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BANK NOT LIABLE IN NIGERIAN-STYLE EMAIL SCAM

Question: When a bank sues to recover an overdraft created by a Nigerian-style email scam, which party has the burden of proof on the question of whether, in the context of section 3406 of the Commercial Code, the bank acted negligently—the bank or the overdraft account holder?

Answer: The account holder, according to the Fourth Appellate District, Division Two, in *Chino Commercial Bank, N.A. vs. Peters* (E049170), decided May 25, 2010.

Oddly enough, this scheme still works sometimes.

Appellant Brian Peters agreed to a proposal that his corporation would receive money supposedly owed to an individual in Malaysia and then pay the money out as directed in exchange for a 15% fee. His corporation received over \$800,000 and deposited them in an account at Chino Commercial Bank. The company then had the Bank pay out \$468,000. Thereafter, all the checks the company deposited bounced and created an overdraft.

The Bank filed suit against the corporation and Peters (who had signed the account agreement rendering him liable for any account shortage) and obtained a right to attach order against Peters. Ruling for the Bank, the trial court concluded that under section 3406 of the Commercial Code, Peters had the burden of proving the Bank was negligent (which he had not done). It also expressed concern that Peters, despite being negligent himself, "then looks to the bank and says, 'you should have prevented me from doing that.'"

The court of appeal affirmed. It began its analysis by quoting subdivision (a) of section 3406, which states that, "a person whose failure to exercise ordinary care contributes to an alteration of an instrument or to the making of a forged signature on an instrument is precluded from asserting the alteration or the forgery against a person who, in good faith, pays the instrument or takes it for value or for collection." The court held that it was undisputed the Bank was a "person who, in good faith, pa[id] the instrument or t[ook] for value or for collection." The court noted that in this context, "good faith" simply means that the Bank "acted honestly and in accordance with 'reasonable commercial standards of fair dealing.'"

Next, the court of appeal noted there was "ample evidence" that Peters failed to exercise ordinary care and thus contributed to the alteration of the checks. (Indeed, Peters conceded that he was "less than smart in

moving forward on the transaction....") Under subdivision (b) of section 3406, however, if the Bank, too, failed to exercise ordinary care in a way that contributed to the loss, the loss "must be allocated between the Bank and Peters." Citing subdivision (c) of the statute, the court of appeal held that Peters had the burden of proving the Bank was negligent—the Bank was not required to prove it was *not* negligent. Concluding he had not come close to doing so, the court affirmed the right to attach order.

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