

New York Commercial Division Round-Up

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[Bank of New York Escapes Liability Due to Court's Application of The Imposter Rule](#)

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On July 14, 2010, Justice Bernard J. Fried granted Bank of New York's motion to dismiss a complaint alleging conversion in connection with the cashing of false checks. *See Tripp & Co., Inc., v. The Bank of New York (Delaware) Inc., N/K/A BNY Mellon Trust of Delaware, N.A., and Citibank South Dakota, N.A.*, Index No. 114110-2009 (Sup. Ct., NY County July 14, 2010). Tripp is a small brokerage firm that retained the check clearing services of non-party Pershing, LLC ("Pershing"). At Tripp's request, Pershing issued checks payable to Tripp's customers and drawn on Pershing's account maintained by Bank of New York. Tripp's former employee, Michael Axel ("Axel") misappropriated \$624,244.78 through a series of fraudulent checks between June 2002 and December 2007. Axel accomplished the foregoing by requesting checks from Pershing, forging the payees names, and cashing and depositing the checks into his own personal account at Citibank. Citibank accepted for deposit and made payments on the checks, while Bank of New York accepted and cleared the checks. As a result, Tripp filed an action alleging conversion against Bank of New York and Citibank.

Justice Fried dismissed the action, holding that the "imposter rule" immunized the banks. UCC § 3-405, or the "imposter rule," "makes any indorsement in the name of the named payee legally effective, i.e., not forged," thereby shifting the risk of loss from the depository and/or drawee bank to the drawer of the checks. *See Getty Petroleum Corp v. American Express Travel Related Services Co.*, 90 N.Y.2d 322, 327 (1997). While UCC § 3-419 generally imposes the risk of loss upon the drawee bank for improper payment over a forged instrument, UCC § 3-405(1)(c), commonly referred to as the "impostor rule" provides: "[a]n endorsement by any person in the name of a named payee is effective if . . . an agent or employee of the maker or drawer has supplied him with the name of the payee intending the latter to have such interest." Further, the official comments to UCC § 3-405(1)(c) specifically state that the loss should fall upon the employer as a risk of his business enterprise because the employer is normally in a better position to prevent such forgeries by exercising reasonable care in the selection or supervision of his employees. *Official Comment*, UCC § 3-405(1)(c) (2009). In addition, the "imposter rule" imposes no duty of care and makes the endorsements effective regardless of whether the bank defendants acted commercially reasonably.

Here, Tripp alleged that the quantity and nature of the checks in question, the frequency of the deposits, and the amount and duration of the fraud should have induced Bank of New York and Citibank to investigate. The court disagreed, and applying the “imposter rule,” concluded that the indorsements were legally effective because Axel acted as an agent of the drawer (Pershing), Pershing acted as Tripp’s agent in performing clearing services for Tripp, and Axel was Tripp’s employee. Pershing drew up checks at the request of Axel for five years, demonstrating that Pershing authorized Axel to supply the payee information for the checks. Axel, as an agent of Pershing, supplied the names of the payees, intending the latter to have no such interest, rendering application of the “imposter rule” appropriate. Further, the court noted that because Tripp was in a position to prevent the fraud in his hiring and monitoring of Axel and collected on an insurance policy that covered Axel’s fraudulent conduct, the application of the “imposter rule” was entirely reasonable in this instance.

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