

HOLDER IN DUE COURSE and CHECK FRAUD

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Every company that issues stop payments on checks or uses generic check stock that is available entirely blank is vulnerable to a holder in due course lawsuit. Litigation expense and holder in due course judgments can cripple a company financially and should be feared and avoided, especially in light of some Appellate Court rulings.

Section § 3-302 of the Uniform Commercial Code defines a holder in due course as "...the holder of an instrument if: (1) the instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity; and (2) the holder took the instrument (i) for value, (ii) in good faith, (iii) without notice that the instrument...has been dishonored, (iv) without notice that the instrument contains an unauthorized signature or has been altered..." The UCC allows a holder in due course full transferability of rights to assure the holder a free market for the instrument (§ 3-203). A holder in due course has three years from the date a check was dishonored or ten years from the date the check was issued, whichever period expires first, to sue the maker for recoupment (§ 3-118).

Following are three cases decided by the Superior Court of New Jersey, Appellate Division. All involve Robert J. Triffin, a Pennsylvania resident who is in the business of purchasing dishonored instruments (checks), acquiring holder In due course status and suing the maker for recoupment. The complete cases can be downloaded and viewed at www.FraudTips.Net/holder.htm.

ROBERT J. TRIFFIN V. SOMERSET VALLEY BANK AND HAUSER CONTRACTING COMPANY

Superior Court of New Jersey, Appellate Division, A-163-00T5
<http://lawlibrary.rutgers.edu/courts/appellate/a0163-00.opn.html>

In October 1998, Alfred Hauser, president of Hauser Co., was notified by a retailer and Somerset Valley Bank that several individuals were cashing what appeared to be Hauser Co. payroll checks. Mr. Hauser reviewed the checks and ascertained that, while the checks looked like his checks, they were counterfeits because none of the payees worked for him and he did not authorize anyone to sign those checks on his behalf.

At that time, Hauser Co. employed Automatic Data Processing, Inc. (ADP) to provide payroll services, and a facsimile signature was utilized on all Hauser Co. payroll checks. Mr. Hauser executed affidavits of stolen and forged checks at the bank, stopping payment on the checks at issue. The Bank subsequently received over 80 similar checks drawn on Hauser Co.'s account, valued at \$25,000. The checks were returned unpaid by the bank and marked as "Stolen Check - Do Not Present Again." In February and March 1999, Robert Triffin purchased 18 of these dishonored checks totaling \$8,826.42 from four check cashing agencies. Each agency stated that it cashed the checks for value, in good faith, without knowledge that any of the signatures were unauthorized or forged. All 18 checks bore a red and green facsimile signature stamp in the name of Alfred M. Hauser.

Mr. Triffin then sued Somerset Valley Bank and Hauser Co., contending that Hauser Co. was negligent in failing to safeguard both its payroll checks (which apparently looked like legitimate ADP checks) and its facsimile stamp, and was liable for payment of the checks.

The lower court granted Mr. Triffin summary judgment on the basis that the checks appeared to be genuine. Hauser Contracting appealed the decision, arguing that summary judgment was improperly granted because the Court failed to properly address Hauser Co.'s defense that the checks were invalid negotiable instruments and therefore erred in finding the plaintiff a holder in due course. However, the Appellate Court agreed with the lower court. It also found that because the checks appeared to be genuine, Hauser Co. was required, but had failed, to show that the check cashing stores had any notice that the checks were not validly drawn. The Court found that the 18 checks met the definition of a negotiable instrument. Each check was payable to a bearer for a fixed amount, on demand, and each check appeared to have been signed by Mr. Hauser, through the use of a facsimile stamp. Hauser then contended that the checks were not negotiable instruments because Mr. Hauser did not sign the checks, did not authorize their signing, and its payroll service, ADP, did not produce the checks. The Court found that lack of authorization was a separate issue from whether the checks are negotiable instruments. The Court dismissed Hauser's argument that the checks were invalid because they were fraudulent and unauthorized, reasoning that to preclude liability from a holder in due course, "it must be apparent on the face of the instrument that it is fraudulent." Hauser failed to introduce any such evidence, and Mr. Triffin won.

Recommendations: It is clear from this case that if a thief can get check stock that looks genuine, your company can be held liable for losses that may occur from those counterfeit checks. Most companies buy check stock from vendors that sell the identical check stock entirely blank to other companies, totally uncontrolled, thus aiding the forgers. Many companies opt for these checks because they are less expensive than customized checks (legal fees and holder in due course judgments are not factored into the low cost). Forgers acquire the check stock, and using a \$99 scanner and Adobe Illustrator, create counterfeit checks that cannot be distinguished from the account holder's original checks. This is what creates holder in due course legal exposure.

Companies should use checks uniquely designed and manufactured for them, or buy from vendors such as SafeChecks (www.safechecks.com) that customize every company's check and never sells check stock entirely blank without it first being customized for the end user.

ROBERT J. TRIFFIN V. CIGNA INSURANCE COMPANY

297 N.J. Super. 199, 687 A.2d 1045 (App. Div. 1997)

<http://lawlibrary.rutgers.edu/courts/appellate/a4000-95.opn.html>

In this case, Mr. Triffin appealed a trial court's summary judgment decision dismissing his complaint for payment of a Cigna Insurance Company check that was transferred to Triffin by a holder in due course after Cigna had stopped payment on the check.

On July 7, 1993, a check for \$484.12 had been issued for workers' compensation benefits to James Mills by one of Cigna's companies, Atlantic Employers Insurance Company.

Mills received the check, but falsely claimed to the issuer that he had not due to a change in his address. He requested that payment be stopped and a new check issued.

The insurer complied and stopped payment on the initial check and issued a replacement check that was received and cashed by Mills. Thereafter, Mills cashed the initial check at Sun's Market, Triffin's assignor, before the stop payment notation was placed on the check. Sun presented the check for payment through its bank. Cigna's bank dishonored the check on or about July 12, 1993, stamped it "Stop Payment," and returned the check to Sun's Market's bank. Sun's Market was out \$484.12. All parties agreed that had Sun's Market pressed its claim against Cigna as the issuer of the check, Sun's would have been entitled to a judgment because of its status as a holder in due course.

Sun's Market posted the check on a bulletin board in the store where it stayed for about two years until Robert Triffin visited the store and purchased the item at a deep discount off face value. In the purchase, Sun assigned its holder in due course rights to the check to Triffin, who filed suit against Cigna on August 28, 1995, over two years after the check was returned unpaid. Although Triffin lost on summary judgment at the trial court, the Appellate Court reversed the summary judgment and instructed the lower court to enter judgement in favor of Robert Triffin, with interest.

Recommendation: Every company issues stop payments, and some have hundreds of outstanding stop payment orders on checks. Two important items to consider about stop payments. First, as this case illustrates, placing a stop payment on a check does not necessarily terminate your obligation to pay the check. Companies should print on the face of the check a statement declaring a date after which the check is no longer valid, such as "**THIS CHECK EXPIRES AND IS VOID 20 DAYS AFTER ISSUE DATE.**" If a check is lost, the payee would have to wait 20 + 2 days before the check is reissued.

While this practice would be very inconvenient for the recipient, there is no other way a company can protect itself from a holder in due course claim. Second, a stop payment is typically good for only 180 days. After that time, the stop payment drops off the bank's system and is no longer monitored. If the checking account is not on Positive Pay, the stop payment should be re-issued. A check that is six months old becomes a stale-dated check, and a bank has the legal right (but not the legal requirement) to decline payment on a stale-dated check. Further, a bank cannot be held liable for paying a stale-dated check. Positive Pay will catch stale-dated checks. Visit www.PositivePay.Net.

ROBERT J. TRIFFIN V. POMERANTZ STAFFING SERVICES, LLC

370 N.J.Super. 301, 851 A.2d 100, 2004.NJ.0000281

<http://lawlibrary.rutgers.edu/courts/appellate/a2002-02.opn.html>

This is one of the few cases Robert Triffin lost. It illustrates the value of using high security, controlled check stock to protect oneself from some holder in due course claims. In this case, the Court was asked whether an innocent party, whose check stock was imitated and whose signature was forged, can be held liable when another innocent party pays that check in good faith. The answer is No.

On April 20 and 21, 2002, a check cashing store cashed 18 counterfeit checks, in amounts ranging between \$380 and \$398, purportedly issued by Pomerantz Staffing Services. Each check bore Pomerantz's full name and address and a facsimile signature of "Gary Pomerantz." Printed on the face of each check was a warning: "THE BACK OF THIS CHECK HAS HEAT SENSITIVE INK TO CONFIRM AUTHENTICITY." Without examining the checks as suggested by this warning, the store cashed the checks, which the bank returned unpaid and stamped: "COUNTERFEIT" and "DO NOT PRESENT AGAIN." (The fact that the bank caught checks of such low dollar value suggests that Pomerantz was utilizing its bank's Positive Pay service. Visit www.PositivePay.Net.)

Robert Triffin bought those checks and filed suit against Pomerantz. Both parties filed cross-motions for summary judgment. The trial judge granted Pomerantz's motion and dismissed the case. Triffin appealed because Triffin almost always wins on appeal.

In the appeal, Pomerantz claimed that it did not sign the checks, which also did not come from its check stock. Triffin presented no evidence opposing those claims. Also, Triffin did not explain why the check casher did not examine the checks for heat sensitive ink as directed on the face of check. Their bogus nature would have been revealed by simply touching the checks. The Court said it was reasonable that the holder, and especially a check casher, can be expected to fully examine the front and back of the instrument to verify its authenticity when a method for doing so is available. Because the check casher failed to authenticate the checks, it did not obtain holder in due course status, and Triffin could not claim what the check casher did not have. Mr. Triffin lost.

Recommendations: Use high security checks that include explicit warning bands and overt and covert security features to help prevent check fraud losses, including some holder in due course claims. Consider the **SuperBusinessCheck** designed by Frank Abagnale with 15 security features, including heat sensitive ink, a true watermark and explicit warning bands. The **SuperBusinessCheck** is a highly secure, controlled check stock that is available through SafeChecks. Visit www.Supercheck.Net to view this new check. Call SafeChecks at (800) 755-2265 ext. 3304 to receive a sample.

About the authors

Frank Abagnale is one of the world's most respected authorities on the subject of forgery, secure documents, identity theft and embezzlement. For over 30 years he has lectured to and consulted with hundreds of financial institutions, corporations and government agencies around the world, including the FBI. More than 14,000 financial institutions, corporations, and law enforcement agencies use his fraud prevention materials. He is the author and subject of *Catch Me If You Can*, a Steven Spielberg movie that starred Tom Hanks and Leonardo DiCaprio. Mr. Abagnale can be contacted at (800) 237-7443.

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