DEFENDER
THE NADC NEWSLETTER

Are Cashier's Checks and Wire Transfers Really a Cash Equivalent?

Martin G. Margolis

Imagine the following scenario. A customer enters your client's dealership to purchase a vehicle. Successful negotiations result in the sale of a vehicle for which the customer pays the full purchase price with a cashier's check drawn on a New Jersey bank. The dealership readily accepts this form of payment and releases the vehicle to the customer, who drives away. The title work is processed. Several days later, the dealer receives notification that a "stop payment" order was placed on the cashier's check by the bank that issued it. The dealer is left "holding the bag" with no payment, no car, no title and no recourse other than the prospect of extensive litigation.

Most (if not all) motor vehicle dealers think this scenario is improbable; after all, everyone believes that cashier's checks are as good as cash! Bayway Auto, Inc., a New Jersey motor vehicle dealership ("Bayway") discovered, the hard way, that certain New Jersey banks (and undoubtedly hosts of others all over the nation) do not view cashier's checks as cash equivalents. Late in 2003, Commerce Bank, N.A. ("Commerce") (and two other banks at Commerce's behest) issued stop payment orders on certain cashier's checks and wire transfers and, by so doing, effectively put Bayway out of business. It was only after litigation and the

continued on page 2

Martin G. Margolis

Sidebar

Contents:

Score One for Dealers Under Federal Wage-Hour Law

Ninth Circuit Says Overtime Exemption Applicable to F&I Managers

D. Gerald Coker

While the Ninth Circuit Court of Appeals is not known for its employer-friendly decisions under federal labor and employment statutes, the court got it right in *Gieg v. DRR, Inc., dba Courtesy Ford* (407 F. 3d 1038 (9th Cir. 2005)). The Ninth Circuit reversed three decisions from district courts in Washington and Oregon in favor of employees who sued dealerships for unpaid overtime premium pay under the Fair Labor Standards Act (FLSA) (29 U.S.C. § 201, *et seq.*)

The Court of Appeals held that finance and insurance "managers" were subject to the overtime exemption in Section 7(i) of the FLSA. This exemption is available for an employee if: (1) the dealership is a "retail establishment," meaning that 75% of its dollar volume in sales of goods or services, or both, are recognized as retail for the automobile industry and not resale, (i.e., not resold by the buyer in its original form or as a component of another vehicle); (2) the employee's total compensation is in excess of one and one-half times the applicable minimum wage (i.e., more than $7.73 per hour at

continued on page 3

D. Gerald Coker

are cashier checks... from page 1

appellate process were exhausted that the court recently put in writing what business entities across the state have believed all along—banks cannot stop payment on (or reverse) instruments issued against its own funds (i.e., cashier's checks and wire transfers).

On May 18, 2005, the Appellate Division of the Superior Court of New Jersey (the second highest court in the state) issued its published decision in the matter of *Pierre Parks, Bayway Auto, Inc. and Platinum Imports, Inc. v. Commerce Bank, N.A., Fleet Bank and Wachovia Bank, N.A.* (377 N.J. Super. 378) "Bayway") (litigation prosecuted for the plaintiffs by The Margolis Law Firm). The decision will have a far reaching and significant impact on the conduct of business in the state of New Jersey (and, undoubtedly, elsewhere) which directly impacts the manner in which motor vehicle dealerships conduct business. The court regarded the issue as one of first impression in New Jersey. In this appeal, the court was called upon to decide whether a bank may stop payment on its cashier's checks or reverse its wire transfers.

Commerce's fund recovery actions were prompted by the insufficiency of funds in its customer's account which was discovered by Commerce after its issuance of the certified instruments. The sum total of the cashier's checks and wire transfers exceeded $384,000. After its consideration of the record and relevant sources of law, the court held that, under the circumstances depicted, a bank does not have the legal authority to unilaterally stop payment on a cashier's check or wire transfer or, for that matter, attempt to reverse a wire transfer. The reasoning of the court was essentially this: a cashier's check carries the imprimatur of the financial institution that issues it and the instrument is viewed in the commercial marketplace as the functional equivalent of cash. The court went on to state that the public also perceives wire transfers as electronic conveyances of cash, making funds disbursed in this fashion immediately available to their intended recipient. The court observed that as our modern system of commerce becomes ever more dependent upon electronic transactions, it considers the preservation of the public's confidence in these types of financial instruments to be the overarching public policy principle guiding the court's review of the Bayway matter. The court further observed that this public policy is clearly reflected in the federal regulations it cited.

There was no factual dispute in Bayway with respect to the circumstances. The parties stipulated as to the chronology and the banks acknowledged the recovery procedure employed. Once Commerce determined that it had issued cashier's checks and effectuated wire transfers on its customer's accounts, thereafter learning that the funds in its customer's accounts were insufficient to cover what Commerce had done days earlier, it perceived it had a right to recoup its monies. In its efforts to do so, Commerce simply stopped payment on the cashier's checks, attempted a reversal of the wire transfers and, in fact, went as far as to trace the disposition of its certified transmissions to other banks. Commerce was successful in requesting that the recipient banks freeze the funds based upon Commerce's proposed indemnification of the recipient banks. Effectively, Commerce clogged the pipeline for nearly all of its certified funds.

Plaintiffs, Pierre Parks, Bayway Auto, Inc. and Platinum Imports, Inc., filed an Order to Show Cause seeking a mandatory injunction compelling Commerce (and the other involved banks who complied with Commerce's wishes to render the funds unavailable to the plaintiffs) to pay over the certified funds. Initially, the trial court refused to grant the preliminary injunction and, instead, scheduled a plenary hearing. After emergent discovery and several days of hearings and testimony from a number of witnesses, the Court concluded that Commerce lacked the legal authority to stop payment on its cashier's checks and wire transfers. The trial court accordingly enjoined Commerce from dishonoring those instruments. The Appellate Court observed that, by adopting the Expedited Funds Availability Act (12 U.S.C §§ 4001-4010), Congress intended "to accelerate the availability of funds to bank depositors and to improve the Nation's [sic] check payment system."

The court further observed that the regulatory scheme recognizes the irrevocable characteristics of both a cashier's check and other forms of electronic payments such as wire transfers. Because the Federal Reserve Board of Governors (FRBG) defined these instruments in terms of their similarity to cash, the court found that it is entirely reasonable for the marketplace to treat them as the functional equivalents to cash.

The court went on to observe that, when a bank issues a cashier's check, it becomes primarily obligated to pay the amount represented upon presentation. Thus, "insufficiency of funds in the customer's account in no way diminishes the bank's primary obligation to honor the instrument when presented for payment, because the funds supporting the cashier's check come from the bank itself." The court found further support in its reference to the applicable sections of the Uniform Commercial Code. The court characterized as misplaced, Commerce's reliance on a federal regulation which confers upon a bank the right to charge back funds it made available to its customer for electronic payments (in the form of wire transfers and cashier's checks) for which the bank had not, in fact, received good funds from its customer. The court determined that those charge back regulations cited to were irrelevant to the issues raised in Bayway and, in fact, construed the regulation as one which authorizes a bank to recoup funds lost in connection with the release of uncollected funds by "charging back" or debiting its customer's account and not otherwise. The court found that said regulation does not authorize the bank to renege on its primary obligations by stopping payment on its cashier's checks or wire transfers, observing that once the bank issues an official cashier's check, it is not merely acting as a drawee or a depository for some-

continued on page 5

President's Letter

Jonathan P. Harvey

Keeping an organization vital and providing value for members is challenging, exciting and rarely accomplished, particularly with a group of lawyers whose training is to assume nothing, question everything and doubt success until it is etched in granite, and then, revel in it for only an instant. That training helps our clients prepare for the worst, but tends to cast us in the glass half empty column. Well, I am here to tell you that as far as I am concerned, the NADC glass is more than half full. But, to be consistent, I do not assume we will be here a year from now, I question whether we will have a sufficient membership base, and although there is consensus that this is the most successful start-up organization of lawyers in anyone's memory, for the life of me, I am trying to figure out what we have done for you lately.

For example, although one hundred members of NADC gathered in Atlanta for our first national conference, there were over 160 who did not attend. It is to those I address this letter, and them I encourage to become more active. The list serve is fast becoming the preeminent research and networking tool in the industry, providing instant access to hundreds of dealer lawyers throughout the country, and allowing individual response, if desired. Combined with the Forum, the website is the place to go when you have a dealer issue. Make it a point to go there frequently, make it a point to give us criticism when you can, and contact me if you have interest in becoming involved in the operation of this organization.

In connection with value, the Board met in Chicago on June 2 and authorized the planning of a second conference for the Fall, the format of which will be more concentrated and have more depth (in response to comments received from those who attended in Atlanta). As soon as the proposed agenda is developed, we will share it with the membership, which is now up to 280.

Drive safely and remember to smell the roses.

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Score One... From page 1

the present $5.15 per hour minimum wage) in weeks in which more than 40 hours are worked; and (3) the employee receives more than one-half of his or her earnings for a representative period (not less than one month) from commissions. The Code of Federal Regulations classifies automobile dealerships as businesses that may be recognized as a retail establishment for the purposes of section 7(i). The section 7(i) exemption is from *overtime* only, and the dealership must maintain an accurate record of the employee's hours worked and pay at least the minimum wage for each hour worked, subject to (2) above.

The plaintiffs in *Gieg* performed typical F&I department duties such as completing finance and DMV forms, selling insurance policies and extended service contracts, and persuading customers to obtain financing from the manufacturer's financing division or other institutions. They were paid almost exclusively by commissions on what they sold. The Ninth Circuit noted the District Court's holding that utilizing the section 7(i) exemption "requires a clear showing that more than half of an employee's compensation represents commissions on *retail* goods and services, and not *all* goods and services as long as they are sold by a retail or service establishment." (407 F. 3d at 1043) Dealerships and their counsel understandably were very concerned about this because it effectively – and inappropriately – added another requirement to section 7(i), one which dealerships cannot meet when it comes to F&I producers, many

continued on Page 4

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Score One... From page 3

of whom are highly compensated and work well in excess of 40 hours per week.

According to the Ninth Circuit, the policy justification for the section 7(i) exemption "appears to have more to do with the employee's compensation than with the exact nature of the goods or services sold. The regulation [29 CFR § 779.414] exempts employers who employ well-compensated employees earning commissions in 'big ticket' departments from paying overtime." (407 F. 3d at 1046) The court then framed the key issue on appeal: "Is the § 207(i) exemption limited to employees earning commissions on *retail* goods or services or does it apply more broadly to all employees earning commissions on goods and services?" (*Id*. at 1049) Responding to the appellees' contention that they did not qualify for the exemption because they are not employed in activities that are within the scope of the dealerships' exempt retail business, the court examined 29 CFR § 779.308, which provides:

> In order to meet the requirement of actual employment 'by' the establishment, an employee, whether performing his duties inside or outside the establishment, must be employed by his employer in the work of the exempt establishment itself in activities within the scope of its exempt business. [Citations omitted] (*Id*. at 1050)

The court noted that in the cases interpreting this provision cited in section 779.308, "it was held that the employee or employees in question were not 'employed . . . in the work of the exempt establishment itself in activities within the scope of its exempt business' and hence were not excluded from FLSA coverage;" however, each case "involved an employer engaged in a business endeavor that was *truly* separate from, and not at all related to, the exempt business of the establishment." (*Id*.) Contrasting that circumstance with the facts in the case before it, the court found that the dealerships were single retail or service establishments which did not maintain separate and distinct

continued on Page 6

Resource Corner

Rob Cohen

For those of you whose practice areas encompass the alphabet soup (i.e., Regulations B, M, Z, etc.) as well as those who defend dealers in run-of-the-mill consumer complaints, there are a series of publications that should be an essential part of your resource library. The National Consumer Law Center (NCLC) produces several titles as part of its Consumer Credit and Sales Legal Practice Series which devote significant content to auto sales and finance issues. Within this series, there are various individual titles such as Automobile Fraud, Truth in Lending, Repossessions and Foreclosures, Fair Credit Reporting, Credit Discrimination, and the Cost of Credit. There are many other titles dealing with such things as bankruptcy, consumer warranties, and class action litigation, to name just a few.

Each publication is exceptionally well documented and provides a consumer lawyer's approach to many of the compliance issues faced by dealers. Granted, it is somewhat slanted against dealers at times. However, this slant can actually benefit dealers. Dealer-friendly interpretations found within this well-respected publication (and there are many) tend to have considerable impact on opposing counsel. The information and analyses are simply top notch, particularly the more technical aspects of regulations such as those associated with the Truth In Lending Act.

I have recently relied upon the Truth In Lending publication to help answer a client's question regarding the backdating of contracts. Backdating has become quite the hot topic in light of the *Rucker v. Sheehy Alexandria* (244 F.Supp.2d 618) decision back in 2003. As many of you may recall, that decision send shock waves through the auto finance industry due to its conclusion that backdating a retail installment sale contract at the time of a re-write resulted in a Truth In Lending violation. The court's reasoning was that since TILA requires an accurate APR disclosure and a re-written agreement is consummated at the time of the re-write, the APR as disclosed on a backdated contract was understated. I am oversimplifying the decision in consideration of brevity, however, that is the basic idea.

At any rate, my client asked for a formula to calculate the actual APR when a contract is backdated (assuming it differs from the stated APR). The client was interested in determining whether their backdated deals could come in under the 0.125% tolerance threshold that TILA allows. I was happy to learn that not only does the NCLC's Truth In Lending publication discuss in great detail the tolerance issue, but it also comes with a CD that contains two software programs that can be used to calculate APRs. The software allows you to enter variables such as amount financed, payment, term, and days to first payment and then calculates the corresponding APR.

Assuming the *Rucker* court is the prevailing view, by shortening the days to the first payment, this allowed me to calculate APRs on backdated contracts. To explain, let's say a customer buys a car on June 1 and his first payment is July 1. Then, on June 10 the deal is re-written but the re-written contract is still dated June 1 and the first payment is still due on July 1. Now, instead of there being 30 days until the first payment, there are only 21. Plugging all the variables into the NCLC software yields an actual APR.

NCLC is a nonprofit corporation and its publications can be ordered online from www.consumerlaw.org.

Do you have a key legal resource that you would like to share? If so, send an email to rob.cohen@autoadvisory.com.

are cashier checks... from page 2

one else's money but, in fact, the bank is making an affirmative commitment to pledge its own assets with regard to the payment of such items.

Of greater significance is the trial court's grant of injunctive relief based upon the New Jersey four-prong test that such injunctions shall be granted only when necessary to prevent irreparable harm, the legal rights underlying a moving party's claim are settled, the material facts are uncontroverted and a relative hardship analysis favors the moving party. As the trial judge found, and the Appellate Division confirmed, there was no question that Bayway would suffer irreparable harm and that the transactions involved were a part of on-going commercial activities customarily carried on by Bayway as essential parts of its business model. The court concluded that permitting Commerce to dishonor its instruments would significantly undermine Bayway's economic relationships and that such a loss is not susceptible to monetary quantification.

Of paramount significance is the court's observation that in assessing irreparable harm, a court must also consider how the bank's actions affect the public interest. Anyone who has ever used a computer to pay a bill, transfer funds or ascertain the status of a deposit, the court said, can attest that electronic banking is now a routine part of the services offered by today's banks. Indeed, the thrust of the regulations pursuant to the Expedited Funds Availability Act reflect a clear preoccupation with regulating this aspect of modern banking and, accordingly enjoining Commerce from dishonoring its cashier's checks and wire transfers advances the public interests embodied in the subject federal regulations. The court determined that the relative hardship occasioned by the injunction, if any, is best borne by the defendant banks.

Thanks to this appellate court's wise decision, such transactions as experienced here and in your clients' dealerships daily should now proceed without incident and titles may be transferred expeditiously. You should, of course, consult the applicable law construction in your venue.

A copy of the Parks decision may be obtained by e-mailing Mr. Margolis at mgmargollis@mgm-lawfirm.com.

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Score One... From page 4

business operations on their premises in which the F&I employees were engaged. "Rather, the duties performed by the finance officers were an integral, and integrated, part of their employer's auto dealership operations as a whole." (*Id*. at 1052) (quoting from the Secretary of Labor's amicus brief).

The importance of this case was magnified because the Ninth Circuit previously had held that F&I salespersons did not qualify for the "salesman" exemption from overtime in section 13(b)(10) of the FLSA because that provision "plainly applies only to the sales and servicing of automobiles" and not to "commissions based on insurance sales or the procurement of financing." (*Gieg v. Howarth*, 244 F. 3d 775, 776 (9th Cir. 2001)) Moreover, even in situations where he or she receives the required salary of at least $455 per week, the typical F&I producer does not meet the duties tests in order to qualify for the executive or administrative exemption from the overtime, minimum wage and timekeeping provisions of the FLSA. Therefore, as far as F&I salespersons are concerned, section 7(i) was the only remaining overtime exemption available for dealerships in most cases.

While *Gieg v. DRR, Inc*. is good news for dealerships, practitioners should be mindful of the fact that some states have wage and hour laws which limit the availability of some of the FLSA overtime exemptions. Be sure to check state law before rendering wage-hour advice to your dealership clients. On a related note, while the 2004 regulations issued by the U.S. Department of Labor did not change the overtime exemptions for dealership employees who qualify as "salesmen, partsmen and mechanics" under section 13(b)(10) of the FLSA, dealerships should make sure that these exemptions are being applied only to those employees who qualify. For example, lubemen and painters are not considered to be "mechanics," although they may qualify for the section 7(i) overtime exemption if they are paid on a bona fide "flat rate" basis. Clients should be reminded that the Department of Labor can go back two years to find FLSA violations and three years if it is a "willful" violation.

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