

## Bankruptcy Court Rules for Bank in Check Fraud Case



John McGarvey



Scott Rickman

M&P successfully represented Fifth Third Bank in an adversary proceeding styled *MERV Properties, LLC v. Eric Friedlander, et al.*

The decision broke new ground in Kentucky by setting criteria for a customer's report of unauthorized account activity in an account that is sufficient to toll the one-year statute of repose in KRS 355.4-406.

In granting the Bank's motion for summary judgment, the Court first adopted the 2014 holding of the Kentucky Supreme Court in *Mark D. Dean, P.S.C. v. Commonwealth Bank & Trust Company*, which found Articles 3 and 4 of the Uniform Commercial Code displace any common law remedies a customer has concerning the customer's checking account. (M&P also served as counsel for Commonwealth Bank in the *Dean* case.) The Court then expanded upon *Dean* by finding that expressions of general concern of unauthorized activity in an account do not rise to the level of a report of an unauthorized payment of a check. The notice to a bank must be specific as to the item that the customer alleges was paid without authorization. Taken together, the *Dean* and *MERV* cases provide several grounds for the defense of check fraud claims.

Citing *Dean*, the Court held that the Uniform Commercial Code as adopted by Kentucky "provides a comprehensive framework setting out the parties' respective duties and remedies governing the relationship between a bank and its account customers and provides specific remedies with respect to unauthorized activity in the customer's account. Here, MERV's claims for breach of contract and fraud are



displaced by the KUCC". Applying the rules of 4-406, the Court found that MERV failed to report certain specific checks that were allegedly unauthorized within one year after account statements concerning those checks were provided to it. MERV was consequently barred by the UCC from asserting a claim against Fifth Third based upon the payments.

Summary judgment was also granted to the Bank regarding certain deposits made into MERV's account. Applying the general statute of limitation, KRS 355.4-111, the Court found MERV failed to file suit against Fifth Third concerning those deposits within the three years prescribed by the UCC.

As a bonus, the Court also found that Fifth Third acted within its contractual rights with its customer in demanding payment, per the account agreement, for locating and copying items paid from the account and that withholding copies, absent payment, did not toll the reporting requirement of Article 4-406.

Scott T. Rickman  
John T. McGarvey

John T. McGarvey  
M. Deane Stewart  
John A. Majors  
Scott T. Rickman  
Thomas C. Fenton  
Scott White  
Garret B. Hannegan ■  
Melinda T. Sunderland  
Eric M. Jensen ●  
Molly E. Rose ♦  
Timothy A. Schenk  
Thomas W. Volk  
Thomas R. Coffey  
J. Morgan McGarvey  
Taylor M. Hamilton ♦  
Bradley S. Salyer ▲  
Sarah Mattingly

### OF COUNSEL

James I. Murray  
M. Thurman Senn  
C. Edward Hastie  
Clyde H. Foshee, Jr.  
Albert "Ben" Chandler  
P. Branden Gross

**Elmer E. Morgan**  
(1919-2010)

**David C. Pottinger**  
(1934-1999)

### KEY

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- Admitted IN Only
- Admitted KY, IN & OH
- ▲ Admitted KY, IN & TN

601 West Main Street  
Louisville, KY 40202  
502.589.2780 p.  
502.585.3498 f.

133 West Short Street  
Lexington, KY 40507  
859.253.1900 p.  
859.255.2038 f.

2501 Crossings Boulevard  
Bowling Green, KY 42104  
270.842.9005 p.  
502.560.6862 f.

100 E. Spring Street  
New Albany, IN 47150  
812.946.4386 p.

1005 S. Main Street, Suite 101  
Corbin, KY 40701  
606.528.3073 p.

# 2015 KY Legislative Update



Morgan McGarvey

Now that the dust has settled from the 2015 Legislative Session, it is time to take a look at some of the laws passed by the General Assembly. Despite being a short session, the legislature tackled several weighty issues and passed some significant new laws. Many consider the heroin bill to be the hallmark piece of legislation for this session. Laws were also passed to stabilize the road fund, expand domestic violence protections, and help make Kentucky

a leader in medical research. Unless a bill declared an emergency or contained a special effective date, the bills passed by the Kentucky General Assembly took effect on June 24, 2015.

Below is a summary of some of the legislation passed during the 2015 session:

- **Breeders' Cup:** HB 134 ensures that the Breeders' Cup race will run this year at Keeneland in Lexington. Kentucky is the cradle of the breeding industry and where the idea of the Breeders' Cup was conceived. The direct and indirect economic impact to the state should be about \$65 million.

- **Child Booster Seats:** HB 315 requires children who are less than eight years old and are between 40 and 57 inches in height to use booster seats. A child in a booster seat decreases the chance of that child getting injured in a crash by 45%.

- **Child Abuse:** SB 102 allows a child's death caused by intentional abuse to be considered first-degree manslaughter.

- **Child Protection:** SB 119 requires school administrators, teachers and others employed by a school district to receive child abuse and neglect prevention, recognition and reporting training.

- **Dating Violence:** HB 8 expands court protections to dating violence victims, as well as victims of sexual abuse and stalking.

- **Drug Abuse:** HB 24 restricts access to medicines that contain dextromethorphan (DM) to help prevent minors from abusing cough medicines.

- **DUI:** SB 133 expands the use of ignition interlocks for people caught driving under the influence of alcohol. Ignition interlocks are devices that will not let a vehicle start if alcohol is detected. Drunk driving deaths dropped 30% in other states that enacted ignition interlock laws.

- **Duty to Warn:** SB 51 codifies the long-standing principle that psychotherapists may break the psychotherapist-patient privilege and warn law enforcement and potential victims when they reasonably suspect imminent harm.

- **Emergency Responders:** SB 161 authorizes the Governor to lower the U.S. flag to half-staff on state buildings if a Kentucky emergency responder dies in the line of duty.

- **End-of-life Care:** SB 77 enables Kentuckians to determine their own end-of-life care.

- **Feeding the Hungry:** SB 55 allows game meat to be donated to not-for-profit organizations as long as the meat is properly field dressed and processed.

- **Heroin:** SB 192 increases prison sentences for heroin traffickers while expanding addiction treatment programs. The bill increases the availability of Naloxone, which reverses the effects of heroin overdose. A "Good Samaritan" provision in the bill allows people to report drug overdoses without the fear of criminal prosecution. The bill also allows local-governments to create a needle exchange program to reduce the spread of blood borne diseases.



- **Interstate Family Support Act:** SB 108 modernizes state law by putting Kentucky in line with the Uniform Interstate Family Support Act, thereby ensuring our state continues to receive close to \$45 million in child support funding from the federal government.

- **Medical Research Center:** HB 298 authorizes the construction of a state-of-the-art medical research center to target diseases prevalent in Kentucky, including cancer, diabetes and heart disease.

- **Newborn Health Screening:** SB 75 requires newborn health screenings to include checks for Krabbe Disease, an inherited disorder that affects the nervous system.

- **Road Fund:** HB 299 prevents the state gasoline tax from decreasing rapidly when crude oil prices drop. Gas tax proceeds are used to construct and repair state roads and bridges throughout the Commonwealth to allow cities and counties to take care of local roads.

## LEGISLATIVE UPDATE *(Continued)*

• **SOAR:** SB 168 establishes the Kentucky Appalachian Regional Development Fund as a vehicle for Shaping Our Appalachian Region (SOAR) to receive future appropriations from the General Assembly. The money will be used in support of job creation and retention, entrepreneurship, tourism, broadband deployment, workforce training, leadership development, health and wellness, infrastructure and economic diversity in Appalachia.

• **Technology:** HB 152 will update telecommunications laws and allow more investment in modern technologies. Companies can focus on broadband and other technologies for investment instead of outdated infrastructure.

• **Uniform Voidable Transfers Act:** SB 204 updates our Uniform Voidable Transfers Act for the first time since the 1800's. This may sound esoteric, but actually is quite important because it modernizes our law, provides bright line standards, and protects the citizens of our Commonwealth from being further defrauded by bad actors hiding their assets.

• HB 209 creates "Gold Star Sibling" specialty license plate for Kentuckians with siblings who died while serving in the armed forces.

*Morgan McGarvey*

*Morgan McGarvey is a member of M&P's Litigation Practice Group. He was elected to the Kentucky State Senate in 2012.*

## 2015 KY Legislative Update - REAL ESTATE



Branden Gross

Following the close of the 2015 Kentucky legislative session, several bills passed into law that affect the real estate industry:

**City Real Estate Taxes:** Under KRS 91A.070, a city has the option to collect its real estate taxes itself or have those taxes collected by the sheriff of the county. For a city that collects its own real estate taxes, the city first must adopt an ordinance that sets forth its procedure for the collection of those taxes. House Bill 136 amends

KRS 91A.070 to require the city's adopted ordinance to include the date that the taxes are due, the penalties and interest due for the failure to timely pay the taxes due, and the terms and conditions of any installment payment program offered. A city may also adopt such other necessary procedures to collect the taxes that do not otherwise conflict with state law. Further, KRS 91A.070 now allows a city to implement an amnesty program to forgive or reduce penalties and interest for late tax payments. This change should take effect on June 24, 2015 (being 90 full days after the final adjournment of the Kentucky Legislature).

**Mortgages:** Prior to the recent amendment, KRS 382.520 provided that in addition to the identified obligation, a mortgage secures payment of all renewals, extensions or interest rate reductions of that obligation, whether so provided in the mortgage or not. However, for the second time in two legislative sessions, KRS 382.520 was amended. House Bill 201 amends KRS 382.520 to state that a loan secured by a mortgage shall secure payment of *all interest rate modifications* and not just interest rate reductions. Senate Bill 148 amends KRS 382.290 to require that the legal description in a mortgage shall include a source of title, i.e. a statement that plainly identifies the source instrument



from which the mortgagor's title to the property was derived. Prior to this Senate Bill, only the legal description in a deed required a source of title. Senate Bill 148 also tightened the language in KRS 382.297 by explicitly prohibiting an affidavit of mortgage amendment from altering "the parties or the collateral of a recorded mortgage." A number of county clerks had already prohibited such alterations, and so, from a practical point, the amendment may not change your practice. This change should take effect on June 24, 2015.

**Real Estate Agents & Brokers:** House Bill 149 amends KRS 324.085 to allow real estate agents to complete their continuing education requirements online. Also, a new sales associate real estate agent must complete 48 hours of continuing education within two years of receiving its license, or the Kentucky Real Estate Commission shall automatically cancel a failing agent's license. This change takes effect as of January 1, 2016.

*Branden Gross*

*P. Branden Gross is a leader in real estate finance law and president-elect of the Kentucky Land Title Association.*



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# FirmNews

## M&P IS PLEASED TO ANNOUNCE:

The opening of an office in **Corbin, Kentucky**, located at 1005 South Main Street, Corbin, Kentucky 40701, (606) 528-3073. Robert L. Brown, III has joined M&P as of counsel in the Corbin office.

**Scott White** has been named a Fellow of the Litigation Counsel of America (LCA), a peer-selected honorary society for trial lawyers.

**Mindy Sunderland** was named among the “20 People to Know in Law” by Louisville’s Business First.

**John McGarvey** has been invited to emcee the 2015 Kentucky Bankers Association Annual Convention at The Westin Resort & Spa in Hilton Head, SC, in September.

**Mindy Sunderland** chaired the University of Kentucky College of Law's Third Biennial Collection Law Conference. John McGarvey was a presenter.

**John McGarvey** was invited to attend the 62nd annual National Security Forum at the Air War College, Maxwell Air Force Base, Alabama.

Actual resolution of legal issues depends on many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter. If you have any questions about this newsletter, or suggestions for future articles, contact Mindy Sunderland, Editor.

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