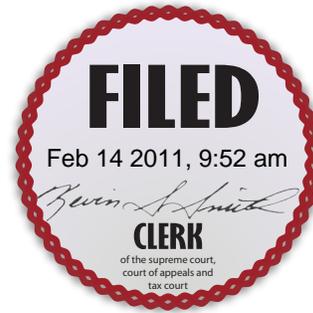


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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AUDITOR OF CLARK COUNTY, INDIANA, )  
and BOARD OF COMMISSIONERS OF )  
CLARK COUNTY, INDIANA, )  
)  
Appellants-Plaintiffs, )

vs. )

No. 10A05-1007-PL-418

JP MORGAN CHASE BANK, N.A., )  
)  
Appellee-Defendant. )

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APPEAL FROM THE CLARK SUPERIOR COURT  
The Honorable Vicki L. Carmichael, Judge  
Cause No. 10D01-0704-PL-58

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February 14, 2011

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**BARNES, Judge**

## **Case Summary**

The Auditor of Clark County and the Clark County Board of Commissioners (collectively “Clark County”) appeal the trial court’s grant of summary judgment in favor of JP Morgan Chase Bank, NA (“Chase”). We reverse and remand.

### **Issue**

The restated issue before us is whether the account agreement between the parties precludes Clark County’s action to recover consequential damages from Chase, which allegedly resulted from Chase’s banking errors.

### **Facts**

The evidence most favorable to Clark County as the summary judgment nonmovant is that Clark County opened a business account with Chase for the purpose of depositing funds that would be used to pay federal employment taxes automatically and directly to the Internal Revenue Service (“IRS”). On September 11, 2006, the IRS notified Clark County it was being penalized \$8,085.07 because Chase had refused an electronic funds transfer (“EFT”) payment demand by the IRS. Chase subsequently wrote the IRS a letter, stating that the payment demand had been wrongfully refused because of an error by Chase, and requesting that the IRS waive the penalty against Clark County. The IRS denied this request.

Chase officials thereafter made representations to Clark County that similar banking errors would not occur in the future. In October 2006, however, Chase again denied an EFT payment request by the IRS, apparently because it had placed a hold on a

deposit Clark County had earlier made to the account. The IRS then notified Clark County that the total penalties against it for late payment of federal employment taxes had increased to \$16,371.96.

On April 3, 2007, Clark County filed a complaint against Chase, seeking recovery of the \$16,371.96 in penalties that the IRS had assessed against it for Chase's refusal to honor the EFT payment requests. On January 14, 2010,<sup>1</sup> Chase moved for summary judgment. The sole designated evidence Chase provided in support of its motion was the deposit account agreement that governed Clark County's account. Chase asserted that the agreement precluded any recovery by Clark County for consequential damages caused by Chase's banking errors and characterized the IRS penalties as consequential damages. On May 11, 2010, the trial court granted summary judgment in favor of Chase and dismissed Clark County's complaint with prejudice. Clark County filed a motion to correct error, which the trial court denied. Clark County now appeals.

### **Analysis**

When reviewing a summary judgment ruling, we apply the same standard as the trial court. Auto-Owners Ins. Co. v. Harvey, 842 N.E.2d 1279, 1282 (Ind. 2006). Summary judgment is proper "if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C); Harvey, 842 N.E.2d at 1282. We must construe all facts and reasonable inferences drawn from them in favor of the nonmoving

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<sup>1</sup> The file stamp on the motion indicates that it was filed on January 14, 2009. The CCS and certificate of service signature on the motion indicate that it actually was filed on January 14, 2010.

party. Harvey, 842 N.E.2d at 1282. We may affirm a summary judgment ruling if it is sustainable on any legal theory or basis found in the evidentiary matter designated to the trial court. West American Ins. Co. v. Cates, 865 N.E.2d 1016, 1020 (Ind. Ct. App. 2007), trans. denied.

This case turns exclusively upon the interpretation of a contract, i.e. the deposit account agreement governing Clark County's account with Chase. If the terms of a contract are unambiguous, they will be given their plain and ordinary meaning. Arrotin Plastic Materials of Indiana v. Wilmington Paper Corp., 865 N.E.2d 1039, 1041 (Ind. Ct. App. 2007). Clear and unambiguous contract terms are conclusive, and we will not construe the contract or look to extrinsic evidence, but will merely apply the contractual provisions. Id. A contract is ambiguous only if reasonable persons could find its terms susceptible to more than one interpretation. Id. "If the language of a contract is unambiguous, the intent of the parties is determined from the four corners of the document." Id.

By contrast, if an instrument is ambiguous, "all relevant evidence may properly be considered in resolving the ambiguity." University of Southern Indiana Found. v. Baker, 843 N.E.2d 528, 535 (Ind. 2006).<sup>2</sup> If a contract is ambiguous, it should be construed against the party who furnished and drafted the agreement. Keithley's Auction Serv. v.

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<sup>2</sup> Baker specifically concerned trust instruments. Its holding abandoning the distinction between patent and latent ambiguities has been applied in the context of other written instruments, including contracts. See Shorter v. Shorter, 851 N.E.2d 378, 383 (Ind. Ct. App. 2006). Before Baker, extrinsic evidence could only be used to address latent ambiguities in written instruments, i.e. ambiguities that arose only by reference to extrinsic facts, and not patent ambiguities, which arose from the language of the instrument itself. Baker, 843 N.E.2d at 534.

Children of Jesse Wright, 579 N.E.2d 657, 659 (Ind. Ct. App. 1991). “If the contract is ambiguous or uncertain in its terms and if the meaning of the contract is to be determined by extrinsic evidence, its construction is a matter for the factfinder.” First Fed. Sav. Bank of Indiana v. Key Mkts., Inc., 559 N.E.2d 600, 604 (Ind. 1990). “Extrinsic evidence is evidence relating to a contract but not appearing on the face of the contract because it comes from other sources, such as statements between the parties or the circumstances surrounding the agreement.” CWE Concrete Const., Inc. v. First Nat’l Bank, 814 N.E.2d 720, 724 (Ind. Ct. App. 2004), trans. denied.

We will assume that the penalties the IRS imposed against Clark County because of Chase’s refusal to make the requested EFT payments constituted consequential damages flowing from that refusal. We emphasize that Chase makes no argument and provides no evidence, at this point in the litigation, that it properly refused the IRS’s EFT payment requests. Chase asserts that it cannot be liable to pay any consequential damages to Clark County, even if it erred in refusing to make the requested EFT payments, pursuant to the following paragraph found in the “General Account Terms and Conditions” section (“general section”) of the deposit account agreement:

**Liability:**

You agree that we shall be relieved of any and all liability for acting upon your instructions or failing to act on your instructions when we reasonably believe that to do so would cause us to be exposed to civil or criminal liability, or conflict with customary banking practices. YOU AGREE THAT WE SHALL NOT BE LIABLE FOR INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES REGARDLESS OF THE FORM OF ACTION AND EVEN

IF WE HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IF WE FAIL TO STOP PAYMENT ON AN ITEM, OR PAY AN ITEM BEARING AN UNAUTHORIZED SIGNATURE, FORGED DRAWER'S SIGNATURE OR FORGED ENDORSEMENT OR ALTERATION, OUR LIABILITY, IF ANY, SHALL BE LIMITED TO THE FACE AMOUNT OF THE ITEM.

App. p. 80.

Clark County counters that the extent of Chase's liability is governed by a different provision, which falls within the "Electronic Funds Transfer Services" section ("EFT section") of the deposit account agreement:

**THE BANK'S LIABILITY FOR FAILURE TO COMPLETE TRANSACTIONS:**

If we do not complete a transaction from your account on time or in a correct amount, according to our Agreement with you, we will be liable for your losses or damages.

However, there are some exceptions. For instance, we will not be liable if:

1. Through no fault of ours, you do not have enough available funds in your account to make the transaction.
2. The ATM where you are making the transfer does not have enough cash.
3. The ATM was not working properly and you knew about the breakdown when you started the transaction.
4. Circumstances beyond our control (such as fire or flood) prevent the transaction, despite reasonable precautions that we have taken.

5. In the case of preauthorized credits, the data from the third party is not received, is incomplete or erroneous, or if the recipient is deceased.

Id. at 89. This provision does not expressly limit the extent of Chase's liability to exclude consequential damages. Additionally, Chase does not claim that this case falls within any of the five exceptions to Chase's liability for failure to timely complete an EFT transaction.

When ascertaining a contract's clarity, or lack thereof, we consider the whole document, not just the disputed language. City of Lawrenceburg v. Milestone Contractors, L.P., 809 N.E.2d 879, 883 (Ind. Ct. App. 2004), trans. denied. "Construction of contract language that would render any words, phrases, or terms ineffective or meaningless should be avoided." Id. We presume that all provisions included in a contract are there for a purpose and, if possible, must reconcile seemingly conflicting provisions to give effect to all provisions. Id.

We conclude that, taken as a whole, the account agreement is ambiguous with respect to the extent of Chase's potential liability for errors such as the ones alleged to have occurred here. First, the sentence in the general section of the account agreement upon which Chase relies, which expressly disclaims liability for consequential damages, immediately follows a sentence referring to Chase's liability for failing to follow a customer's instructions in order to avoid exposure to civil or criminal liability or conflict with customary banking practices. The sentence is in all caps, and is followed by another sentence in all caps referring to failures to stop payment on an item, or paying an item

with an unauthorized, forged, or altered signature. Even within the context of this single paragraph, it is arguably unclear whether the limitation on recovery of consequential damages was intended to apply to all possible liability to which Chase might be exposed, or only to the types of possible liability described in the paragraph.

Even if that paragraph was unambiguous by itself, however, the account agreement as a whole becomes ambiguous when the paragraph is read in conjunction with the liability provision of the EFT section of the agreement upon which Clark County relies. That section states, subject to certain exceptions, “If we do not complete a transaction from your account on time or in a correct amount, according to our Agreement with you, we will be liable for your losses or damages.” App. at 89. A reasonable person reading this sentence would be led to believe that if Chase erroneously failed to timely process an EFT payment, Chase would be liable for any resulting damages; it does not disclaim liability for consequential damages. There clearly is considerable tension between this sentence in the EFT section of the agreement and the attempt to disclaim liability for consequential damages in the general section of the agreement.

Chase urges us to read the damages provision of the EFT section of the account agreement out of the agreement entirely, at least with respect to Clark County. It notes that at the outset of the EFT section, it states, “For Business Accounts, wire transfer and all other funds transfer or other treasury services not identified in this section will be governed by a separate agreement.” App. at 86. Chase contends that the EFT payments

from Clark County's business account to the IRS were a type of funds transfer not governed by the EFT section of the account agreement. Even if we were to assume without deciding that Chase is correct on this point, Chase has not submitted any supposed "separate agreement" that would govern the transactions at issue here. Without more, we decline to assume that the EFT section and its terms regarding Chase's liability did not apply here.

Clark County is alleging that Chase erroneously failed to make timely EFT payments to the IRS, resulting in damages to Clark County in the form of IRS penalties. Chase has failed to convince us that the account agreement unambiguously precludes recovery of these type of damages, or that the EFT payments were not governed by the EFT section of the agreement. As such, the trial court erred in entering summary judgment in Chase's favor. We reverse and remand for further proceedings, which may include the presentation of extrinsic evidence to help glean the meaning of the account agreement as a whole and whether the transactions at issue here are governed by the EFT section of the agreement.

### **Conclusion**

We reverse the grant of summary judgment in favor of Chase and remand for further proceedings consistent with this opinion.

Reversed and remanded.

VAIDIK, J., concurs.

BAKER, J., concurs in result with separate opinion.

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And BOARD OF COMMISSIONERS OF )  
CLARK COUNTY, INDIANA, )

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Appellee-Defendant. )

No. 10A05-1007-PL-418

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**BAKER, Chief Judge, concurring in result.**

Although I concur in the result reached by the majority, I write separately because I must respectfully part ways from its analysis. Initially, I do not agree with the majority that the damages sought by Clark County are consequential damages. See Black’s Law Dictionary 394 (7th ed. 1999) (defining “consequential damages” as “[l]osses that do not flow directly and immediately from an injurious act, but that result indirectly from the act”) To the contrary, I believe it apparent that they are actual damages: the actual amount of the damages incurred by Clark County as a direct result of Chase’s admitted

mistakes. See id. (defining “actual damages” as “[a]n amount awarded to a complainant to compensate for a proven injury or loss; damages that repay actual losses”).

The parties’ contract holds Chase responsible for occasions in which it fails to complete a transaction on time or in a correct amount, pursuant to the terms of the agreement. Here, that is precisely what happened. I believe that the contract unambiguously renders Chase liable as a result. Consequently, I concur in the majority’s decision to reverse and remand.