

1 JAMES C. STURDEVANT (SBN 94551)
2 VIARK T. JOHNSON (SBN 76904)
3 THE STURDEVANT LAW FIRM
4 \$75 Sansome Street, Suite 1750
5 San Francisco, California 9411 1
6 Telephone: (415) 477-2410
7 =acsimile: (415) 477-2420

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5 THOMAS J. BRANDI (SBN 53208)
6 LAW OFFICE OF THOMAS J. BRANDI
7 44 Montgomery Street, Suite 1050
8 San Francisco, CA 94104
9 Telephone: (415) 989-1 800
10 Facsimile: (415) 989-1 801

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Attorneys for Plaintiffs

11 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 IN AND FOR THE COUNTY OF SAN FRANCISCO
13 UNLIMITED JURISDICTION

15 PAUL MILLER, individually and on behalf of)
16 others similarly situated,)

Plaintiff,

17 vs.

18 BANK OF AMERICA N.T. & S.A.
19 a California corporation, and DOES 1 - 50, 1

20 Defendants.)
21)
22)
23)
24)
25)

CASE NO. 301917

CLASS ACTION

i PLAINTIFF'S SUPPLEMENTAL
) MEMORANDUM OF POINTS AND
) AUTHORITIES IN OPPOSITION TO
) DEFENDANT'S MOTION FOR
1s SUMMARY JUDGMENT OR
20 ALTERNATIVELY SUMMARY
ADJUDICATION OF ISSUES

Date: July 13, 2001
Time: 3:00 p.m.
Location: Rm. 624

Honorable Anne E. Bouliane

1 Plaintiff Paul Miller submits the following Memorandum of Points and
2 authorities in response to the Supplemental Brief of Defendant Bank of America in
3 support of its Motion for Summary Judgment or Alternatively Summary
4 adjudication of Issues (hereinafter, 'Def's Supp. Brief "I.

5 INTRODUCTION

6 Defendant's Supplemental Brief reflects the bank's continuing refusal to
7 recognize that Social Security Direct Deposit accounts are special accounts which
8 require specialized treatment in order to assure the protections of both federal and
9 state law to preserve and protect public benefit funds for their intended use.
10 Based upon generic provisions of the Commercial Code, none of which addresses
11 issues related to the specialized nature of Social Security Direct Deposit accounts,
12 the bank argues that it has the absolute right to "charge back" such accounts when
13 it desires "for various reasons" to "debit a checking account to reverse a prior
14 credit." While such a right may apply to regular deposit accounts, its application to
15 Social Security Direct Deposit accounts would defeat the express purpose of the
16 Social Security Act, 42 U.S.C. § 407 and the underlying policy of California's
17 exemption statute, 5704.080. To satisfy the purposes of those statutes, funds
18 made available to a Social Security recipient in his or her direct deposit account
19 may not be unilaterally withdrawn by the bank for its own benefit absent an explicit
20 agreement by the depositor that the protected funds may be utilized in that manner.
21 Further, such unilateral debits or collection actions are unlawful, unfair and
22 fraudulent whether or not they have the effect of actually overdrawing the Social
23 Security recipient's direct deposit account. Any unauthorized debiting of such
24 accounts is prohibited by both federal and state law.

25 ARGUMENT

26 California Civil Code Section § 704.080 states the Legislature's policy with
27 respect to funds maintained in a checking or savings account which receives
28 payments from the Social Security Administration by means of direct deposit. In

1 order to carry out the purposes of the Social Security Act of providing a minimum
2 monthly income to the elderly or disabled, those funds are exempt from collection
3 or attachment. Rather than require that specific Social Security funds be traced to
4 the account to determine their exempt status, the legislature wisely determined that
5 all funds in a Social Security Direct Deposit account, up to an amount of
6 \$2,000.00 per depositor, are exempt from collection or attachment regardless of
7 their source. (Code Civ. Proc. § 704.080(b)). Funds in the account *actually*
8 received from SSA are exempt regardless of the balance in the account. (Code Civ.
9 Proc. § 704.080(c)). The legislature also expressly provided that any contractual or
10 other prior waiver of these statutory exemptions is against public policy and void.
11 (Code Civ. Proc. § 703.040). Finally, as a matter of public policy, such exempt
12 funds are not subject to the right of set off or other informal means of collection.
13 *Kruger v. Wells Fargo Bank* (1974) 1 1 Cal.3d 352, 367-371.

14 In the scenario raised by the Court at the hearing on June 8, 2001, the bank
15 erroneously credited funds to a Social Security recipient's direct deposit account,
16 which were then spent by the account holder. By the time the bank realized its
17 error, however, the account was replenished by subsequent deposits, resulting in a
18 balance exceeding the amount of the erroneous credit. As a result, the bank's
19 subsequent reversal of the erroneous credit does not create an overdraft. The
2a Court's inquiry was whether the bank's action was improper even though no
21 overdraft was created. The answer is yes.

22 Not surprisingly, Bank of America argues that its action in the above-
23 described scenario is entirely proper even though it clearly is acting to recover
24 funds owed to the bank as a result of the fact that the depositor spent the money
25 erroneously credited to the account. If no subsequent funds had been deposited to
2t the account, the bank would be forced to pursue other collection remedies available
2; to it. Because other money came into the account via direct deposit, however, the
28 bank asserts it is justified in seizing those funds from the account, regardless of

1 their exempt status, to collect the amount allegedly owed to it. From the bank's
2 perspective, it's all just arithmetic; all money is "fungible." The result occasioned
3 by the bank's conduct, however, is the same as that which the Supreme Court
4 condemned in *Kruger v. Wells Fargo Bank, supra*, at 370. Bank debits take a
5 customer's exempt funds to satisfy money allegedly owed to the bank rather than
6 being available for the benefit of the Social Security recipient.

7 Defendant attempts to justify its position by the fact that "money is
8 Fungible," making it impossible for the bank to determine which funds were spent
9 and which remain in the account. (Def's Supp. Brief at p. 4) It is precisely this
10 fact, however, which prompted the Legislature to provide that a// funds in a Social
11 Security Direct Deposit account (up to a cap of \$2,000.00 per depositor) are
12 exempt. Bank of America need not determine which funds were withdrawn and
13 spent because none of the funds may legally be taken by the bank to satisfy the
14 amount claimed against the account holder for the erroneous credit.

15 Defendant also argues that prohibiting the bank from unilaterally debiting
16 Social Security Direct Deposit Accounts to reverse credits would "make it
17 impossible for the bank to permit Social Security recipients to engage in such
18 ordinary transactions as making deposits." (Def's Supp. Brief at p. 3). This
19 statement has no basis in fact or law. While it is illegal for the bank to take back
20 funds that it has made available to a Social Security recipient by unilaterally
21 reversing a credit to his or her direct deposit account, nothing prevents the bank
22 from obtaining transaction-specific authority from the depositor to apply funds from
23 the exempt account to pay amounts that the depositor owes. Absent such
24 agreement, the bank may not simply debit the account. In any event, given the
25 substantial guaranteed and predictable deposit flow that the bank receives by virtue
26 of direct deposits, together with the guaranteed revenues associated with direct
27 deposit accounts, it is unlikely that Bank of America will refuse to offer Social
28 Security Direct Deposit accounts simply because it cannot automatically and

1 unilaterally debit those accounts to collect amounts allegedly owed to it by
2 depositors.

3 Finally, defendant argues that the statutory provisions of Commercial Code
4 § 4214 and Financial Code § 864 authorize its conduct under the scenario described
5 above as well as the scenario in which an overdraft is created by the reversal of a
6 credit. As noted previously, neither of these statutes concerns Social Security
7 Direct Deposit accounts and the unique nature of those accounts deriving from 42
8 U.S.C. 407 and Code of Civil Procedure § 704.080. Although Section 4214 of the
9 Commercial Code provides for the right to “charge back” a customer’s regular
10 deposit account or seek a refund for a “provisional settlement” that is not made
11 final, it does not authorize the collection of an erroneous credit or a credit resulting
12 from a subsequently dishonored check from an exempt Social Security Direct
13 Deposit account.

14 Similarly, Financial Code § 864 does not specifically apply to Social Security
15 Direct Deposit accounts. Its limited definition of “debt,” excluding “debits for
16 uncollected funds or for an overdraft of an account” applies only to the statutory
17 requirement, applicable to any account, that prior notice of a setoff be given by the
18 bank. It does not authorize a set off against a Social Security Direct Deposit
19 account and does not undermine or limit the protections afforded such accounts.
20 As indicated by the legislative history submitted with plaintiff’s opening papers,
21 § 864 of the Financial Code was enacted by the Legislature to enhance the rights of
22 all bank customers by entitling them to the advance notice of a set off that the
23 Supreme Court, in *Kruger v. Wells Fargo, supra*, held was not Constitutionally
24 required. Moreover, § 864(h) expressly provides that the section “shall [not]
25 prejudice a person’s right to assert exceptions” under Code of Civil Procedure
26 § 703.01, *et seq.* Accordingly, it should not be distorted to narrow the rights
27 afforded by the Court for customers with exempt accounts to be free from offsets
28 and other internal collection actions.

1 Defendant's statutory and other arguments presented in its supplemental
2 orief differ little from the arguments made in its moving and reply papers. Those
3 arguments ignore the substantial number of disputed facts at issue in this case
4 which preclude the granting of defendant's motion for summary judgment. (See
5 Plaintiff's Separate Statement of Undisputed Facts in Opposition to Defendant's
6 Motion for Summary Judgment or Alternatively Summary Adjudication). They also
7 Fail to address independently each of the causes of action alleged in the First
8 Amended Complaint, each of which stands on its own. Finally, the bank's
9 arguments run directly contrary to the Supreme Court's holding in *Kruger, supra*,
10 and, if accepted, would result in precisely the adverse consequences decried by the
11 Court. Just as happened with Mr. Miller, recipients of public benefits would be
12 deprived of their otherwise exempt funds so that the bank could satisfy
13 immediately, without notice or express authorization, its alleged claims against
14 them.

15 **CONCLUSION**

16 For the foregoing reasons, Bank of America's internal enforcement of its
17 claims against Social Security Direct Deposit Accounts, whether or not such
18 actions result in overdrafts, is unlawful under federal and state law. For this reason
19 and for the reason that there are numerous material issues of fact in dispute,
20 defendant's motion for summary judgment or, in the alternative, for summary
21 adjudication should be denied.

22 **DATED: July 10, 2001**

23 Respectfully submitted,
24 **THE STURDEVANT LAW FIRM**
25 **A Professional Corporation**
26 **LAW OFFICES OF THOMAS J. BRANDI**

27 By: g T . 6
28 James C. Sturdevant
Attorneys for Plaintiff

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