TRANSACTIONS AND TRIALS

BERMAN AND SABLE NEWSLETTER

Volume 2, Issue 1 February 1999

Now that we have you addicted to our Transactions and Trials Newsletter and you've succumbed to the obsession of collecting all issues of all volumes with the expectation that in 30, or so, years the originals, which today are sent to you free, will be worth thousands of dollars each (sort of like the original 1954 set of Topps baseball cards), we present this next issue for your collection and enjoyment. If you've missed any of the past issues and need them to complete your set, so you can brag, someday, that you have a complete set for the year, please write to us soon. We do have a number of back issues in stock. However, if you want autographed copies, we only have a limited supply.

Forged Checks — Who is Responsible for Payment?

By James J. Brault

Most people are aware of the general rule that a bank is liable to its customer if the bank makes a payment on a forged check. In Connecticut, such rule is set forth in Conn. Gen. Stat. §42a-4-401 which states that a bank may charge against the account of a customer items that are "authorized by the customer". Forged checks are typically not "authorized by the customer". The rule may seem harsh on banks but the lawmakers apparently felt that banks were in a better position to prevent and/or absorb the loss.

Banks are not without protection, however. There are two sections in the Connecticut General Statutes which preclude a bank depositor from asserting a forgery against a bank.

The first is Section 42a-4-406 which states, in general, that if a bank sends a bank statement or returns cancelled checks to a bank customer, the customer must exercise reasonable care in examining such items to determine whether any checks were paid by the bank that were not authorized by the customer. The following fact pattern is illustrative: Bank sends to customer a bank statement and cancelled checks on a monthly basis. A forged check is paid by the bank in the month of January and the cancelled check is received by customer in early February. Customer fails to detect such wrongful payment and thus fails to notify the bank. The same scoundrel forges another customer check in March, which the bank pays. If the bank can prove (i) that the customer should have discovered the January forgery and (ii) that the bank would not have made payment on the check that was forged in March had the customer notified the bank of the January forgery, then the customer cannot seek to collect the amount of the March forged check from the bank. Such argument would not protect the bank from being held accountable to the customer for the January forged check.

The second section which affords protection to banks is Section 42a-3-406, which states that a person is precluded from asserting the forgery against a bank if such person's negligence substantially contributes to the making of an unauthorized signature. A recent citation illustrates how harmful such section can be to a depositor.[1]

Company A utilized a computer program which involved bringing up a check image on a monitor, typing in the required information,

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loading the printer with blank checks and printing out the completed checks. The CFO in charge of paying the company's bills stored the blank checks in a box beneath the printer. A dishonest secretary helped himself to several blank checks and forged the required signatures. All of such checks were paid in due course by the company's bank. In addition, the secretary intercepted the monthly bank statements and doctored the information to conceal the forgeries. The ruse was eventually uncovered and Company A sued the bank to recover the amount of the forged checks, claiming that the checks were not "authorized by the customer". The court held for the bank, stating that the company's negligence precluded them from recovering from the bank. The company's negligence, according to the court, stemmed from their failure to safeguard the blank checks.

The majority of people probably never have occasion to confront the issue of forged checks. When they do, they are hopefully in a position to collect the loss from the forger. When the forger has nothing, the bank is often the depositor's last resort. The above information indicates that prudent depositors will, at a minimum, (i) review monthly bank statements and cancelled checks and (ii) maintain their checkbooks in a secure location.

Berman and Sable News

- ***Congratulations, Partner. Attorney Maria Tougas has become a partner of the firm. Attorney Tougas (then, Attorney Kokinis) joined Berman and Sable immediately upon graduating from law school in 1989.***
- ***Welcome to the firm. Attorney Robert Caffrey joined Berman and Sable in January, 1999. Admitted to practice in Ohio in 1984 and in Connecticut in 1989, Bob practiced locally for a number of years, and more recently was employed at Travelers.***
- ***Welcome to the firm (II). Attorney Linda Mandell joined Berman and Sable in November, 1998. Prior to her association with the firm, Linda clerked for Judge Joseph P. Flynn in the Ansonia/ Milford Superior Court.***
- ***Welcome to the firm (III). Lori Lessard has joined Berman and Sable as a litigation paralegal. Lori brings 6 years of paralegal experience to the firm.***

ATTORNEY/CLIENT PRIVILEGE --

When you have it, how you keep it and how you can lose it

By Robert J. Caffrey

Clients need to tell their lawyers everything! In order to encourage full, complete and candid disclosure, the attorney/client privilege exists. The privilege, however, is not absolute and can be lost, either voluntarily or involuntarily. Once it is lost, whatever you said to your lawyer can be disclosed.

The simplest way to analyze the attorney/client privilege is to think about what it is; what it is not; what it covers; how you keep it; and, most importantly, how you can lose it.

What is it?

The attorney-client privilege prevents an attorney, or the attorney's employees, from disclosing any communications you have with your lawyer "in confidence" when you seek legal advice. It applies to both people and businesses. Rule 1.6(a), Rules of Professional Conduct.

What it is not!

Certain information will not be protected by the privilege. Information that is available to the public, which you disclose to your attorney, is not protected. Technical information, such as research, tests and experimental results given to your lawyer, are not protected unless you are seeking a legal opinion or interpretation. *Remember, the attorney/client privilege attaches to the communication itself, not to the facts communicated.* Therefore, generally, the privilege can't be used to protect the disclosure by your attorney to an opposing attorney of underlying facts.

What it covers

The privilege covers client-attorney conversations intended to be confidential aimed at seeking legal advice of any kind. Questions about both litigation and the legal effects of activities in your business and personal life are

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covered so long as you're seeking "legal advice".

How do you keep it?

Communications with your lawyer must be kept "confidential". You cannot willingly disclose your conversations with your lawyer to someone else. No one else should be present during conversations with your lawyer, except under certain limited circumstances. Employees or agents of the lawyer can be present if their presence assists in your representation. Also, if the client is a business, employees of the business can be present during discussions if it is required, or helps in your representation.

How can you lose it?

If you voluntarily disclose these communications to a third person, you waive the privilege. If you make these communications in the presence of a third person who is not an agent or employee of your lawyer, or one of your employees present to assist in the representation, the privilege could be waived.

When it isn't there

There are four situations where the attorney/ client privilege doesn't apply. In fact, the Connecticut Rules of Professional Conduct provide that lawyers are not required to maintain confidentiality on some issues, and can be disciplined if they do in some cases.

- ***Crime/fraud exception.*** Communications about the future commission of a crime, or an attempt to continue ongoing criminal or fraudulent conduct are not privileged. Rule 1.6(b) and 1.6(c)(1), Rules of Professional Conduct.
- ***Fraud on the Court.*** The privilege doesn't apply to communications which may involve the perpetration of a fraud on the court, such as assisting the client in violating a court order. Rule 1.6(c)(2), Rules of Professional Conduct.
- ***Suits between clients and lawyers.*** When attorneys sue to recover their fees, if the client's defense involves conversations or activities which took place between them, the attorney can give his/her version of the facts. Rule 1.6(d), Rules of Professional Conduct.
- ***ERISA and Pension Plan Administration.*** A trustee's obligation to beneficiaries under ERISA and pension plans overrides any claim of attorney/client privilege existing between lawyers and the trustees for the plan.

Duh . . . . !

The following are questions actually asked of witnesses by attorneys during trials or depositions and the responses given by insightful witnesses:

1. **Q**: Can you describe the individual?
   A: He was about medium build and had a beard.
   Q: Was this a male or a female?
2. **Q:** Is your appearance here this morning pursuant to a deposition notice which I sent to your attorney?
   A: No, this is how I dress when I go to work.
3. **Q**: Doctor, how many autopsies have you performed on dead people?
   A: All my autopsies are performed on dead people.
4. **Q**: All your responses must be oral, OK? What school did you go to?
   A: Oral.
5. **Q**: Do you recall the time that you examined the body?
   A: The autopsy started around 8:30 p.m.
   Q: And Mr. Dennington was dead at that time?
   A: No, he was sitting on the table wondering why I was doing an autopsy.
6. **Q**: You were not shot in the fracas?
   A: No, I was shot midway between the fracas and the navel.
7. **Q**: Are you qualified to give a urine sample?
   A: I have been since early childhood.
8. **Q**: Did you read this Guaranty when you signed it?
   A. No.
   Q: Did you know what this Guaranty said when you signed it?
   A: I guess the same thing it says now.

A Primer on Demand Letters

By Alena Gfeller

Many lending institutions, large and small, take it upon themselves to issue demand letters (often called "notices of default") to debtors who have defaulted in payment under notes, mortgages and other loan documents. However, care must be taken to ensure that your demand will "stick" when moving to enforce these loan documents.

Many judges of the Superior Court are likely to dismiss actions when it is determined that the notice of default given to the debtor is inadequate. See, Citicorp Mortgage, Inc. v. Porto, 41 Conn. App. 598, 602-03 (1996) (proper notice of default is a **mandatory condition** precedent to an action for foreclosure) [Emphasis added]; MidConn Bank v. Mattera, 1997 Conn. Super. LEXIS 266 (January 16, 1997) (the failure to give proper notice of demand and acceleration constitutes an absolute defense to a foreclosure action). Therefore, when dealing with *consumer debt*, the loan documents themselves as well as both State and Federal statutes, contain specific language which must be utilized to ensure a valid and binding demand letter.[1]

When undertaking the drafting of a demand letter begin by reading your loan documents. It is good practice to read your documents each and every time you draft a demand letter. Often, the language of the document is unchanged, but you will be surprised to find that some documents will contain obscure demand language which must be utilized to ensure proper demand. After you have completed a draft of the demand letter, let someone else compare the language of your letter to the language contained in the loan document. This "proofing" will help to ensure complete accuracy.

Finally, it is likely that your consumer loan documents (especially FNMA/FHLMC uniform mortgage forms) will require that the following provisions be included in your demand letter (or "notice of default"): (a) an Acceleration Clause (a statement that you [the lending institution] are asserting your right to accelerate amounts due under the loan documents); (b) that the debtor's failure to cure will result in a default; (c) that the debtor be allowed at least thirty days in which to cure the default; (d) that the debtor has a right to reinstate after acceleration; and (e) that the debtor has a right to assert the non-existence of a default or other defense. It is advisable to incorporate the specific mortgage clause language in any demand letter or notice of default. Moreover, make sure that the demand letter includes basic information such as the debtor's name, loan number, and address of the property.

It must be noted "for the record" that if you are dealing with *commercial* loan documents (as opposed to *consumer* loan documents), demand letters or notices of default are not usually a prerequisite to commencing an action. This premise is based on the fact that most commercial loan documents contain waiver language which allows the lender to bypass the usual demand procedure.[2]

In conclusion, to avoid the potential of having an action dismissed on the basis of an invalid demand, or improper notice of default, be sure that all of the information called for in the loan documents is clearly and conspicuously contained in the demand letter.

[1] For example, §49-6c of the Connecticut General Statutes requires written notice of the imposition of "any delinquency charge, late fee or similar assessment as a result of a late payment on a note, mortgage or installment sales contract". In addition, 15 U.S.C. §1692, *et seq*, of the Federal Statutes (the Fair Debt Collection Practices Act) contains language which must be utilized in demand letters to consumer debtors if one falls under the definition of a "debt collector".

[2] Such waiver language is often very broad and may read as follows: "Borrowers hereby waive presentment, demand, notice of demand, notice of nonpayment, and/or any other notice required to