
Unauthorized Withdrawal from ATM/POS: Compounding Customers' Nightmares in the Banking Sector of Nigeria

***Uwem Udok,**
University of Uyo, Nigeria.

****Ndudie E. Oton**
Department of Private Law, Faculty of Law, University of Uyo. Nigeria

doi: <https://doi.org/10.37745/ejaafr.2013/vol11n1098111>

Published October 15 2023

Citation: Udok U. and Oton N.E. (2023) Unauthorized Withdrawal from ATM/POS: Compounding Customers' Nightmares in the Banking Sector of Nigeria, *European Journal of Accounting, Auditing and Finance Research*, Vol.11, No. 10, pp.98-111

ABSTRACT: *In recent times, a lot of bank customers have experienced a sudden disappearance of funds in their bank accounts and this has been a source of concern to the stakeholders in the banking sector of Nigeria. These are unauthorized transactions which occur without the consent or authorization from the customers. The unauthorized transactions may be in the form of illegal or unauthorized withdrawals by criminals or indiscriminate or multiple deductions or debits by the banks claiming to be ATM/POS transaction charges. In some cases, the entire life savings of a customer may be siphoned without any trace of the source of the illegal withdrawals. This paper examines these cases of unauthorized transactions in the accounts of bank customers and argues that appropriate steps should be taken by the banks to prevent unauthorized transactions in the customers' accounts rather than rely an exemption clause which may not avail them when they are negligent. The paper concludes that the customers also have a role to play to guard against unauthorized withdrawals in their accounts, and recommends among others, that any customer who discovers any unauthorized transaction in his or her account should immediately report to the bank for appropriate action to be taken.*

KEYWORDS: unauthorized withdrawal, ATM/POS, customers' nightmares, banking sector, Nigeria

INTRODUCTION

The issue of missing funds or sudden disappearance of funds from the accounts of customers in the banks has been a source of concern to the stakeholders in the banking sector of Nigeria.¹ The

***Uwem Udok**, LL.B. (Hons) (Nigeria), B.L. (Lagos), LL.M. (Lagos), Ph.D. (Jos). Cert. CLE (Durban, SA), Professor, formally Vice-Dean and Head of Department, Private Law, Faculty of Law, University of Uyo, Nigeria. He may be reached at uwemudok@yahoo.com. GSM: 08024787818.

banking industry in Nigeria, in recent times has witnessed unprecedented level of unauthorized transactions in the customers' accounts in the various banks.² These unauthorized transactions may be in the form of customers' accounts being debited by the bank and the bank claiming it is POS or ATM transaction charges even when a customer barely uses his or her ATM card. Also, a fraudster or a criminal may set up skimmers and hidden cameras to steal a customer's account number and PIN at places like ATM center or an account holder may accidentally give his or her personal information away.³

As pointed earlier, most banks claim they debit the accounts of the customers as charges for ATM or POS transactions. In this case, at least the bank offers explanation for the unauthorized transactions in the customers' accounts. However, there are cases, where the banks are not having any explanations for these unauthorized debits especially where there is an illegal or unauthorized withdrawal or transfer of funds from a customer's account without the knowledge or consent or authorization by the customer. In some cases, in the case of illegal or unauthorized withdrawal, the customer does not receive an alert because the customer has deactivated his or her bank alert for security reasons. The customer only becomes aware of the missing funds when he or she goes to the bank to make withdrawal from his or her account.⁴

Most banks place limits on daily withdrawals from either ATM or POS but regrettably, fraudsters often succeed in siphoning funds from the accounts of customers over and above the daily withdrawal limit without any intervention by the bank to stop it.

Customers have a duty to seek redress on issues of excess charges and unauthorized withdrawals from their accounts without their consent or authorization.⁵ The Central Bank of Nigeria (CBN) has from time to time issued circulars on legitimate bank charges for ATM/POS transactions as well as guidelines on ATM and POS operations in Nigeria.⁶ Aggrieved customers can also approach the court to seek redress for their missing funds.

****Ndudie E. Oton**, LL.M, B.L, LL.B, Lecturer in Law, Department of Private Law, Faculty of Law, University of Uyo. Email address: ndudieoton@gmail.com. GSM: 07060470922.

¹ Tope Omogbolagun, "Fraudulent Withdrawals Compound Nigerian's Economic Crisis Bank lose Ground" <https://punchng.com/fraudulent-withdrawals-compound-nigerians-economic-crises-banks-lose-ground> accessed on 24 April, 2023.

² Otunba Coffee, "We will take it up" CBN asks bank customers to report unauthorized debits" <https://www.cable.ng/will-take-it-up-cbn-asks-bank-customers-to-report-unauthorised-debits>. Accessed on 24th April, 2023.

³ Maryalene Laponsie "How do Banks Handle Unauthorized Transactions?" <https://money.usnews.com/banking/articles/how-do-banks-handle-unauthorized-transactions>. Accessed on 24th April, 2023

⁴ Omogbolagun (n.1)

⁵ Coffee (n. 2)

⁶ *Ibid*

This paper will examine all the issues highlighted herein and make appropriate recommendations to tackle cases of an unauthorized withdrawals from the ATM/POS in the banking sector of Nigeria.

Conceptual Clarifications

Automated Teller Machine

Automated Teller Machine (ATM) is an electronic communication device that enables customer of financial institutions to perform financial transactions such as cash withdrawals, deposits funds, transfer, and account information inquiries at any time and without the need for direct interaction with the bank.⁷

It is a cash dispenser which is designed to enable customers enjoy bank services without coming into contact with cashiers. ATM combines a computer terminal, record keeping system and cash vault into one unit permitting customers to enter into the bank bookkeeping with a plastic card containing a Personal Identification Number (PIN). Once access is gained, it offers several retail banking services to customers.⁸

An ATM has also been described as an electronic outlet that allows customers to complete basic transaction without the aid of a branch representative.⁹ ATMs are known by a variety of names,¹⁰ many ATMs have a sign above them indicating the names of the bank or organizations that own the ATM and possibly including the network to which it can connect. ATMs that are not operated by financial institutions are known as a white label ATMS.

Point of Sale (POS)

A Point of Sale (POS) is a place where a customer executes the payment for goods or services and where sales taxes may become payable. A transaction on POS may take place in person or online with receipts generated either in print or electronically.¹¹

It is a device that serves the purpose of processing card payments for shoppers at retail stores. Not only is a POS used for payment of goods, it is also used for payment of services rendered.¹² In the past, POS services terminals were only found at supermarkets and other retail outlets or filling stations, but today, POS services terminals can be seen everywhere to the extent that they have become a mobile device moved from one street corner to another or from one shop to another.

⁷ Automated Teller Machine.en.wikipedia.org. accessed on 5th May, 2020.

⁸ *Ibid*

⁹ Julian Kagan “Automated Teller Machine” <https://www.investopedia.com>. Accessed on 14th May, 2020.

¹⁰ *Ibid*

¹¹ Marcel Mbamalu “POS Terminals: Fraud and Alerts” <https://www.primebusiness.africa/POS-terminals-fraud-and-alerts>. Accessed on 23rd April, 2003

¹² *Ibid*

POS business has become a lucrative business in Nigeria to the extent that students, housewives, unemployed youths, graduates, and even youth corp members have taken advantage of its lucrative nature to make brisk business.

Banks issue POS machines to their customers and terms and conditions apply. Banks are entitled to a fixed commission often ranging from 0.25% to 1.5% of each transaction done through the issued POS terminals. However, in most cases, the cost of acquiring a POS machine varies from bank to bank and full or part payment is acceptable.¹³

Recently, the CBN released the names of licensed mobile money operators to operate POS services in Nigeria. In fact, the CBN barred commercial banks from running POS services in the country.¹⁴ These licensed mobile operators have provided relief to many Nigerians at the time of unprecedented transaction failures.¹⁵ Indeed, during the period of cash crunch occasioned by the re-designed of the Naira notes, POS operators came to the rescue of many Nigerians as the banks were unable to cope with large number of customers trooping to the banks on daily basis to withdraw cash that was not available or grossly inadequate for the teeming number of their customers.

POS services have come to stay in Nigeria but regrettably some fraudsters have infiltrated the camp of POS service providers and defrauded unsuspecting members of the public of their hard earned money.¹⁶ Customers patronizing the POS operators should be very careful in dealing with some of them so that they don't fall into the hands of those fraudulent POS operators to defraud them of their money.

Unauthorized Withdrawal

Unauthorized withdrawal refers to the withdrawal or transfer of funds from an individual's banking account without proper authorization or consent by the person.¹⁷ In the instant case, the individual is the customer while the unauthorized withdrawal is effected by the bank or the fraudster depending on the circumstances of the case.

A withdrawal is said to be unauthorized when it is carried out without the knowledge, consent, or authorization by the customer. Sometimes, a customer may become aware of the unauthorized withdrawal through debit alert but it is not authorized by him or her neither does he or she consent to the bank debit. Most unauthorized withdrawals are illegal and fraudulent especially where a criminal or fraudster is involved and the customer should immediately lodge a report to the bank. Sometimes, the bank is also accused of fraudulent charges by customers in their accounts. A

¹³ *Ibid*

¹⁴ "CBN approves 17 companies as mobile money and POS operators in Nigeria" legit, money. April 23, 2023.

¹⁵ *Ibid*

¹⁶ *Ibid*

¹⁷ <https://www.google.com/search?hl=enNG&source=hp&bih=&q=illegal+and+unauthorized+withdrawals+from+ATM%FPOS+&if/sig=AOEireoAAAAA2E2-6F>. – accessed on 2nd May, 2023.

customer who notices or discovers a fraudulent charge in his or her account should contact the bank immediately and lodge a report.

Unauthorized Transaction

Unauthorized transaction refers to the transaction that is carried out in a customer's account without the consent or authorization from the customer. Unauthorized transactions may be in the form of fraudulent bank charge, illegal deduction, or illegal and fraudulent withdrawal from the accounts of the customers in the banks.

Criminals or fraudsters steal customers' account numbers and PINs and use same to carry out unauthorized transactions in their accounts without the consent and authorization by the customers. Banks also carry-out deductions in customers' accounts in the form of fraudulent charges for ATM/POS services. Social engineering is one of the most effective ways to gain access to a bank account.¹⁸ Therefore, bank customers should be mindful of the persons they divulge their account information to in order to forestall possible use of the said account information by criminals or fraudsters to siphon funds from their bank accounts.¹⁹

Potential Ways of Compromising Account Information

There are several ways account information of a customer can be compromised. Hence, it is pertinent to identify and highlight them in this work.

- i. A fraudster or a scammer reaches out to a prospective victim and appears to be an authority figure. The scammer interacts with the prospective victim and gains some trust and thereafter, asks "identity question" to supposedly verify the victim's identity before proceeding with some account action. After obtaining the necessary²⁰ account information, the scammer proceeds to use same to answer security question and gain access to the victim's account.²¹
- ii. **Shoulder Surfing:** Some customers do not cover with their hands the ATM keypad while entering the PIN and amount thereby allowing the next person in the line to withdraw money from ATM the opportunity to see their PIN information. Such a person can use the PIN information to siphon money from the customer's account.
- iii. **Seeking Help to Withdraw Money from the ATM or POS:** Another potential way of compromising account information is where a customer sends his or her son, daughter, relative, personal assistance, or secretary to help him or her withdraw money from ATM/POS. Indeed, the customer has compromised his or her PIN number to the person. Nobody can be trusted irrespective of the relationship between the customer and the helper.

¹⁸ Laponsie (n.3)

¹⁹ *Ibid*

²⁰ *Ibid*

²¹ *Ibid*

- iv. **Lost or Misplaced ATM Card:** Loss or misplacement of ATM card is another way in which a customer can compromise his or her account information. If the card is stolen or found by a fraudster, the card can be cloned and a new PIN activated and used in siphoning money from the customer's account.
- v. **Complicity by some Bank Officers:** It has been established that some roguish account officers of banks often get ATM cards and sometimes, they even duplicate by getting extra ATM cards and withdraw money intermittently from the customers' accounts.²² In most cases, the customer without any suspicion hands over his or her card to the bank officer based on request from the said officer for the purpose of verification or confirmation of some information which may be fictitious.

Steps to Take when a Customer Discovers Unauthorized Withdrawal

A customer who discovers any unauthorized withdrawal in his or her account should immediately contact the bank and inform the bank of the illegal deduction. Some banks provide phone numbers where customers can call the fraud unit to lodge any report if they discover any missing funds in their account.

Apart from phone numbers, banks also have social media platforms like twitter, instagram, facebook as well as e-mail addresses where customers can lodge report with the bank. Lamenting her inability to reach out to Guaranty Trust Bank through their customer care numbers, one customer of the bank said,

“I slept and woke up to see that over ₦39,000.00 had been deducted from my account. I was very infuriated. Out of anger, I called the GTB customer care numbers but none of them could be reached. I went to Twitter to tweet at the bank and got a response from one of the GTB support”.²³

It is advisable for bank customers who discover unauthorized withdrawals in their accounts, apart from calling the customer care line or the fraud unit of the bank, to follow up such call with a written letter. The letter should contain the customer's account number, the date and time when he or she discovered the ATM was missing or compromised and when the unauthorized transaction took place.²⁴ This will enable the bank to conduct investigation and revert to the customer on the outcome of the investigation. The customer should be patient while awaiting for the outcome of the investigation because it may take 10 days or more to investigate and revert to the customer.

²² Tope Omogbolagun (n.1)

²³ Laponsie (n. 3)

²⁴ *Ibid*

Liability of the Bank for Unauthorized Withdrawal

Sometimes, a customer who discovers unauthorized withdrawal from his or her account may decide to approach the court to seek redress if the said customer is not satisfied with report of the investigation by the bank. This happens where the bank denies responsibility for the unauthorized withdrawals attributing same to the activities of criminals or fraudsters. The victim may sue the bank for negligence or breach of contract depending on the circumstances of the case.

Negligence

Generally, negligence connotes an omission or failure to do something which reasonable man under the same circumstances would do or doing something which a reasonable man or prudent man would not do.²⁵ The tort of negligence is a damage which is not remote and cause by breach of duty of care owed by the defendant to the plaintiff.²⁶

Negligence is a question of fact, not law, so that each case has to be decided on its peculiar facts. When there is an allegation of negligence, a plaintiff must establish that:

- ❖ The defendant owed him a duty of care
- ❖ There was a breach of the duty, and
- ❖ The breach caused him injury or damage

The case of *Zenith Bank Plc. v Williams Areo*²⁷ is very illustrative of an unfortunate case of unauthorized withdrawals from the respondent's account with the appellant bank. It was an appeal against the Judgment of the High Court of Lagos State (Trial Court) delivered on the 30th April, 2013 in favour of the respondent against the appellant in the sum of ₦1,235,300.00 being the total sums of money withdrawn from the respondent's bank account with the appellant. The facts of the case was that, on the 2nd October, 2008 without the knowledge, authority or consent of the respondent, a total sum of ₦300,000.00 was illegally and fraudulently debited and withdrawn from the claimant's (respondent) account in tranches of ₦20,000.00 each by unknown persons *via* ATM and the appellant debited the respondent's account with the sum of ₦1,500.00 as ATM fees for the transaction. Also, on the same date, a total of N906,600.00 was illegally and fraudulently debited from the respondent's account *via* POS. Again, on the 7th October, 2008 another sum of ₦17,200.00 was illegally and fraudulently debited and withdrawn from the respondent's account by unknown person *via* ATM. He came to know of these transactions on the 9th October, 2008 when he issued a cheque to one queen Ofumela to withdraw some money from his account and the appellant's officer dishonored the cheque. Upon enquiry, he was informed that as at 7th October, 2008 the balance standing against his account with the appellant was only ₦653.92. He protested the alleged balance because he had over One Million Naira in his account. Upon

²⁵ *Agi v Access Bank Plc.* (2019) 9 NWLR (Pt 1411) 121 at par B – C. See also *Odinaka v Moghalu* (1992) 4 NWLR (Pt 233). *Diamond Bank Ltd v PIC Ltd.* (2009) 18 NWLR (Pt 1104) 307.

²⁶ *S.P.D.C.N Ltd v Okeh* (2018) 17 N.W.L.R. (Pt 1647) 420 at p. 435.

²⁷ (2021) LCN/15850 (CH)

examination of his statement of account, he discovered the above stated illegal and fraudulent transactions which he did not make and he demanded a refund but it was refuted by the appellant. Consequently, the respondent filed a suit at the High Court of Lagos State and prayed the court for the following reliefs against the appellant:

- (1) A DECLARATION that the withdrawals and payment totaling N1,225,300.00 from the claimant's account with the defendant's Dugbe Branch, Ibadan, Oyo State on the 2nd and 7th of October, 2008 respectively *via* Automated Teller Machine (ATM) and Point of Sale (POS) by unknown persons were illegal, fraudulent and were done without the claimant's mandate.
- (2) A DECLARATION that by allowing withdrawals and payments totaling ₦1,225,300.00 from the claimant's account with the Defendant's Dugbe Branch, Ibadan, Oyo State on the 2nd and 7th October, 2008 respectively *via* Automated Teller Machine (ATM) and Point of Sale terminal (POS) the defendant was negligent and in breach of its duty of care to the claimant (underline mine).
- (3) The sum of ₦1,225,300.00 being the credit balance standing against the claimant's account with the Defendant's Dugbe Branch, Ibadan, Oyo State as at the 1st October, 2008.
- (4) Interest on the said sum of ₦1,225,300.00 at the date of judgment and thereafter at the same rate until the whole amount is fully liquidated.
- (5) Further or other reliefs

At the conclusion of trial, the trial court held that the respondent proved his case of negligence against the appellant and entered judgment in terms of ₦1,225,300.00 and interest of the sum at a rate of 15% per annum from the date of the judgment till liquidated.

Appellant was dissatisfied with the judgement of the trial court and filed a notice of appeal against it. The main issue of contention on appeal was whether the appellant as banker of the respondent was negligent in allowing the withdrawals from the account of the respondent.

Withdrawal Limit

At the trial court, there was evidence before the court led by the respondent on the daily ATM withdrawal limit of ₦60,000.00 but the sum of ₦300,000.00 was withdrawn on the same date through the ATM thereby exceeding the daily withdrawal limit. The trial court found that the appellant failed to traverse the daily withdrawal limit alleged by the respondent and consequently held that the respondent had discharged the burden of proof on the issue of daily limit. Thus, shifted the burden of proof to the appellant but the appellant failed to disprove it.

Hon. Justice Aliyu of the Court of Appeal, Lagos Division affirmed the findings of the learned trial judge on the issue of daily withdrawal limit when he stated as follows:

“The evidence of DW1 supra confirmed without a doubt that the appellant was in control of all the mechanisms for the use of the ATM

card it issued. It controlled the withdrawal limit; it ensures security on the ATM by putting cameras, but by, its own admission, left the cameras unfunctional. With all these mechanisms under its control yet, DW1 and PW2 could not say the daily limit on the respondent's ATM card. I believe the appellant's officers suffer selective amnesia on the daily withdrawal limits on the respondent's debit ATM card. They were not worthy of belief on this issue... it is for the above reasons that I approve and totally agree with the findings and the holding of the learned trial judge that the appellant breached the duty of care it owed the respondent in respect of the ATM card as a result of which he suffered damages in economic loss of the money withdrawn from his account.

Breach of Contract

As earlier stated in this paper a person who discovers unauthorized withdrawals from his account may institute an action against the bank for negligence or breach of contract depending on the circumstances of the case. However, it has been settled that an action based in negligence can arise from a breach of contract. ²⁸ The case of *Ekong Archibong v First Bank of Nigeria Plc.*²⁹ is illustrative.

The appellant as plaintiff at the High Court of Justice, Uyo Division filed a Writ of Summons claiming against the respondent as defendant as follows:

- (1) The sum of ₦76,400.00 (Seventy-Six Thousand, Four Hundred Naira) only withdrawn from his account No. 185 3010006766 with the defendant.
- (2) Interest on the said ₦76,400.00 at the current bank interest of 20% from the 29th May, 2010 until the debit is liquidated.
- (3) ₦750,000.00 damages on the injury sustained and on the breach of contract. (Underline mine)

The case of the appellant was that on the 8th of June, 2010, he went to the respondent at Oron Road, Uyo Branch, to withdraw the said money to enable him make a deposit for his eye operation. He tried severally but could not withdraw money from his account, He lodged a formal complaint of illegal withdrawal from his account with the bank. The defendant denied liability in its reply. The respondent defence was that since the plaintiff (Appellant) had carried out a PIN change from the old PIN, the PIN number was only known to him and no one else. That from the investigation of the respondent, the sums of ₦60,300 and ₦16,100 were illegally withdrawn from his account on the 28th May, 2010 and 29th May, 2010 respectively, the respondent in its further defence stated that the plaintiff compromised his PIN information and card details to fraudsters.

²⁸ *FBN Plc. v EXCELL Plastic Industry Ltd.* (2002) LPELR 10250.

²⁹ Appeal No. CA/73/2013 Judgment delivered on the 27th February, 2014.

The respondent (defendant) pleaded and relied on the ATM agreement signed by the applicant (Appellant) when he applied for the ATM card. The ATM agreement (Exhibit E) contained exclusion clause which absolved the respondent of liability in the event of any risk suffered by the cardholder. Since the appellant signed the ATM agreement (Exhibit E), he was bound by the terms contained therein³⁰

The trial court consequently dismissed the case against the respondent. Dissatisfied with the judgment, the appellant filed an appeal at the Court of Appeal Calabar. The Court of Appeal upheld the judgment of the trial court and stated as follows:

“The appellant’s counsel claims that what is really challenging is the respondent’s reliance on the terms and clauses in Exhibit E to exempt itself from liability. It is obvious that both parties went into this contract with their eyes open. The appellant signed the agreement that embodied those clauses it is now contesting. The agreement is legal and therefore, binding on both parties signing it. The appellants cannot pick and choose which clauses to bind him. The agreement is holistic and binding on the parties... the appeal is unmeritorious and therefore, dismissed.

Indeed, both the trial court and the appeal court considered and relied on the exemption clause contained in Exhibit E to absolve the respondent from liability.

Legal Issues Arising from Unauthorized Withdrawals from the ATM/POS

There are many legal issues arising from the unauthorized withdrawals from the ATM/POS. It is pertinent to identify and examine some of them which the bank may fall back as a defence(s) against any claim made by the plaintiff against the bank.

Mitigation of Loss

In the case of *Zenith Bank V Areo*, the respondent was a customer of the appellant bank. The appellant issued the respondent with a Zenith Easy Card debit card, which allowed him access to his account through the appellant’s Automated Teller Machine (ATM), Point of Sale (POS) and E-Commerce sites in the INTERSWITCH network. Upon receiving his debit card from the appellant, the respondent activated and changed his default Personal Identification Number and began using it.

It is not clear from the facts of the case whether the respondent was set up on SMS alert platform with his phone number from the inception of the account. Neither the appellant nor the respondent from the facts of the case led evidence to establish this fact. Usually, the customer will apply to

³⁰ *Ayanlere v FBN (Nig.) Ltd.* (1998)11 NWLR (Pt. 575) at 621.

the bank to set his or her account up on SMS alert platform with the customer's phone number and the bank charges a token for rendering such services.

It is submitted that if the respondent's account was set up on SMS alert platform, the respondent would have received alerts on his phone showing the unauthorized withdrawals and therefore, would have taken steps to mitigate his losses by immediately notifying the appellant to block his account as soon as he noticed the unauthorized withdrawals.

This paper is of the view that it is the duty of the plaintiff to mitigate his damages and any negligence in this regard is a bar to the claim.³¹ It is rather unfortunate that both the lower court and the appeal court failed to make findings in the issue of SMS alert which would have gone a long way in determining whether in the circumstances, the respondent failed in his duty to mitigate his damages.

As stated earlier in this paper, a customer who discovers any unauthorized withdrawal in his or her account should immediately contact the bank and report the illegal withdrawal. The only way to make timeous report is where the customer is set up on SMS alert platform which the customer should apply to the bank for such services. In the instant case, there was no evidence that the respondent's account was set up on SMS alert platform and this is fatal to the case of the respondent. Note that it is the duty of the customer to apply to the bank for such services.

Exemption Clause

Another issue arising from unauthorized withdrawal from the ATM/POS is that of exemption clause. Exemption clause is "a clause which may be inserted into a contract which purports to exclude one party from liability for the breach of contract, negligence or misrepresentation". It has also been defined as "a term which seeks to exempt or limit one of the parties to a contract from liability wholly or in certain situation which may arise under the contract".³²

Exemption clause is mostly found in standard form contracts i.e. contracts whose terms are contained in printed forms and are used for all contracts of the same kind. The term used in a particular trade or for the sale of a particular product or service will usually be the same. The customer is then faced with the option of either accepting the contract as it is, or not entering into the contract at all. In such a case, the doctrine of the freedom of contract practically does not exist.³³

Exemption clauses are of two types: limitation or limiting clause and exclusion clause. Limitation or limiting clause seeks to limit the liability of the party who desires to insert the clause while the

³¹ See *Ibile Holdings v PDSS* (2002) 16 NWLR (Pt. 792) 117 at 13.

³² Adebayo, *Case Book in law of Contract* (Princeton & Associates publishing Co. Ltd., Lagos 2004) 189

³³ G. H. Treitel, *The Law of Contract* (6th edu. Stevens & Sons Ltd., London 1990) 167

exclusion clause seeks to exclude the party who desires to insert into the contract completely from any sort of liability or liabilities.

The bank and customer relationship is contractual in nature.³⁴ Contracts entered into between banks and customers are one out of many types of standard form contract. The ATM agreement is an example of a standard form contract wherein banks insert limiting or exclusion clause (as the case may be) to either limit or exclude them from liability. In *Ekong Archibong v. FBN*³⁵, the Court of Appeal sitting in Calabar upheld the judgment of the High Court of Akwa Ibom State sitting in Uyo which dismissed the claim of the appellant against the respondent. The respondent bank had relied on an exemption clause in the ATM agreement which absolved the respondent bank of liability (This was a case of unauthorized withdrawals from the ATM).

In *Zenith Bank Plc v Areo*,³⁶ the issue of exemption was not raised by the appellant. However, the trial court and the appeal court appeared to have relied heavily on the failure of the appellant to stop the unauthorized withdrawals in view of the fact that the daily withdrawal limit was exceeded despite the inbuilt mechanism in the bank's system meant to check the daily limits.

The question that begs for an answer is how did the respondent's ATM card get into the hands of fraudsters who carried out the unauthorized withdrawals? There was evidence before the court that the respondent was in possession of his ATM debit card at all-time material to this case. There was also evidence before the court that for money to be withdrawn from the ATM machine, a person must have the card and the PIN number. The appellant submitted that based on the evidence before the court as testified by the respondent, the respondent was directly or indirectly responsible for the withdrawal from his account. In *Agi v Access Bank Plc*.³⁷ the appeal court per Ogbuniya J.C.A. opined as follows:

“That it was... a third party he, probably divulged his secret PIN to, that withdraw his money... at Enugu.”

Unfortunately, both the lower court and the appeal court in *Zenith Bank v. Areo*³⁸ failed to evaluate the evidence of the respondent during cross-examination that for money to be withdrawn from the ATM machine, a person must have the card and PIN number.

This paper is of the view that the only inescapable conclusion is that the respondent compromised his account information to a third party who used same to siphon money from his account. Indeed,

³⁴ See *Trade Bank Plc v Barilux (Nig) Ltd* (2000) 1 NWLR (Pt. 685); *Union Bank of Nig. Plc v Wokubama* (2000) 14 NWLR (Pt 688) 10

³⁵ Suit No CA/C/73/2013

³⁶ supra

³⁷ (2014) 9 NWLR (Pt. 1411) at 162 par. C – E

³⁸ *Zenith Bank* (n. 27)

the respondent must have failed to take all necessary precautions or steps to prevent unauthorized use of his card.

A clause in an ATM agreement usually contains the following:

“In the absence of any proven fraudulence on the part of the Bank in the contravention of these terms, any unauthorized use of your card shall be deemed to have arisen as a result of your negligence and compromise of your card and/or PIN. You will be liable for all losses incurred arising from unauthorized use of your card due to your negligence.”³⁹

If the appeal court had made a proper findings of fact, it probably may have come to a different conclusion but it found the appellant liable for the negligence for allowing withdrawals from the respondent’s account to exceed the daily limit. In the first place, if the respondent had not compromised his account information, it would have been difficult if not impossible for a third party to gain access to his account information and use same to perpetrate the criminal act. It is for this reason that the bank sometimes relies on exemption clause contained in an ATM agreement to escape liability in the event of unauthorized withdrawal.⁴⁰

CONCLUSION AND RECOMMENDATIONS

Many bank customers have lamented unauthorized withdrawals from their accounts by criminals or fraudsters who have gained access to their accounts information through fraudulent means to siphon money from their accounts. Sometimes, it may not be fraudsters who perpetrate this fraudulent act but the banks also indulge in multiple and indiscriminate deductions from the customers’ accounts claiming that they are ATM or POS transaction charges.

The customers have a role to play to guard against unauthorized transactions in their accounts by reporting timeously whenever they discover any unauthorized debits in their accounts. The entire life savings of a customer can disappear from the account in a twinkle of an eye because of unauthorized withdrawal. It is therefore pertinent to make the following recommendations:

- (i) Customers who open an account with a bank should apply to the bank for their accounts to be set up on SMS alert platform.
- (ii) Customers who discover any unauthorized transactions in their accounts should immediately report to the bank to block the account to forestall further withdrawals.
- (iii) Customers who apply for ATM card should spend time to read the contents of the ATM agreement before signing it.
- (iv) Customers should cover with their hand the ATM keypad while entering the PIN and amount.

³⁹ See First Bank of Nigeria ATM agreement form.

⁴⁰ Ekong Archibong (n.)

- (v) Customers should avoid asking for the help of strangers especially suspicious looking individuals.
- (vi) Customers should not respond to scam mails or phone calls seeking for information about their account details.
- (vii) Bank should desist from making indiscriminate and multiple deductions from the customers' accounts in the name of ATM/POS transaction charges.
- (viii) Bank should act swiftly whenever they receive any report of unauthorized transaction.
- (ix) Bank should not rely on exemption clause to escape liability when they are negligent.