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"FORGED ENDORSEMENT CLAIMS" AGAINST DEPOSITARY BANKS: DEFENSES AVAILABLE TO THE INSURED AND COVERAGE IMPLICATIONS UNDER THE FINANCIAL INSTITUTION BOND

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Introduction

A common source of exposure under Financial Institution Bonds is claims asserted by depositary banks negotiating checks bearing alleged forged endorsements. Typically, a claim under the Bond by a depositary bank is triggered by a claim asserted against the depositary bank by either the payee of the check or the drawee bank.[1] The claim may require the fidelity carrier to evaluate uncertain issues relating to coverage and the underlying merits of the claim asserted against the insured. Assuming coverage and exposure in excess of the deductible, the carrier may also need to consider whether to assert its right to assume the defense of the depositary bank.[2]

This paper addresses these issues in three parts. First, the paper addresses the coverage issues that may arise in connection with forgery claims made under the 1986 version of the Financial Institution Bond Standard Form No. 24 ("the Bond"). Second, the paper addresses the causes of action and defenses under the Uniform Commercial Code ("UCC") that are typically raised where a claim is asserted against a depositary bank as a consequence of alleged forged endorsements.[3] Finally, the paper addresses whether common law causes of action may also be asserted against depositary banks in addition to claims under the UCC.

Analysis

I. THE COVERAGE AFFORDED UNDER THE FINANCIAL INSTITUTION BOND IS NOT CO-EXTENSIVE WITH A DEPOSITARY BANK'S LIABILITY FOR FORGED ENDORSEMENTS.

Claims alleging forged endorsements must be evaluated under Insuring Agreement (D)(1).[4] Under "D (1)", the carrier will indemnify the insured for:

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[1] For the purpose of this paper, a “drawer" is the party that issues a check out of its personal or commercial checking account, a "payee" is the party to whom the check is issued, the "depositary bank" is the financial institution at which the check is cashed, and the "drawer bank" is the financial institution at which the drawer maintains his/her checking account.

[2] See Financial Institution Bond, Standard Form No. 24, General Agreements F.

[3] Articles 3 and 4 of the UCC were revised in 1990. The revisions significantly changed the available causes of action and defenses relating to claims brought against depositary banks for forged endorsements. As the revised UCC has now been adopted in at least 45 jurisdictions, references to the UCC in this paper will refer to the 1990 revisions.

[4] Insuring Agreement (B) provides coverage for, inter alia, theft, false pretenses, and common law or statutory larceny committed on the premises of the insured. However, §2(a) of the exclusions specifically exempts forgeries from coverage under Insuring Agreement (B). As a consequence, the only operative provision of the Bond in regard to claims based on forgeries is Insuring Agreement (D)(1). See Financial Institution Bond, American Bar Association at p. 121 (Clore, ed. 1995) (hereafter “ABA Financial Institution

D. Loss resulting directly from

(1) Forgery or alteration of, on or in any Negotiable Instrument (except an Evidence of Debt), Acceptance, withdrawal order, receipt for the withdrawal of Property, Certificates of Deposit, or Letter of Credit

. . . .

A mechanically reproduced facsimile signature is treated the same as a handwritten signature.

The following coverage issues are implicated by Insuring Agreement D.

The definition of "a forgery"

The Bond defines a "forgery" as

> The signing of the name of another person or organization with intent to deceive; it does not mean a signature which consists in whole or in part of one's own name signed with or without authority, in any capacity, for any purpose.[1]

Under the UCC, a party injured as a consequence of a depositary bank negotiating a check with an invalid endorsement can assert a cause of action if the endorser signed the name of another person in the absence of authority, if the endorser signed his or her own name as endorsor but lacked authority to negotiate the check, or if the depositary bank negotiated the check in the absence of a necessary endorsement.[5] In contrast, coverage under the Bond is limited to instances where the endorsing party signed the name of another in the absence of authority.[6]

As a consequence of the difference in scope between the causes of action available under the UCC and the coverage afforded under the Bond, a depositary bank may face difficult proof issues in establishing coverage that need not be proved by the claimant seeking a recovery against the depositary bank due to the cashing of a "forged endorsement" check. For instance, assuming no endorsement on a check other than possibly an unreadable scribble, a depositary bank claiming coverage under the Bond would need to establish that the scribble

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Bond").

[5] UCC, §§ 1-201(43), 3-403(b). See Fisher, "Check Fraud Litigation in Connecticut after the 1990 Revisions to the U.C.C.", 68 Connecticut Bar Journal at p. 400-401 (1994) (hereafter "Check Fraud Litigation").

[6] "ABA Financial Institution Bond" supra at p. 133-34. See French American Banking Corp. v. Flota Mercante Grancolombiana, 752 F. Supp. 83 (S.D.N.Y.), aff'd, 925 F.2d 603 (2d Cir. 1991); Empire State Bank v. St. Paul Fire and Marine Insurance Co., 441 N.W.2d 811 (Minn. App. 1989). See also Alpine State Bank v. Ohio Casualty Insurance Co., 941 F.2d 554 (7th Cir. l991). Compare Filor, Bullard, & Smith v. INA , 605 F.2d 598 (2d Cir. 1978) (finding coverage under pre-1986 versions of the Financial Institution Bond where persons signed their own names in the absence of authority).

was "a signature" and that it was signed by another without authority.[7] Assuming that these coverage elements could not be proven, the depositary bank might still face liability to the injured party based on the theory that it had negotiated the check in the absence of a necessary endorsement.[8]

B. Mechanically reproduced facsimile signatures

The potentially limited scope of coverage under the Bond is also apparent from issues relating to coverage for mechanically produced endorsements. Under the Bond, a mechanically produced facsimile signature is treated the same as a handwritten signature. As a consequence, a stamped script signature will trigger coverage under the bond.[9] However, there is a split of authority as to whether coverage under the Bond is triggered by a stamped, printed legend such as "Pay to the Order of X Company"; that is, whether a printed stamp is a "signature".[10] This issue is generally of no consequence in regard to the depositary bank's liability under the UCC since, assuming that a printed stamp is not a signature, the absence of a signature endorsement could trigger liability on the part of the depositary bank.

C. Loss resulting directly from a forgery

In order to invoke coverage under the Bond, the loss sustained as a consequence of a forged endorsement must result "directly" from the forgery.[11] Arguably, the depositary bank cannot invoke coverage unless it establishes that the forgery substantially contributed to the loss and that, "but for" the fraudulent endorsement, no loss would have been incurred.[12]

D. Intent to deceive

The Bond requires that the signing of the signature of another must be accompanied by an intent to deceive.[13] No such requirement inheres in the UCC causes of action against a depositary bank. A depositary bank's liability can be triggered under the UCC as a

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[7] UCC 3-401(b) defines a "signature" as the writing of a name upon an instrument or the writing of any word or mark used in lieu of a name.

[8] See French American Banking Corp. v. Flota Mercante Grancolombiana, 925 F.2d 603 (2d Cir. 1991) (holding that there was no coverage under the Bond because the insured could not establish that an illegible scrawl was a forgery—that is, a signature of another).

[9] ABA Financial Institution Bond, supra, at pp. 138-39.

[10] Compare William Iselin & Co. v. Fireman's Fund Insurance Co., 117 A.D.2d 86, 501 N.Y.S.2d 846 (1986) (coverage afforded to a stamped printed signature) with Elmer Fox & Co. v. Commercial Union Insurance Co., 274 F. Supp. 235 (D. Colo. 1967) (coverage not afforded to a stamped printed signature). See also Alpine State Bank v. Ohio Casualty Insurance Co., 941 F.2d 554 (7th Cir. 1991).

[11] Bond, Insuring Agreement (D)(1).

[12] See Jefferson Bank v. Progressive Casualty Insurance Co., 965 F.2d 1274 (3d Cir. 1992).

[13] Bond, Definitions §1(i).

consequence of a party endorsing a check with the signature of another where s/he mistakenly believed that s/he had the necessary authority to sign the check.[14] These facts would not trigger Bond coverage.

II. THE UCC CAUSES OF ACTION AGAINST DEPOSITARY BANKS PRESUME THAT THE LOSS OCCASIONED BY A FORGED ENDORSEMENT SHOULD ORDINARILY BE INCURRED BY THE DEPOSITARY BANK, BUT ALLOW THE LOSS TO BE REALLOCATED BASED ON PRINCIPLES OF COMPARATIVE NEGLIGENCE.

A. UCC causes of action against a depositary bank may be asserted by either the drawee bank or the payee.

Three parties may potentially incur a loss in the first instance as a consequence of a depositary bank cashing a check bearing a forged endorsement-- the payee, the drawer, or the drawee bank. The UCC affords the payee and the drawee bank causes of action against the depositary bank.

1. Causes of action available to the drawee bank

Typically, where a depositary bank cashes a check bearing a forged endorsement, the proceeds from the check do not reach the intended payee. The payee may advise the drawer that it did not receive the proceeds of the check and assert that the drawer's obligation to it has not been extinguished.

Under the pre-1990 version of the UCC, there was a split of authority as to whether a drawer facing this situation could assert a claim directly against a depositary bank.[15] The revised UCC resolved this uncertainty against such causes of action.[16] Under the revised UCC, the drawer's sole remedy is a claim against the drawee bank under §4-401 seeking that its account be re-credited for the proceeds of the “forged endorsement” check.[17] By limiting the claim in this fashion, the drafters of the UCC sought to focus the claim, in the first instance, on parties who have had and may continue to have an ongoing banking relationship. This may be of advantage to the customer since the bank may favor compromise in order to preserve an ongoing business relationship.[18] This may also advantage the drawee bank since it can limit its liability to some extent by the terms of the contract that it enters into with each of its customers.[19]

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[14] See, pp. 5-9, infra.

[15] Check Fraud Litigation, supra, at p. 398.

[16] Id. See UCC §3-420(a).

[17] Check Fraud Litigation, supra, at p. 398. See also, Tonelli v. Chase Manhattan Bank, 41 N.Y.2d 667, 394 N.Y.S.2d 858 (1977).

[18] Check Fraud Litigation, supra, at p. 398-400.

20 Id. See, UCC, Section 4-103(a).

The drawer's cause of action under §4-401 is analogous to a breach of contract action for the wrongful debiting of the drawer's account. The drawer's prima facie case does not require a showing of fault; it is sufficient that the drawer establish that the check was not properly payable because it was fraudulently endorsed.[20]

Though the UCC affords a drawer a cause of action against the drawee bank, the revised UCC also reaffirms that liability for a forged endorsement must ordinarily rest with the depositary bank in the absence of fault on the part of the other persons involved with the check. This reflects the conclusion that of all the parties, the depositary bank is generally best situated to frustrate a forged endorsement; presumably by refusing to negotiate a check in the absence of persuasive evidence as to the tendering party's identity and authority.[21]

These principles are embodied in UCC, §§3-417 and 4-208, under which a depositary bank warrants to the drawee bank, inter alia, that the endorsements on a check are genuine and authorized. Under UCC § 3-119, the drawee bank receiving a claim of a forged endorsement under §4-401 will likely vouch in the depositary bank, with the depositary bank able to assert all available defenses against the drawer. If the depositary bank does not agree to assume the defense, it may be bound by the resolution of the claim and could face a claim from the drawee bank under UCC § 3-417(d) (2) for reimbursement of the drawee bank's attorney's fees. If the drawee bank resolves the drawer's claim in the absence of vouching in the depositary bank, it can assert a claim for the loss it incurred against the depositary bank.[22] However, the depositary bank can assert against the drawee bank all of the defenses that could have been asserted against the drawer.[23]

Thus, an action initiated by the drawer against the drawee bank will generally trigger a warranty claim by the drawee bank against the depositary bank.

2. Causes of action available to the payee

The UCC remedy available to a payee victimized by a fraudulent endorsement lies through a cause of action for conversion under §3-420 against either the depositary or the drawee bank.[24]

In order for the payee to have standing to allege conversion, its rights in the check must have vested. Such rights vest in the payee when the drawer causes the check to be "delivered" to the payee, a co-payee, or an agent of the payee.[25] A check is deemed to be "delivered"

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[20] Check Fraud Litigation, supra, at pp. 400.

[21] Id. at p. 401. See, Menichini v. Grant, 995 F.2d 1224 (3rd Cir. 1993).

[22] UCC §§3-417 AND 4-208.

[23] Id.

[24] If the payee proceeds solely against the drawee bank, that bank will likely assert a warranty claim against the depositary bank, possibly by vouching in the depositary bank.

where the drawer has transmitted a check in a fashion reasonably calculated to reach the payee or its agent.[26] Delivery is deemed complete irrespective whether the check is actually received by the payee.[27] For instance, if the drawer mails the check to the payee's house but the check never reaches the payee because it is diverted by the payee's agent or any third person, rights vest in the payee and the payee may assert a claim for conversion if the check proceeds are collected by a third person over a forged endorsement.

The requirement of "delivery" similarly has consequences for the question of whether the drawer continues to owe a financial obligation to the payee. If, for example, an employee steals a check from the drawer's offices, the drawer's obligation to the payee remains intact and the payee can continue to demand payment from the drawer. The drawer's remedy is to assert a claim against the drawee bank under §4-401, thereby possibly triggering a warranty claim against the depositary bank.[28] However, once the check is "delivered", the drawer has satisfied its obligation to the payee, the payee's property right in the check have attached, and the payee can pursue a claim for conversion under §3-420 against either the depositary bank or the drawee bank.[29]

The prima facie case for conversion does not require a showing of intentional misconduct or negligence. It is sufficient that the check was delivered to the payee and that the depositary bank disbursed the payee's funds to an unauthorized party.

B. The defenses available to a depositary bank confronting either a conversion or warranty claim address the following issues: authority for the alleged forged endorsement; fault on the part of any party participating in the transaction; time limitations for filing suit or providing notice; and whether the moving party's loss was directly caused by the forged endorsement.

1. Authorization

If the payee authorized the party endorsing the check to sign the payee's signature, the endorsement is effective and there is no claim against the depositary bank.[30]

The depositary bank can also assert a defense where the payee, after the cashing of the check, ratifies his/her signature signed by a third party. UCC§3-403 incorporates the common law doctrine of ratification. To be effective, the payee at the time that it ratified must have knowledge of the forgery and must intend to be bound by the endorsement.[31] Ratification

[25] UCC, §3-420, Comment 1. See, Justus Co. v. Gary Wheaton Bank,509 F. Supp. 103 (N.D. Ill. 1981).
[26] Id.

[27] Id.

[28] Id.
[30] Id.

[30] UCC §1-201(43).

may conceivably occur where the forger is a family member or where the payee has an ongoing business relationship with the forger.[32] The payee may or may not expect that the forger will reimburse it for the proceeds of the check. The ratification defense is generally asserted where the payee initially structures an arrangement with the forger and then pursues its remedies against the drawer or depositary banks after the forger reneges on the bargain.

2. Fault

The revised UCC embraces the concept of comparative negligence. The depositary bank can defend a claim by asserting the negligence of the moving party. The moving party can in turn allege a lack of care by the depositary bank. Assuming that all parties bear some responsibility for the loss, the UCC requires the trier to allocate the loss among the parties based on each party's relative responsibility for the loss.[33]

Three provisions of the revised UCC embody principles of comparative fault.

a. Imposter Rule—UCC §3-404a

Where a drawer issues a check to a person impersonating the payee or the payee's agent, the revised UCC declares the imposter's endorsement to be "... effective as the endorsement of the payee".[34] In effect, the UCC posits that the drawer was best situated to have obviated the theft and therefore should most likely bear the loss. However, if the depositary bank breached its duty of care and thereby substantially contributed to the loss, the trier must apportion responsibility for the loss between the drawer and the drawee and depositary banks.[35]

b. Fictitious Payees – UCC §3-404(b)

§3-404(b) applies where a party arranges for the drawer to issue checks to persons who are not entitled to such checks; either fictitious persons or actual persons who are not entitled to payment from the drawer. The perpetrators may be employees or other persons associated with the drawer who have sufficient contact with the drawer's check issuing process such that

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[31] See Inn Foods, Inc. v. Equitable Co-operative Bank, 45 F.3d 594 (1st Cir. l995); Hendrix v. First Bank of Savannah, 195 Ga.App. 510, 394 S.E.2d 134 (1990); Eutsler v. First National Bank, 639 P.2d 1245 (Okla. 1982).

[32] Check Fraud Litigation, supra, at p. 404-5.

[33] Under the pre-1990 version of the UCC, the claimant's negligence precluded any recovery so long as the depositary bank had acted in good faith and in accordance with reasonable commercial standards. UCC §3-419(3). However, any negligence at all on the part of the depositary bank precluded a defense based on the lack of care of other parties.

[34] UCC §3-404(a).

[35] Id.

they can arrange for checks to be issued.[36]

The UCC presumes under these facts that the drawer is best situated to prevent the issuance of checks to fictitious payees. As such, an endorsement by any person in the name of a fictitious payee is effective in favor of any bank taking the check for collection.[37] However, if the collecting bank exhibits a lack of due care in accepting the check and if that negligence substantially contributes to the loss, the trier must apportion the loss between the drawer and the depositary bank.[38]

Bond claims from depositary banks based on checks issued to “fictitious payees” may not trigger coverage under the Bond. Arguably, the signing of the name of a fictitious person does not qualify as a signature of "another" under the Bond definition of forgery.[39] This coverage defense may not apply to "fictitious payee" checks issued in the names of actual persons who are not entitled to payment from the drawer. However, it can also be argued that in order to invoke the forgery coverage of the Bond, the check must be genuine but for the forgery.[40] Under this thesis, no “fictitious payee” checks would trigger coverage, regardless whether or not the payee was a real person.

c. Embezzlements by Employees— UCC §3-405

§3-405 addresses contexts where an employee or co-conspirator of an employee forges the endorsement of the employer on checks issued to the employer as payee or fraudulently endorses a check issued from the employer's checking account to a third person.

If the culpable employee's job responsibilities extended to the process of issuing, safeguarding, or transporting the check, the forged endorsement is effective as the endorsement of the person to whom the instrument is made payable if it is in the name of that person.[41] The rationale is that the employer is best situated to discover and prevent the wrongful conduct of its employees.[42] However, if the collecting bank exhibits a lack of due care in accepting the check and if that negligence substantially contributes to the loss, the trier must apportion the loss between the drawer and the depositary bank.[43]

d. Catch-all Comparative Negligence-- §3-406.

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[36] Check Fraud Litigation, supra, at p. 406.

[37] UCC §3-404(b).

[38] Id.

[39] Bond, Definitions §1(i).

[40] See, Reliance Insurance Company v. Capital Bancshares, Inc., 912 F.2d 756 (5th Cir. 1990)

[41] 42 UCC §3-405.

[42] Menichini v. Grant, 995 F.2d 1224 (3rd Cir. 1993). UCC §3-405.

[43] UCC §3-405.

Where the party claiming a loss as a result of a forged endorsement did not exercise ordinary care and that failure substantially contributed to the forgery, that party is precluded from asserting the forgery against another party.[44] However, if the defendant bank also failed to exercise ordinary care, the trier must apportion the loss among the parties based on their relative responsibility for the loss.[45]

In situations where the plaintiff is a business, the trier may find a lack of due care on the part of the plaintiff in situations where it:

(a) hired a new employee with accounting responsibilities but failed to conduct a background check that would have disclosed prior misconduct[46];

(b) failed to supervise employees having financial responsibilities[47];

(c) failed to properly supervise and limit access to checks and financial documents[48];

(d) failed to conduct periodic audits[49];

(e) failed to create a system of checks and balances so that no one person could perform important financial tasks in the absence of oversight[50]; or

(f) failed to promptly investigate when confronted with evidence suggesting possible misconduct.[51]

A trier may find that a depositary bank exercised a lack of care in accepting and processing a "forged endorsement" check where it:

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[44]UCC §3-406.

[45] According to UCC §3-103(7), "ordinary care", in the case of a person engaged in business, means the observance of reasonable commercial standards, prevailing in the area in which the person is located, with respect to the business in which the person is engaged.

Where parties in forged check litigation find it necessary to retain banking operations experts, this provision appears to require that the experts be intimately familiar with and testify regarding local banking practices.

[46] See Commercial Credit Equipment Corp. v. First Alabama Bank, 636 F.2d 1051 (5th Cir. 1981).

[47] See Menichini v. Grant, 995 F.2d 1224 (3d Cir. 1993).

[48] See Read v. South Carolina National Bank, 286 S.C. 534, 335 S.E.2d 359 (1985).

[49] See American National Insurance Co. v. Fidelity Bank, 691 F.2d 464 (8th Cir. l982).

[50] Menichini v. Grant, 995 F.2d (3d Cir. 1993). See Fraudulent Check Litigation, supra, at p. 396-97, 408-9.

[51] See Westport Bank & Trust Co. v. Lodge, 164 Conn. 604, 325 A.2d 222 (1973).

(a) allows an individual to open an account in the name of a business without confirming the person's authority to open the account[52];

(b) allows an individual to deposit into a personal account a check made out to a business[53];

(c) fails to follow its own procedures[54]; or

(d) cashes a check from a business checking account that is made out to the bank as payee.[55]

It is not entirely clear whether §3-406 allows a depositary bank to assert the negligence of a party other than the particular party which initiated the claim. In litigation brought by the payee against a depositary bank, the text of §3-406 does not appear to allow the bank to assert the negligence of the drawer. It has been suggested that the depositary bank would be entitled to file a third party action against the drawer in order to establish the drawer's degree of responsibility, but the source of authority for this proposition is unclear.[56]

3. Statutes of Limitation and Notice Defenses

A conversion action brought by a payee must be filed within three years after the cause of action accrues.[57] Warranty actions brought by a drawer against a drawee bank also must be brought within three years after a cause of action has accrued.[58]

A drawee bank which intends to assert a breach of warranty claim against a collecting bank must provide the collecting bank with notice of the claim within 30 days after the drawee bank has reason to know of the breach and the identity of the warrantor.[59] In the absence of timely notice, the warrantor is discharged to the extent of a loss caused by a consequence of the delay.[60]

4. Intended Payee

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[52] See Wheat State Service Corp. v. Volfax National Bank, 44 Colo. App. 376, 618 P.2d 696 (1980).

[53] See Aetna Casualty & Surety Co. v. Hepler State Bank, 6 Kan. App. 2d 543, 630 P.2d 721 (1981).

[54] See Sun Bank/Miami v. First National Bank, 698 F. Supp. 1298 (D. Md. 1988).

[55] See Bullitt County Bank v. Publishers Printing Co., 684 S.W.2d 289 (Ky.App. l984).

[56] Fraudulent Check Litigation, supra, at p. 408.

[57] UCC §3-118.

[58] UCC §4-411.

[59] UCC §3-417 and 4-208.

[60] UCC §3-417 and 4-208.

In order to establish liability for a forged check under the UCC or coverage under the Bond, the forged check must cause a loss.

Based on a causation analysis, the courts have held that where a forged check reaches the "intended payee", there may be no liability on the part of the depositary bank even if the payee ultimately incurs a loss.[61]

In some jurisdictions, the fact that the proceeds of a check reached the person intended by the drawer to receive the funds is enough to absolve the banks of liability for cashing the check with a forged endorsement.[62] In other jurisdictions, the bank must also show that the drawer suffered no loss or adverse effect on its rights in the transaction that was proximately caused by the negotiation of the check bearing the forged endorsement.[63]

The “intended payee” defense may be apposite where a joint payee check is deposited by one payee with one genuine endorsement and one forged endorsement. A key consideration would be whether the drawer intended that the payee depositing the check was to received the proceeds.

The intended payee defense may also be apposite where two bank customers open a joint account under which either party can act on the other's behalf in regard to all matters relating to the account, including withdrawing funds which were deposited by the other party. Assume that one party forges the other party's endorsement on a single payee check, deposits the check into the joint account, and then withdraws the proceeds from the account and applies the funds for his own purposes. If the payee sues the depositary bank, the bank can argue that the check reached the intended payee since it was deposited into the payee's joint account. The loss to the payee was arguably caused not by the forgery but rather by the fact that the other party to the joint account misapplied the funds after they were withdrawn from the joint account.[64]

III. COMMON LAW CAUSES OF ACTION AGAINST DEPOSITORY BANKS FOR THE CASHING OF CHECKS BEARING FORGED ENDORSEMENTS MAY BE PREEMPTED BY THE UCC.

A party asserting claims against a depositary bank due to the cashing of checks bearing forged endorsements may allege common law causes of action sounding in tort or contract in addition to UCC causes of action. The impetus for alleging a common law claim may reflect

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[61] See County of Pierce v. Suburban Bank, 815 F.Supp. 1124 (N.D.Ill. l993); Spevack, Cameron, & Boyd v. National Community Bank, 291 N.J. Super. 577, 677 A.2d 1168 (1996); Ambassador Financial Services, Inc. v. Indiana National Bank, 605 N.E. 2d 746 (Ind. Sup. Ct. 1993); Blackmon v. Hale, 1 Cal. 3d 548, 463 P.2d 418 (1970); Modern Equipment Corp. v. Northern Trust Co., 284 Ill. App. 586, 1 N.E.2d 105 (1936).

[62] See, Florida National Bank v. Greer, 96 So.2d 409 (Fla. 1957).

[63] See, Ambassador Financial Services, Inc. v. Indiana National Bank, supra, 605 N.E.2d 746.

[64] See, Modern Equipment Corp. v. Northern Trust Co., supra, 1 N.E. 2d 105.

the belief that such cause of action would be more favorable to the plaintiff in regard to issues such as time limitations or burdens of proof.

§1-103 of the UCC states:

> Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating causes shall supplement its provisions

On face, the text of §1-103 suggests a preference for retaining common law principles where possible. Nonetheless, §1-103 embodies the recognition that one of the key roles played by the UCC is to create a uniform commercial law throughout the country and that this objective is potentially frustrated by the recognition of common law causes of action that may differ from state to state. Based on §1-103, common law causes of action may be deemed preempted in contexts where there is a particular provision of the UCC that addresses the same conduct addressed by the common law cause of action and the UCC and common law causes of action differ in material respects. For instance, a number of courts have ruled that the UCC's conversion cause of action set out in §3-420 and the related provisions outlining a bank's defenses to such action preempt a common law cause of action based on a bank accepting a check evidencing a forged endorsement.[65]

It is impossible to make broad generalizations regarding the likely strength of a preemption argument. The analysis requires scrutiny of the particular common law cause of action asserted by the plaintiff to determine whether it closely overlaps the same conduct as that addressed by a UCC provision. If so, there would need to be consideration of whether the common law cause of action differed from that under the UCC in material respects, thereby potentially triggering the rationale for preemption.

Conclusion

Bond claims alleging forgeries require a careful coverage analysis. Assuming coverage, the revised UCC provisions, particularly those importing comparative negligence principles, have strengthened the defenses afforded to depositary banks. However, while the adoption of comparative negligence principles is a favorable development, these principles add an additional layer of uncertainty in predicting outcomes which, in turn, makes the task of assessing the fidelity carrier's exposure far more speculative.

[65] See Equitable Life Assurance Society v. Okey, 812 F.2d 906 (4th Cir. l987); First Investors Corp. v. Citizen's Bank, 757 F. Supp. 687 (W.D.N.C. l991), aff'd, 956 F.2d 263 (4th Cir. 1992); Roy Supply, Inc. v. Wells Fargo Bank, 39 Cal. App. 4th 1051, 46 Cal. Rptr.2d 309 (1995); Berthot v. Security Pacific Bank, 170 Ariz. 318, 823 P.2d 1326 (l992); Flavor-Inn v. NCNB National Bank, 309 S.C. 508, 424 S.E.2d 534 (l992); Cartwood Construction v. Wachovia Bank & Trust Co., 84 N.C.A. 245, 352 S.E.2d 241 (N.C. App. 1987). But See, Federal Insurance Co. v. NCNB National Bank, 958 F.2d 1544 (11th Cir. 1992).

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