

Question 5 – February 2020 – Selected Answer 1

(A)

(1)

Employer's negligence is a possible defense for First Bank. This case involves a forged drawer's signature since Assistant stole the check from Employer and wrote the check forging Employer's signature. Where there is a drawer's forged signature, the drawee bank typically bears the loss assuming the thief cannot be found and must credit the alleged drawer's account for checks it pays out. That is because the check is not properly payable due to the forgery.

However, the obligation to recredit the alleged drawer's account is subject to the defense of the alleged drawer's negligence. In this case, First Bank has a good argument because although we do not know where Employer's checkbook was at the time Assistant stole the check, we do know the circumstances surrounding their relationship at the time. The facts state that Assistant gave a two week notice in which he angrily told Employer he was quitting due to the bonus being low and that he could no longer pay his bills. Thus, Employer was on notice that Assistant is likely vengeful and in desperate need of money. After being put on such notice, Employer retained the employee to serve out his final two weeks. The facts give us no indication that his responsibilities or access to important items (like checks) were in any way different from before the falling out. It is likely that Employer had a duty to ensure protection against the vengeful employee under these facts. As a result, First Bank has a good defense of negligence.

(2)

First Bank likely does not have a good defense of failure to review his bank statement. Under the bank statement rule, a drawee/payor of a not properly payable check may not have an obligation to recredit the alleged drawer's account where the alleged drawer fails to prudently monitor his bank statement. However, there are time limits. Those forgeries discovered within a year of the bank statement are considered timely where there are no facts suggesting a serial forger. Where there is a serial forger, the alleged drawer must discover the forged items within 30 days of the statement to keep the drawee on the hook. Here, Employer discovered and reported the forgery 15 days after receiving the statement. This was timely, and First Bank has no defense under the bank statement rule.

(3)

The "trusted employee" rule is likely not a defense that First Bank can use. First, although Assistant presumably stole the checks during his employment with Employer, the forgery did not occur until nearly a month after Assistant's employment was terminated with Employer. Second, the "trusted employee" rule only applies in the case of a forged indorsement. Since this was not an indorsement but rather a drawer signature forging, the defense is not available.

(B)

First Bank was not negligent in failing to compare the signatures. An alleged drawer can assert the bank's negligence in some cases, however, that argument will not work here. Where a bank is engaged in customary practices, it is unlikely to be deemed negligent. Here, the bank's policy was not to compare the signatures because the check was written for only 800 dollars. It is customary among banks generally, and clearly in this case, to create a threshold amount for making such an authentication procedure necessary. Likely First Bank had a 1000 dollar threshold, and since it was acting in accordance with its policies, it will not be deemed to have been negligent.