IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

VICTORY CLOTHING CO., INC., d/b/a TORRE CLOTHING	:	FEBRUARY TERM 2004
v.	:	NO. 1397
	:	COMMERCE PROGRAM
WACHOVIA BANK, N.A.	:	

JUDGMENT

AND NOW, this 21st day of March, 2006, the Court finds in favor of plaintiff Victory Clothing Company, Inc. and against defendant Wachovia Bank, N.A in the amount of $188,273.00, less thirty (30) percent of that amount based on plaintiff Victory Clothing Company Inc.'s comparative negligence, as set forth in the Court's contemporaneously filed Opinion. Therefore, plaintiff Victory Clothing Company, Inc. is awarded $131,791.10.

BY THE COURT,

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HOWLAND W. ABRAMSON, J.

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OPINION

***Background*:**

This is a subrogation action brought by the insurance carrier for plaintiff Victory Clothing, Inc., d/b/a Torre Clothing ("Victory") to recover funds paid to Victory under an insurance policy. This matter arises out of thefts from Victory's commercial checking account by its office manager and bookkeeper, Jeanette Lunny ("Lunny"). Lunny was employed by Victory for approximately twenty-four (24) years until she resigned in May 2003. From August 2001 through May 2003, Lunny deposited approximately two hundred (200) checks drawn on Victory's corporate account totaling $188,273.00 into her personal checking account at defendant Wachovia Bank, N.A. ("Wachovia"). Lunny's scheme called for engaging in "double forgeries" (discussed *infra*). Lunny would prepare the checks in the company's computer system, and make the checks payable to known vendors of Victory (e.g., Adidas, Sean John), to whom no money was actually owed. The checks were for dollar amounts that were consistent with the legitimate checks to those vendors. She would then forge the signature of Victory's owner, Mark Rosenfeld ("Rosenfeld"), on the front of the check, and then forge the indorsement of the

unintended payee (Victory's various vendors) on the reverse side of the check. The unauthorized checks were drawn on Victory's bank account at Hudson Bank (the "drawee bank" or "payor bank").[1] After forging the indorsement of the payee, Lunny either indorsed the check with her name followed by her account number, or referenced her account number following the forged indorsement. She then deposited the funds into her personal bank account at Wachovia (the "depositary bank" or "collecting bank").

At the time of the fraud by Lunny, Wachovia's policies and regulations regarding the acceptance of checks for deposit provided that "checks payable to a non-personal payee can be deposited **ONLY** into a non-personal account with the same name." (Emphasis in original).

Rosenfeld reviewed the bank statements from Hudson Bank on a monthly basis. However, among other observable irregularities, he failed to detect that Lunny had forged his signature on approximately two hundred (200) checks. Nor did he have a procedure to match checks to invoices.

In its Complaint, Victory asserted a claim against Wachovia pursuant to the Pennsylvania Commercial Code, 13 Pa. C.S. §§ 3405 and 3406. A bench trial was held on September 21, 2005. At trial, Victory asserted a claim solely under 13 Pa. C.S. § 3405. See Victory's Response to Wachovia's Motion for Compulsory Non-Suit, at p. 2. Section 3405 of the Pennsylvania Commercial Code states, in relevant part:

> § 3405. Employer's responsibility for fraudulent indorsement by employee
>
> (b) RIGHTS AND LIABILITIES.-- For the purpose of determining the rights and liabilities of a person who, in good faith, pays an instrument or takes it for value or for collection, if an employer entrusted an employee with

[1] Hudson Bank is not a party to this lawsuit.

> responsibility with respect to the instrument and the employee or a person acting in concert with the employee makes a fraudulent indorsement of the instrument, the indorsement is effective as the indorsement of the person to whom the instrument is payable if it is made in the name of that person. **If the person paying the instrument or taking it for value or for collection fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss resulting from the fraud, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss.**

(Emphasis added). In essence, Victory contends that Wachovia's actions in accepting the checks payable to various businesses for deposit into Lunny's personal account were commercially unreasonable, contrary to Wachovia's own internal rules and regulations, and exhibited a want of ordinary care. See Complaint, at ¶ ¶ 15-17.

***Discussion*:**

I. Double Forgeries

As stated *supra*, this case involves a double forgery situation. This matter presents a question of first impression in the Pennsylvania state courts, namely how should the loss be allocated in double forgery situations. A double forgery occurs when the negotiable instrument contains both a forged maker's signature *and* a forged indorsement. The Uniform Commercial Code ("UCC" or "Code") addresses the allocation of liability in cases where either the maker's signature is forged or where the indorsement of the payee or holder is forged. See Travelers Indemnity Co. v. Stedman, 895 F. Supp. 742, 746 (E.D. Pa. 1995); Perini Corp. v. First National Bank, 553 F.2d 398, 403 (5th Cir. 1977) ("the Code accords separate treatment to forged drawer

signatures…and forged indorsements"). However, the drafters of the UCC failed to specifically address the allocation of liability in double forgery situations. See Travelers Indemnity Co., 895 F. Supp. at 747; National Credit Union Admin. v. Michigan National Bank, 771 F.2d 154, 157 (6th Cir. 1985) ("the Code does not in terms state the appropriate analysis for allocating loss when a check bears a forged drawer's signature and lacks the indorsement of the named payee"). Consequently, the courts have been left to determine how liability should be allocated in a double forgery case.

The seminal case on double forgeries is Perini Corp. v. First National Bank, 553 F.2d 398 (5th Cir. 1977). The facts of Perini can be summarized as follows:

> Perini Corp. maintained checking accounts with two New York banks, and drew against these accounts using preprinted checks signed by a facsimile signature machine. Seventeen preprinted checks were stolen, run through the machine and made out to the order of Quisenberry Contracting Co. and Southern Contracting Co., both fictitious firms. A man calling himself Jesse D. Quisenberry opened accounts in the names of these payees at First National Bank, deposited the stolen checks in these accounts [by indorsing them in a personal capacity, signing simply " Jesse D. Quisenberry"] and later withdrew almost all of the credit in both accounts.
>
> When Perini discovered the fraud, Quisenberry was long gone. Worse still, Perini had filed a facsimile specimen with its two banks and agreed to hold them harmless if checks purporting to bear the facsimile signature were honored. Perini was left with recourse against First National Bank only. First National Bank found itself in a bind, because Quisenberry had indorsed the checks to the fictitious companies in his *personal* capacity, yet First National Bank offered no resistance to this practice. The checks therefore presented an unusual combination of circumstances: they bore undoubtedly forged drawer's signatures, but also bore indorsements that could also be characterized as forged.

See White & Summers, Uniform Commercial Code, § 16-4 at 585 (5th ed., West 2000).

In its analysis of how to treat a double forgery case, the Court in Perini examined the loss allocation principles applied by the Code in cases of single forgeries. The Court observed that in cases where only the maker's signature was forged, liability generally rested with the drawee bank; however, in cases where there was only a forged indorsement, the drawee bank could generally "pass liability back through the collection chain to the party who took from the forger [usually the depositary bank] and, of course, to the forger himself if available." Perini, 553 F.2d at 403, 405.

The traditional rationale for placing liability on the drawee bank in cases of checks bearing only a forged maker's signature is that the drawee bank is in the best position to recognize the maker's signature (its customer), and therefore is in the best position to discover the forgery. Id. at 405. A less fictional rationalization for this rule is that the UCC drafters believed that "it is highly desirable to end the transaction on an instrument when it is paid rather than reopen and upset a series of commercial transactions at a later date when the forgery is discovered." Id. In contrast, the rationale for placing liability on the depositary bank in cases of checks bearing a forged indorsement is that the depositary bank is in the best position to detect the false indorsement, such as by verifying the identification of the person making the deposit. Id. at 405, 406. However, the Court recognized that this superior ability by the depositary bank to detect a forged indorsement may be reduced in the case of a double forgery:

> Someone forging a check will likely draw the check to a payee whose identity he can readily assume, such as himself or a fictitious person. In such circumstances the

> party who first takes the check may well have no particular opportunity to detect any impropriety in the indorsement.

Id. at 406. The Court then emphasized the Code's commitment to finality, and concluded that a check bearing a double forgery should be treated as a check bearing only a forged maker's signature. Thus, the Court held that in double forgery situations, liability should fall on the drawee bank.

In addition to the finality principle, there is a separate, but related, reason for the rule announced in Perini. This rationale, known as the "loss causation principle," can be explained as follows:

> In a double forgery situation a check was never validly drawn to a payee entitled to payment, and hence, no true payee can appear with a claim against the drawer or drawee. Neither the drawer or drawee, therefore, can be said to have suffered a loss attributable to the forged indorsement, but rather the loss results from the drawee having paid the check over the forged drawer's signature where no payment was ever intended.

See Travelers Indemnity Co., 895 F. Supp. at 748, citing National Credit, 771 F.2d at 157-58; Perini, 553 F.2d at 414-15. Thus, under this reasoning, double forgeries should be treated as if they only bear a forged drawer's signature because the forged indorsement was not the cause of the drawer's loss. See National Credit, 771 F.2d at 159. In other words, "whatever negligence caused the collecting bank to pay the forger over the forged indorsement, such negligence cannot be regarded as the cause of the customer's loss. Loss accrued only when the customer's account was debited by the drawee bank, not when the forger collected on his indorsement." See Brighton, Inc. v. Colonial First

National Bank, 176 N.J. Super. 101, 116, 422 A.2d 433, 440 (N.J. Super. Ct. App. Div. 1980), aff'd, 86 N.J. 259, 430 A.2d 902 (N.J. 1981).

Numerous jurisdictions have since adopted the Perini holding and have treated double forgery cases, for loss allocation purposes, as cases bearing only the forged maker's signature. See, e.g., National Credit Union Admin. v. Michigan National Bank, 771 F.2d 154 (6th Cir. 1985); Cumis Insurance Society, Inc. v. Girard Bank, 522 F. Supp. 414 (E.D. Pa. 1981); Winkie, Inc. v. Heritage Bank, 99 Wis. 2d 616, 299 N.W.2d 829 (Wis. 1981); Payroll Check Cashing v. New Palestine Bank, 401 N.E.2d 752 (Ind. Ct. App. 1980); Brighton, Inc. v. Colonial First National Bank, 176 N.J. Super. 101, 422 A.2d 433 (N.J. Super. Ct. App. Div. 1980), aff'd, 86 N.J. 259, 430 A.2d 902 (N.J. 1981).

II. The Effect of the UCC Revisions

In 1990, new revisions to Articles 3 and 4 of the UCC were implemented (the "revisions"). See Barkley Clark & Barbara Clark, The Law of Bank Deposits, Collections and Credit Cards, vol. 2, Table of State Enactments (rev. ed., A.S. Pratt & Sons 2005).[2] The new revisions made a major change in the area of double forgeries. Id. at ¶ 10.09[2]. Before the revisions, the case law was uniform in treating a double forgery case as a forged drawer's signature case, with the loss falling on the drawee bank (as outlined above). Id. at ¶ 10.09. The revisions, however, changed this rule by shifting to a comparative fault approach. Id. Under the revised version of the UCC, the loss in double forgery cases is allocated between the depositary and drawee banks based on the extent

[2] As of September 2004, 48 states and the District of Columbia have adopted the revisions. See The Law of Bank Deposits, at Table of State Enactments. Pennsylvania adopted the revisions effective July 9, 1993. Id., see also Travelers Indemnity Co., 895 F. Supp. at 746.

that each contributed to the loss. Id. at ¶ 10.09[2]; see also Bank of Glen Burnie v. Loyola Federal Savings Bank, 336 Md. 331, 337, 648 A.2d 453, 455 (Md. 1994) (noting that the revised UCC "applies principles of comparative negligence to allocate loss between the collecting and drawee banks based on the extent to which each bank contributed to the loss"); Steven B. Dow, The Doctrine of Price v. Neal in English and American Forgery Law: A Comparative Analysis, 6 Tul. J. Int'l & Comp. L. 113, 156-57 (Spring 1998) (observing that the revised Code has a "formal deviation" with respect to double forgery cases: under the old Code, double forgery cases were treated as forged drawer's cases, but under the revised Code, the loss in double forgeries is allocated under a comparative negligence scheme). "By adopting a comparative fault approach, classification of the double forgery as either a forged signature or forged indorsement case is no longer necessarily determinative." See The Law of Bank Deposits, at ¶ 10.09[2]; see also Bank of Glen Burnie, 336 Md. at 337, 648 A.2d at 455 (noting that "classification as either a forged indorsement or a forged drawer's signature is not necessary to a determination of loss allocation"). Thus, under the revised Code, a depositary bank may not necessarily escape liability in double forgery situations, as they did under the prior law. See The Law of Bank Deposits, at ¶ 10.09[2].

Specifically, revised § 3-405 of the UCC, entitled "Employer's Responsibility for Fraudulent Indorsement by Employee," introduced the concept of comparative fault as between the employer of the dishonest employee/embezzler and the bank(s). This is the section under which Victory sued Wachovia. Section 3-405(b) states, in relevant part:

> If the person paying the instrument or taking it for value or for collection fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss resulting from the fraud, the person

> bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss.

Wachovia argues that this section is applicable only in cases of forged indorsements, and not in double forgery situations. However, at least one court has found that the new revisions have made section 3-405 apply to double forgery situations. The case of Gina Chin & Associates, Inc. v. First Union Bank, 256 Va. 59, 500 S.E.2d 516 (Va. 1998), involved a double forgery scheme where an employee of the Gina Chin company (the "company") forged the signature of one of the company's officers on a number of checks that were made payable to the company's suppliers. Id. at 61. The employee then forged the indorsements of the payees, and deposited the checks into her own account at First Union Bank ("First Union"). Id. The drawee banks then paid the checks and debited a total of $270,488.72 from the company's account. Id. The company sued First Union (the depositary bank) under revised sections 3-404 and 3-405. Id. The company alleged that First Union was negligent in accepting the forged checks for payment, and that the acceptance of the forged checks was in contravention of established banking standards. Id. at 63. First Union argued that the company did not have a cause of action against it under those sections because those sections only applied to forged indorsements, and not to double forgery situations. Id. at 61. The Virginia Supreme Court rejected this argument and held that sections 3-404 and 3-405 may be used by a drawer against the depositary bank in double forgery situations. Id. The Court stated:

> The revisions to [§§ 3-404 and 3-405] changed the previous law by allowing "the person bearing the loss" to seek recovery for a loss caused by the negligence of any person

> paying the instrument or taking it for value based on comparative negligence principles. The concept of comparative negligence introduced in the revised sections reflects a determination that all participants in the process have a duty to exercise ordinary care in the drawing and handling of instruments and that the failure to exercise that duty will result in liability to the person sustaining the loss. Nothing in the statutory language indicates that, where the signature of the drawer is forged, the drawer cannot qualify as a "person bearing the loss" or that the drawer is otherwise precluded from seeking recovery from a depositary bank under these sections. In the absence of any specific exclusion, we conclude that the sections are applicable in double forgery situations.

Id. at 62. Accordingly, the Court determined that the company was not precluded from asserting a cause of action against First Union under sections 3-404 and 3-405. Id. at 63.

The Court finds the reasoning of Gina Chin & Associates persuasive and holds that, under the revised Code, a drawer is not precluded from seeking recovery from a depositary bank in a double forgery situation under section 3-405. Therefore, Victory can maintain its cause of action against Wachovia under 13 Pa. C.S. § 3405.

III. The Fictitious Payee Rule

Lunny made the fraudulent checks payable to actual vendors of Victory with the intention that the vendors not get paid. Wachovia therefore argues that Victory's action against it should be barred by the fictitious payee rule under 13 Pa. C.S. § 3404. N.T. 10:13 to 11:19 (September 21, 2005). Section 3404 of the Pennsylvania Commercial Code states, in relevant part:

> § 3404. Impostors; fictitious payees
>
> (b) FICTITIOUS PAYEE.-- If a person whose intent determines to whom an instrument is payable (section

> 3110(a) or (b)) does not intend the person identified as payee to have any interest in the instrument or the person identified as payee of an instrument is a fictitious person, the following rules apply until the instrument is negotiated by special indorsement:
> (1) Any person in possession of the instrument is its holder.
> (2) An indorsement by any person in the name of the payee stated in the instrument is effective as the indorsement of the payee in favor of a person who, in good faith, pays the instrument or takes it for value or for collection.

The fictitious payee rule applies when a dishonest employee writes checks to a company's actual vendors, but intends that the vendors never receive the money; instead, the employee forges the names of the payees and deposits the checks at another bank. See The Law of Bank Deposits at ¶ 10.09[2]. Under section 3-404(b) of the UCC, the indorsement is deemed to be "effective" since the employee did not intend for the payees to receive payment. Id. The theory under the rule is that since the indorsement is "effective," the drawee bank was justified in debiting the company's account. Id. Therefore, the loss should fall on the company whose employee committed the fraud. Id.

Revised UCC §3-404 changed the prior law by introducing a comparative fault principle. Id. Subsection (d) of 3-404 provides that if the person taking the checks fails to exercise ordinary care, "the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss." Therefore, "although the fictitious payee rule makes the indorsement 'effective,' the corporate drawer can shift the loss to any negligent bank, to the extent that the bank's negligence substantially contributed to the loss." See The Law of Bank Deposits at ¶ 10.09[2]. Under the revised Code, the drawer now has the right to sue the depositary bank directly based on the bank's negligence. Id. Under the Old Code, the fictitious payee rule was a "jackpot" defense for depositary banks because most

courts held that the depositary bank's own negligence was irrelevant. Id. at ¶ 12.08. However, under revised UCC §§3-404 and 3-405, the fictitious payee defense triggers principles of comparative fault, so a depositary bank's own negligence may be considered by the trier of fact. Id.

Under the revised UCC, a double forgery situation would still be treated as a fictitious payee situation under Section 3-404(b). Id. at ¶ 10.09[2]. Comparative fault would again come into play as between the drawer, drawee bank, and depositary bank. Id. The liability of either the drawer or drawee bank could be shifted upstream to the depositary bank where the dishonest employee opened his or her account. Id. This result under the revised Code "differs sharply from the result under the old Code, where double forgery cases were treated as forged drawer's signature cases, with the depositary bank escaping liability based on the finality of payment principle and the notion that the forged indorsement was irrelevant because of the fictitious payee rule." Id. Therefore, based on the foregoing reasons, the fictitious payee defense does not help Wachovia in this case.

IV. Allocation of Liability

As stated *supra*, comparative negligence applies in this case because of the revisions in the Code. In determining the liability of the parties, the Court has considered, *inter alia*, the following factors:

- At the time of the fraud by Lunny, Wachovia's policies and regulations regarding the acceptance of checks for deposit provided that "checks payable to a non-personal payee can be deposited **ONLY** into a non-personal account with the same name." (Emphasis in original). See Amended Joint Statement of Stipulated Facts, at ¶ 29.

- Approximately two hundred (200) checks drawn on Victory's corporate account were deposited into Lunny's personal account at Wachovia. See Amended Joint Statement of Stipulated Facts, at ¶ 22.

- The first twenty-three (23) fraudulent checks were made payable to entities that were not readily distinguishable as businesses, such as "Sean John." N.T. 124:2-5, 142:7-18 (Sept. 21, 2005). The check dated December 17, 2001 was the first fraudulent check made payable to a payee that was clearly a business, specifically "Beverly Hills Shoes, Inc." Deposition of Allan Schweitzer 82:15 to 84:12 (Jan. 20, 2005); N.T. 142:19 to 143:1 (Sept. 21, 2005).

- In 2001, Victory had approximately seventeen (17) employees, including Lunny. Deposition of Mark Rosenfeld 13:2-4 (Jan. 17, 2005).

- Lunny had been a bookkeeper for Victory from approximately 1982 until she resigned in May 2003. See Amended Joint Statement of Stipulated Facts, at ¶¶ 8, 9. Rosenfeld never had any problems with Lunny's bookkeeping before she resigned. Depo. Rosenfeld 73:22 to 74:5 (Jan. 17, 2005).

- Lunny exercised primary control over Victory's bank accounts. N.T. 19: 20 to 20:1 (Sept. 21, 2005).

- Between 2001 and 2003, the checks that were generated to make payments to Victory's vendors were all computerized checks generated by Lunny. No other Victory employee, other than Lunny, knew how to generate the computerized checks, including Rosenfeld. Depo. Rosenfeld 43:12 to 44:20 (Jan. 17, 2005).

- The fraudulent checks were made payable to known vendors of Victory in amounts that were consistent with previous legitimate checks to those vendors. N.T. 98:3-8 (Sept. 21, 2005).

- After forging the indorsement of the payee, Lunny either indorsed the check with her name followed by her account number, or referenced her account number following the forged indorsement. See Amended Joint Statement of Stipulated Facts, at ¶ 26. All of the checks that were misappropriated had the same exact account number, which was shown on the back side of the checks. N.T. 36:19 to 37:4, 128:23 to 130:10 (Sept. 21, 2005).

- About ten (10) out of approximately three hundred (300) checks each month were forged by Lunny and deposited into her personal account. N.T. 68:20 to 69:1, 95:21 to 96:10 (Sept. 21, 2005).

- Rosenfeld reviewed his bank statements from Hudson Bank on a monthly basis. Depo. Rosenfeld 28:8-13 (Jan. 17, 2005).

- Rosenfeld received copies of Victory's cancelled checks from Hudson Bank on a monthly basis. However, the copies of the cancelled checks were not in their normal size; instead, they were smaller, with six checks (front and back side) on each page. N.T. 53:7-17, 127:18 to 128:16 (Sept. 21, 2005); Exh. D-1; Exh. A to P-6.

- The forged indorsements were written out in longhand, i.e. Lunny's own handwriting, rather than a corporate stamped signature. N.T. 36:5-18, 73:9-12 (Sept. 21, 2005).

- Victory did not match its invoices for each check at the end of each month. N.T. 140:19 to 141:20 (Sept. 21, 2005).

- An outside accounting firm performed quarterly reviews of Victory's bookkeeping records, and then met with Rosenfeld. Depo. Rosenfeld 25:18 to 26:16 (Jan. 17, 2005). This review was not designed to pick up fraud or misappropriation. N.T. 37:5-13, 133:2 to 134:22 (Sept. 21, 2005).

Based on the foregoing, the Court finds that Victory and Wachovia are comparatively negligent. With regard to Wachovia's negligence, it is clear that Wachovia was negligent in violating its own rules in repeatedly depositing corporate checks into Lunny's personal account at Wachovia. Standard commercial bank procedures dictate that a check made payable to a business be accepted only into a business checking account with the same title as the business. See Expert Report of Edward J. Fallon, Exh. P-2. Had a single teller at Wachovia followed Wachovia's rules, the fraud would have been detected as early as December 17, 2001, when the first fraudulently created non-personal payee check was presented for deposit into Lunny's personal checking account. See Expert Report of Dennis L. Houser, Exh. P-5. Instead, Wachovia permitted another one hundred and seventy-six (176) checks to be deposited into Lunny's account after December 17, 2001. Id. The Court finds that Wachovia failed to exercise ordinary care, and that failure

substantially contributed to Victory's loss resulting from the fraud.[3] Therefore, the Court concludes that Wachovia is seventy (70) percent liable for Victory's loss.

Victory, on the other hand, was also negligent in its supervision of Lunny, and for not discovering the fraud for almost a two-year period. Rosenfeld received copies of the cancelled checks, albeit smaller in size, on a monthly basis from Hudson Bank. The copies of the checks displayed both the front and back of the checks. See Exh. D-1; Exh. A to P-6. Rosenfeld was negligent in not recognizing his own forged signature on the front of the checks, as well as not spotting his own bookkeeper's name and/or account number on the back of the checks (which appeared far too many times and on various "payees" checks to be seen as regular by a non-negligent business owner).

Further, there were inadequate checks and balances in Victory's record keeping process. For example, Victory could have ensured that it had an adequate segregation of duties, meaning that more than one person would be involved in any control activity. N.T. 24:11-13, Expert Testimony of David A. Lopez (Sept. 21, 2005). Here, Lunny exercised primary control over Victory's bank accounts. Another Victory employee, or Rosenfeld himself, could have reviewed Lunny's work. In addition, Victory could have increased the amount of authorization that was needed to perform certain transactions. N.T. 24:14-16, Expert Testimony of David Lopez (Sept. 21, 2005). For example, any check that was over a threshold monetary amount would have to be authorized by more than one individual. N.T. 26:6 to 27:2, Expert Testimony of David Lopez (Sept. 21,

[3] Official Comment 4 to UCC § 3-405 states: "Failure to exercise ordinary care is to be determined in the context of all the facts relating to the bank's conduct with respect to the bank's collection of the check. If the trier of fact finds that there was such a failure and that the failure substantially contributed to loss, it could find the depositary bank liable to the extent the failure contributed to the loss." "Ordinary care" is defined as the "observance of reasonable commercial standards, prevailing in the area in which the person is located with respect to the business in which the person is engaged." See UCC § 3-103(9).

2005). This would ensure an additional control on checks that were larger in amounts. Furthermore, Victory did not match its invoices for each check at the end of each month. N.T. 140:11 to 141:20 (Sept. 21, 2005). When any check was created by Victory's computer system, the value of the check was automatically assigned to a general ledger account before the check could be printed. Id. The values in the general ledger account could have been reconciled at the end of each month with the actual checks and invoices. Id. This would not have been overly burdensome or costly because Victory already had the computer system that could do this in place. Based on the foregoing, the Court concludes that Victory is also thirty (30) percent liable for the loss.

CONCLUSION

For all the foregoing reasons, the Court finds that Wachovia is 70% liable and Victory is 30% liable for the $188,273.00 loss. Therefore, Victory Clothing Company, Inc. is awarded $131,791.10. The Court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT,

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HOWLAND W. ABRAMSON, J.