

Selected Subjects

Guru Chatter*



on Forgery and Endorsement Issues

Endorsing a Joint Refund Check

Question: When endorsing a joint refund check, what are the requirements that Treasury looks at? It usually does not say "and." Didn't the Treasury have some info on this a couple of years ago? I couldn't find it.

Answer by John Burnett:

In my experience, joint federal tax refund checks do, in fact, use an ampersand between the names. Either the check should be deposited to a joint account in the names of the payees (with a credit account within named payee stamp if not personally endorsed), or it should be endorsed -- in person -- by both payees for cashing, with appropriate steps taken to verify both payees' identity.

A Forged Endorsement or a Missing Endorsement?

Question: I recently received a letter concerning a check that was processed by my bank in over a year ago. The check is payable to our customer and "as lien holder Ford Motor Credit" The bank the check is drawn on has sent their letter for collection based on Forged Endorsement with an affidavit of Check Fraud. Does this fall under Forged Endorsement or just endorsement of one of the parties is missing?

Answer by John Burnett:

That depends on what's on the back of the check. If your depositor simply endorsed his own name and deposited the check without FMC's endorsement, there's an endorsement missing. If there is something that purports to be FMC's endorsement on the check, you're dealing with a forged endorsement warranty claim.

I think the difference between the two isn't going to affect you much. If there is an "and" or an ampersand between the two payee names, you're on the hook, as is your customer, unless it can be demonstrated that your customer otherwise satisfied FMC's interest in the check.

Charge Back Check Stamped with Wrong Endorsement

Question: What action do we need? I have a check payable to a business, however, it was stamped with an endorsement stamp belonging to a different company. How do I charge back the item?

Answer by John Burnett:

If you wish to charge back the item, you must do so by your midnight deadline, and you send it back just as you would send back any other returned item.

If, however, you're hoping to charge it back after the midnight deadline has lapsed, you cannot do so without an affidavit from the payee stating that it neither endorsed the check nor received any benefit from it (a forged endorsement affidavit). Your customer, who wrote the check, would ask the payee to supply that affidavit if the payee contacts your customer to allege non-payment.

And, if you obtain such an affidavit, you then send the check back to the depository bank "without entry." Someone in your organization knows the ins and outs of that process.

Correct Procedure for Special Endorsement

Question:

I have always been taught when transferring a check over to someone else and using the special endorsement it should be endorsed as follows (Let's say John Smith is the original owner of the check and is signing it over to Jane Smith): John Smith will write Pay to the Order of Jane Smith then he will sign it. After that Jane Smith will sign under John. I have recently been told that way is incorrect. I have been told it should be as follows: John Smith signs the check then under that writes pay to the order of Jane Smith, Jane Smith then signs. Which method is the correct legal endorsement?

Answer by Ken Gollhofer:

[John Smith will write Pay to the Order of Jane Smith then he will sign it. After that Jane Smith will sign under John]

That is correct. The payee needs to provide the instructions before he signs his name. Otherwise they could have been added by someone else.

Forged Endorsement - Statute of Limitations

Question: We have received a check back along with an affidavit from another financial institution stating that the endorsement was forged. The check is dated Sept 2001 and the date on the back of the check is also 9/2001. We are wondering if the Statute of Limitations has run out on this check. The account the check was deposited to is now closed. Several articles I have read on BankersOnline say the time period is three years, but then I will read something

else that says there is no time limit. Since this check is for over \$1,000 and the account is now closed we want to know what our options are.

Answer by John Burnett:

Take a look at your state's version of the Uniform Commercial Code, particularly section 4-111. The standard language reads, "An action to enforce an obligation, duty, or right arising under the Article must be commenced within three years after the cause of action accrues." Then look at section 4-207 on Transfer Warranties, where the standard language indicates, "A cause of action for breach of warranty under this section accrues **when the claimant has reason to know of the breach.**" [Emphasis added]

The language in your state's UCC may vary. Note that the three-year period in the standard rule begins when the claimant (in this case it would be the drawer of the check entering a claim against the payor bank for paying a check with a forged indorsement) has reason to know of the breach. That trigger date can vary depending on the circumstances. But it's not likely, in my opinion, that the payee of the check (which is really the party that gets things rolling by dunning the drawer for non-payment) would have sat quiet for a year before alerting the drawer that the check might have been indorsed fraudulently.

In this case, I think your institution's stance should be that the statute of limitations has run and that you will not honor the claim. That recommendation is based on the information you have supplied, and could vary depending on other facts not stated.

Must We Give Conditional Credit for Forged Checks?

Question: If a customer files an "Affidavit of Forgery" for forged checks, must the Bank give the customer conditional credit for the amount of the forged checks? Or, can the Bank require that the complaint go to court first and the perpetrator of the crime be convicted and be required to pay restitution first?

Answer by Ken Gollhofer:

The UCC is not a consumer protection law. Unlike Regulation E which governs electronic payments, it does not set a specific time frame in which customer complaints regarding unauthorized payments must be resolved. All the UCC requires is that the bank is "fair," but that requirement is not toothless.

When a bank pays a forgery of its own customer's signature under circumstances where the customer did not contribute to the making of the forgery and reported it promptly, the bank should acknowledge to itself: *This is our fault; this is our liability.*

While your bank may wish to avoid or delay the loss by conditioning your responsibility on your ability to obtain restitution, neither the law nor common

sense supports your position. You are directly responsible for making only the payments that your customer orders; i.e. recognizing your customer's signature. If you impose such an arbitrary requirement on reimbursing the customer for your error you invite the customer to sue you. If he does, your losses will be increased and justifiably so.

Forgeries -Originating Bank Refuses to Give Credit

Question: We had a situation in which two large forged checks were drawn on one of our customer's accounts. After reviewing the statement, the customer brought the forged checks to our bank's attention. The day that we learned of the forgery (which was within 30 days of the day the first check cleared) we returned the forged checks through our Fed Cash Letter returns. The bank of first deposit refused the return as an untimely return. We then did an adjustment to try to get our money back. We were given credit, and then the credit was revoked as untimely. We have since tried to deal directly with the bank of original deposit. Because our bank made the error of first returning the checks through the Fed, the originating bank is refusing to give us credit. The amounts of the two checks are \$4,592.81 and \$4,597.17. Do we have any recourse for recovering our funds?

Answer by Ken Golliver:

Sorry, but I think you have already achieved the most likely result. The drawee bank is responsible for inspecting the drawer's signatures and identifying those that are forgeries or counterfeit. You had until midnight of the banking day following the banking day of presentment to make that determination and send the check back to the bank of first deposit. If you kept the check beyond that time frame, then the item is finally paid and any issues regarding the propriety of the payment are between you and your customer.

There was no "error" in returning the items through the Fed; your method of returning the items has no effect on your liability for failing to return them promptly. Whether you had returned the checks through the Fed or directly to the depository bank, the return was untimely.

Forgery Claim on Check with Stop Pay Already on It

Question: We have a customer who placed a stop payment on a check for "unsatisfactory service" and now wants to claim that the check was forged. At the time the stop payment was placed, the customer provided us with the payee name, check number, amount (\$900.00), and issue date and even signed the stop payment order. The customer did not then mention that the signature was not authorized. The bank returned the item back to the BOFD as a stop payment. The payee of the check was an individual who cashed the check at a large grocery store chain. The grocery store is now pursuing payment from the maker of the check; hence the reason the maker wants to claim it was forged. Can the

customer now claim the check was forged even though it was previously returned as a stop payment? What are the bank's obligations?

Answer by Ken Gollhofer:

That's really pretty amazing...

Since the check has not been paid, your customer is in no position to assert a forgery against your bank; i.e. no funds have been taken from his account and he has no basis for claiming you made a mistake. So, you have no reason to accept a forgery affidavit and, thus, become part of his alibi (excuse me, I meant "story").

He could certainly assert any valid claim of forgery as a defense against the grocery store. However, if their attorney wonders why you returned the check "payment stopped" instead of "forgery" and subpoenas a copy of the stop payment order, your customer may be looking at a perjury charge in addition to liability on the check. As your question suggests you understand, an accurately completed stop payment order is an affirmation that he did indeed write the check.

Counterfeit Checks - Which Bank Takes the Loss?

Question: Our depositor received two counterfeit checks in his statement and brought them to our attention. These checks were not signed. I realize that we did not return the checks by the midnight deadline but since they were not signed doesn't the collecting bank have some responsibility? Under UCC law (1990) the definition of ordinary care was introduced. "Ordinary care" means observance of reasonable commercial standards of the relevant business prevailing in the areas in which the person is located. The second sentence of the definition is a particular rule limited to the duty of a bank to examine an instrument taken for processing for collection or for payment by automated means. This seems to mean to me that if a live teller took the check and didn't check for a signature, they did not exercise "ordinary care." Likewise, since most banks file checks automatically under some set dollar amount we should fall under the payment by automated means as the bank of first deposit was in the best position to prevent loss. Does our bank have a leg to stand on?

Answer by John Burnett:

Initially, the loss will fall on the drawee bank (your bank), which is charged with the knowledge of its customer's signature. The drawee bank might consider attempting to collect from the depository bank on the theory that it had a clear opportunity to prevent the fraud, since it could see that the checks were not signed. This is a difficult question, since any court hearing it would obtain a lot more information about customary bank practices, procedural guidelines of the two banks involved, etc.

Protecting Bank from Checks Forged by Family Member

Question: Although this has happened a number of times over the years, a recent series of events has caused me concern over the way we handle it. A customer reported that several checks which appeared paid in her statement had been taken from the back of her checkbook and cashed supposedly by an unknown person. She signed the forgery affidavit and when the investigation proved that a family member had been the perpetrator, she decided not to pursue her claim. I am looking to protect the bank from future claims regarding this incident if the customer changes her mind again. Is this something others are doing already? Is there some standard language I could adopt to create a form?

Answer by Randy Carey:

I would visit with your attorney and have them assist in developing a hold harmless form for the accountholder to sign when you have this type of situation.

Answer by John Burnett:

I would also seriously consider whether it was in the best interest of the bank to continue doing business with a customer with apparently recidivistic light-fingered family members.