


Texas Consumer & Commercial Law Update

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Welcome

In this edition of the *Texas Consumer & Commercial Law Update*, we will look at the current state of banking litigation in the State of Texas. The first section will analyze a financial institution's exposure arising from the handling of cashier's checks. The next two sections will take a big picture look at whether tort theories of liability can be brought by plaintiffs in connection with the handling of their accounts or negotiable instruments.

This Edition

A Bank's Liability for Payment of Cashier's Check

If a cashier's check reported lost, stolen or destroyed is reissued, banks can end up with double the liability if the original check ends up in the hands of a holder in due course. How do banks protect themselves from this liability? How do banks accommodate their customer's need to have a check reissued? What if their customer requests a stop payment?

The remitter (the customer purchasing the cashier's check) cannot stop payment because of a defense the remitter may have to payment. Allowing the remitter to stop payment on a cashier's check is contrary to the principle of a cashier's check as the equivalent to cash. A bank that wrongfully refuses payment of a cashier's check based on a request from its customer may be liable to the payee, in addition to the face amount of the check, for expenses and loss of interest and possible consequential damages. (UCC 3.411(b)).

If a cashier's check is lost or stolen, the remitter or the payee (referred to as the "claimant") may request reissue and must submit to the bank a sworn written declaration of loss which fulfills the requirements of the UCC 3-312. If the request is received within a reasonable time before the check is presented for payment, the bank must pay or reissue the check 90 days after the issuance of the original cashier's check.

Prior to the expiration of 90 days, the bank is not liable for payment to a person entitled to enforce the check even if it has received a proper claim for reissue accompanied by a declaration of loss. Following the expiration of 90 days, if the check has not already been paid to a person entitled to enforce the check, the bank is then obligated to pay the claimant and the bank is discharged of its liability on the check even if presented by a holder in due course. If subsequently a holder in due course does make demand for payment, the claimant is obligated to pay the holder.

Under the revised UCC, the claimant is not required to post a bond as security unless the claimant wants a new check issued prior to the expiration of 90 days.

Case Alerts

[Bank of America v. Hubler](#)

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Mortgage Fraud in the State of Texas

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Claims Arising From Mishandled Transactions

What happens if a customer wants to bring a claim that his or her bank mishandled a transaction? Putting check conversion cases to the side for the moment, the “economic loss rule” will probably apply to most bank cases and would bar claims of negligence or negligent misrepresentation.

The general rule in Texas is that a litigant may not recover economic losses under a negligence theory when the loss complained of is already the subject matter of a contract between the parties. If the injury in question is actually only the economic loss that would arise from the contract itself, then it may be said that the cause of action sounds in contract alone. In those cases in which the parties have a contractual relationship, Texas courts are instructed to look to the nature of the injury and the substance of the cause of action to determine whether a loss or claim exists outside of the contract. As a practical matter, in most cases courts decline to allow tort-type theories when the parties’ relationship is established through the contract.

In recent years, Texas courts have begun applying the economic loss rule to banking litigation. As recently as December 2006, an intermediate Texas appellate court re-affirmed this doctrine as it related to financial institutions in [Bank of America v. Hubler](#). In the *Hubler* case, the customer made a stop-payment request which the bank granted but then failed to honor. After a bench trial on the merits, the trial court entered a judgment in favor of the customer on both breach of contract and negligent misrepresentation. In granting the bank’s appeal (in part), the Waco Court of Appeals found that the two causes of action arose from the same scenario, namely, allowing an unauthorized withdrawal which, of course, is the essence of the bank’s contractual obligation to its customer.

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Check Conversion

Are check conversion cases handled differently? The answer is yes and no. Check conversion cases allow the financial institution to present the same economic loss argument to defeat tort claims. In addition, however, Texas courts have begun to recognize and implement Uniform Commercial Code displacement arguments to the benefit of the banking industry.

Check conversion cases are exclusively governed by §3.420 of the UCC. Although there are many interesting nuances in this code section, the main point is that the measure of damages is crystal clear: a claimant may not under any circumstances, recover damages in excess of his or her interest in the instrument (the measure is presumed to be the face amount of the instrument). In other words, the parties start with the proposition that the maximum amount owed on the check will be the face amount, but that in no event can the plaintiff obtain money over and above his ownership interest in the funds. This result has led to all sorts of attempts by disgruntled plaintiffs to plead such theories as common law conversion, tortious interference, negligence, and so forth.

The general response is that §3.420 is the sole means of addressing check conversion. Further, the UCC is a carefully balanced and considered statutory scheme that is singularly applicable to negotiable instruments and that any attempt to alter that balance should be viewed with suspicion. So, while plaintiffs may continue to argue that their pet theories only supplement the UCC, Texas courts will reject their claims based on established case law holding that common law and equity principles are inconsistent with the Code when it comes to negotiable instruments. For example, in *Southwest Bank v*

Information Support Concepts, Inc., the Texas Supreme Court rejected a party's attempt to inject statutory contribution and indemnity into a case involving negotiable instruments.

The most recent case on this topic is [AMX Enterprises, Inc. v. Bank One N.A.](#), a case that was previously discussed in a case note in the Spring 2006 edition of our E-newsletter. In that case, a Houston appellate court rejected common law theories of tortious interference, money had and received common law conversion, negligence, and gross negligence.

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