Clark Hill

California Bankers Association Bank Counsel Seminar

Masters of the Universe
Bank Operations in Review

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I. Alteration or Counterfeit – A developing area of Bank vs/ Bank disputes.

- The basic rule worked for decades:
  - The depositary bank warrants that a check is not altered, but does not warrant that a check is not forged. Commercial Code Section 4207. So:
  - If a fraudulent check is a counterfeit, and not returned by the midnight deadline, then the drawee bank bears the loss.
  - If a fraudulent check is an alteration, and not returned by the midnight deadline, then the depositary bank bears the loss.
  - *Wachovia Bank, N.A. v. Foster Bancshares, Inc.*, 457 F.3d 619, 622 (7th Cir. 2006)

Technology marches on

- The Commercial Code presumed that a depositary bank was in the best position to detect an alteration.
- With modern scanners and printers bad actors can use an authentic check as source material and create a completely new item with the same account number and amount but a different payee.
- With modern electronic processing the original deposited item is almost never available for inspection by the time a claim is made.

It’s the paper, not the ink.

- The question of what makes an item a counterfeit and what makes the item a forgery has been the subject of dispute.
- The best answer so far:
- A digital alteration of the check image to create a new piece of paper is a counterfeit, not an alteration. *Provident Sav. Bank, F.S.B. v. Focus Bank*, 548 F. Supp. 3d 862, 868 (E.D. Mo. 2021).
- An authentic piece of paper issued by the Drawer is an alteration, even if all the original writing is washed away and replaced. *Fid. Brokerage Servs. LLC v. Pac. W. Bank*, 749 F. Supp. 3d 1058, 1064 (C.D. Cal. 2024).

Who has the burden of proof?

- In the olden days, when the paper check was presented to the Drawee Bank, which then destroyed it, the Drawee Bank had the burden of proving that the check was altered. *Chevy Chase Bank, F.S.B. v. Wachovia Bank, N.A.*, 208 F. App'x 232, 235 (4th Cir. 2006).

- When the Depositary Bank presents an electronic image, and destroys the original paper item, the Depositary Bank has the burden of proof. 12 C.F.R. § 229.38

Presumption is Rebuttable.

- Remarkable how often the Depositary Bank sees indicia of counterfeit to overcome the presumption.
- Equally remarkable how often the Drawee Bank misses the midnight deadline but then sees indicia of alteration.

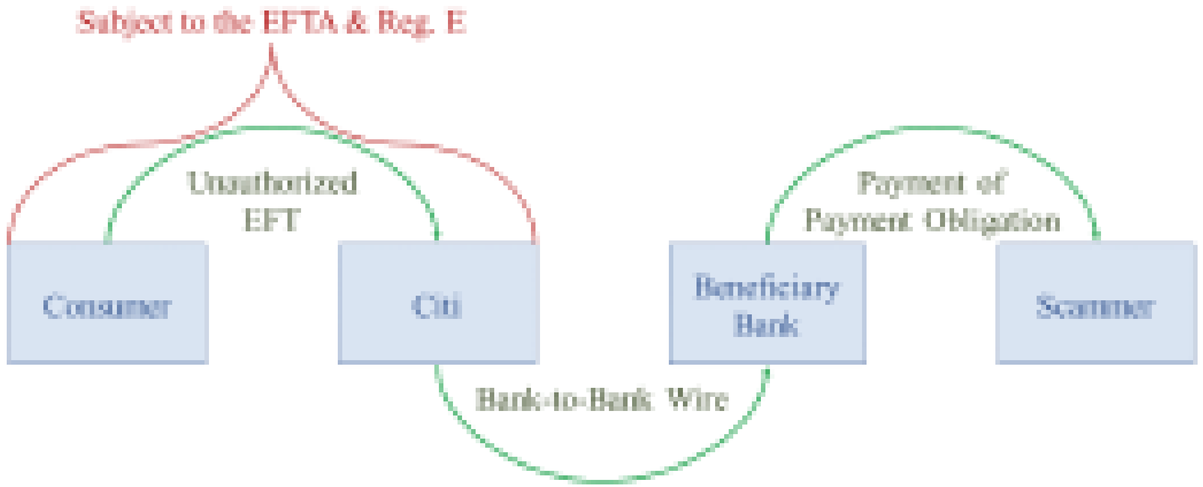
II. Wire Fraud – The Growth Industry

A. Claims against the sending bank.

B. Claims against the receiving bank.

The Sending Bank – *New York v. Citibank*

- The trial court decision on a motion to dismiss – A wire transfer might be subject to the Electronic Funds Transfer Act if steps in the wire involve internal movement of funds in addition to the bank-to-bank transfer through the Fedwire system.



What it means.

- If the EFTA applies then the financial institution must either –
- Complete a code-compliant investigation and provide a written response to the claim within 10 business days, or
- Provide the customer with provisional credit pending completion of the investigation.
- In other words “take the money and run”.
- 15 U.S.C.A. § 1693f.

The Trial Court Decision

"In sum, the plain meaning of subsection (7)(B) [excluding wire transfers from EFTA] does not apply to electronic transfers of funds between consumers and their financial institutions, even when made ancillary to an interbank wire."

New York v. Citibank, 24-CV-659 (JPO), Opinion dated 1/21/25.

Certified for Appeal. Oral Argument held April 6, 2026. Second Circuit Case No. 25-2105.

Important Limitation

"…the term "electronic fund transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, or computer or magnetic tape…"

- 15 U.S.C.A. § 1693a(7).

“But you told me . . .”

“…we conclude it is reasonable to interpret the complaint as alleging that [the banker’s] statements that “ ‘the Check cleared’ ” and that “ ‘it is all good; it is cleared and good to go’ ” were in direct response to Y.P.’s inquiries regarding the check's validity, not merely the availability of the funds.”

Y.P. v. Wells Fargo Co., 119 Cal. App. 5th 1069, 1087 (2026)

Actions Against Receiving Banks

- The basic rule:
- "Because [the bank] had no actual knowledge of the misdescription at the time the deposits were made, it incurred no liability for making the deposits.
- *Studco Bldg. Sys. US, LLC v. 1st Advantage Fed. Credit Union*, 133 F.4th 264, 275 (4th Cir.), cert. denied, 146 S. Ct. 187, 223 L. Ed. 2d 62 (2025).

Cracks in the armor.

- Opening accounts for fraudsters. *Elkin Valley Baptist Church v. PNC Bank, N.A.*, 748 F. Supp. 3d 293, 347 (W.D. Pa. 2024). In California see *Software Design & Application, Ltd. v. Hoefer & Arnett, Inc.*, 49 Cal. App. 4th 472, 481 (1996).

- Handling after a fraud claim is made. "…placing a hold on disputed funds pending an investigation a bank would not be usurping the judicial role…" *Hirshon L. Grp. PC v. Wells Fargo Bank Nat'l Ass'n*, 752 F. Supp. 3d 220, 226 (D. Me. 2024)

When the same bank is the sender and receiver.

- *Lukis Glob. Corp. v. Comerica Bank et al.*, No. 2:26-CV-02150-AH-(DSRX), 2026 WL 2127238, at *5 (C.D. Cal. July 21, 2026).
- Section 11302 duties of receiving bank don’t apply.
- Transactions is still a funds transfer under Division 11, preempting most claims.
- Exemption of wire transfers from EFTA not in issue on the facts.

Zelle

"Benefitting from unauthorized transactions, despite knowledge of the fraudulent nature of the transaction, is sufficient to allege that a defendant created an atmosphere conducive to fraud"

New York v. Early Warning Services, LLC, New York County Supreme Court Case No. 654753/2025, order denying motion to dismiss. 7/20/26.

Complaint is based on New York law:

"12. Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply… for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts …and the court may award the relief applied for or so much thereof as it may deem proper..."

N.Y. Exec. Law § 63.

III. Privacy

California Trap and Trace Law:

"(a) Except as provided in subdivision (b), a person may not install or use a pen register or a trap and trace device without first obtaining a court order pursuant to Section 638.52 or 638.53."

Cal. Penal Code § 638.51 (Effective January 1, 2016).

Use a what?

(b) “Pen register” means a device or process that records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted, but not the contents of a communication. “Pen register” does not include a device or process used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services provided by such provider, or a device or process used by a provider or customer of a wire communication service for cost accounting or other similar purposes in the ordinary course of its business.

(c) “Trap and trace device” means a device or process that captures the incoming electronic or other impulses that identify the originating number or other dialing, routing, addressing, or signaling information reasonably likely to identify the source of a wire or electronic communication, but not the contents of a communication.

- Cal. Penal Code § 638.50



If applied to the internet, the statute describes almost every website.

The result has been swarms of demand letters asserting violations of the trap and trace law.

In most cases the cost to settle is less than the cost to litigate whether the statute applies to websites or not.

Cases that have litigated the issue have met with mixed results, often concluding that the statute applies to telephones, not websites.

Legislative Fix Adopted

- SB690 amends Penal Code Section 637.2
- Does not amend the definition of pen register or trap and trace.
- But, provides that claims of violations regarding an internet website, online app, or mobile app can only be brought by the Attorney General.
- Approved September 30, 2026.
- Applies retroactively to any pending claim filed within two years before the operative date of the amendment.

In the Court of Appeal

Variety Media v. Superior Court. 2d Civil No. B350578.

Oral argument held August 25, 2026. Supplemental briefing requested on whether SB690 makes the case moot.

Trial court decision overruled Variety Media's demurrer. *Rose v. Variety Media*, LASC Case No. 25STCV01865. (9/24/25).

Thank You

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Proposed AB 1660

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Certifications from Public Administrator

- Probate Code Section 7601 *et seq.*
- A public administrator who is authorized to take possession or control of the property of a decedent may issue a written certification of that fact
- The written certification is effective for 30 days after the date of issuance

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Certifications from Public Administrator

- A financial institution presented with certification must
  - Provide the public administrator with information concerning property held in the sole name of the decedent
  - Grant access to a safe deposit box rented in the sole name of the decedent to permit inspection and removal of any will or instructions for disposition of the decedent's remains
  - Surrender to the public administrator property of the decedent that is subject to loss, injury, waste or misappropriation

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Certifications from Public Administrator

- Probate Code Section 7660 *et seq.*
- Decedent estates which don't exceed $50,000
  - Written certification from public administrator regarding a small estate
  - Provide public administrator with information concerning property held in the sole name of the decedent
  - Grant administrator access to a safe deposit box
  - Surrender to administrator "any" property
  - Financial institution is then discharged from liability

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Proposed AB 1660

- Adds monetary sanctions for financial institutions that fail to comply with existing laws that require financial institutions to:
  - Provide Administrator (PA), Public Guardian (PG), or Public Conservator (PC) with information about property held in the name of the individual,
  - Prevent the property from being transferred, encumbered, or disposed
  - In the case of a decedent, surrender a safe deposit box and property to the PA

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Proposed AB 1660

- The measure covers three closely related areas of law
  - Public Administrators settle the estates of those who die without a will
  - Courts appoint Public Guardians and Conservators as the guardian or conservator of a person, or estate, or both, when the person is a minor, disabled, mentally ill, or frail, and cannot manage their own affairs

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Proposed AB 1660

- Allegedly too common for banks to resist or deny a PA's request for documents and access to accounts upon service of a certification
- Financial institutions frequently question the PA's authority to the information and property
  - Particularity when it is not clear that the property is subject to "loss, injury, waste or misappropriation"

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Proposed AB 1660

- This bill would:
  - Make written certifications issued by a PA, PG and PC valid for 60 days
  - Require use of a form certification by a PA, PG and PC
  - Permit a court to award sanctions of no less than $1,000 per violation for failure to comply with these requirements following receipt of service of notice of at least 30 days

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New Form Certification

- The form will contain the following warning:

"SPECIAL NOTE TO FINANCIAL INSTITUTIONS:

State law requires that upon receiving a copy of this Certificate of Authority, financial institutions shall provide the public guardian with information concerning property held by the above-named individual and surrender the property to the Public Guardian if requested

Failure to complete these requests may result in fines imposed by the court in the amount of no less than $1,000 per violation for costs and fees incurred…"

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New Form Certification

- The following statements will be included in the certification:

  Receipt of this Certificate of Authority:

  - Constitutes a finding that the property is subject to loss, injury, waste, or misappropriation, and
  - Constitutes sufficient acquittance for providing information and surrendering property

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QUESTIONS?

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