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Loose Legal Lips

Lawyer's remark at CLE spawns request for fresh look in bank seizure case

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Of the Law Weekly

What appeared to be the epilogue in a hard fought case over a bank's effort to seize money in an account may actually have been a plot twist that could make lawyers think twice about telling war stories.

After the state Supreme Court in 2004 threw out the record-setting $352 million verdict against CoreStates Bank in *Pioneer Commercial Funding Corp. v. American Financial Mortgage Corp.*, the lawyers and trial judge appeared at a continuing legal education panel to discuss the case with colleagues.

Philadelphia attorney Walter Weir, who had advised the bank in its bid to recoup part of a debt owed by American Financial Mortgage Corp., mentioned he was aware of an earlier case that dealt with the issue upon which the Pennsylvania high court based its decision to throw out the verdict.

Maurice Mitts, who represents California-based mortgage lender Pioneer Commercial Funding Corp., calls Weir's failure to disclose the earlier litigation a fraud upon the state Supreme Court.

Mitts, of Mitts Milavec in Philadelphia, has filed a petition asking the Supreme Court to open the judgment and to instruct the Philadelphia trial court to hold a hearing on the bank's alleged failure to provide discovery.

Ralph Wellington, of Schnader Harrison Segal & Lewis in Philadelphia, represents CoreStates, which has since merged with Wachovia, and said he was not authorized to comment. Requests for comment from Wachovia went unanswered.

In the suit, Pioneer, a California mortgage "warehouse" lender, claimed that its business was devastated in 1997 when CoreStates, a predecessor to Wachovia, illegally seized $1.7 million from an account held by American Financial that had been frozen, and then refused to return it even after it became clear that the money belonged to Pioneer.

According to court papers, the case began as a dispute over more than $1.7 million that was deposited into American Financial's CoreStates account by Norwest Funding Inc. after American Financial forwarded a group of mortgages to Norwest.

At the time, Pioneer was acting as a warehouse lender for American Financial, but it said it was unaware that an American Financial executive had engaged in a check-kiting scheme that left its accounts

overdrawn by more than $4 million.

Lawyers for CoreStates argued that the money was properly seized because CoreStates had had the right to seize any funds in American Financial's account as a "setoff" against stolen funds.

At trial jury sided with Pioneer and awarded it more than $1.7 million in direct damages, $13.4 million in consequential damages and a whopping $337.5 million in punitive damages.

Less than six months later, the verdict was slashed to less than $56 million by the trial judge, Philadelphia Common Pleas Judge Gene D. Cohen.

Cohen left standing the jury's compensatory and consequential damage awards, but slashed the punitive award from $337 million to $40.5 million - three times the compensatory award.

Rejecting the bank's claim the jury had been inflamed by improper remarks by Pioneer's attorney, Cohen concluded evidence of discovery violations by CoreStates was properly before the jury. Cohen also said any passion that may have slipped into the jury's deliberation was properly corrected by remittitur.

A Superior Court panel concluded that Cohen had not gone far enough in slashing the punitive award. By a 2-1 vote, the appellate panel upheld the jury's compensatory awards, but it ordered a new trial on the punitive damages.

Writing for the majority, Judge Michael T. Joyce said the "unreasonable punitive damage award cannot stand" both because of remarks made by Mitts during his closing argument and because the amount itself violated the bank's due process rights.

But in dissent, Judge Phyllis W. Beck correctly anticipated the issue that would later doom the entire verdict when the state Supreme Court heard the case.

In a 24-page opinion, the high court held that the trial judge erred by allowing the plaintiff to present a tort claim of conversion against CoreStates without allowing CoreStates the right to defend its actions under the Uniform Commercial Code.

The central issue in the Supreme Court appeal was whether American Financial's account was a general fund containing money that belonged to the company, or whether it was a special – or trust – account that held the proceeds of mortgage transactions.

"The case had a lot of notoriety because of the amount of the jury's verdict," said Weir, the attorney for CoreStates who was a fact witness during the trial. "The Pennsylvania Bar Institute thought that it would make a great CLE program."

Weir appeared on a panel with Mitts and Cohen where each presented his view of what happened during the trial and before the Supreme Court. Weir said his remarks concluded the panel and the floor was opened to questions from the audience.

A lawyer in the audience asked whether the president of American Financial Mortgage, Thomas Flatley, had ever been prosecuted for the alleged check-kiting scheme.

According to Pioneer's court filings, Weir remarked that Flatley had never been indicted for the losses

"Among other things, I related to the audience the president's involvement in prior litigation that had been commenced by American Financial Mortgage Corp. against the Internal Revenue Service and Core States Bank," Weir said.

In that case, American Financial had sought an injunction against the IRS to prevent the IRS from enforcing a levy against American Financial's account at CoreStates, Weir said.

Mitts said that litigation cuts to the very heart of the Supreme Court's ruling against Pioneer's verdict. In the litigation against the IRS, CoreStates argued that the account was not a trust because American Financial drew from it to pay its taxes, Mitts said.

"If this information had been available to us, it would have made a world of difference," he said.

Weir describes Pioneer's allegations and the petition for allocatur as frivolous.

"These allegations are clearly false as evidenced by the fact that a lawyer under Maurice Mitts' direction had questioned me in a deposition in which I disclosed the existence of this litigation," Weir said.

Weir also said American Financial's request for an injunction against the IRS levy was denied because its claim the account was a trust was denied on the merits.

"There was no adjudication. There was no evidence. There was no issue raised or adjudicated concerning whether that account was or was not a special deposit account," Weir said.

"What Mr. Mitts tried to argue that because Core States had not made any claim against the fund, it was thereby admitting that the account was a special deposit account, when no such admission had ever been made," Weir said.

Robert L. Byer, chairman of Duane Morris' appellate litigation group, said the Pioneer petition for allocatur is interesting and unusual. It also bears similarities to *Wilkes v. Phoenix Home Life Mutual Insurance Co.*, 902 A.2d 366 (Pa. 2006), in which Supreme Court dismissed a collateral attack on a judgment. "I think what the case illustrates, is the general reluctance to allow collateral attacks even where allegations of fraud are made," Byer said. "There is a strong interest in the finality of judgments."

Byer also said the Pioneer petition fails to make immediately clear how disclosure of the information would have changed the outcome of the Supreme Court's analysis.

"It's difficult to see how a collateral attack based on fraud can succeed in the absence of a very strong showing of how the result would have differed, if the alleged fraud had not occurred," Byer said. "I also think its fairly difficult to succeed in an action for alleged fraud that stems from the concealment of information that was in the public record."

Byer said he was pleasantly surprised when he saw the April 2005 CLE on the Pioneer case advertised. Given the highly contentious nature of the case, he thought it was unusual the attorneys and trial judge would sit down to discuss it.

If Pioneer's petition for allocatur is accepted and results in a different outcome, it could make attorneys think twice about such appearances.

"What it might do is create an unwillingness of lawyers to appear in a program like this, which was a retrospective of a particular case," he said.

Samuel C. Stretton, a West Chester, Pa., legal ethics lawyer, said he's always warned lawyers to be careful talking about old cases.

"I've warned lawyers repeatedly that when they speak they have to be really careful about talking about specific cases and clients, even when they're many years in the past, because they could violate the attorney-client privilege," Stretton said. Stretton is the author of the "Ethics Forum" feature in *Pennsylvania Law Weekly*.

Even if Pioneer's allegations lead to disciplinary charges and a new trial, the case won't have a chilling effect on CLE participation, Stretton said.

"Lawyers just have to use their heads a little more," he said. "If you say one thing during a trial and another thing during a CLE, most attorneys don't engage in that kind of contradictory conduct." •