

**Nebraska Bankers Association  
LEGAL CORNER**

**Ogallala Livestock Auction Market v. Leonard  
(Action for Conversion)**

In *Ogallala Livestock Auction Market v. Leonard*, 30 Neb. App. 335 (2021), a cattle and livestock broker (Leonard) purchased cattle and other livestock for third-party buyers on a commission basis. Leonard's "arrangements" with his bank (Pinnacle) involved an account which consistently had a negative balance. Typically, checks would be drawn upon a negative balance on the account, Leonard would verify that deposits were forthcoming, and the checks would be honored by the bank.

In 2015, Leonard purchased 1,584 head of cattle from Ogallala Livestock, delivered them to the buyers and drew checks on his account totaling nearly \$3 million. Five deposits were made into Leonard's account as payments to Leonard from the third-party buyers. Upon presentment, Pinnacle dishonored the checks drawn on Leonard's account and utilized the deposited funds to set off outstanding fees and interest Leonard owed on his account. Leonard thereafter failed to make payment to Ogallala Livestock or return the cattle.

The complaint filed by Ogallala Livestock against Pinnacle was dismissed by the District Court for failure to state a claim for relief. On appeal, the Nebraska Court of Appeals reversed the lower court ruling in part and remanded the cause for further proceedings.

In the trial court, Ogallala Livestock asserted a cause of action for conversion. Pinnacle defended on the basis that Ogallala Livestock had no right in funds represented by a check and no right to sue the drawee on a dishonored check.

Neb. U.C.C. §3-408, provides that a check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment and that the drawee is not liable on the instrument until the drawee accepts it.

The Nebraska Supreme Court has previously held: "[A] check, of itself, and in the absence of special circumstances, is neither a legal nor an equitable assignment or appropriation of a corresponding amount of the drawer's funds in the hands of the drawee, and that therefore, in and of itself, it gives the holder of the check no right of action against the drawee and no valid claim to the fund of the drawer in its hands, even though the drawer has on deposit sufficient funds to pay it. It creates no lien on the money which the holder can enforce against the bank."

In order to state a claim for conversion, Ogallala Livestock was required to allege sufficient facts to establish that it had an ownership interest in the funds deposited into Leonard's account.

The Court of Appeals noted that "a deposit of funds in a bank to the credit of the depositor ordinarily is termed a "general deposit." In such cases, the title to the funds deposited passes to the bank, and the relation of debtor and creditor exists between the bank and the depositor. The presumption is that a bank deposit made in the usual

course of business is a general deposit and not a special or trust deposit. However, Ogallala Livestock asserted that deposits paid into Leonard's account were an exception to the general deposit rule and that they were special deposits or deposits for a specific purpose.

The Supreme Court has previously articulated that special deposits occur where the property, securities, or funds are left with the bank for safekeeping only, and the specific property or fund is to be returned to the depositor. In such a case, the bank is a mere bailee. Title to the deposit does not pass to the bank, but remains in the depository.

The Court went on to note that “[w]ith respect to deposits made for a specific purpose, this occurs where funds are deposited in a bank for the purpose of paying a specific obligation. The burden is on the claimant to show that the deposit was received by the bank with the express or clearly implied agreement that it should be kept separate from the general funds of the bank and that it should remain intact. In the case of a deposit for specific purpose, the bank acts as the agent of the depositor, and if the bank should fail to apply the deposit as directed, or should misapply it, it may be recovered as a trust deposit.”

Citing prior precedent, the Court held that “a bank may not set off funds in a depositor's account in payment of the depositor's indebtedness to the bank when the bank knows or should know that the funds being set off belong to another. A bank that appropriates the deposit made by a customer to reduce his or her indebtedness to the bank, knowing the deposit, or a part thereof, to be a trust fund, is liable to the true owner for conversion of his money, and an action at law to recover the amount can be maintained...”

Finding that Leonard had plead sufficient facts to suggest the existence of an agreement between Ogallala Livestock and Pinnacle and/or that Pinnacle knew or should have known that the purpose of the deposits was to cover the checks that Leonard had written to Ogallala, the Court of Appeals remanded the cause for further proceedings, returning the case for further action by the trial court.