



## Case Study

# Summary Judgment Highlights the Legalities of Positive Pay

SecurePay™

Positive Pay Implementation Software

**Wells Fargo & Company** (NYSE: WFC) is a nationwide, diversified, community-based financial services company with \$1.2 trillion in assets. Founded in 1852 and headquartered in San Francisco, Wells Fargo provides banking, insurance, investments, mortgage, and consumer and commercial finance through more than 9,000 stores, 12,000 ATMs, the Internet (wellsfargo.com and wachovia.com), and other distribution channels across North America and internationally.

In a summary judgment rendered July 14, 2010 by the U.S. District Court of Minnesota, Wachovia Bank was found not liable for a fraudulently-altered check drawn on the bank, because the bank's client had failed to implement Positive Pay services recommended by Wachovia Bank which would have prevented payment of the check.

AP Technology aided the defense on the case, and SecurePay software was cited as a low-cost Positive Pay implementation option. It was established that Wachovia acted reasonably in requiring the client to utilize Positive Pay from both an implementation and total-cost-of-ownership perspective.

### Check Fraud Case Background

On December 1, 2005, a Wachovia Bank client issued a check in the amount of \$153,856.46. Criminals stole the check out of the mail, changed the name of the payee, and convinced the payee to endorse the check and deposit it into his account at TCF Bank. The actual payee was a Protestant minister who had been duped by the fraudsters into believing he was helping a refugee family in South Africa.

The payee wired the money, allowing him to keep \$3,500 as a contribution. When TCF presented the check for payment to Wachovia Bank nothing prevented the transaction from being viewed as legitimate, and the client's account was debited \$153,856.46.

In January 2006, the bank's client detected and reported the fraud to Wachovia, demanding a refund to their account.

In a summary judgment rendered July 14, 2010 by the U.S. District Court of Minnesota, the Court found Wachovia not liable for payment, as payor bank, of the fraudulently-altered check, because the client had failed to implement fraud-detection products and services recommended by Wachovia Bank which would have prevented payment of the check.

### Grounds for the Legal Ruling

Court records show that the client contended that Wachovia should bear the loss because the altered check was not "properly payable" under Article 4-401(a) of the Uniform Commercial Code ("UCC"). If a bank charges a client's account for a check that is not properly payable (e.g. forged and therefore not authorized by the customer), a bank will ordinarily be held responsible for the client loss under Section 4-401(a) of the UCC.

However, this is merely a default rule. Banks and clients can agree to a different rule in the bank's depository agreement with the client, per Section 4-103(a) of the UCC. The requirement for the depository agreement, though, is that the agreement "cannot disclaim the responsibility of a bank for its lack of good faith or failure to exercise ordinary care." Wachovia disagreed with the client's claim of bank liability, citing that Wachovia's depository agreement clearly provided that if the client declined to implement Wachovia's "Positive Pay" fraud-deterrence program that the client could not hold Wachovia liable for subsequent check fraud losses.

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Innovative Payment Solutions

Court records show that the client acknowledged that Wachovia had made Positive Pay available to them and that their use of Positive Pay would have detected the fraudulently-altered check. However, the client argued that it was unreasonable for the Court to enforce Wachovia's depository agreement, because, among other things, it was too expensive to modify the client's computer to use Positive Pay and it was not technically feasible to implement Positive Pay on the client's computer. The Court rejected the client's arguments and found that the client could not hold Wachovia liable for the fraudulent check.

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Per William Mohrman, the attorney for Wachovia, "AP Technology was critical in evaluating and supporting the standard for determining the reasonableness of Wachovia's contract on the grounds of technical feasibility and cost of implementing Positive Pay. They clearly established the basis that Wachovia acted reasonably in requiring the client to utilize Positive Pay from both an implementation and total-cost-of-ownership perspective. AP Technology acknowledges that it is unfortunate that the client mistakenly thought it would cost tens of thousands of dollars to implement Positive Pay, when in fact Positive Pay could have been configured on existing computers for significantly less money, as the company sees this same scenario occurring many times over."

### **Positive Pay Check Fraud Prevention and the SecurePay Implementation Solution**

Positive Pay is a bank treasury service that enables a client to transmit pertinent information to its bank about every check they issue. When checks are presented for payment, discrepancies from the check-issue file are flagged for review and a client payment decision.

Wachovia recommends Positive Pay services and SecurePay implementation software to its clients as the most effective way to combat check fraud. Wachovia explains in court documents that unless a client implements a program such as Positive Pay, a bank has little chance of identifying a forged or altered check, because a bank has no way of knowing whether a particular check was actually issued by a client or whether a particular check was issued in the amount that appears on the check.

SecurePay software provided by AP Technology would have enabled Wachovia's client to implement Positive Pay services quick-

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ly and at minimal expense. SecurePay software is a universal software solution for Positive Pay that allows clients to convert check issue files to their bank's required format and automate transmission to the bank's Positive Pay system – creating a seamless and effortless process for fraud protection for any size business. SecurePay software is currently recommended to business clients by 7 of the 10 leading U.S. commercial banks as an easy and cost-effective way to begin using the bank's Positive Pay services. SecurePay is already helping thousands of businesses to connect to their banks for Positive Pay protection.

### **Conclusions**

It is clear from the court's decision that banks and businesses must both do their part to prevent check fraud and avoid losses. Banks that are exercising "ordinary care" by offering Positive Pay services and products such as SecurePay software to their clients, along with providing clear, specific language to customers in depository contracts, can potentially avoid liability for subsequent check fraud losses should a client choose to forego implementing prevention offerings. Businesses that cost-effectively implement Positive Pay using SecurePay software will not only meet bank requirements to avoid check fraud liability, they will also establish an effective partnership with their bank to stop check fraud and make the real criminal liable for their crime.

### **About AP Technology**

AP Technology, a private California Corporation founded in 1989, is a leading provider of secure payment solutions for financial institutions and corporations. AP Technology solutions enhance the connection between banks and their clients by automating secure check issuance and data exchange. These solutions include SecurePay Positive Pay file conversion software, the APSecure official check issuance system, and advanced banking e-HUB and secure communications technology. From our ground-breaking accomplishments in secure laser check printing to our bank cashier's check printing solutions, AP Technology has a long history of developing industry-leading innovations in MICR check printing and fraud prevention. 7 of the 10 leading U.S. commercial banks have Positive Pay partnerships with AP Technology. For more information, visit [www.aptechnology.com](http://www.aptechnology.com)

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