



## When the attorney endorses the client's name to the settlement check

*Upon learning that his attorney has forged the endorsement on a settlement check and the money is now gone, the client has multiple options for redress*

BY DAVID J. COOK

This article explains the authority of the attorney to endorse a client's name to a settlement check and deposit the check in the attorney's trust account, and the liability of the bank to the client for conversion under Uniform Commercial Code section 3420 if the endorsement is forged or unauthorized.<sup>1</sup>

### **The client owns the check — not the attorney**

Here is the issue: The attorney settles the case with or without client's authority, negotiates the settlement check, but lacks the client's written authority to affix the name of the client as the endorsement to the check.

As can be imagined, the money is gone. The sad summary is that the

attorney, without the client's knowledge or consent, settled the case, forged the client's name to the settlement agreement and settlement check, deposited check or checks, and absconded with the proceeds.<sup>2</sup> Through the state bar disciplinary process and ensuing client security fund proceedings,<sup>3</sup> the client learns that the attorney has illicitly settled the case and came into possession of the



settlement check. Even the cops or FBI (if large scale) are called.

Upon learning that the attorney has in fact forged the name of the client, and assuming no special or general power of attorney, the client has multiple options. The first and most economical option is that the client can demand upon the collecting bank [i.e., the bank for the attorney who processed the check] for reimbursement by presenting an affidavit of forgery. Banks establish security departments that process affidavits of forgery, open an investigatory file, confront the customer attorney and attempt to determine in fact that the signature was a forgery, and that the attorney acted wrongfully and lacked a retainer agreement with a power of attorney. The bank might even pay.

The next option is that the client prosecutes a claim under the statutory authorized client security fund.<sup>4</sup> The State Bar of California provides a client security fund to compensate clients for attorney thefts and embezzlements.<sup>5</sup> The client files a verified application asserting an attorney theft. In response, the client security fund commission investigates the claim, might hold a hearing, and renders an award compensating the client. Upon payment to the client, the fund is subrogated to the client's rights and files a civil action for reimbursement against the attorney. The state bar might file suit against the collecting bank for the loss based on equitable, contractual or statutory subrogation principles.

Another option is that the client recycles the underlying litigation. This is a moment for pause. In some instances, the client fully authorized the settlement and signed the releases, but the attorney forged the client's name on the settlement check and dissipated the proceeds [Substance abuse, or gambling, is prevalent in these cases.] The client does not have a credible claim to vacate the authorized settlement just because the attorney embezzled the settlement check.

On the other hand, if the attorney settled the case without the client's

authorization and forged the client's name to the settlement agreement, the client would have a credible claim to topple the underlying settlement, rescind the mutual releases (forged) and reinstate the underlying litigation, but faces an offset for the money taken by the errant attorney.

### **Bank is liable on forged endorsement**

The collecting bank is strictly liable for the conversion by deposit or payment based on a forged endorsement under Uniform Commercial Code section 3420. [The bank who took the check for payment from the attorney is called the collecting bank; the bank who paid the check is calling the paying bank or drawee on the check. The account holder is called the drawer.] The collecting bank is said to have converted the check in the event of deposit without an endorsement, a forged endorsement, or an unauthorized endorsement.

The fact that a bank is liable in conversion for the deposit and collection of proceeds is well understood and generally undisputed.<sup>6</sup> The thesis percolating through Divisions 3 and 4 of the Uniform Commercial Code has always been to impose a duty upon each party in the transaction to insure that they are receiving good title to the instrument. The rationale in imposing liability upon each serial party is that they are in the better position to assure good title, or reject the item. Despite the use of ATMs, remote deposit strategies (smart phones), and other non-personal methods of deposit, the collecting bank remains strictly liable in conversion in the handling of the instrument.

### **Attorneys lack authority to endorse the client's name to a settlement check**

The courts have repeatedly held that attorneys lack the authority to give way,

transfer or surrender the client's substantive rights, such as surrendering the client's right for a jury trial. Courts have held that attorneys, by virtue of their employment, are not authorized per se to affix their names to a settlement agreement. *Levy vs. Superior Court (Golant)*<sup>7</sup> squarely held that an attorney cannot affix his or her name to a binding settlement agreement which is subject to enforcement as a final judgment under the California unique settlement statute, California Code of Civil Procedure section 664.6.<sup>8</sup>

The near unanimous rule is those attorneys *per se* lack the authority to endorse the client's name to a settlement check.<sup>9</sup> The paradigm is the attorney settling the case, forging the client's signature on the settlement agreement, affixing the client's name as an endorsement on the settlement draft and depositing the check in the collecting bank. These facts would impose liability upon the bank for conversion under section 3420 which provides for strict liability.<sup>10</sup>

In *Navrides v. Zurich Insurance Co.*,<sup>11</sup> the California Supreme Court differentiated between the authority of the attorney to receive the check from the adverse party, and the separate authority of the attorney to endorse the client's name to the check. The Court intimated that the collecting bank would be strictly liable to the attorney's clients for accepting the check based on a forged or missing endorsement. *Navrides* rearranges the relationship between clients, seeking to protect their recovery, attorneys seeking to facilitate the orderly receipt and collection of the settlement proceeds, and the financial institution seeking to avoid liability for the mishandling of a settlement check.<sup>12</sup> *Navrides* compels the banks to confirm that the attorney is authorized, as a matter of contract, to endorse the client's name to the check (or face liability for conversion) and commands the client to hire an honest attorney if executing a power of attorney.



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## Endnotes

<sup>1</sup> Uniform Commercial Code (California Commercial Code) 3420 provides as follows:  
 "3420: (a) The law applicable to conversion of personal property applies to instruments. An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment. An action for conversion of an instrument may not be brought by (1) the issuer or acceptor of the instrument or (2) a payee or endorsee who did not receive delivery of the instrument either directly or through delivery to an agent or a co-payee.  
 (b) In an action under subdivision (a), the measure of liability is presumed to be the amount payable on the instrument, but recovery may not exceed the amount of the plaintiff's interest in the instrument.  
 (c) A representative, other than a depository bank, who has in good faith dealt with an instrument or its proceeds on behalf of one who was not the person entitled to enforce the instrument is not liable in conversion to that person beyond the amount of any proceeds that it has not paid out."  
 For purpose of clarity UCC Section 3420 is cited in this article as Commercial Code Section 3420 and, unless stated to the contrary, is deemed uniform in every state. Section 3420 succeeds 3419, but given the passage of time, this article considers Section 3420 as the operative statute.

<sup>2</sup> *Navrides vs. Zurich Insurance Company* (Id. at pp. 700-701) [While theft of client's funds through forgeries or other wrongful conduct is rare, client suffers greatly.]

<sup>3</sup> See for example, the National Client Protection Organization Inc. which provides a comprehensive list of the client security funds.

<sup>4</sup> California Business and Professions Code Section 6140.5(b) and *State Bar v. Statile* (2008) 168 Cal.App.4th 650 (this author's case)

<sup>5</sup> Client security funds are typically organized and maintained by the state bar. See for example, *Saleeby vs. State Bar of California* (1985) 39 Cal.4th 547 which details the history of client security funds (pp. 555-556) and held that the State Bar must provide for a set of rules in conformity with basic due process in the administration and payment of claims. (p. 562-567). See [www.abanet.org/cpr/clientpro/cp-dir\\_fund.pdf](http://www.abanet.org/cpr/clientpro/cp-dir_fund.pdf) for a complete directory of client security funds.

<sup>6</sup> *Harry H. White Lumber Co. vs. Crocker Citizens National Bank* (1967) 253 Cal.App.2d 368, 373-375 (extensive national survey of case under prior law.) Court held collecting bank liable if endorsement of joint payee is forged (Page 374)

<sup>7</sup> *Levy vs. Superior Court (Golant)* (2002) 10 Cal.4th 578.

<sup>8</sup> Code Civ. Proc., § 664.6 provides as follows: "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement."

<sup>9</sup> *Palomo vs. State Bar of California* (1984) 36 Cal.3d 785, 794 "An attorney's general authority to pursue and collect a claim does not include the implied authority to endorse the client's signature on negotiable instruments payable to the client, since the agency can be fully performed without this power. Any such endorsement authority must be expressly granted. (*Navrides v. Zurich Ins. Co.* (1971) 5 Cal.3d 698, 707, fn. 6; *Helgeson v. Farmers Ins. Exchange* (1953) 116 Cal.App.2d Supp. 925, 927, disapproved on other grounds, *Navrides, supra*, 5 Cal.3d at p. 712; see also *Arcade Realty Co. v. Bank of Commerce* (1919) 180 Cal. 318, 321; *Cignetti v. American Trust Co.* (1956) 139 Cal.App.2d 744, 748, disapproved on other grounds, *Navrides, supra*, 5 Cal.3d at p. 712.)"

<sup>10</sup> *Kenerson vs. FDIC* 44 F. 3d 19, 35-37 (1st Circuit, 1995) *Navrides vs. Zurich Insurance Company* (1971) 5 Cal.3d 698, 705 which held that the third party (obligor) was authorized to deliver the check to the attorney, but the attorney was authorized by virtue of his engagement to endorsement check and receive the proceeds. The court cogently spelled out the liability of the collecting bank as follows:

"We emphasize that by commencing the present action plaintiff ratified the entire transaction between Forsyth and Zurich. But her ratification did not necessarily extend beyond the consummation of the settlement so as to include events transpiring after Forsyth received the draft and encompass ratification of the unauthorized endorsement of her signature on the draft.

A payee, whose endorsement has been forged subsequent to the delivery of a check to the payee or his agent, can sue the collecting bank in conversion. Since a forged endorsement is wholly inoperative, the collecting bank acquires no right to retain the check or to enforce its payment against the drawee bank by virtue of the forged endorsement. However, the payee may in a limited sense ratify the bank's Collection of the amount of the check from the drawee bank and then sue the collecting bank in conversion for paying this amount to the forger. (*Fabricon Products v. United Cal. Bank* (1968) 264 Cal.App.2d 113, 116-117; *Indiana Plumbing Supply Co. v. Bank of America* (1967) 255 Cal.App.2d 910, 915; *Palo Alto etc. Ass'n v. First Nat. Bank* (1917) 33 Cal.App. 214.) Thus, the payee is allowed a selective ratification as it were; he may ratify the collection of the amount of the check from the drawee bank by the collecting bank on the forged endorsement, but is not required to ratify the forged endorsement in toto and thereby approve payment to the forger. We know no reason why this doctrine of selective ratification is inappropriate in this case, so we need not hold plaintiff to ratification of her unauthorized endorsement on the draft." (Emphasis added)."

<sup>11</sup> *Navrides v. Zurich Insurance Co.* (1971). 5 Cal.3d. 698, 705.

<sup>12</sup> Commercial Code section 3420 (b) limits the liability of the collecting bank to the face amount of the instrument. *Gil v. Bank of America* 138 Cal.App.4th 1371, and *Stenseth v. Wells Fargo Bank*, (*ibid.*, punitive damages are not allowable nor attorney's fees.)