

BofA Can't Ax MDL Over Calif. COVID Relief Fraud Issues

By **Dorothy Atkins**

Law360 (May 26, 2023, 10:12 PM EDT) -- A California federal judge on Thursday trimmed a proposed multidistrict class action consumer litigation alleging Bank of America NA's security failures exposed their unemployment and disability benefits cards to fraud and led the bank to breach their contracts by freezing all accounts during the COVID-19 pandemic.

In an **81-page order**, U.S. District Judge Larry Alan Burns kept alive the bulk of the sprawling litigation, dismissing for good only three of 14 claims and allowing the consumers to amend other claims that were tossed.

The decision keeps alive multidistrict litigation against the North Carolina-based bank that landed on Judge Burns' docket in **June 2021**, following a wave of fraudulent transactions targeting California's public benefits programs in the early days of the COVID-19 pandemic in 2020.

The bank had a contract with the state to provide electronic benefits payment services via prepaid debit cards, or EDD cards, for the California Employment Development Department. But the consumers claim in their consolidated complaint that the bank's failure to implement basic security measures, like using standard security card chips, led to a spike in fraudulent transactions.

Instead of investigating each cardholder's claims of unauthorized transactions, the bank allegedly denied claims outright and froze thousands of accounts, and then failed to manage the high volume of customer service calls from cardholders, depriving cardholders access to crucial benefits for months, the consumers allege.

The 14-count complaint asserts a host of contract, negligence and breach of fiduciary duty claims as well as violations of California's Unfair Competition Law, the federal Electronic Fund Transfer Act, the California Consumer Privacy Act and the state's Customer Records Act. It also asserts due process rights violations under the 14th Amendment and the California Constitution.

However, in October 2021, the bank asked the court to throw out the case, arguing that the consumers' "wide-ranging claims" must fail, and they are supported "by neither law nor facts."

The bank argued, among other things, that the consumers haven't sufficiently alleged the bank is a state actor to assert a viable constitutional claim, and their account agreements specifically authorize the bank to freeze the account.

The bank added that most account holders have already been fully reimbursed, emphasized that the transaction fraud was "unprecedented," and the bank has since taken steps to protect consumers' identities from the fraud and shut down the bad actors, but that has had "unintended but regrettably unavoidable impact" on some account holders.

In his decision Thursday, Judge Burns dismissed for good the Unfair Competition Law claim, finding that the consumers can't allege there are inadequate legal remedies to address their claims, and he tossed without leave to amend third-party beneficiary breach of implied contract claims.

The judge also held that some of the named plaintiffs didn't timely notify the bank of their claims so he dismissed those claims with leave to amend. He also ruled that the consumers can't assert certain privacy claims based on the theory that the bank collected, transmitted and stored the consumers'

personal information in an inadequately secure manner.

However, the judge allowed state privacy claims based on other theories to proceed as well as Electronic Fund Transfer Act claims by plaintiffs who were fully reimbursed, except one plaintiff who was refunded within 10 days.

The judge additionally tossed the California Customer Records Act, or CCRA, claim with leave to amend, finding that the consumers didn't sufficiently allege when a breach that would trigger CCRA notification requirements occurred. However, he let the consumers get another shot at amendment, and he gave the consumers until June 6 to file a fresh complaint.

The consumers' counsel, Brian Danitz of Cotchett Pitre & McCarthy LLP, said in a statement Friday that the court's "thorough" decision is a critical step toward achieving justice for the hundreds of thousands of Californians who were deprived of their only lifeline during the pandemic.

"Bank of America failed to safeguard the accounts of EDD debit cardholders and then failed to handle fraud claims when made," Danitz said. "The decision shows how the bank failed to live up to its obligations under federal and state law at a tremendous cost to so many vulnerable Californians."

A representative from the bank declined to comment Friday.

The civil litigation is proceeding months after federal banking regulators fined Bank of America **\$225 million** in July 2022 for allegedly botching the administration of a prepaid card program to distribute unemployment insurance and allegedly failing to establish an "effective risk management" that led to wrongly denied or delayed claims.

The consumers are represented by Connie K. Chan, Michael Rubin, Stacey Leyton and Matthew Murray of Altshuler Berzon LLP and Joseph Cotchett, Brian Danitz, Karin B. Swope, Andrew Kirtley and Kevin J. Boutin of Cotchett Pitre & McCarthy LLP.

The bank is represented by James W. McGarry, Thomas M. Hefferon and Laura A. Stoll of Goodwin Procter LLP and Yvonne W. Chan of Jones Day.

The case is *In re Bank of America California Unemployment Benefits Litigation*, case number 3:21-md-02992, in the U.S. District Court for the Southern District of California.

-Additional reporting by Al Barbarino. Editing by Michael Watanabe.