

STATE OF MICHIGAN
COURT OF APPEALS

MICHIGAN BASIC PROPERTY INSURANCE
ASSOCIATION,

UNPUBLISHED
January 24, 2012

Plaintiff-Appellee,

v

No. 299597
Wayne Circuit Court
LC No. 08-107295-CK

JOYCE WASHINGTON, CLEVELAND
POWELL, COUNTRYWIDE HOME LOANS,
DIMONTI & ASSOCIATES, and SAN DIEGO
NATIONAL BANK,

Defendants,

and

FIFTH THIRD BANK,

Defendant/Third-Party-Plaintiff,

v

NATIONAL CITY BANK, a/k/a PNC BANK NA,

Defendant/Third-Party-Defendant-
Appellant.

Before: GLEICHER, P.J., and CAVANAGH and O'CONNELL, JJ.

PER CURIAM.

This controversy concerns a simple piece of paper, a common check. The question before us is not as simple or straight forward as the piece of paper at its core: Who bears the loss when someone forges an endorsement on a check and wrongfully takes the proceeds? Specifically, we are asked to consider whether defendant Fifth Third Bank is statutorily or contractually liable to its customer, plaintiff Michigan Basic Property Insurance Association (MBP), for honoring a check with forged endorsements and deducting those funds from MBP's account.

We conclude that Fifth Third Bank would be required by the Uniform Commercial Code (UCC) to recredit the check proceeds to its customer's account as it deducted those funds over a

forged endorsement. However, the parties altered their statutory duties by contract. MBP assumed liability for “any improper endorsements by payees.” MBP also agreed to review its account statements and notify Fifth Third of any discrepancies or forgeries within 30 days. MBP failed to do so and its breach of the contractual notice requirement, as well as its contractual assumption of risk, precludes its claim to relief. As the trial court granted summary disposition in MBP’s favor, we reverse and remand for entry of judgment favoring Fifth Third Bank.¹

I. CHECK COLLECTION PROCESS

“In the normal functioning of the check collection process,” a “drawer” writes a check made payable to a “payee,” with the funds ultimately to be deducted from the drawer’s checking account. *J Walter Thompson, USA, Inc v First BancoAmericano*, 518 F3d 128, 131 (CA 2, 2008); MCL 440.3103(1)(e). The payee takes the check to his or her bank for cash or deposit. “The payee’s bank, which is the first to receive the check, is known as the ‘depository bank.’” *J Walter Thompson*, 518 F3d at 131; MCL 440.4105(b). In a simple transaction, the depository bank sends the check directly to the drawer’s bank for payment. In that situation, the depository bank is also a “collecting” and “presenting” bank. “A ‘collecting bank’ . . . handles a check for collection. A ‘presenting bank’ . . . presents an item for payment.” *J Walter Thompson*, 518 F3d at 131; MCL 440.4105(e)-(f). The check is “presented” to the bank that holds the drawer’s bank account. That bank is referred to as a “drawee bank” as it “draws” the funds from its customer’s account and a “payor bank” as it pays the cash promised in the check. *J Walter Thompson*, 518 F3d at 131; MCL 440.4104(c); MCL 440.4105(c).

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Michigan Basic Property Insurance Association (MBP) issued a \$69,559.06 check jointly payable to its insured, Joyce Washington, and two lien holders over her property, Countrywide Home Loans and T & C Federal Credit Union (the “Washington-Countrywide” check).² Either Joyce Washington or Cleveland Powell, who acted with Washington’s power of attorney, took the check to National City Bank on February 16, 2007. Either Washington or Powell endorsed the check by signing “Countrywide Home Loans,” “T & C Credit Union” and “Joyce Washington,” interspersed with two additional but illegible signatures. The signatures were all made in the same handwriting. National City accepted the check and deposited the proceeds into an account shared by Washington, Powell and a corporate entity.

National City presented the check directly to Fifth Third Bank. MBP maintains an account at Fifth Third and wrote the Washington-Countrywide check from its Fifth Third account. Pursuant to a special commercial client account agreement, Fifth Third sent MBP a daily account statement detailing all checks presented for payment against MBP’s account. That

¹ From our review of the record, it appears that MBP’s fraud and conversion claims against defendants Joyce Washington and Cleveland Powell remain pending.

² The check was part of a larger homeowner’s insurance settlement and was made jointly payable due to a mortgage clause in the underlying policy.

statement listed the check number, date presented, amount payable and electronic tracing number of the subject check. Fifth Third expected MBP to review the daily account statement and immediately notify it of any checks that should not be paid. MBP did not object to the presentment of the check so Fifth Third withdrew the funds from MBP's account and transferred \$69,559.06 to National City. Fifth Third later sent MBP a February 2007 monthly account statement including the same item description as the daily statement to memorialize that the check had been paid. MBP raised no objection to the monthly statement.

Despite that the subject check was made payable to joint payees, it appears that Washington kept the entirety of the proceeds, and she certainly did not satisfy the lien held by Countrywide Home Loans. Countrywide notified MBP of the lack of payment and, on March 31, 2007, MBP issued a duplicate joint check for \$69,559.06 and mailed it directly to Countrywide.

One year later, in March 2008, MBP filed a fraud and conversion suit against Washington and Powell, as well as claims against National City for UCC violations.³ However, National City owed no direct duty to MBP and the court dismissed the UCC claims. Only then did MBP pursue reimbursement from its own bank, Fifth Third. On May 18, 2009, MBP filed suit against Fifth Third, arguing that the bank's payment of the subject check was "unauthorized" because the forged payee endorsements rendered the check "not properly payable." Fifth Third, in turn, filed a third-party claim against National City, now PNC Bank, for breaching its warranty under the UCC that the check it presented for payment was properly endorsed.

Fifth Third and National City each sought summary dismissal of MBP's reimbursement claim. Fifth Third contended that MBP was not entitled to reimbursement because it failed to use ordinary care and contributed to the forgery by mailing the original check to Washington instead of Countrywide. Fifth Third challenged MBP's failure to review its account statements and timely notify the bank of any discrepancies or forgeries as required by the account terms. National City added that Fifth Third's account contract placed the risk of forged endorsements on the customer, MBP. Fifth Third also sought summary disposition of its third-party claim against National City for presenting a check with forged endorsements for payment in violation of the UCC.

MBP filed a counter motion for summary disposition, seeking reimbursement as a matter of law. MBP contended that Fifth Third violated MCL 440.4401 of the UCC by charging against MBP's account a check that was not "properly payable" due to forged endorsements. MBP defended that it had exercised ordinary care because it was contractually required to mail the Washington-Countrywide check to its insured, and had no reason to suspect that Washington would forge the endorsements of her joint payees. MBP further asserted that it reasonably expected Fifth Third to have a procedure in place to prevent payment on unauthorized checks. MBP insisted that it could not have discovered the forgery from the sparse information provided

³ MBP also raised several claims against financial institutions related to Countrywide's negotiation of the March 31, 2007 check. Those claims were settled in the trial court and are not at issue in this appeal.

in Fifth Third's daily and monthly account statements and therefore could never provide the notice required by the account terms.

The trial court determined that Fifth Third was liable to reimburse MBP \$69,559.06 and that National City was liable to indemnify Fifth Third in the same amount. The court denied Fifth Third's motion to dismiss MBP's claims on various grounds:

Fifth Third's motion to dismiss [MBP's] claims for reimbursement is denied. MCL 440.3406[1] only bars [MBP's] claims if its failure to exercise ordinary care substantially contributed to an alteration or forgery of the check at issue. [MBP] had a contractual obligation to its insured to issue a check jointly payable to the payees noted on the check at issue. This Court does not find evidence proving that [MBP] failed to exercise ordinary care.

[MBP's] claims are not barred under § 29 of the Rules & Regulations Applicable To All Fifth Third Accounts And Cards ("Rules & Regulations"). Copies of checks are scanned and the original check is destroyed by Fifth Third. These scanned copies are not sent to [MBP]. The daily check report sent to [MBP] only shows which checks were paid not to whom they were paid. [MBP] had no notice that the funds were paid to a forger. The February 2007 account statement did not provide notice of the alleged alteration or forgery either. Due to Fifth Third's institutional practices, [MBP] did not have notice of the forgery so that it could have notified Fifth Third within the 30-day period provided under § 29 of the Rules & Regulations. [MBP] exercised reasonable care in its duties to inspect bank statements under MCL 440.4406.

Section 30 of the Rules & Regulations provides that "Customer assumes liability for any improper endorsement by payees." That section, however, does not apply in this instance because forging a payee's name and presenting a check for payment does not constitute an "endorsement" by a *payee*. The language of the contract is clear and unambiguous that [MBP] would be responsible if its payees improperly endorsed the check. MCL 440.1201 defines unauthorized signature and includes the word "forgery." The contract agreement does not use the term "unauthorized signature" but only refers to payee's endorsements. An endorsement was made by [Powell] and [Powell] is not a payee. Countrywide [] never endorsed the check. [Emphasis in original.]

National City is entitled to assert the defenses Fifth Third may have against [MBP]'s claim. However, as noted above, these defenses fail against [MBP].

Fifth Third's motion for summary disposition as to National City is granted. If the check at issue was honored with forged endorsements, then National City breached its presentment warranties to Fifth Third under MCL 440.3417 and 440.4208. As a result, National City would indemnify Fifth Third for any amount Fifth Third is required to re-credit [MBP].

[MBP] has presented evidence that the check was forged – that is, the endorsement “Countrywide Home Loans” was not made by Countrywide. Fifth Third and National City do not concede that this was a forgery; both banks failed to present any competent evidence to the contrary.¹ Therefore, this court finds that there is no genuine issue of fact that the check was forged. [MBP] is entitled to reimbursement from Fifth Third in the amount of \$69,599.06 [sic].

¹ It is somewhat unbelievable that National City accepted a handwritten “Countrywide Home Loans” as the real endorsement of the former largest mortgage company in the country.

After the trial court issued its ruling, Fifth Third assigned its rights and defenses to National City. National City then pursued this appeal.

III. STANDARD OF REVIEW

We review a trial court’s decision on a motion for summary disposition de novo. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). A motion under MCR 2.116(C)(8) “tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted.” *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

“A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.” In evaluating such a motion, a court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004) (internal citations omitted).]

Summary disposition is appropriate under MCR 2.116(I)(2) “[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment.”

We review underlying issues of statutory interpretation de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003). The goal of statutory interpretation is to discern the intent of the Legislature based on the language of the statute. “If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written.” *Rose Hill Ctr, Inc v Holly Twp*, 224 Mich App 28, 32; 568 NW2d 332 (1997). If a statute is ambiguous, however, judicial construction is permitted. *Detroit City Council v Mayor of Detroit*, 283 Mich App 442, 449; 770 NW2d 117 (2009).

We also review underlying issues of contract interpretation de novo. *Citizens Ins Co v Pro-Seal Service Group, Inc*, 477 Mich 75, 80; 730 NW2d 682 (2007). We must apply the plain and unambiguous language of a contract as the document “reflects the parties’ intent as a matter of law.” *Hasting Mut Ins Co v Safety King Inc*, 286 Mich App 287, 292; 778 NW2d 275 (2009).

IV. ANALYSIS

A. Liability Under the UCC

The current transaction occurred mostly as anticipated under the UCC. MBP, as the “drawer,” wrote the subject check from its bank account at the “drawee”/“payor” bank, Fifth Third. Joyce Washington, as a payee on the check, took the instrument to her bank (or had Powell do so with her power of attorney). National City, which served as the “depository bank,” deposited the check proceeds into Washington’s account. It then “handle[d] the check for collection” and presented it to Fifth Third for payment.

Upon National City’s presentment of the check, Fifth Third was required to quickly decide whether to honor or dishonor it:

If an item is presented on and received by a payor bank[,] the bank is accountable for the amount of the following:

(a) A demand item other than a documentary draft whether properly payable or not if the bank, in any case where it is not also the depository bank, retains the item beyond midnight of the banking day of receipt without settling for it or, regardless of whether it is also the depository bank, does not pay or return the item or send notice of dishonor until after its midnight deadline. [MCL 440.4302(1).]

To make this decision, Fifth Third had to first determine whether the check was “properly payable.” A bank may only deduct “properly payable” items from its customer’s account and should use due care at the time of presentment to mitigate its losses.

A bank may charge against the account of a customer an item that is properly payable from that account even though the charge creates an overdraft. An item is properly payable if it is authorized by the customer and is in accordance with any agreement between the customer and bank. [MCL 440.4401(1).]

In the simplest transactions, a single drawer makes a check payable to a single named payee. That payee then signs his or her name to endorse the check and takes the proceeds. The check in this case was not made payable to a single payee, it was made payable to three. “If an instrument is payable to 2 or more persons not alternatively, it is payable to all of them and may be negotiated, discharged, or enforced only by all of them.” MCL 440.3110(4). To “negotiate” the check, each joint payee must “endorse” it. MCL 440.3204(1). If a joint payee’s endorsement signature is missing or forged, the endorsement is incomplete and the check is not “properly payable.” *Pamar Enterprises, Inc v Huntington Banks of Michigan*, 228 Mich App 727, 733; 580 NW2d 11 (1998); *Siecinski v First State Bank of East Detroit*, 209 Mich App 459, 462; 531 NW2d 768 (1995).

The subject check was endorsed in the name of all three named payees: Washington, Countrywide, and T & C. Despite Fifth Third and National City’s contrary allegations, there is no *genuine* issue of material fact that at least two of those endorsements were forged by Washington or Powell acting on her behalf. Neither Fifth Third nor National City presented any

evidence rebutting MBP's forgery claim. On the other hand, substantial evidence supported that the mortgage company and credit union endorsements were forged. All three endorsements were made in one script. The check was deposited at National City by a National City customer into the customer's National City account. National City should have known that its customer was not a Countrywide or T & C corporate representative, was not entitled to endorse a check on Countrywide's or T & C's behalf, and certainly had no power to deposit proceeds payable to the corporate Countrywide and T & C into her personal account. The obviously forged endorsements rendered the check not "properly payable" under the UCC. *Pamar*, 228 Mich App at 733; *Siecinski*, 209 Mich App at 462.

As a general rule, a bank that pays funds from a customer's account based on a check with forged endorsements must recredit or reimburse those funds to the customer's account. *Leather Manufacturers' Bank v Merchants' Bank*, 128 US 26, 34; 9 S Ct 3; 32 L Ed 342 (1888) (under the common law); *The Guardian Life Ins Co v Weisman*, 223 F3d 229, 232 (CA 3, 2000) (under the UCC). See also *Morof v United Missouri Bank, Warsaw*, 391 Fed Appx 534, 537 (CA 6, 2010); *Distributor Label Products, Inc v Fleet Nat'l Bank*, 401 NJ Super 345, 349; 950 A2d 939 (2008).⁴ MCL 440.3406(1) creates an exception to the bank's duty to reimburse its customer for otherwise not "properly payable item[s]."

A person whose failure to exercise ordinary care substantially 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 bank must show (1) that it acted in "good faith," (2) while the customer's lack of "ordinary care" (3) "substantially contributed to" (4) "the making of a forged signature." "Good faith" is defined by the UCC as "honesty in fact and the observance of reasonable commercial standards of fair dealing." MCL 440.3103(1)(d). In determining whether a bank observed "reasonable commercial standards of fair dealing," we must consider the "fairness of [its] actions, rather than any negligence on its part." *Wachovia Bank, NA v Fed Reserve Bank of Richmond*, 338 F3d 318, 323 (CA 4, 2003). There is no argument or evidence that Fifth Third was unfair in its actions. Accordingly, we proceed as if Fifth Third acted in "good faith" when it paid the Washington-Countrywide check.

The UCC defines the "ordinary care" required of MBP as "observance of reasonable commercial standards, prevailing in the area in which the person is located, with respect to the business in which the person is engaged." MCL 440.3103(1)(g). While we disagree with the trial court's reasoning, we agree with its conclusion that MBP acted with ordinary care and was not precluded from seeking reimbursement under the UCC.

⁴ As most states have adopted the model UCC with only slight stylistic changes, it is useful to review their interpretations and applications of various UCC provisions. See, e.g., *Baker v DEC Int'l*, 458 Mich 247, 255; 580 NW2d 894 (1998); *Power Press Sales Co v MSI Battle Creek Stamping*, 238 Mich App 173, 180; 604 NW2d 772 (1999).

Fifth Third accused MBP of negligently mailing the subject check directly to its insured rather than to the lien holder that was allegedly entitled to the entirety of the proceeds. The trial court accepted as true MBP's assertion that it was contractually bound to mail the check directly to its insured and to include its insured as a joint payee on the check. As MBP failed to present the insurance policy on the record neither the trial court nor this Court could conclude as a matter of law that MBP acted in accordance with its contractual duties. However, Fifth Third presented no evidence that MBP's procedure of mailing jointly payable checks directly to its insured amounted to a "failure to exercise ordinary care." To invoke comparative negligence principles, Fifth Third was required to create a genuine issue of material fact that the prevailing practice in the homeowner's insurance industry is to exclude the insured as a named payee and mail those checks directly to the creditor, rather than the insured, and that such a practice is a reasonable commercial standard. Absent any attempt by Fifth Third to meet its evidentiary burden, the trial court properly denied its motion for summary disposition on the UCC claims.

As an alternate ground for reversal, National City contends that MBP acted negligently by failing to issue a "stop payment" order to void the Washington-Countrywide check.⁵ Washington waited five months to deposit the subject check into her National City account. In the meantime, Washington obtained counsel and objected to the inclusion of a joint payee on a \$325.00 check for contracting work. For unspecified reasons, MBP subsequently notified Fifth Third to stop payment on the \$325.00 check. Washington's counsel also challenged "the inclusion of the T & C Credit Union" as a payee on the Washington-Countrywide check as "a breach of the policy."

MBP conceded in its amended complaint that "[b]etween September 22, 2006 [the date of the insurance settlement] and February 16, 2007, Countrywide . . . frequently inquired regarding the status of payment on the claim as it was [a] loss payee under the policy." MBP has not conceded, and neither Fifth Third nor National City presented any evidence, that MBP should have prejudged Washington as a fraud risk. Rather, there appears a question of fact whether MBP simply believed that Washington's counsel would resolve the conflict with Countrywide before negotiating the check. Accordingly, there would be no reason for MBP to preemptively stop payment on the check. Viewed in the light most favorable to MBP, this evidence is insufficient to support negligence on MBP's part or to warrant judgment as a matter of law.

Fifth Third further challenges the trial court's failure to consider its alternate defense under the UCC—that the check proceeds reached the intended payee.

[T]he intended-payee defense provides that a drawee bank is not liable to the drawer of a check for an improper payment if (1) the proceeds of the check reach the person the drawer intended to receive them and (2) the drawer suffers no loss proximately caused by the drawee's improper payment. This defense is intended to prevent the unjust enrichment of the drawer. [*Pamar*, 228 Mich App at 737 (internal citations omitted).]

⁵ MCL 440.4403 permits a customer to "stop payment of any item drawn on the costumer's account."

The intended-payee defense does not protect Fifth Third in this case. The proceeds of the original Washington-Countrywide check did not reach their intended payee. The check was specifically made jointly payable to three intended payees. Yet, only one payee received the proceeds. MBP suffered a loss as it was required to issue a second check to pay off Countrywide's insured lien. MBP's loss was proximately caused by Fifth Third's wrongful payment of the check; absent the wrongful payment, MBP would not have been required to issue a second check.

B. Liability Under the Account Contract

While Fifth Third would be liable to reimburse MBP's account under the UCC, the parties' actions are also governed by the account contract entitled "The Rules & Regulations Applicable To All Fifth Third Accounts And Cards."⁶ The UCC allows individuals to contractually alter UCC requirements. MCL 440.1102(3); MCL 440.4103(1). The right to alter UCC provisions is necessary due to "the technical complexity of the field of bank collections, the enormous number of items handled by banks, . . . the certainty of changing conditions and the possibility of developing improved methods of collection to speed the process." MCL 440.4103, comment 1. The only limit on the parties' ability to alter UCC requirements is that they "cannot disclaim a bank's responsibility for its lack of good faith or failure to exercise ordinary care or limit the measure of damages for the lack or failure." MCL 440.4013(1). The parties may, however, contractually define the standards of good faith and ordinary care. *Id.*

Of relevance to the current case, the contract between Fifth Third and MBP provides:

27. Customer agrees that Bank can disregard any information on an item other than MICR encoded data, amount, signature of drawer and identity of payee.

* * *

29. Customer agrees to carefully examine and reconcile account statements. . . . Customer agrees that Bank will not be liable if Customer fails to exercise ordinary care in examining their statements. Customer will notify Bank of any discrepancy with any item, including, but not limited to, deposits, withdrawals, and checks, within thirty (30) days of the statement mailing or made available to customer date. *Customer will also notify Bank of any forgery or alteration of any item within thirty (30) days of the statement mailing or made available to customer date. If notification is not received, Bank will have no liability for such item(s).* Customer also agrees that Bank will have no liability if the item is forged, altered or counterfeited in such manner that the fraud could not be detected by a reasonable person

⁶ We note that National City contends on appeal that the Fifth Third contract contains an Ohio choice of law provision. However, National City has never applied Ohio law to this case. In any event, the choice of law provision does not appear in the relevant clause "Applicable to all Accounts"; it appears in a separate clause applicable only to "card agreements."

30. Customer assumes liability for any improper endorsements *by payees*.
[Emphasis added.]

The parties' contract reflects the reality that MBP is in the best position to detect fraud on its account and avoid loss. Fifth Third provides daily and monthly statements to MBP from which MBP can detect any abnormal activity. If MBP fails to use ordinary care to review the statements and notify Fifth Third within 30 days of any discrepancy or forgery, the burden of loss is contractually shifted to MBP. The contract also creates a strict assumption of liability by MBP for "any improper endorsements by payees."

Dismissal of MBP's reimbursement claim was required by ¶ 30's strict assumption of liability provision. The trial court erroneously concluded that the contractual provision only applies when a named payee physically places pen to paper to endorse a check. We cannot accept this tenuous interpretation of the Fifth Third account contract. The trial court disregarded that the named payee can improperly endorse a check by granting an agent unfettered license to forge a third-party's signature on the payee's/principal's behalf.

Despite the lack of evidence regarding who actually took the subject check to National City for deposit, the trial court accepted as true that Powell signed the endorsements. The court ruled that, because Powell was not a named payee, ¶ 30 was inapplicable. Even assuming that Powell negotiated the check at National City, we find that the check bore an endorsement by a payee. It is undisputed that Powell was acting under a power of attorney granted by Washington. "Generally, a power of attorney is a written instrument by which a principal authorizes and appoints an agent . . . and delegates to the agent the power to perform acts on behalf of, in place of, and instead of the principal." *Persinger v Holst*, 248 Mich App 499, 530; 639 NE2d 594 (2001). MBP, National City and Fifth Third never asserted that Powell acted beyond the scope of his power of attorney by signing Washington's endorsement on the subject check. Accepting Powell's authority under the power of attorney, his endorsement on behalf of Washington was an endorsement, improper or not, *by a payee*. An endorsement made by an agent or representative on a check serves to bind a principal under the UCC. MCL 440.3401(1) and comment 1. The agent is permitted to sign in his or her own name or that of the principal. MCL 440.3402(1). Therefore, when Powell signed the check with Washington's name, he made an "endorsement[] by [a] payee[]," and MBP assumed strict liability if the endorsement was ultimately "improper."

In addition, MBP's negligence after the Washington-Countrywide check was negotiated precluded relief under the account contract. Even though MBP likely had insufficient information to preemptively stop payment on the subject check, it certainly had enough information *after* the check had been negotiated to alert its bank. MBP failed to "carefully examine and reconcile account statements" as required in the contract and thereby absolved Fifth Third of liability. Fifth Third notified MBP in both the daily and monthly account statements that the original Washington-Countrywide check had been cashed on February 16, 2007. On appeal, MBP asserts, "After the check was presented and honored, Countrywide . . . contacted [MBP] with regard to its interest in the original settlement check and it was discovered that Countrywide did not receive any funds." MBP then mailed a duplicate check directly to Countrywide on March 31, 2007. The record evidence is clear that MBP was aware of some "suspicious" activity within the 30-day notice period. MBP was on notice from the bank statements that the subject check had been negotiated and from Countrywide's subsequent

correspondence that it had not been paid. If MBP required more proof of an account discrepancy, it could have exercised its contractual right to request Fifth Third's electronic copy of the check, which included an image of the endorsements.⁷ MBP would thereby discover the obvious forgery made by its insured or Powell acting as her power of attorney. The bank statements provided sufficient information to arouse MBP's suspicions of forgery or other skulduggery and included more information than required under the UCC. See MCL 440.4406(1) (statement must include "item number, amount, and date of payment"). As MBP failed to notify Fifth Third of the discrepancy or forgery until approximately 27 months after the February 2007 statement date, Fifth Third would also have "no liability" under ¶ 29 of the contract.

MBP's challenges to the propriety of these contractual provisions lack merit. While a bank customer's strict assumption of liability for improper endorsements contemplated in ¶ 30 seems severe, it is supportable in the reality of the banking industry. As noted by the Third Circuit Court of Appeals, "it would be a mistake to require drawee banks to review payee indorsements . . ." *The Guardian Life Ins Co*, 223 F3d at 233. As our population and economy have expanded, "the volume of checks handled daily by banks" has exploded. *Id.* To accommodate the growth while containing costs, banks have necessarily moved to automated systems that cannot review the authenticity or accuracy of payee endorsements. *Id.* Banks instead review a random sampling or an amount-specific selection of checks to gauge the rate of improper endorsements. *Id.* As noted by the Third Circuit:

"Increasingly banks are little more than high-speed mechanical sorters of checks, and drawers or other parties are in much better positions to prevent losses. In such circumstances we should resist the temptation to put the loss on the more wealthy but less culpable and less capable risk avoider." [*Id.* at 234, quoting 1 White & Summers, Uniform Commercial Code (3d ed, 1988), p 805.]

MBP also implies that Fifth Third's 30-day notice period was too short to be effective. MCL 440.4406(3) requires a bank customer to "exercise reasonable promptness in examining the statement" and to "promptly notify the bank" of an alteration or forgery. Other jurisdictions have resoundingly approved of contractually shortened notice provisions, like the current 30-day period. The general consensus in federal and state courts is that account holders who fail to notify a bank of an account discrepancy within the contractually agreed-upon time period lose

⁷ The account contract provides:

32. Customer may not, in all cases, get return of their original deposit account documents, including checks (items). Bank may add images of Customer's items to its electronic document storage system. After doing so, Bank may destroy original items. Any copy from that system will be acceptable for all purposes. Customer may obtain a copy of their deposit account items upon request.

See also MCL 440.4406(2) (the bank must maintain legible copies of deposited checks and provide that copy to its customer upon request).

the right to reimbursement. See, e.g., *Graves v Wachovia Bank*, 607 F Supp 2d 1277, 1280 (MD Ala, 2009) (40-day notice period); *Bank of America, NA v Putnal Seed & Grain, Inc*, 965 So2d 300, 301-302 (Fla App, 2007) (60-day notice period); *Parent Teacher Assoc v Manufacturers Hanover Trust Co*, 138 Misc 2d 289, 293; 524 NYS2d 336 (1998) (14-day notice period); *Crescent Women's Medical Group, Inc v Keycorp*, 127 Ohio Misc 2d 93, 95-96; 806 NE2d 201 (2003); *Nat'l Title Ins Corp Agency v First Union Nat'l Bank*, 263 Va 355, 362; 559 SE2d 668 (2002) (60-day notice period); *Borowski v Firststar Bank of Milwaukee, NA*, 217 Wis 2d 565, 574-575; 579 NW2d 247 (1998) (14-day notice period). Fifth Third's designation of a 30-day notice period comports with the UCC's prescribed need for "reasonable promptness" and would find approval in many, if not most, of our sister states.

In summary, the trial court correctly determined that Fifth Third would have been liable to reimburse MBP under the UCC as the bank improperly deducted funds to pay a check bearing obviously forged endorsements. Yet, Fifth Third's statutory liability was eliminated by the parties' contractual agreement that MBP would bear the loss incurred from "improper endorsements by payees" and would provide notice of any discrepancies within 30 days of the relevant account statement. The subject check bore such an improper endorsement and MBP did not provide the required notice, precluding its claim for reimbursement of the \$69,559.06 check proceeds. National City's liability on Fifth Third's warranty claim is limited to the "amount paid" on the subject check. As Fifth Third is no longer liable to MBP, National City's duty to indemnify Fifth Third also disappears.

Affirmed in part, reversed in part and remanded for entry of judgment consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell