

**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.	:	CONTROL NO: 071103
	:	

**ORDER**

AND NOW, this 29th day of August, 2005, upon consideration of Defendant Wachovia Bank, N.A.'s Motion in Limine, and response thereto, and in accordance with the Court's contemporaneously filed Opinion, it is hereby ORDERED and DECREED that said Motion is DENIED.

**BY THE COURT,**

HOWLAND W. ABRAMSON, J.

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**OPINION**

**Background:**

This action arises out of the alleged thefts from plaintiff Victory Clothing, Inc., d/b/a Torre (“Victory”) commercial checking account by its office manager and bookkeeper, Jeanette Lunny (“Lunny”). Lunny allegedly stole approximately \$188,000 in corporate funds from Victory from August 2001 through May 2003. Lunny’s scheme called for engaging in “double forgeries.” Victory alleges that Lunny forged the name of Victory’s owner, Mark Rosenfeld (“Rosenfeld”), on the front of the check, then forged the names of the unintended payees, which were name of Victory’s various vendors (e.g. Adidas, Sean John), on the reverse side of the check. The unauthorized checks were drawn on Hudson Bank (the “drawee bank” or “payor bank”). Lunny then endorsed the payees’ names and deposited the funds into her personal bank account, entitled “Jeanette Lunny, t/a Torre”, with defendant Wachovia Bank, N.A. (the “depository bank” or “collecting bank”). Rosenfeld claims that he reviewed the bank statements from Hudson Bank on a monthly basis. However, he failed to detect that Lunny had forged his signature on approximately two hundred (200) checks.

Victory has asserted a claim against Wachovia pursuant to the Pennsylvania Commercial Code, 13 Pa. C.S.A. §§ 3405 and 3406 (which states in pertinent 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”). Victory alleges that Wachovia’s actions in accepting the checks payable to others for deposit into Lunny’s account were commercially unreasonable, and contrary to Wachovia’s own internal rules and regulations because “[d]espite the fact that Lunny was not authorized to act for these entities, Wachovia...accepted the checks made payable to these entities for deposit into the personal checking account of Lunny, or paid these checks to Lunny.” Plaintiff’s Complaint, ¶ 13.

Presently before the Court is defendant Wachovia’s Motion in Limine. In its Motion in Limine, Wachovia requests that the Court preclude all evidence of any damages incurred more than one year before the action was commenced on February 9, 2004, on the basis of 13 Pa.C.S. § 4406(f). For the reasons set forth below, Wachovia’s Motion in Limine is denied.

**Discussion:**

Section 4406 of the Pennsylvania Commercial Code sets forth a customer's duty to discover unauthorized signatures or alterations on items drawn on its account. Wachovia argues that under Section 4406(f), Victory is statutorily precluded from asserting any damages arising from checks that were not reported to Wachovia within one year after receiving the statement containing the unauthorized checks. Section 4406(f) states:

§ 4406. Duty of customer to discover and report unauthorized signature or alteration

(f) STATUTES OF LIMITATIONS APPLICABLE TO CUSTOMER.-- Without regard to care or lack of care of either the customer or the bank, a customer who does not within one year after the statement or items are made available to the customer (subsection (a)) discover and report the customer's unauthorized signature on or any alteration on the item is precluded from asserting against the bank the unauthorized signature or alteration. If there is a preclusion under this subsection, the payor bank may not recover for breach of warranty under section 4208 (relating to presentment warranties) with respect to the unauthorized signature or alteration to which the preclusion applies.

This is an apparent case of first impression in Pennsylvania. Wachovia asserts that Section 4406(f) section is applicable not only to payor-drawee banks (such as Hudson), but also to depository banks (such as Wachovia). While the Court acknowledges that Wachovia's position has a certain logic, (to wit, that Victory attempts to circumvent the one-year preclusion by suing the depository bank directly, rather than its own drawee/payor bank), the Court finds no support for it either in the plain language of the statute or in the case law.

The object of interpretation and construction of all statutes is to ascertain and effectuate the intention of the legislature. Pennsylvania School Boards Association, Inc. v. Commonwealth of Pennsylvania, 863 A.2d 432, 436 (Pa. 2004). The best indication of legislative intent is the plain language of a statute. Id., citing e.g., Bowser v. Blom, 569 Pa. 609, 617, 807 A.2d 830, 835 (Pa. 2002). "Where the words of a statute are clear and free from ambiguity the legislative intent is to be gleaned from those very words." Pennsylvania Financial Responsibility Assigned Claims Plan v. English, 541 Pa. 424, 430, 664 A.2d 84, 87 (Pa. 1995). Thus, "other interpretive rules of statutory construction are to be utilized only where the statute at issue is ambiguous." Pennsylvania School Boards Association, Inc., 863 A.2d at 436.

Here, Section 4406 is plainly entitled "Duty of *customer* to discover and report unauthorized signature or alteration." (emphasis added). Subsection (f) of the section is clearly

labeled “STATUE OF LIMITATIONS APPLICABLE TO *CUSTOMER*.” (emphasis added). In addition, the content of the subsection clearly applies to “customers.” Therefore, the plain language of the statute shows that the statute was intended to be limited to “customers.” The legislature specifically defined the term “customer” in 13 Pa. C.S. § 4104. A “customer” is defined as a “person having an account with a bank or for whom a bank has agreed to collect items, including a bank that maintains an account at another bank.” 13 Pa. C.S. § 4104.

It is clear that Victory was not a “customer,” as defined by the statute, of Wachovia. Victory did not have an account with Wachovia, nor did Wachovia agree to collect items for Victory. Section 4406(f) places an obligation on the customer to exercise reasonable promptness in reviewing its bank statements and discovering any unauthorized payments, by way of unauthorized signature or alteration, within one year after the bank provides the necessary financial records. Victory did not receive any bank statements from Wachovia, so there were no statements from Wachovia for Victory to review. Rather, Victory was a “customer” of its own bank, Hudson Bank.<sup>1</sup>

The Court finds instructive the reasoning of the Superior Court of Massachusetts in the case of Commerce Bank & Trust Co. v. Vulcan Industries, Inc., 14 Mass. L. Rep. 682, 2002 Mass. Super. LEXIS 226 (2002).<sup>2</sup> The facts in Vulcan are similar to the facts in the case at bar. In Vulcan, an employee of Vulcan Industries, Inc. (“Vulcan”) used Vulcan’s corporate checks to

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<sup>1</sup> Hudson Bank is not a party to this lawsuit.

<sup>2</sup> “While it is a truism that decisions of sister states are not binding precedent on this Court, they may be persuasive authority, and are entitled to even greater deference where consistency and uniformity of application are essential elements of a comprehensive statutory scheme like that contemplated by the Uniform Commercial Code.” Commonwealth v. National Bank & Trust Co., 469 Pa. 188, 194, 364 A.2d 1331, 1335 (1976) (internal citation omitted). See also Continental Insurance Company v. Schneider, Inc., 873 A.2d 1286, 1294, 2005 Pa. LEXIS 1023, \*\*21 (Pa. 2005) (“Although these cases involved other jurisdictions’ versions of the UCC, they are nevertheless persuasive authority here as the relevant provisions in their UCC statutes are substantially similar to the provisions in the Pennsylvania UCC and one of the goals of uniform laws such as the UCC is uniformity of application.”)

pay her home equity loan with Commerce Bank (“Commerce”). It was undisputed that Vulcan was not a customer of Commerce, and that Commerce never sent Vulcan any statements or correspondence regarding the transactions. Commerce asserted that most of Vulcan’s claims for damages were precluded by the one-year statute of limitations provision under G.L.c. 106, § 4-406(f). (G.L.c. 106, § 4-406(f) and the Pennsylvania statute at issue, 13 Pa.C.S. § 4406(f), are identical). The Court rejected Commerce’s defense and stated:

Commerce reasons that this one-year window precludes Vulcan's claims for all but \$78,632.02 of the embezzled funds. This would be the case if Vulcan had ever been a Commerce customer; but since it never was, Commerce's reliance on this statute is misplaced. The term “customer” is defined in G.L.c. 106:4-104(a)(5) as “a person having an account with a bank or for whom a bank has agreed to collect items, including a bank that maintains an account at another bank.” Vulcan does not fit this statutory definition and therefore G.L.c. 106, § 4-406(f) does not apply to Vulcan, and Commerce's assertion that dismissal must follow all claims precluded by the one-year window fails.

Id. at \*3-4.

Furthermore, it is clear that 13 Pa.C.S. § 4406 applies to payor banks, and not to depository banks, such as Wachovia. The section’s chapter is entitled “RELATIONSHIP BETWEEN PAYOR BANK AND ITS CUSTOMER.” The relationship described in the section is between the drawer and his payor bank, and not between the drawer and a depository or bank. See Bittner v. Janney Montgomery Scott, Inc., 19 Pa. D. & C.3d 268, 276 (Ct. Cm. Pl. 1980). To find that the statute applies to depository banks would be an expansive reading of the statute, inconsistent with its plain language.

The case of In Re McMullen Oil Co. v. Crysen Refining, Inc., 251 B.R. 558, 578, 2000 Bankr. LEXIS 810, \*\*44 (Cal. Bankr. Ct. 2000), is similarly on point. The issue in McMullen was what liability a depository bank has for accepting a check for deposit into a third party

account (not belonging to the payee), based solely on the fact that the check lacked an endorsement by the payee. Id. at 566. The depository bank, Comerica Bank, defended itself under the one-year preclusion of the California Commercial Code § 4406(f), which is substantially the same as the Pennsylvania Commercial Code § 4406(f). The Court stated, “Section 4406 codifies and adds specificity to duties that have long been imposed upon a customer with respect to a payor bank, which is the depositor's own bank.” Id. at 578. The Court then went on to say:

Section 4406(f) provides no assistance to Comerica, because Comerica and its predecessors were not payor banks for any of the checks here at issue. This action is not against any of the payor banks for the fifteen checks. In addition, the bank account statements did not go to McMullen: they went to the Pension Fund, the owner of the deposit account. Instead, this case is brought against the depository bank. Section 4406 does not govern such a claim. In consequence, its one-year issue preclusion rule does not apply.

Id.

It must be emphasized that Victory’s cause of action against Wachovia is a negligence claim for failure to exercise ordinary care. The primary basis of Victory’s claim against Wachovia is not that the checks were paid over Rosenfeld’s forged signature, but that they were paid over Lunny’s forged endorsement of the payees of the checks, Victory’s vendors. The rule of preclusion contained in Section 4406(f) is limited to unauthorized payments by reason of “the customer’s unauthorized signature on or any alteration on the item.” It plainly does not apply to other acts of commercial negligence in accepting Lunny’s endorsements as those of the vendors.

In sum, the Court finds that Section 4406 of the Pennsylvania Commercial Code is inapplicable to this matter.

**CONCLUSION**

For all the foregoing reasons, defendant Wachovia's Motion in Limine is denied.

**BY THE COURT,**

HOWLAND W. ABRAMSON, J.