

Check Scams That Target Lawyers

How Check Scams Work and How to Avoid a Loss

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By **Bob Luttrell**

Numbers of lawyers, and the general public, are being targeted with a scam that goes something like this: A message, usually e-mail, arrives requesting services or wanting to buy goods. The sender usually checks out in an Internet search. (Web sites aren't that hard to set up.) At some point a check arrives in what appears to be a legitimate business transaction. The check may be in response to a demand letter from a lawyer in the payment of a claim or as a retainer to pay for services in advance or for the purchase price of a car. You get the picture. The check looks and feels like a real check, maybe even a cashier's check. Usually, it purports to be issued by (or drawn on) a bank at a remote location with no local branches.



Almost immediately after the check arrives, there is a request to send part of the funds by wire transfer. The client may want the amount collected less fees. The client may have overpaid the retainer and want a refund. The car buyer may have paid for shipment and now says they have taken care of this expense directly and would like a refund.

Once the funds are wired, they are almost impossible to recover. UCC §4A-211. The wire is usually to an account in another country. And, in any event, the funds are typically again wired to another institution out of reach as soon as they hit the designated bank. So, the victim is left to hope that the check is "good." It never is.

These scams work because of a basic misunderstanding of how checks are collected and when the funds represented by those checks are "good," i.e. they cannot be reclaimed. Because of complaints that deposits were not available for use in a timely manner, Congress adopted the Expedited Funds Availability Act (12 USC §4001-4010). The Federal Reserve Board adopted Regulation CC (12 CFR §229.1 et seq.) to implement it. Among other things, they mandate the latest time when funds of various types of deposits must be "made available" to the depositors. Funds from cashier's checks must be "made available" within two business days. Many banks have adopted shorter "availability schedules." These schedules do not bear any relationship to how long it may take to discover that a check will not be paid.

Checks that are "sent through clearing" (all deposited checks) do not have positive confirmation of payment. The funds become "available" for withdrawal based on the bank's availability schedule (with the maximum limit governed by FRB Reg CC). "Available" funds do not equal collected funds. A check can be returned after the funds have been "made available." Having the funds "available" is not the same as knowing that the check has paid. If a check is sent through clearing, you get a negative confirmation that the check is not paid when it is returned. This will generally take three to four days at best. The check is handled electronically. Scammers gain additional time by using a fake bank routing number. Then, the counterfeit check bounces around in the clearing system until it kicks out to get human attention. In those cases, the check can take a week or more to find its way back to your account.

Numerous time frames are thrown out about when it is safe to "assume" that a check is "good:" "midnight deadline," 11 days or a week. There really is no time after which it is safe to assume that the check has paid. (Obviously the longer the time, the more likely it has paid. But that is a rule of probability, not a rule of law.)

The best practice to be safe is to go to your bank and ask to send the check for "collection." Ninety percent of the tellers may not know what you mean. This is done all the time with oil and gas lease drafts. UCC 4-501. When you finally find someone who does, the check will go out of the bank under a "collection letter," not "through clearing" under a "cash letter." Then you will receive positive confirmation some days later that the check has been paid. As you would expect, there is a fee for this special handling.

Some people want to talk to the bank and rely on what the bank "said." What the bank "says" may not be what the customer "hears." When talking to the bank, either the depository or the payor, the customer must listen carefully to the "bank speak." All the payor bank will generally say is that "a check in that

amount will clear at this time," not that "we will pay your check when presented." Or the depository bank will say that the "funds will be available on," not that "these funds are good." Any commitment that a particular check represents "good" funds and will be paid according to its terms should be in writing. That will clear up the ambiguity. I have never seen a bank give such an assurance.

To recap, the standard check collection process contains no positive feedback that a check is "good." If a depositor wants to know that a check has paid, the check should be sent by the bank "for collection." Then the collection is outside the normal system and a positive response "up or down," as they say in government, is received. There are lots of ways for the bad guys to trick the regular check collection system so that a check may bounce around for days or weeks before it finds its way back. If the money is gone, the depositor is liable. See UCC §3-415 and the bank's deposit account agreement.

As a further aside and to keep you up at night, the way some of these scams work is to alter a legitimate check. In such a case, a claim against the depositor for breach of warranty can exist for as long as three years. UCC §§4-111 & 4-207(a)(3). Altered checks are usually, but not always, caught within about 60 days. But that is well outside the time that lawyers would be required to forward client funds. MRPC Rule 1.15(d). This warranty liability cannot be disclaimed by a non-recourse endorsement. UCC §4-207(b). It may be possible to disclaim this warranty in the collection letter by sending the check "without recourse and disclaiming any warranties created by the contract of endorsement," but that is an open question.

In the days of a flat world it may be increasingly difficult, but the way for lawyers to keep out of trouble is to know their client.

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OKLAHOMA CITY
TENTH FLOOR
TWO LEADERSHIP SQUARE
OKLAHOMA CITY, OK 73102-7103
(405) 235-9621 office • (405) 235-0439 fax

TULSA
500 ONEOK PLAZA
100 WEST 5TH STREET
TULSA, OK 74103
(918) 587-0000 office • (918) 599-9317 fax