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12
13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF SAN FRANCISCO
15

16 Paul Miller, individually and on behalf of others
similarly situated,

17 Plaintiff,

18 v.

19 Bank of America NT & SA,

20 Defendant.
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No. 301917

**SUPPLEMENTAL BRIEF OF
DEFENDANT BANK OF AMERICA
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT OR
ALTERNATIVELY SUMMARY
ADJUDICATION**

Original Hearing Date
Date: June 8,2001
Time: 3:00 p.m.

Continued Hearing Date
Date: July 13,2001
Time: 3:00 p.m.
Dept: 624
The Honorable Anne Bouliane

Trial Date: Not Set
Complaint Filed: September 16, 1998

1 Defendant Bank of America N.A. (“Bank of America” or “Bank”) submits--&is supplemental
2 brief in support of its Motion for Summary Judgment or Alternatively Summary Adjudication.

3 INTRODUCTION

4 The Court raised the following issue at the June 8 oral argument. A customer to whose
5 account the Bank credits funds that did not really belong to her, does not have a right to keep those
6 funds. Assume the Bank credited such funds to the account of a customer who receives Social
7 Security funds by direct deposit. Assume further that the customer withdrew those funds before the
8 Bank realized she was not entitled to them, but that sufficient funds nonetheless remain in the account
9 so that the Bank could still reverse the erroneous credit without creating an overdraft. Can the Bank
10 reverse the credit by debiting the account for that amount? Or is the Bank instead required to pursue
11 the customer separately, e.g., by suing her? In other words, does the customer in this hypothetical
12 situation owe the Bank a “debt” within the meaning of the levy statute, Civ. Proc. Code 9 704.080
13 (“Section 704.080”), such that the Bank’s debiting of the account for the prior credit would constitute
14 a “levy” or some other prohibited collection activity? ’

15 As shown below, reversing a credit to which the customer was not entitled in the first place
16 does not violate the levy statute, whether or not such reversal overdraws the account.

17 ARGUMENT

18 A bank might debit a checking account to reverse a prior credit for various reasons. The bank
19 may have erroneously credited to that account funds that were supposed to go into someone else’s
20 account (the situation that Plaintiff alleges happened to him). The customer may have mis-added the
21 amount of a prior deposit. Or the customer may have - innocently or duplicitously - deposited a
22 check for which the Bank gave him credit, but it later turned out that the check was no good.

23 The Court’s inquiry was (as the Bank understands it) whether the Bank can reverse prior
24 credits to which the customer was not entitled, where such a reversal would not overdraw the

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26 ’ This issue is not actually raised by Plaintiffs Complaint. Plaintiff has not alleged that a
27 bank’s reversal of an erroneous credit that does not overdraw the account is improper.

1 account, if the customer in question receives Social Security funds electronically. Although research
2 has not disclosed cases involving reversals of credits resulting from the Bank's misdirecting a deposit
3 intended for someone else, there is authority relating to reversals of credits resulting from the
4 customer's deposit of a check that turns out to be no good.

5 When a customer deposits a check into her account at, say, Bank of America, "the customer
6 receives a provisional credit for the amount of the check." *Symonds v. Mercury Sav. & Loan Ass'n*,
7 225 Cal. App. 3d 1458, 1664 (1990). At the moment the Bank gives the customer such provisional
8 credit, the Bank has not itself yet collected anything on the check. Bank of America (the "collecting
9 bank") forwards the check to the checkwriter's bank, say, Wells Fargo ("the payor bank") for Wells
10 Fargo to pay. If Wells Fargo refuses to pay - e.g., because the Wells Fargo customer who wrote the
11 check has insufficient funds, or stopped payment - Bank of America is, for the time being, out of
12 pocket for the uncollected check. Commercial Code 9 4214 ("Section 42 14") therefore allows Bank
13 of America to reverse the provisional credit it gave its customer. *Symonds*, 225 Cal. App. 3d at 1464-
14 65. In particular, Section 42 14 provides:

15 If a collecting bank has made a provisional settlement with its customer
16 for an item and itself fails by reason of dishonor, suspension of
17 payments by a bank or *otherwise* to receive a settlement for the item
18 which is or becomes final, the bank may revoke the settlement given by
19 it, charge back the amount of any credit given for the item to its
customer's account or obtain refund from its customer whether or not it
is able to return the items if by its midnight deadline or within a longer
reasonable time after it learns the facts it returns the item or sends
notification of the facts.

20 Corn. Code 5 4214(a) (emphasis added). Thus, where the collecting bank is unable to collect on the
21 deposited check, it may reverse the provisional settlement that it gave its customer who deposited the
22 check - *i.e.*, charge back the customer's account. *Id.*, Unif. Corn. Code cmt. 2.

23 Section 4214 also provides that the bank's right to charge back the customer's account is not
24 affected by whether the customer, in the interim, might have withdrawn the funds. The chargeback
25 right is not affected by "[p]revious use of a credit given for the item[.]" Corn. Code §4214(d).

26 Nor is the Bank's right to charge back the prior credit affected by the possibility that the Bank
27 itself may have been negligent in handling the deposit. The chargeback right is not affected by
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1 “[failure by any bank to exercise ordinary care with respect to the item[.]” *Id.* See official comment
 2 to the Uniform Commercial Code, which California has adopted, notes that the Bank’s right to charge
 3 back the prior credit “applies irrespective of the cause of the nonpayment, and of the person
 4 ultimately liable for nonpayment. Thus chargeback is permitted even if nonpayment results from the
 5 depository bank’s own negligence.”² *Id.*, Unif. Corn. Code cmt. 5.

6 Nor is such chargeback forbidden by the levy statute, Section 704.080. Financial Code 3 864
 7 (“Section 864”), discussed at length in the Bank’s moving papers, makes clear that reversal of a
 8 provisional credit because of uncollected funds does not constitute a “debt.” A debt, as defined by
 9 Section 864, “does not mean a charge for bank services *or a debit for uncollected funds* or for an
 10 overdraft of an account imposed by a bank on a deposit account.” Fin. Code 3 864 (emphasis added).
 11 Thus, the Bank’s reversal of a provisional credit is not a debt owed by the customer to the Bank, and
 12 therefore does not require the Bank to give the depositor notice and the opportunity to claim
 13 exemptions, such as the exemption for Social Security deposits under Section 704.080. *Id.*

14 To hold otherwise would not only be contrary to Section 4214 and Section 864, it would also
 15 make it impossible for a bank to permit Social Security recipients to engage in such ordinary
 16 transactions as making deposits. Suppose, for instance, that a customer who received Social Security
 17 funds by direct deposit is credited with \$30.00 when he deposits a friend’s check that turns out to be
 18 no good. If the Bank could not simply reverse the \$30.00 credit, but instead had to sue the customer
 19 separately, the Superior Courts of California would be deluged with thousands of suits by banks
 20 against their own customers to recover provisional, uncollected credits. Further, any customer whom
 21 the Bank were to sue in such circumstances would undoubtedly (and justifiably) respond, “Why on
 22 earth is my bank suing me for the \$30.00 (and saddling me with court costs), instead of just reversing
 23 the \$30.00 provisional credit from my account?” No bank in its right mind would permit a Social

24
 25 ² Of course, after the chargeback occurs, the customer might have a claim against her bank if
 26 her bank’s “failure to exercise ordinary care in handling the deposited item” caused injury to her.
 27 Corn. Code 3 4214 (d), Unif. Corn. Code cmt. 6. Similarly here, plaintiff Miller might have had an
 28 individual cause of action against the Bank if the Bank negligently handled the deposit to his account.

1 Security recipient to open a checking account, if the bank would have to run to court every time a
2 provisional credit needed to be reversed.

3 At the June 8 hearing, the Court appeared to be focusing on the situation where, after the
4 credit to the account, the customer withdrew the credited funds before the Bank realized the credit
5 was no good (assuming all the while, however, that enough funds still remained so that the Bank
6 could reverse the credit without overdrawing the account). Since money is fungible, however, it will
7 not be possible to tell whether the funds withdrawn by the customer were the erroneously credited
8 funds, or some other funds. For instance, suppose a Bank customer has \$400.00 in his account, then
9 receives an erroneous credit of \$30.00, and then withdraws \$50.00. Did that withdrawal include the
10 erroneous \$30.00 credit, or did it consist entirely of his other funds? And if the Bank were to reverse
11 the \$30.00 credit, would it be debiting the same \$30.00 or a different \$30.00? This is all unknowable.

12 More importantly, as discussed above, the Commercial Code permits chargebacks of
13 provisional credits even if the customer already withdrew the funds. And requiring the Bank to
14 forego a chargeback, and instead sue its customer, would be inconsistent with Financial Code 0 864,
15 and with customers' expectations - even where the chargeback did not cause an overdraft.

16 The Bank is aware of at least three Superior Court decisions sustaining demurrers to, or
17 striking, claims that bank debits to an account of a Social Security electronic recipient violated the
18 levy statute, where such debits did not necessarily cause *an* overdraft. In *Watkins v. Bank of America*
19 *N. T. & SA.*, an action filed in the Alameda County Superior Court, the plaintiff alleged, in his Third
20 Cause of Action, that someone deposited into his account a forged check drawn on that account;
21 withdrew funds from the account; and wrote forged checks on the account. (Declaration of Ame D.
22 Wagner in Support of Bank of America's Supplemental Brief in Support of Motion for Summary
23 Judgment or Alternatively Summary Adjudication ("Wagner Decl."), Ex. A, 7 11.) The plaintiff
24 alleged that the Bank had denied him access to funds in his account and charged service fees in
25 violation of Section 704.080. (Id., flfi 36-39.) The Alameda Superior Court (Hon. James A.
26 Richman), in an unpublished decision, sustained the Bank's demurrer to the Third Cause of Action
27 without leave to amend, citing Financial Code § 864 and *Symonds*. (Wagner Decl., Ex. B.)

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1 In *Cortez v. Wells Fargo Bank, NA.*, an action in San Francisco Superior Court, the plaintiff
2 alleged, in his Third Cause of Action, that the bank violated Section 704.080 by charging NSF fees to
3 his checking account (and/or a linked savings account). (*Id.*, Ex. C, 11 lo-23 and 54-57.) The Court
4 (Hon. Stuart R. Pollak) sustained defendant's demurrer to the Third Cause of Action with leave to
5 amend. (*Id.*, Ex. D.) Apparently no amendment was ever filed. (Wagner Decl., 74.)

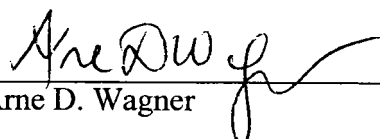
6 In *Arment v. Wayman Co.*, the plaintiff alleged that the Bank violated the Unfair Competition
7 Law, Bus. & Prof. Code § 17200 *et seq.*, and the implied covenant of good faith, by asserting and
8 enforcing a right to charge fees to Social Security direct deposit accounts. (*Id.*, Ex. E, 7198-1 00,
9 106.) The Riverside Superior Court (Hon. Dallas Holmes) granted the defendant's motion to strike
10 all allegations relating to the alleged violation of Section 704.080, on the ground that under Section
11 864, charging fees does not constitute a setoff or the collection of a debt for purposes of Section
12 704.080. (*Id.*, Ex. F.)

13 **CONCLUSION**

14 For the foregoing reasons, reversals of credits, or imposition of other debits for transactions in
15 checking accounts that receive electronic Social Security benefits, whether or not such reversals or
16 debits result in an overdraft, do not constitute collection of debts for purposes of - and hence do not
17 violate - Section 704.080. The Bank is therefore entitled to summary judgment.

18 Dated: June 29,2001

19 ARNE D. WAGNER
20 STEPHEN E. PAFFRATH
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23 By: 
Arne D. Wagner

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PROOF OF PERSONAL SERVICE
(CCP 1011,2015.5)

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DECLARATION OF ARNE D. WAGNER IN SUPPORT OF BANK OF AMERICA'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR ALTERNATIVELY SUMMARY ADJUDICATION

on the following by placing a true copy thereof enclosed in a sealed envelope addressed as follows for collection and delivery at the mailroom of Morrison & Foerster LLP, 425 Market Street, San Francisco, California, 94 105, in accordance with Morrison & Foerster's ordinary business practices:

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The Sturdevent Law Firm
475 Sansome Street
Suite 1750
San Francisco, California 94 111

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed at San Francisco, California, this 29th day of June, 2001

Victoria R. Smith

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(signature)

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(CCP 1013a, 2015.5)

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DECLARATION OF ARNE D. WAGNER IN SUPPORT OF BANK OF AMERICA'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR ALTERNATIVELY SUMMARY ADJUDICATION

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44 Montgomery Street
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

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Victoria R. Smith
(wed) (signature)