

## Lawyers: Know Your Clients Unsolicited Emails – Fake Checks – Vanishing Clients

Suppose a lawyer receives an unsolicited email from an unknown foreign company seeking assistance with collecting debts owed by its U.S. customers. After the lawyer agrees to represent the company, the client's customer sends the firm a check, and instructs the lawyer via email to remit the funds to the client's account at Bank A, after deducting the firm's retainer. Once the client's check "clears" at Bank B, the firm wires funds to the client's account at Bank A. *Oops...*the check is bogus and the client disappears. Who bears the loss? The firm, Bank A, and/or Bank B?

### Internet Check Scam

A recent New York State Court of Appeals case<sup>1</sup> involves a law firm that fell victim to an Internet counterfeit check scam. In 2007, a Hong Kong company contacted a U.S. lawyer via e-mail to assist with collection of debts owed by its North American customers. After numerous e-mail exchanges between the lawyer and the prospective client, the firm agreed to represent it. The client told the firm that its customer will send a check to the firm to cover its \$10,000 retainer payment, but that the firm should wire the excess to the client's bank account. The client's customer sent the firm a check for \$197,500. The firm deposited the check at its bank.

Three days later, a firm lawyer contacted the firm's representative at its bank, with whom the firm had a five year banking relationship, to find out if the check had "cleared." The bank confirmed that the check had cleared and that the funds were available for transfer. The firm then wired \$187,500 to the client's bank account. Unfortunately, the check turned out to be counterfeit. As a result, the firm's bank revoked the monies from the firm's bank account.

The firm sued the payor bank and the collecting bank under various theories, including negligence in failing to identify the check as counterfeit, and for negligent misrepresentation in informing the firm over the telephone that the check had "cleared."

The Court held that the firm bore full responsibility to protect itself against the risk of a counterfeit check by "knowing its client." Accordingly, the Court denied the firm's motion for summary judgment because there was no evidence that the payor bank breached its duty to the firm by failing to identify the check as counterfeit. Nor was there any evidence that the collecting bank failed to exercise ordinary care by stating that the check had "cleared." The Court observed that the firm's reliance on the collecting bank's statement that the check had "cleared" was unreasonable as a matter of law since the term could be construed to mean that the amount of the check was available in the account at that time, but not that a final settlement of the check had been made.

The Court of Appeals bolstered its ruling by stating policy considerations underlying the Uniform Commercial Code: "By prospectively establishing rules of liability that are generally based not on actual fault but on allocating responsibility to the party best able to prevent the loss by the exercise

of care, the UCC not only guides commercial behavior but also increases certainty in the marketplace and efficiency in dispute resolution.” *Putnam Rolling Ladder Co. v. Manufacturers Hanover Trust Co.*, 74 N.Y.2d 340 (1st Dep’t 1989).

#### Avoid Red Flags

This case serves as a cautionary tale for lawyers and law firms which make critical client intake decisions everyday. Lawyers should be extremely wary of unsolicited emails from local or foreign businesses or organizations with which neither they nor their colleagues or contacts have ever dealt before.

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<sup>1</sup> Greenberg, Trager & Herbst, LLP v. HSBC Bank USA and Citibank, N.A., Index No. 152 (N.Y. Ct. App., Oct. 13, 2011).

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