355.4-111. In applying these statutes, the Circuit Court rejected Dean P.S.C.'s arguments that it could extend these statutory periods by a "discovery rule." It also rejected Dean P.S.C.'s arguments that the statutory periods could be extended by claims of fraudulent concealment by Commonwealth Bank. The Circuit Court explained that Commonwealth Bank did not conceal any wrongdoing when it "mailed a bank statement which set out every transaction which occurred in the account and provided a copy of every check written on the Dean escrow account (including counter checks) every

¹KRS 355.3-405 addresses an employer's responsibility for fraudulent indorsements by its employee. KRS 355.4-406 addresses a customer's duty to discover and report unauthorized signatures or alterations on items for an account.

month.” See Shelby Circuit Court’s “Opinion And Order” (2/17/10) at p. 7. In that order, the Circuit Court rejected Commonwealth Bank’s arguments that the common law claims were barred by the 1-year requirement of KRS 355.4-406(6) for reporting unauthorized activity with respect to the account. The Circuit Court was of the opinion that because Ms. Wills was identified on the signature card as an authorized signer, there was no “unauthorized signature” for Dean P.S.C. to discover. See Shelby Circuit Court’s “Opinion And Order” (2/17/10) at p. 8. The Circuit Court expressed this conclusion without referring to the definition of “unauthorized signature” in KRS 355.1-201(ao).

After additional briefing, the Circuit Court then entered a second “Opinion And Order” on November 5, 2010, in which the Circuit Court found that each of the common law claims were insufficient as a matter of law for various reasons relating to the elements of those common law claims. In that order, the Circuit Court rejected Commonwealth Bank’s argument that the provisions of the UCC relating to the duties and responsibilities of the bank and its customer for handling the payment of checks displaced common law doctrines. See Shelby Circuit Court’s “Opinion And Order (11/5/10) at p. 7.

Dean P.S.C. then appealed, and the Court of Appeals affirmed the grants of summary judgment. The Court of Appeals ruled that all of Dean P.S.C.’s claims were barred by the substantive requirement of KRS 355.4-406(6) that a bank customer must “discover and report” to the bank “within one (1) year after the statement or items are made available to the customer” in order to assert any claim that a signature on an item is not authorized. It noted that Dean P.S.C.’s claim that Ms. Wills was abusing her authority by obtaining counter checks and using them in a check kiting scheme fell within the scope of the definition of “unauthorized signature” in KRS 355.1-201(ao). Citing extensively to this Court’s decision in Concrete Materials Corp. v. Bank of Danville, 938

S.W.2d 254, 256 (Ky. 1997), as well as to numerous similar rulings in other jurisdictions, the Court of Appeals found that all of Dean P.S.C.'s claims were barred by KRS 355.4-406(6).

ARGUMENT

1. This Court Should Reaffirm Its Ruling In Concrete Materials Corp. That The One Year Time Limit Under KRS 355.4-406(6) For A Customer To Discover And Report Unauthorized Checking Account Transactions “Is A Substantive Bar That Destroys The Right To Sue The Bank, Regardless Of The Theory On Which The Plaintiff Brings Suit.”

Kentucky first adopted the Uniform Commercial Code in 1958 (taking effect July 1, 1960). See 1958 Ky. Acts ch. 77. Less than a year later, Justice Palmore declared for a unanimous court that “we adopt as a rule that the Code is plenary and exclusive except where the legislature has clearly indicated otherwise.” Lincoln Bank & Trust Co. v. Queenan, 344 S.W.2d 383, 385 (Ky. 1961).

An important issue in this case is whether a customer can assert common law claims against a bank despite failing to satisfy the requirements of KRS 355.4-406(6) relating to a customer's statutory duty to inspect its checking account statement and timely report unauthorized signatures or alterations on an item. This statute reads:

(6) Without regard to care of lack of care of either the customer or the bank, a customer who does not within one (1) year after the statement or items are made available to the customer (subsection (1)) discover and report the customer's unauthorized signature on or any alteration on the item is precluded from asserting against the bank the unauthorized signature or alteration. If there is a preclusion under this subsection, the payor bank may not recover for breach of warranty under KRS 355.4-208 with respect to the unauthorized signature or alteration to which the preclusion applies.

One of this Court's very first reported decisions after the UCC took effect in Kentucky in 1960 specifically affirmed the application of §4-406 to checking account fraud. In Wuest Bros., Inc. v. Liberty National Bank & Trust Company, 388 S.W.2d 364 (Ky. 1965), this Court addressed a

bank's liability where a company employee forged signatures on seventeen company checks over an 18 month period. The bank accepted liability for the first check but disputed liability for the remaining 16 checks on the ground that the customer failed to inspect its account statements to detect the fraud and notify the bank. This Court accepted the bank's argument using pre-UCC principles since the forgeries all occurred prior to 1960. However, the Court noted that its decision was "in harmony with those incorporated in KRS 355.4-406(1), 2(a), (b) and (3) of the Uniform Commercial Code, which became effective July 1, 1960, and which now unquestionably determine the liability of a bank to a depositor in a forgery case like the one before us." Wuest, 388 S.W.2d at 366.

Thirty-two years later, a bank customer again failed to monitor its checking account. In that case, the misconduct by its plant manager went on for eight years before it was discovered. When the customer sued the bank, this Court wrote:

The fundamental purpose of KRS 355.4-406(4) [currently codified at subsection (6)] is to place the burden of prompt and reasonable inspection of bank statements on the bank customer so that upon a discovery of an alteration or irregularity, the customer and the bank could be on the alert for future problems.

Concrete Materials Corp. v. Bank of Danville, 938 S.W.2d 254, 257 (Ky. 1997).²

²The Concrete Materials decision applied the version of KRS 355.4-406 in effect prior to January 1, 1997. Since then, and effective January 1, 1997, KRS 355.4-406 was revised when Kentucky updated its Uniform Commercial Code to adopt what is commonly referred to as the 1990 Amendments to Articles 3 and 4 of the Uniform Commercial Code. The 1990 date refers to the year when the proposed revisions were completed by the Uniform Law Commission and the American Law Institute. In the 1990 Amendments, KRS 355.4-406(4) was renumbered as subsection (6), and slightly amended in ways that are not material to this case. See 1996 Ky. Acts ch. 130 §106. The following shows the changes to KRS 355.4-406(4) made by the amendments which took effect in 1997:

~~[(4)]~~ **(6)** Without regard to care of lack of care of either the customer or the bank, a customer who does not within one (1) year **after** ~~[from the time]~~ the statement or items are made available to the customer (subsection (1)) discover and report **the customer's** ~~[his]~~ unauthorized signature **on** or any alteration on the **item** ~~[face or back of the item or does not within three (3) years from that time discover and report~~

This Court further followed the express language of the statute to hold that KRS 355.4-406(4) [now subsection (6)] “limits the customer’s opportunity for redress where bank statements have not been reviewed in a timely fashion without regard to the negligence of the bank or the failure to adhere to normal banking procedures.” *Id.* Citing Clark, The Law of Bank Deposits and Anderson, Uniform Commercial Code, this Court noted that the one-year time limit for reporting a forgery or alteration “is a substantive bar that destroys the right to sue the bank, ***regardless of the theory on which the plaintiff brings suit.***” Concrete Materials, 938 S.W.2d at p. 259 (emphasis added). In support of this affirmation of the plain language of KRS 355.4-406, the Court cited decisions from New York, Florida, Michigan, Arkansas, and Tennessee. *Id.*³

Since it was decided, the Concrete Materials decision itself has been favorably cited and followed by numerous courts. See Environmental Equipment & Service Co. v. Wachovia Bank, 741 F.Supp.2d 705, 716 n. 13 (E.D. Pa. 2010); American Airlines Employees Federal Credit Union v. Martin, 29 S.W.3d 86, 92 n.25 (Tex. 2000); Euro Motors, Inc. v. Southwest Financial Bank And Trust Co., 696 N.E.2d 711, 714 (Ill.App. 1998). Cases adopting the result in Concrete Materials

~~any unauthorized endorsement]~~ is precluded from asserting against the bank **the [such] unauthorized signature [or indorsement] or [such] alteration. If there is a preclusion under this subsection, the payor bank may not recover for breach of warranty under KRS 355.4-208 with respect to the unauthorized signature or alteration to which the preclusion applies.**

³A related issue in Concrete Materials was the ability for the checking account agreement to contain a contractual provision obligating the customer “to report any errors, forgeries, unauthorized withdrawals or alterations to use as soon as possible, but in no event, later than sixty days after the statement is made available to you.” This Court, consistent with the majority rule in other jurisdictions, held the agreement to be enforceable under the UCC. Concrete Materials, 938 S.W.2d at 257. This ruling has been cited by courts of other states which have reached the same conclusion. See FCT Electronics, L.P. v. Bank of America, 2011 Conn.Super. LEXIS 2414 (Conn.Super. 2011); Freese v. Regions Bank, 644 S.E.2d 549, 552 (Ga.App. 2007); American Airlines Employees Federal Credit Union v. Martin, 29 S.W.3d 86, 97 n. 58 (Tex. 2000). Because of the extreme delay by Dean P.S.C. in inspecting its account statements, such a provision is not at issue in this case.

though not citing it include Pinigis v. Regions Bank, 977 So.2d 446 (Ala. 2007) and Halifax Corp. v. First Union Nat'l Bank, 546 S.E.2d 696 (Va. 2001). The Court of Appeals correctly cited to several other cases which hold that the 1-year time limit of Section 4-406(6) is applicable without regard to the theory on which the customer brings the action, including conversion, breach of fiduciary duty and aiding and abetting. See Court of Appeals' Opinion at pp. 7-8 (citing Euro Motors, Wetherhill v. Putnam Invs., 122 F.3d 554, 558 (8th Cir. 1997); Siecinski v. First State Bank Of East Detroit, 531 N.W.2d 768, 770-771 (Mich.App. 1995); Arkwright Mut. Ins. Co. v. State Street Bank & Trust Co., 703 N.E.2d 217, 221 (Mass. 1998); American Fed. of Teachers, AFL-CIO v. Bullock, 605 F. Supp.2d 251, 262 (D.D.C. 2009)).

All of these courts acknowledge that this result "furthers the UCC's objective of promoting certainty and predictability in commercial transactions." See American Airlines, 29 S.W.3d at 93. The courts uniformly note that "the customer ... should know whether or not he authorized a particular withdrawal or check, [and] he can prevent further unauthorized activity better than a financial institution, which may process thousands of transactions in a single day." Id.

In applying this 1-year bar rule, the Court of Appeals corrected the Circuit Court's oversight in not referring to the definition of "unauthorized signature" in KRS 355.1-201(ao):

(ao) "Unauthorized signature" means a signature made without actual, implied, or apparent authority. The term includes a forgery."

This definition is important because the 1-year bar rule of KRS 355.4-406(6) requires a customer to "discover and report the customer's unauthorized signature...." The Court of Appeals observed that "Jody [Wills] exceeded her authority when she engaged in the check-kiting scheme ... [and] hers was an unauthorized signature that Dean would have discovered if it had complied with its duty under KRS 355.4-406(3) to examine its bank statements." See Court of Appeals' Opinion at p. 6.

While not strictly permitting an affirmative negligence cause of action, the Court of Appeals'

decision in the Dean P.S.C. lawsuit contains dicta that a customer might be able to avoid the 1-year bar period of KRS 355.4-406(6) if the customer could show “circumstances which make it unreasonable to expect that the customer should have discovered the unauthorized payment.” See Court of Appeals Opinion at pp. 8-9.⁴ This statement confuses the allocation of liability in KRS 355.4-406 before and after the 1-year period from the date the statement or items are made available by the bank. This Court should avoid the same confusion.

Specifically, under Subsection (6), if the bank makes available the items or a statement referencing the items containing the information about the items specified in Subsection (1), then the one-year bar date is absolute. It is the customer’s obligation to discover the wrongdoing within the one-year period. If the period is less than one year, then (and only then) do the liability allocation rules of Subsection (3) and (4) come into play. Only in Subsection (3) is there any reference to whether “the customer should reasonably have discovered the unauthorized payment.” This error was noticed by the treatise writer Barkley Clark when he discussed the Court of Appeals’ decision in Clarks’ Bank Deposits And Payments Monthly. He wrote:

We disagree with the Kentucky appellate court on one point. We don’t think that the lack of negligence of the customer in reviewing bank statements should affect the one-year deadline. The Official Comments cited by the court in the Kentucky case refer to the general negligence rule found in subsection (c) of 4-406 [KRS 355.4-406(3)]. In contrast, the one-year rule in subsection (f) [KRS 355.4-406(6)] applies, by its terms, “without regard to care of lack of care of either the customer or the bank.” The fact that Dean didn’t notify the bank until more than one year after the monthly statements were available to it was enough. In short, subsection (f) trumps subsection (c). The court’s unnecessary language on this point is unfortunate.

⁴Even under this incorrect approach, the Court of Appeals found that Dean P.S.C. had no defense since “we conclude, as did the circuit court, that Mark, on Dean’s behalf, should reasonably have discovered Jody’s unauthorized transactions.” See Court of Appeal’s Opinion at p. 9. The KBA agrees.

See Vol. 21, No. 4, Clark's Bank Deposits And Payments Monthly, "Failure To Report Check Kite Within One Year Bars Plaintiff's Common Law And UCC Claims," (Apr. 2012) at p. 4. The KBA fully supports this analysis of the interrelationship between KRS 355.4-406(3) and 4-406(6). It does so first on statutory language grounds. Second, a contrary view destroys the effectiveness of KRS 355.4-406(6) as establishing a uniform and easy to apply black line rule for when a customer must, at the very latest, report unauthorized transactions in its checking account. Thus, the KBA urges this Court not to issue an opinion contrary to this analysis by Mr. Clark.

In sum, all of the KBA's members have for years relied upon the Concrete Materials decision and the plain language of KRS 355.4-406(6) to structure their banking operations based upon the understanding that a business customer has a duty to inspect its bank statements to detect and report fraudulent activity by its employees. Furthermore, the KBA's members have understood that a customer who ignores this duty for a year or more cannot, under any circumstances, hold its bank liable for any unauthorized signatures or alterations disclosed in statements over a year old. There is neither a statutory nor policy basis for overturning this longstanding law in Kentucky, and the dismissal of Dean P.S.C.'s complaint against Commonwealth Bank should be affirmed by this Court.

2. This Court Should Reject Dean P.S.C.'s Efforts To Have A Judicially Created "Discovery" Exception To The One Year Statutory Period In KRS 355.4-406(6) For Reporting Unauthorized Signatures Or The General Three Year Statute Of Limitations In KRS 355.3-118(7) And KRS 355.4-111.

In its Argument III(A), Dean P.S.C. argues that "even if Dean's UCC cause of action accrued in 2005, the discovery rule would toll this statute of limitations." See Brief of Appellant at p. 23. Dean P.S.C. describes this "discovery rule" as one which permits the statute of limitations to be tolled if the defendant "fraudulently concealed its wrongful actions." Id.

As a preliminary matter, in analyzing this argument, this Court should distinguish between (i)

the traditional statute of limitations of KRS 355.3-118(7) and KRS 355.4-111 and the (ii) the substantive bar rule of KRS 355.4-406(6).

Regarding the later, KRS 355.4-406(6) provides that the one-year error reporting deadline is only triggered “after the statement or items are made available to the customer (subsection (1)).” Subsection (1) of KRS 355.4-406 requires that the bank’s statement of account provided to the customer either “return or make available to the customer the items paid” or “provide information sufficient to allow the customer reasonably to identify the items paid.” The last sentence of Subsection (1) even provides a safe harbor by specifying that the “statement of account provides sufficient information if the item is described by item number, amount, and date of payment.” In this case, it is undisputed that Commonwealth Bank provided Dean, P.S.C. a monthly statement mailed to Dean P.S.C.’s address which contained the original or a copy of each paid item. See Record on Appeal at 258, 261-264, 266-311.

In other words, the General Assembly by enacting KRS 355.4-406 has already specified the parameters of what does or does not constitute sufficient information to the bank’s customer to allow it to “discover” the misconduct and to trigger KRS 355.4-406(6). Where a bank complies with this express statutory language, it is inappropriate for the Court to establish a judicially created standard of “fraudulent concealment” or a undefined “discovery rule” which would allow the customer to avoid the one year substantive bar rule of KRS 355.4-406(6). Cf. Euro Motors, Inc. v. Southwest Financial Bank And Trust Co., 696 N.E.2d 711, 715 (Ill.App. 1998) (rejecting exceptions to the 1-year bar rule of §4-406(f) because “the commercial certainty that the UCC seeks to achieve in respect to commercial transactions would quickly dissipate if *ad hoc* exceptions to its commands were too eagerly crafted to accommodate the occasional ‘hard case.’”).

Of course, the KBA contends that this is not a “hard” case. The lawyer handling hundreds of

thousands of dollars of real estate transactions grossly ignored both ordinary rules of sound business and specific rules of professional conduct by failing to ever examine the bank statements sent monthly by Commonwealth Bank. Indeed, this Court in Countrywide Home Loans, Inc. v. Kentucky Bar Assn, 113 S.W.3d 105 (Ky. 2003), emphasized the important, and sometimes mandatory, role lawyers are required to play in handling certain aspects of real estate transactions that cannot be handled by bank employees. The irony is not lost on the KBA that six years after the Countrywide Home Loans case, the bank in this case is being sued by a real estate closing law firm that did not monitor for years its monthly escrow account bank statements.

Regarding the traditional statute of limitations of KRS 355.3-118(7) and KRS 355.4-111, both of these statutes expressly provide that the enforcement action “must be commenced within three (3) years after the claim for relief accrues.” Because the Court of Appeals relied solely upon KRS 355.4-406(6), it did not address Dean P.S.C.’s “discovery rule” argument under these two statutes. The Circuit Court did consider the argument, but rejected it based upon the reasons cited in Haddad’s of Illinois, Inc. v. Credit Union 1 Credit Union, 678 N.E.2d 322 (Ill.App. 1997). See Shelby Circuit Court’s “Opinion And Order” (2/17/10) at p. 5. The Haddad’s of Illinois case had previously been cited as the basis for rejecting a discovery rule under KRS 355.3-118(7) in the unreported Court of Appeals’ decision in Bradley v. National City Bank of Kentucky, No. 2003-CA-2711-MR, 2004 WL 3017297 (Ky.App. 2004).

Dean P.S.C. cites to the Bradley case as standing for the proposition that the three year limitation periods in KRS 355.3-118(7) and KRS 355.4-111 can be tolled “where there is fraudulent concealment by a bank.” See Brief of Appellant at p. 23. This is a different type of method of extending the statute of limitations than the true “discovery rule” referenced in the R.T. Vanderbilt Co. v. Franklin, 290 S.W.3d 654 (Ky.App. 2009), opinion which is cited by Dean P.S.C. on page 22

of its Brief of Appellant. The R.T. Vanderbilt case involved a latent personal injury asbestosis claim governed by KRS 413.140(1) and the discovery rule adopted by this Court in Louisville Trust Co. v. Johns-Manville Products Corp., 580 S.W.2d 497 (Ky. 1979). In Johns-Manville, this Court determined that a personal injury claim arising from a latent disease caused by exposure to a harmful substance did not accrue “until the plaintiff discovers or in the exercise of reasonable diligence should have discovered not only that he has been injured but also that his injury may have been caused by the defendant’s conduct.” Johns-Manville, 580 S.W.2d at 501.

Thus, the first question is whether Dean P.S.C. is arguing for application of a “fraudulent concealment” exception under Bradley or for a “discovery rule” under Johns-Manville? Dean P.S.C.’s brief to this Court focuses on the claim that “[t]here is evidence from which a jury could find in Dean’s favor that CBT fraudulently concealed its wrongful actions from Dean.” See Brief of Appellant at p. 23. This is reinforced by Dean P.S.C.’s quoting the language in Munday v. Mayfair Diagnostic Laboratory, 832 S.W.2d 912, 915 (Ky. 1992), that “where the law imposes a duty of disclosure, a failure to disclose may constitute concealment.” See Brief of Appellant at p. 23.

The fraudulent concealment concepts of Bradley and Munday are actually “an estoppel [which] may arise to prevent a party from relying on a statute of limitations by virtue of a false representation or fraudulent concealment.” See Munday, 831 S.W.2d at 914 (citing Cuppy v. General Accident Fire and Life Assurance Corp., 378 S.W.2d 629 (Ky. 1964)). As such, the concept theoretically might apply to any statute of limitations defense, but it has no application in this case.

Specifically, to support its fraudulent concealment argument, Dean P.S.C. asserts that “CBT did not contact Dean to let it know that CBT had been providing numerous counter checks to Wills.” See Brief of Appellant at p. 23. This assertion is flatly contradicted by the record. The KBA can say it no better than did the Circuit Court:

Commonwealth mailed a bank statement which set out every transaction which occurred in the account and provided a copy of every check written on the Dean escrow account (including counter checks) every month. Dean states that Wills intercepted the bank statements and that he had no opportunity to review the statement to discover Wills' fraud. Wills, **not** Commonwealth, concealed the bank statements from Dean. Wills' concealment cannot be imputed to Commonwealth. There are no facts of record that any action or inaction on the part of Commonwealth prevented Dean from receiving the bank statements which detailed all transactions in the escrow account.

See Shelby Circuit Court's "Opinion And Order" (2/17/10) at p. 7 (Court's emphasis). Thus, there is no basis for applying a fraudulent concealment estoppel against Commonwealth Bank in this case or against any bank that regularly sends monthly bank statements to its customers.

As for the traditional "discovery rule," this Court recently emphasized in Fluke Corp. v. LeMaster, 306 S.W.3d 55 (Ky. 2010), that it "is available only in cases where the fact of injury or offending instrumentality is not immediately evident or discoverable with the exercise of reasonable diligence, such as in cases of medical malpractice or latent injuries or illnesses." Id. at 60. In Fluke Corp., this Court refused to apply the discovery rule to claims arising from an industrial accident allegedly caused by a defective voltage meter. This Court cautioned against applying the discovery rule in ways that the "exception is capable of swallowing the rule." Id. at 60-61, n. 7.

That is precisely the problem and the rationale the Haddad's of Illinois court used to reject applying the traditional discovery rule to claims under UCC §3-118(7). The Court quoted the following passage from Husker News Co. v. Mahaska State Bank, 460 N.W.2d 476, 479 (Iowa 1990):

As tempting a choice as that may be in an individual case, however, we think the public would be poorly served by a rule that effectively shifts the responsibility for careful bookkeeping away from those in the best position to monitor accounts and employees. Strict application of the limitation period, while predictably harsh in some cases, best serves the twin goals of swift resolution of controversies

and ‘certainty of liability’ advanced by the [Code].

Haddad’s of Illinois, 678 N.E.2d at 325-326.

In addition to these policy reasons, there is an equally compelling reason for not applying the discovery rule – the drafters of the Uniform Commercial Code failed to adopt it. Courts of other states have rejected a discovery rule to the UCC claims asserted by Dean P.S.C. by noting that the UCC expressly provides for a discovery rule in certain provisions but does not include it in either KRS 355.3-118(9) or KRS 355.4-111. See Hawkins v. Nalick, 975 N.E.2d 739, 799 (Ill.App. 2012); Auto-Owners Ins. Co. v. Bank One, 852 N.E.2d 604, 611 (Ind.Ct.App. 2006). The UCC provisions with express discovery rules include KRS 355.3-416(4) (claim for breach of a transfer warranty “accrues when the claimant has reason to know of the breach”), KRS 355.3-417(6) (claim for breach of presentment warranty “accrues when the claimant has reason to know of the breach”), and KRS 355.4-208(f) (claim for breach of presentment warranty on drafts “accrues when the claimant has reason to know of the breach”). This express difference in approaches confirms that the Circuit Court was correct to reject any argument by Dean P.S.C. for application of the traditional discovery rule to its causes of action.

There is one final reason for not applying a traditional discovery rule in this case. That rule is generally applied when it is difficult for a plaintiff to discover he or she is injured. However, technology is completely changing the nature of the way that bank customers can determine what is happening in their bank accounts. Ms. Wills began her check kiting in 2003, a decade ago. Since then, internet banking has arrived, and increasingly (if not almost universally), a bank customer may access records about activity in his or her checking account via the Internet at any time. No longer must a manager such as Mr. Dean ask his bookkeeper for the monthly bank statement. This ease of direct access by bank customers to their own account data makes it less than credible for a business

plaintiff to claim that it needs the protection of the traditional discovery rule in order to detect wrongdoing in its account.

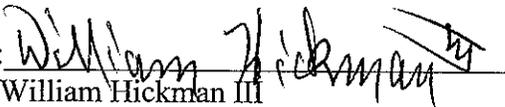
In sum, Dean P.S.C. has no basis for arguing that some type of discovery rule or estoppel should have prevented its claims from being dismissed as untimely.

CONCLUSION

For all the foregoing reasons, this Court should affirm that summary judgment was properly entered dismissing Dean, P.S.C's. claims against Commonwealth Bank as being barred by the 1-year substantive bar of KRS 355.4-406(6).

Respectfully submitted,

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