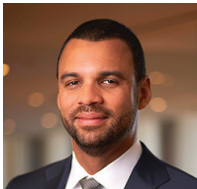


Takeaway From One of the “Biggest Blunders in Banking History”: Get Payment Notices in Order

A Practical Guidance® Article by
H. Gregory Baker and Rachel Maimin, Lowenstein Sandler LLP



H. Gregory Baker
Lowenstein Sandler LLP



Rachel Maimin
Lowenstein Sandler LLP

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.

Related Content

- [Borrowing Notice \(Credit Agreement\)](#)
 - [Borrowing Mechanics Clauses \(Credit Agreement\)](#)
 - [Tranches of Loans and Loan Mechanics in Credit Agreements](#)
 - [Repayment and Prepayment Provisions in Credit Agreements](#)
-

H. Gregory Baker, Partner, Lowenstein Sandler LLP

A former senior counsel for the U.S. Securities & Exchange Commission (SEC) with extensive experience investigating and litigating securities laws violations, Greg provides strategic advice to individuals and businesses in financial services and other industries. He serves as a key advisor on investigations and litigation strategy and applies his firsthand knowledge of the SEC to help clients manage risk and achieve positive outcomes in matters led by financial regulators.

Prior to joining the firm, Greg served for five years in the SEC's Division of Enforcement, most recently as a member of the Asset Management Unit, where he managed investigations and litigations concerning investment advisors, hedge funds, private equity funds, and mutual funds. Greg's matters involved issues such as hedge fund valuations, private equity fee disclosures, compliance violations, market manipulation, performance advertising, insider trading, derivative arbitrage, and accounting. He received four Directors' Awards from the Division of Enforcement in recognition of his outstanding achievements in investigative work.

Greg's notable enforcement actions included the fraudulent mispricing of mortgage-backed securities by principals and traders at a registered investment advisor and a fraudulent scheme by certain company insiders to take undisclosed control of tens of millions of dollars' worth of publicly traded stock of a Fortune 500 company, both of which led to parallel criminal actions brought by the U.S. Attorney's Office for the Southern District of New York. He also investigated and filed the first enforcement action brought by the SEC against a robo-advisor in a matter alleging violations of the Investment Advisers Act of 1940.

Before joining the public sector, Greg worked at two AmLaw 50 firms on a broad range of matters for financial institutions and corporations, including complex contract disputes, internal investigations, securities class action lawsuits, employment disputes, and bankruptcy adversary proceedings. Representing both plaintiffs and defendants, Greg has experience in structured products litigation, insurance and reinsurance claims, complex contractual disputes, trade secret infringement, and criminal defense matters.

He previously served as a law clerk to the Honorable William H. Walls of the U.S. District Court for the District of New Jersey.

Rachel Maimin, Partner, Lowenstein Sandler LLP

Rachel has extensive trial experience in federal criminal proceedings and a strong background in internal investigations. After more than eight years as a federal prosecutor, she now defends individual and corporate clients in matters involving allegations of financial and other white collar crimes.

In the U.S. Attorney's Office for the Southern District of New York (SDNY), Rachel worked on some of the Office's most high-profile cases, including *United States v. Michael Cohen*, where she acted as a senior prosecutor in the investigation and prosecution of the personal attorney to the President of the United States. She was also lead prosecutor on the largest-ever gang investigation and prosecution in New York City history, which resulted in the arrest and prosecution of 120 leaders and members of two rival gangs.

As Assistant U.S. Attorney in the SDNY's Violent and Organized Crime and Public Corruption Units, Rachel was responsible for investigating and prosecuting matters relating to complex financial crimes such as fraud and money laundering; and large and complex criminal organizations engaged in racketeering, narcotics, and violent offenses. She argued numerous appeals before the U.S. Court of Appeals for the Second Circuit. Rachel was awarded the Attorney General's 2017 David Margolis Award for Exceptional Service (the Department of Justice's highest honor) and 2019 Award for Distinguished Service (the Department of Justice's second highest honor).

Prior to her work for the government, Rachel practiced litigation at two prominent firms in New York City. She also clerked for the Honorable Joseph F. Bianco of the U.S. District Court for the Eastern District of New York.

This document from Practical Guidance®, a comprehensive resource providing insight from leading practitioners, is reproduced with the permission of LexisNexis®. Practical Guidance includes coverage of the topics critical to practicing attorneys. For more information or to sign up for a free trial, visit [lexisnexis.com/practical-guidance](https://www.lexisnexis.com/practical-guidance). Reproduction of this material, in any form, is specifically prohibited without written consent from LexisNexis.