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White Collar Criminal Defense

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What to Take Away From One of the "Biggest Blunders in Banking History": Get Payment Notices in Order

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Often–at least in the legal field–a good-faith mistake can be reversed. A privileged document is inadvertently produced in discovery; it can be clawed back. An email to the team is accidentally sent to opposing counsel; professional courtesy generally means that the recipient will destroy the email without reading it. Evidently, not so under New York State law governing debts. After a bench trial, the Hon. Jesse M. Furman, U.S. District Judge for the Southern District of New York, found that Citibank could not recoup nearly $900 million it wired by mistake. Specifically, Citibank, acting as Administrative Agent for a loan taken out by Revlon, Inc., intended to wire $7.8 million in interest payments to the lenders. Instead, because of an intricate series of good-faith human errors, Citibank inadvertently repaid *the entire principal of the loan plus interest in full* to the lenders, to the tune of nearly $900 million. Applying principles of New York state law, Judge Furman found that the money did not need to be returned to Citibank primarily because the funds discharged a valid debt, the recipients made no misrepresentations to induce the payment, and the recipient did not have notice of the mistake.

Knowing the severe ramifications of even a good-faith mistake, what can be taken away from this decision about how to prevent such mistakes from happening in the future? Judge Furman's decision strongly implies, if not directly recommends, that the key lies in the *form and timing of payment notices*. In essence, Judge Furman explains that, if payment notices were clear and standardized across institutions, aberrations or discrepancies would be noticed sooner by payees, who could not reasonably claim that they had no notice of the mistake. Specifically, after Judge Furman's decision, it is critical for experienced white collar counsel, working with internal compliance and IT groups, to implement the following changes:

- **Form of Payment Notices:** Judge Furman noted that there was no clear, standard payment notice form within Citibank or across banking institutions. This created confusion when the lenders mistakenly received the money, and it bolstered the argument that there was no notice of the mistake. Payment notices should be drafted clearly and used uniformly at each institution. Indeed, Judge Furman recommended that banks could alone, or through a trade association, create a standardized payment notice. If there is a discrepancy between a clear payment notice and the actual payment, then the payee may reasonably have notice of the mistake, and the payor may have an easier time arguing it is appropriate to recoup the money.
- **Timing/Dissemination of Payment Notices:** Judge Furman noted that there was an absence of rigorous controls in the industry generally relating to the creation and dissemination of payment notices. Judge Furman observed that, at Citibank, wire transfers themselves were subject to a rigorous six-part check, but payment notices at Citibank and other institutions were often sent late or not at all and commonly contained mistakes. Again, a clear payment notice showing what is actually intended to be paid–even if a mistake is made in the payment itself–is important when the knowledge of the payee comes into question. If there is an aberration in timing or other deviation from standard procedure, then the receiving institution can more reasonably be said to be on notice that a mistake has been made.

The bottom line: Good faith cannot carry the day when statute and precedent dictate otherwise. After conducting a bench trial with voluminous evidence and having issued a decision of over one hundred pages, Judge Furman's clear advice to prevent an error of this magnitude is to get payment notices in order as soon as possible.

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