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# A One-in-a-Billion (-Dollar) Mistake

Authors: John McCamus, Michael Disney and Simone Nash

Last year, Citibank made what was likely the costliest bank error in history. To the astonishment of many observers, a U.S. federal court in New York, in a decision released on February 16, 2021, allowed the recipients of Citibank's mistaken largesse to keep the money. The story has attracted widespread media attention but is by no means over. Citibank's appeal remains pending, and Citibank and other financial institutions are continuing their efforts to limit the damage. Looking at this cautionary tale from north of the border, it's natural to wonder "Could it (legally) happen here?"

## Citibank's Error

Citibank was the administrative agent for a syndicated term loan to Revlon. For a partial restructuring of the facility, Revlon agreed to make about US$7.8 million in interest payments to the lenders. In setting up the wire transfers to make the payments, on August 11, 2020, Citibank accidentally paid off the facility in full, including the entire principal amount owing, a total of almost US$900 million. The lenders were notified of the mistake about a day later and while some returned the overpayments, 10 lenders refused. Citibank sued those lenders for restitution and unjust enrichment in the United States District Court for the Southern District of New York. Justice Jesse M. Furman decided in favour of the defendant lenders in *In re Citibank August 11, 2020 Wire Transfers*, 20 CIVIL 6539 (JMF) (S.D.N.Y. Feb. 16, 2021).

## The Court's Decision

There was no dispute that Citibank had made a mistake, and there was no evidence that any of the lenders had relied to their detriment on the assumption that they were entitled to the payment that they had received. Although Justice Furman reviewed the facts in detail, the decision did not turn on the equities between the parties, but relied primarily on a U.S. law doctrine known as the "discharge-for-value" defence. As in Canada, where the relevant law is provincial (although likely similar in common law provinces), in the United States, the application of this doctrine may vary somewhat from one state to another. Under New York law, a creditor does not have to return mistakenly paid funds that discharged a debt owed to them, so long as the creditor (i) was unaware and did not have notice (which could include constructive as well as actual notice) of the mistake at the time it received the payment; and (ii) made no misrepresentation to the debtor that it was required to make the payment. In the leading New York case on this defence, *Banque Worms v. Bank America Int'l*, 570 N.E.2d 189 (N.Y. 1991), the New York Court of Appeals (the highest New York appellate court) said (at 196):

> When a beneficiary received money to which it is entitled and has no knowledge that the money was erroneously wired, the beneficiary should not have to wonder whether it may retain funds; rather, such a beneficiary should be able to consider the transfer of funds as a final and complete transaction, not subject to revocation.

The Court in *Banque Worms* commented that the transferor bank is in the best position to avoid errors and therefore should be the party that bears the risk of loss. It is also apparent that the Court believed that the finality of wire transfers was important to the integrity of the wire transfer system, a point reiterated by Justice Furman (this concern may be peculiar to New York law, reflecting the role of New York as a financial centre).

Justice Furman found that the lenders did not have constructive notice of the mistake for various reasons, including the following:

- The amounts wired were the exact amounts, to the penny, that would have been owed had Revlon decided to prepay the loans in full.
- Since Revlon had been engaged in negotiations to restructure its debt, it was not unreasonable for lenders to believe that it must have decided to pay off this facility, rather than the possibility that Citibank had accidentally wired almost $900 million.

- Although the credit agreement required Revlon to provide three days' written notice of prepayment to Citibank, which Citibank was in turn required to provide to each lender "promptly" after its receipt, it was not uncommon for such notices not to be received by lenders before the actual prepayment itself – or never to be sent at all.
- Calculation statements provided to the lenders stated that interest payments were "due," and since the payment was not made on a scheduled interest payment date, there was only one way in which interest would have been "due," which was with prepayment of the full principal. Separate statements were often sent for the principal component, so that the reference only to interest did not draw the lenders' attention to a probable error.

## How Would a Canadian Court Decide a Similar Case?

The New York discharge-for-value defence has not been recognized under Canadian law, but it is not clear that a different result would necessarily be reached by a Canadian court on facts similar to those in the *Citibank* decision.

In *B.M.P. Global Distribution Inc. v Bank of Nova Scotia*, [2009] 1 S.C.R. 504, the Supreme Court of Canada stated that while generally the payor of a mistaken payment is able to recover the money paid to the payee, there are limited circumstances in which the payee may have a defence:

- The payor intends that the payee have the money, regardless of any error.
- The payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee.
- The payee has changed its position in good faith, or is deemed in law to have done so.

The only one of these defences that might apply in a case like *Citibank* is the second, the "good consideration" defence. However, the meaning of "good consideration" for these purposes is not well developed in Canadian and English law. It could be interpreted very broadly to capture any case in which the mistaken payment discharges a debt owed to the payee. Alternatively, it could be read more narrowly to require a detrimental change of position on the part of the payee or, more narrowly still, to apply only in cases in which the payment made is required under a binding agreement between the payor and the payee. Only the first broad interpretation would support a result like *Citibank*. It was not disputed in *Citibank* that the lenders did not detrimentally rely on the payments they received; nor did the credit agreement authorize or require Citibank to distribute to the lenders payments that were not due and that Revlon had neither authorized nor funded.

Of course, it is unlikely that a fact situation like *Citibank* will repeat itself in Canada any time soon, and it may be less likely in practice that lenders in a syndicate would be willing to brave the fury of a major bank acting as agent just to hang on to a financial windfall.

## The Fallout from *Citibank*

Both in the United States and Canada, credit agreements will henceforth include what are being dubbed "Revlon Clawback" clauses. In the agency provisions of an agreement, typically the lenders will now expressly promise to return to the agent payments made in error and waive any defence to the agent's claim to repayment. And the borrower will agree that such mistaken payments do not discharge its obligations and that the agent is subrogated to the rights of the lenders to the extent that any such payments are not recovered by the agent.

It remains to be seen whether any other changes will emerge in syndication practices or whether more care will be taken in complying with the details of procedures called for in credit agreements – like delivering notices in a timely manner.

Key Contacts: Derek R.G. Vesey, Dan Wolfensohn and Marc A. Berger