



## IOLTA Indemnification Provisions Trigger Attorney's Obligation to Indemnify Bank for Underlying Litigation Expenses

October 17, 2012

[Henry v. Waller, 2012 IL App \(1st\) 102068, \\_\\_\\_ N.E.2d \\_\\_\\_ \(June 29, 2012\)](#)

### Brief Summary

The First District Appellate Court in Illinois held that: (1) defendant attorney's obligation to indemnify a bank for attorneys' fees and costs incurred in defending underlying litigation involving the negotiation of checks with allegedly forged signatures was triggered under the attorney's interest on lawyers trust account's (IOLTA) indemnification provisions; (2) the attorney was not entitled to a more equitable interpretation of IOLTA account's indemnification provisions; and (3) the IOLTA account's indemnity provisions did not constitute a contract of adhesion.

### Complete Summary

Defendant attorney held an IOLTA account at a bank. One of the resolutions governing this account contained an indemnification agreement requiring the lawyer to indemnify the bank for attorneys' fees and costs that it incurred under certain circumstances. After prevailing in the underlying litigation involving the negotiation of checks with allegedly forged signatures, the bank filed a petition seeking attorneys' fees and costs from the lawyer that it allegedly incurred while defending the underlying litigation. The bank sought fees and expenses pursuant to the indemnification agreement and under certain provisions of the Illinois Uniform Commercial Code (UCC) (810 ILCS 5/1-101 et seq. (West 2006)).

The trial court found that the lawyer was not obligated to indemnify the bank and entered judgment in his favor. On appeal, the bank contended that the trial court erred in denying its petition for attorneys' fees and expenses. The appellate court reversed and remanded.

In 1993, plaintiff client received a \$500,000 judgment against her husband in divorce proceedings. She retained a lawyer at a collection agency to recover that judgment. In October 1998, the client signed a limited power-of-attorney agreement in connection with her engagement of the collection agency. The collection agency then hired defendant attorney to assist in collecting the judgment. The collection agency and defendant attorney negotiated a \$450,000 settlement of the divorce judgment. In December 1998, defendant attorney received the settlement in two cashier's checks payable to "[the client] and [defendant attorney]" in the amounts of \$150,000 and \$300,000. Defendant attorney did not send the checks to the client for her endorsement before depositing them into his IOLTA account. It



was undisputed that at some point prior to defendant attorney endorsing and depositing the checks, they were endorsed with the a signature of the client's name. There was no evidence presented at trial as to how the signatures in the client's name appeared on the back of each check. The client testified that she "never touched" the checks.

Defendant attorney endorsed and deposited each check into his IOLTA account at the bank. The parties stipulated at trial that the bank accepted in good faith the checks deposited in defendant attorney's IOLTA account. Defendant attorney then caused the bank to issue two cashiers checks payable to the firm for the entire amount of the settlement proceeds, and the collection agency then paid defendant attorney \$75,000. The client did not receive any of the settlement money from the collection agency lawyer, who allegedly stole the money and disappeared. The collection agency lawyer was never found. In 1999, the client sued the collection agency lawyer and his firm but was unable to serve the complaint and summons on them.

In 2000, the client amended her complaint to sue the bank and defendant attorney, asserting that the endorsement signatures in her name on the back of the cashier's checks were forgeries. In her legal malpractice, breach of contract and fraudulent transfer claims, she alleged that defendant attorney failed to procure her signature on the settlement checks, failed to pay the settlement proceeds to her, and failed to communicate with her regarding the settlement. She also sued the bank under section 3-420 of the UCC (810 ILCS 5/3-420 (West 2006)), alleging that the endorsements in her name on the settlement checks were unauthorized and that the bank was liable for conversion because it accepted the checks for deposit over unauthorized signatures.

The trial court granted the bank's motion for summary judgment. The client and defendant attorney ultimately reached a settlement agreement with respect to the professional negligence dispute. The bank then filed a petition for attorneys' fees and expenses against defendant attorney, seeking \$225,000 in attorneys' fees and expenses it incurred during the 11 years of litigation in the client's matter. The bank claimed that the attorney contractually agreed to indemnify it pursuant to the terms of his account agreement and sought fees and expenses under the transfer warranty provisions of the UCC. See 810 ILCS 5/4-207(a), 3-416(a) (West 2006).

The trial court denied the bank's petition, finding that the attorney's negotiation of the checks through his account neither triggered the indemnification provisions of his account agreement nor breached the UCC transfer warranties. With respect to the bank's contractual claim for indemnification, the court stated that the negotiation of the checks through the bank by the attorney was "uneventful" and therefore "was not a triggering event for the contractual indemnification obligations of this contract." Instead, the court stated that the cause of action was triggered by a "subsequent conversion" by the collection agency lawyer. The trial court reasoned that the bank was not entitled to indemnification because "[t]he conversion here followed the otherwise proper settlement negotiations and the negotiable instrument acts herein through [the bank]. . . . This case sounds in criminal theft and in conversion, not in breach of warrant[y] or certainly not in breach of the [UCC]." The bank appealed.



The indemnification agreement provided in part:

In order to induce said Bank to act pursuant to the foregoing resolutions, this Corporation hereby agrees as follows:

To indemnify the Bank and save it free and harmless from any and all claims, demands, expenses (including attorney fees and costs), losses or damages it may suffer resulting from or growing out of or in connection with any act taken by the Bank as a result of, or its failure to act under any or all the foregoing resolutions, or its failure not to conform in all respects to the authorizations specified hereunder.

The appellate court held that the indemnification agreement clearly and unambiguously required defendant attorney to indemnify the bank for “*any and all*” attorney fees and expenses it incurs resulting from “*any act*” taken by the bank under any of the account resolutions. (Emphasis in original). The court concluded that the bank acted under two account resolutions and that those actions resulted in the bank incurring attorneys’ fees and costs for which it was contractually entitled to be indemnified.

### **Significance of Opinion**

This decision underscores the importance of carefully reviewing — before signing — contracts such as broad indemnification agreements that do not limit the obligation to indemnify to situations in which one’s own actions, as opposed to those of a third party, are the direct and immediate cause of another incurring attorneys’ fees.

For further information, please contact [Terrence P. McAvoy](#).

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