IN THE SUPREME COURT OF FLORIDA

ARNOLD, MATHENY & EAGAN. P.A.,

Petitioner Case No.: SC07-1136

v.

FIRST AMERICAN HOLDINGS, INC., ET AL.,

Respondents.
_____/

ON A CERTIFIED QUESTION FROM THE
SECOND DISTRICT COURT OF APPEAL

LOWER TRIBUNAL CASE NO. 2D06-0317

ANSWER BRIEF OF RESPONDENTS, FIRST AMERICAN HOLDINGS, INC. AND THE FIRST AMERICAN INVESTMENT BANKING CORPORATION

GEOFFREY TODD HODGES
G. T. HODGES, P.A.
FBN 379964
905 SHADED WATER WAY
LUTZ, FLORIDA 33549
ATTORNEY FOR RESPONDENTS

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES

RULES

ETHICS OPINION

STATEMENT OF THE FACTS

On or about September 2, 1999, Preclude, Inc. ("Preclude") filed the lawsuit in the trial court against The First American Investment Banking Corporation and First American Holdings, Inc. (hereafter, collectively, "First American"). Preclude alleged that it was a party to a consulting agreement with First American and that First American breached the contract by failing to pay fees that Preclude claimed were due (R. 5-16, V.1).

On or about September 28, 1999, First American filed its Answer, Affirmative Defenses, and Counterclaim, together with a Third-party Complaint against Michael C. Cameron ("Cameron"), a Preclude principal. In its responsive pleadings, First American pled that the agreement sued on by Preclude was a forgery, and that the true agreement was actually an employment contract between First American, on the one hand and Cameron and Preclude, on the other (R. 17-41, V.1). First American further pled that Cameron and Preclude had fraudulently induced First American to execute the employment contract by falsely representing an intention to obtain certain securities sales licenses from the NASD (R. 20-41, V.1). Cameron and Preclude knew that Cameron could never obtain those licenses because he had an income tax lien of more than $5,800,000 filed against him, and they knew that he could never pass the NASD's rigorous background investigations (R. 22-23, 34, V.1).

First American also sued Preclude and Cameron for malicious prosecution and abuse of process, based on the presentation of the forged document to the court (R. 20-41, V.1). Eventually, the parties stipulated to a judgment in First American's favor on the counterclaims and third-party claim in the amount of $26,000.00 (R. 61-64, V.1). First American later was forced to establish the nondischargeability of the judgment against Cameron, due to fraud, pursuant to section 523(a)(2) of the Bankruptcy Code (11 U.S.C.). *See*, Order Granting Plaintiffs' Motion for Summary Judgment, dated May 6, 2004, in *First American Holdings, Inc. and The First American Investment Banking Corporation v. Cameron (In re Cameron)*, Adv. Pro. No. 8:02-733, in the United States Bankruptcy Court for the Middle District of Florida, Tampa Division (R. 301-303, 324, V.2).

In June 2002, Arnold, Matheny & Eagan, P.A. ("AME") was acting as counsel for Preclude in connection with the matter *Preclude, Inc. v. Greenleaf Products, Inc.*, Case No. CIO-00-4097, Div. 34, in the Polk County, Florida, Circuit Court (the "Polk County Litigation") (R. 143-144, V.1). On or about June 14, 2002, the Polk County Litigation was settled. Pursuant to the Settlement Agreement in the Polk County Litigation, (the "Settlement Agreement"), Greenleaf Products agreed to pay Preclude the sum of $50,000. According to the Settlement Agreement, that sum was to be paid to AME's trust account (R. 143-146, V.1).

On June 19, 2002, First American obtained from the trial court a Writ of Garnishment (the "First Writ") directed to AME (R. 90-91, V.1), which was served on AME that day (R. 67-69, V.1). AME answered the First Writ on June 19, 2002, and denied that AME possessed any funds belonging to Preclude. AME further stated that Greenleaf Products, Inc. was indebted to Preclude (R. 67-69, V.1).

On June 24, 2002, First American obtained a second Writ of Garnishment (the "Second Writ") directed to AME (R. 81-82, V.1). The Second Writ was served on AME on June 25, 2002 at 3:20 P.M. (R. 78-79, 92, V.1). At 4:00 P.M. that day, AME answered the Second Writ, and again denied that it had possession of any funds or property belonging to Preclude. In its Answer to the Second Writ, AME also stated that it did not know of anyone who was indebted to the Judgment Debtors (R. 78-79, V.1).

On June 21, 2002, i.e., between the dates of service of the First Writ and the Second Writ, AME received the proceeds of the settlement of the Polk County Litigation (R. 187-189, V.1). Upon receipt, AME deposited those funds into its trust account maintained at First Union Bank (n/k/a Wachovia Bank) (hereafter, the "Bank") (R. 187-188, V.1). That same day, AME issued two trust account checks, representing the entire $50,000.00 proceeds of the Polk County Litigation (R. 190-191, V.1). The first check, bearing check no. 13450, was payable to Preclude, and was in the amount of $23,263.76 (R. 190, 205, V.1). The second

check, bearing check no. 13451, was payable to AME, and was in the amount of $26,736.24 (R. 206, V.1).

Because AME had been served with and had answered the First Writ before June 21, 2002, AME had knowledge of First American's judgment against Preclude and Cameron, and knew that First American was seeking to collect that judgment from AME. Nevertheless, AME issued check no. 13450 to Preclude and delivered it to Cameron on June 21, 2002 (R. 299, V.2).

Check no. 13451 cleared AME's trust account and was paid by the Bank on June 24, 2002 (R. 206, V.1, R. 257, V.2). Check no. 13450, however, was not paid or cleared by the Bank until June 28, 2002 (R. 205, V.1, R. 257, V.2). The $23,263.76 represented by check no. 13450 remained in AME's trust account until that date (R. 258, V.2). AME could have stopped payment of check no. 13450 at any time after service of the Second Writ (June 25, 2002) until the check was finally paid and cleared by the Bank on June 28, 2002 (R. 258, V.2).

AME did not stop payment or attempt to stop payment on Check 13450 at any time after service of the Second Writ (R. 261-266, V.2). Even though the funds represented by Check no. 13450 remained in AME's trust account on June 25, 2002 (R. 258, V.2), AME answered the Second Writ on that day by **denying** that AME had possession of any funds belonging to Preclude (R. 73, V.1).

First American replied to AME's Answers to the First Writ and the Second

Writ, denying same (R. 86-89, V.1).

STATEMENT OF THE CASE

In the trial court, First American sought to enforce the Second Writ against AME for the $23,263.76 that remained in AME's escrow account at the time of service of the Second Writ. After discovery, both First American and AME filed Motions for Summary Judgment. First American was§ seeking to impose liability on AME for the proceeds of Check no. 13450, which was paid by the Bank to Preclude three days after service of the Second Writ on AME (R. 271-284, V.2). AME sought to avoid liability based on the status of Check no. 13450 as an attorney's trust account check (R. 291-295, 304-310, V.2). Following a hearing, the Circuit Court granted AME's motion, denied First American's motion, and ordered the Second Writ dissolved (R. 372-373, V.2).

First American appealed that order to the Second District Court of Appeal (R. 374-377, V.2). The Second District reversed the trial court's dissolution of the Second Writ and held that AME maintained "possession and control" of the funds in its trust account until the check delivered to Preclude was presented to the Bank and paid. In a reported decision, *First American Holdings, Inc. v. Preclude, Inc.*, 955 So. 2d 1231 (Fla. 2nd DCA 2007), the District Court held that AME was under a duty to stop payment on Check no. 13450 and hold the funds represented by the check pending the outcome of the garnishment action.

SUMMARY OF ARGUMENT

Florida law permits a judgment creditor to garnish any intangible property of the judgment debtor that is in the "possession or control" of a third person. First American served the Second Writ on AME at a time when AME held $23,263.76 of Preclude's money in AME's trust account. Service of the Second Writ was sufficient to garnish those funds because the funds were in AME's possession and control, under applicable Florida law.

In response to the Second Writ, AME was required to inform the trial court and First American that it held Preclude's money. AME was required to stop payment on the trust account check that AME had delivered to Preclude. AME did neither of those things. Instead, AME simply denied possession of any funds belonging to Preclude.

AME now seeks to avoid its statutory liability for failing to comply with the garnishment statute by asserting that it, as a law firm, should not be required to strictly comply with the garnishment statute with regard to funds held in its escrow account. AME maintains that its status as Precludes's counsel somehow exempts it from its statutory obligations. AME is wrong. All garnishees are held to the same standards in complying with the Florida garnishment statute. There is nothing in the statutes, case law, or Bar Rules that enables AME to avoid these obligations. Further, the cases from other states that AME relies on to support its arguments do

not comport with Florida law.

As correctly pointed out by the Second District, Florida law and policy required AME to stop payment on the check it delivered to Preclude. By failing to do so, AME undertook primary liability to First American. The decision of the Second District should be affirmed.

STANDARD OF REVIEW

Because the question presented is a question of law, this Court's standard of review is *de novo*. *Panama City Beach Community Redevelopment Agency v. State*, 831 So. 2d 662 (Fla. 2002).

ARGUMENT

I. ATTORNEYS HOLDING CLIENT FUNDS IN ESCROW ARE NOT EXEMPT FROM GARNISHMENT.

A. The Garnishment Statute Requires Any Person Served with a Garnishment Writ to Comply with the Writ.

Chapter 77, *Fla. Stat.*, provides for post-judgment garnishment as a remedy available to a judgment creditor to collect its judgment. Writs of garnishment are issued by the Court, and are intended to subject to judgment collection any debt due from a third person to the judgment debtor, or any property of the judgment debtor in the "possession or control" of a third person. *See*, §77.01, *Fla. Stat.* (2005). Service of a garnishment writ "begins the garnishment process which consists of notifying a third party to retain something he has belonging to the defendant, to make disclosure to the court concerning it, and to dispose of it as the court shall direct." *Farm Credit of North Florida, ACA v. Double H Dairy, Inc.*, 742 So. 2d 436 (Fla. 1st DCA 1999), *citing In re Masvidal*, 10 F.3d 761 (11th Cir. 1993) and *Thompson v. Commercial Union Insurance Co.*, 267 So. 2d 18 (Fla. 1st DCA 1972), *cert. den*. 271 So. 2d 461 (Fla. 1972).

When a writ of garnishment is served, the garnishee is required to answer it. In its answer, the garnishee must state whether it is indebted to the judgment debtor or possesses any tangible or intangible property of the judgment debtor, and if so, in what sum. §77.04, *Fla. Stat.* (2005). The garnishee must "report and retain,

subject to the provisions of s. 77.19 and subject to disposition as provided in this chapter, any deposit, account, or tangible or intangible property in its possession or control at the time of service of the writ." §77.06, *Fla. Stat.* (2005). The garnishee that obeys the garnishment writ is provided statutory immunity from all claims made by the judgment debtor or any other person. §77.06(3), *Fla. Stat.* (2005). The garnishee that does not obey the writ is made personally liable for the property or debt that he possessed, but failed to retain. §77.06(1), *Fla. Stat.* (2005).

The policy behind Chapter 77 is to protect the right of judgment creditors to obtain satisfaction of their judgments. It does this by rewarding the compliant garnishee with immunity from all claims arising from his compliance, and by severely penalizing the noncompliant garnishee by making him primarily liable to the judgment creditor. By making a garnishee directly liable to the judgment holder for a failure to comply with a garnishment writ, while absolving the garnishee from liability to the judgment debtor or any other person for good faith compliance with a writ (even if the garnishee's actions are erroneous), the Legislature established a strong policy favoring garnishors. As stated in *Dixie National Bank v. Chase*, 485 So. 2d 1353, 1356 (Fla. 3d DCA 1986):

> ... this statutory scheme contemplates full disclosure in the garnishee's answer of all debts owed by the garnishee to the defendant debtor and a simultaneous garnishment of said funds so as to fully protect the garnishor creditor in collecting on a debt due him by the defendant debtor. The garnishee is also protected against possible liability for its actions in serving an answer and garnishing funds so long as it acts in

> good faith. Plainly, this scheme contemplates full disclosure in the garnishee's answer of all debts owed by garnishee to the defendant debtor and an immediate garnishment on all such indebted funds in the possession of the garnishee. The statutory scheme cannot tolerate incomplete answers wherein only some of the debts owed are disclosed and garnished. If such answers were permissible, as the garnishee Dixie Bank contends, there would be little incentive to file complete answers; moreover, undisclosed funds would plainly remain ungarnished and could be spirited away by the defendant debtor--all to the detriment of the garnishor creditor. . . . we conclude that the term "answer" in the above statute means a *complete* answer revealing all debts owed by the garnishee to the defendant debtor.

B. Client Funds Held in an Attorney's Trust Account are Subject to Garnishment by Creditors of the Client.

The proposition that client funds in the trust account or escrow account of a Florida attorney are subject to garnishment is beyond dispute. *Wilkerson v. Olcott*, 212 So. 2d 119 (Fla. 4th DCA 1968); *Robert C. Malt & Co. v. Colvin*, 419 So. 2d 745 (Fla. 4th DCA 1982); *Garel & Jacobs v. Wick*, 683 So. 2d 184 (Fla. 3d DCA 1996); *Cf. Boroff v. Bic Corporation*, 718 So. 2d 348 (Fla. 2d DCA 1998) (garnishment of funds in escrow account may be defeated by prior perfected attorney's retaining lien; no dispute that funds could be garnished); *accord Miles v. Katz*, 405 So. 2d 750 (Fla. 4th DCA 1981) (garnishment of escrow account may be defeated by prior perfected attorney's charging lien; no dispute that funds could be garnished).

Although client funds in an attorney's trust account belong to the client, *R. Regulating Fla. Bar* 5-1.1, the attorney is clearly in "possession or control" of such

funds within the meaning of the garnishment statute. *Carlton, Fields, Ward, Emmanuel Smith & Cutler, P.A. v. Boyer*, 196 B.R. 801 (N.D. Ind. 1996), *aff'd* 100 F.3d 53 (7th Cir. 1996), *citing Wilkerson*, *supra*.; *see also, In re Camelot Casino Cruises*, 2005 WL 2203160 (Bankr. M.D. Fla. 2005). The attorney who distributes escrow funds in violation of a garnishment order will be held personally liable for the violative distribution. *Robert C. Malt & Co. v. Colvin*, *supra*.

AME strenuously argues that attorneys should be exempt from the requirements of the garnishment statute, due to the "special nature" of the attorney-client relationship. Nothing in the statutory scheme, however, suggests that attorneys (or any other class of professionals or persons) are immune from the obligations imposed by the garnishment statute. The statute contemplates that even true fiduciaries (i.e., trustees under formal trust declarations) are subject to garnishment for the judgment debts of their *cestuis que trust*. §77.06(4), *Fla. Stat.* (2005). If the Legislature wished to exempt attorneys from garnishment process, it could have done so. It did not. Attorneys are simply not exempt from compliance.

According to this Court, a lawyer has a duty to protect lawful third party claims to client funds held in trust against interference by his client. In *Amendment to the Rules Regulating the Florida Bar*, 875 So. 2d 448, 534 (Fla. 2004), the Court stated:

> Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a

> duty under applicable law to protect such third party claims against wrongful interference by the client and, accordingly, may refuse to surrender the property to the client. However, **a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, and, where appropriate, the lawyer should consider the possibility of depositing the property or funds in dispute into the registry of the applicable court so that the matter may be adjudicated**.
> (emphasis added.)

Although the foregoing amendment to the Rules was not yet promulgated at the time AME was served with the Second Writ, by the adoption of that amendment, the Court made very clear that attorneys are **not** entitled to simply ignore the rights of third parties to client funds held in escrow accounts, and **must**, in proper circumstances, refuse to surrender the funds to the client. First American submits that service of a writ of garnishment is just such a circumstance. A writ of garnishment is a court order directing the garnishee to report to the court all funds in its "possession or control," and to retain the funds pending further order of the court. The writ is issued pursuant to "applicable law," i.e., the garnishment statute. According to the foregoing amendment, an attorney served with a writ of garnishment has a duty to protect the garnishor's claim to the escrowed funds. *Id*.

C. The Drawing and Delivery of a Check Does Not Transfer Possession and Control of the Funds Represented by the Check.

"Possession and control" of funds in a checking account does not end when a check is written and delivered. *Fulton v. Gesterding*, 47 Fla. 150, 36 So. 56 (1904); *Hudgins v. Florida Federal Savings and Loan Association*, 399 So. 2d 990

(Fla. 5th DCA 1981); §673.4081, Fla. Stat. ("A check or other draft does not of itself operate as an assignment of funds in the hands of the drawee which are available for its payment, and the drawee is not liable on the instrument until the drawee accepts it."). This is because Florida law permits a drawer of a check to issue a valid stop-payment order to its drawee bank at any time before final payment of the check by the bank. *See*, §674.403, *Fla. Stat.* The power to stop payment is precisely the type of "possession or control" that renders a garnishee liable for funds of a judgment debtor held in the garnishee's checking account, even if the garnishee has written uncleared checks against the funds. *Gelco Corporation v. United National Bank*, 569 So. 2d 502 (Fla. 3d DCA 1990); *Sun Bank/North Florida, N.A. v. Bisbee-Baldwin Insurance Co.*, 559 So. 2d 351 (Fla. 1st DCA 1990).

D. If There are Outstanding Checks at the Time of Service of a Writ of Garnishment, the Garnishee Must Stop Payment.

The service of a writ of garnishment establishes the garnishor's right to all funds in a checking account at the moment of service. If there are checks outstanding, the garnishee must stop payment or otherwise must prevent payment if it is possible to do so. *Gelco Corporation v. United National Bank*, 569 So. 2d 502 (Fla. 3d DCA 1990); *Michael Acri Boxing Promotions, Inc. v. Miles*, 758 So. 2d 704 (Fla. 4th DCA 2000) (Stone, J., concurring specially); *Kipnis v. Taub*, 286 So. 2d 271 (Fla. 3d DCA 1973); *Sun Bank/North Florida, N.A. v. Bisbee-Baldwin*

Insurance Co., 559 So. 2d 351 (Fla. 1st DCA 1990); *Fulton v. Gesterding*, 47 Fla. 150, 36 So. 56 (1904) (same as to drafts).

The only exception to the requirement that payment be stopped is that issuers of cashier's, certified, and official checks are not required to stop payment when served with a writ of garnishment. *See, e.g.*, *WNJU-TV, Inc. v. Barnett Bank of Broward County, N.A.*, 739 So. 2d 1213 (Fla. 4th DCA 1999). These checks are excepted from the stop payment requirement because of their unique nature in the banking system. All checks, other than certified checks, cashier's checks, and official checks, are governed by Article IV of the Uniform Commercial Code. Certified checks, cashier's checks, and official checks, however, are governed by both Articles III and IV. The reasons for this difference are historically complex. Essentially, however, when issuing a cashier's, certified, or official check, a bank is agreeing to substitute its own primary liability on the instrument (i.e., its own promise to pay the instrument on presentment) for its customer's. *See* §673.4111, *Fla. Stat.* (2005); *Warren Finance, Inc. v. Barnett Bank of Jacksonville, N.A.*, 552 So. 2d 194 (Fla. 1989). Because the bank is issuing a check drawn on itself, it is issuing an obligation that it must pay in all events. The issuing bank immediately collects the from its customer the funds needed to pay the check, rather than waiting until presentment of the check for payment, because such a check is deemed paid upon delivery, rather than on presentment or at final settlement. *See*

§674.2131, *Fla. Stat.* (2005).

In contrast, when a customer draws any other type of check on a bank, including an attorney's trust account check, the customer is simply issuing an order to the bank to pay the check when it is presented. The drawer of the check (the customer) remains primarily liable for the obligation that the check represents, until the check is finally paid. The check is not finally paid until the drawee bank decides to pay the check and debits the customer's account. *See* §§674.2131 and .303, *Fla. Stat.* (2005). Before final settlement, the customer can issue a stop payment instruction on the check (i.e., revoke its payment order), and the drawee bank must follow that instruction. *See* §674.403, *Fla. Stat.* (2005); *Warren Finance, Inc., supra*.

AME acknowledges that bank garnishees are obligated to stop payment on outstanding checks that represent funds belonging to the judgment debtor, but argues that Florida law imposes lesser duties on non-bank garnishees. AME, of course, can cite no Florida cases in support of this proposition (there are none), but instead, cites cases from other jurisdictions. In fact, the only Florida case cited by AME, *Michael Acri Boxing Promotions, Inc. v. Miles*, 758 So. 2d 704 (Fla. 4th DCA 2000) stands squarely for the proposition that non-bank garnishees are **not** to be treated differently than bank garnishees, and are required to stop payment on outstanding checks. Judge Stone, in his special concurring opinion in the *Acri*

decision, notes his own dislike of this duty, but acknowledges that it is a duty imposed by Florida law.

The leading case from outside Florida cited by AME for the proposition that non-bank garnishees do not have a duty to stop payment on outstanding checks in the face of a garnishment writ is *Central Security & Alarm Co. v. Mehler*, 125 N.M. 438, 963 P.2d 515 (N.M. Ct. App. 1998). In that case, the New Mexico appellate court ruled that a non-bank garnishee could not be held liable for failing to stop payment on an outstanding check because the garnishee ran a risk of double liability for stopping payment. The New Mexico court specifically addressed the *Gelco* case, *supra*., but distinguished *Gelco* on the basis that a bank was the garnishee. The New Mexico court decided that non-bank garnishees should not be subject to the duty to stop payment on outstanding checks in response to a garnishment writ because they would run a risk of double liability for doing so. *Schwerdt, Grace & Niemackl v. Speedway Festivals, Inc.*, 7 Kan. App. 2d 40, 637 P.2d 477 (Kan. Ct. App. 1981) and *Frickelton v. Fulton*, 626 S.W. 2d 402 (Mo. Ct. App. 1981), cited by AME, also reach that result, on the same ground.

That rationale has no place in Florida's jurisprudence for the simple reason that Florida provides complete statutory immunity for the garnishee who complies with a garnishment writ. According to §77.06(3), Fla. Stat.,

> In any case where a garnishee in good faith is in doubt as to whether any indebtedness or property is required by law to be included in the

> garnishee's answer or retained by it, the garnishee may include and retain the same, subject to the provisions of s. 77.19 and subject to disposition as provided in this chapter, and in such case **the garnishee shall not be liable for so doing to the defendant or to any other person** claiming the same or any interest therein or claiming to have sustained damage on account thereof (emphasis added).

By virtue of this statute, there is **no risk** of double liability for a compliant garnishee who stops payment on an outstanding check. The duty to stop payment on outstanding checks imposed by the Florida courts pursuant to the garnishment statute makes perfect sense in light of the foregoing statutory grant of immunity. The risk of double liability is only placed on the noncompliant garnishee, such as AME, who fails and refuses to stop payment on outstanding checks in obedience to a garnishment writ. AME calls the immunity statute "limited protection" for the garnishee who stops payment, and urges the Court to do likewise and adopt the "majority rule." AME, however, fails to recognize that the statutory immunity is all-encompassing. AME also fails to acknowledge that the so-called "majority rule" is a majority rule only because it addresses a problem that can never arise in Florida – double liability for the stopped payment. The Court should decline AME's invitation to adopt the "majority rule."

There is another reason to reject AME's argument that non-bank garnishees are (or should be) treated differently than bank garnishees. Prior to October 1, 1985, the garnishment statute imposed different duties on bank garnishees than it did on non-bank garnishees. Section 77.06(2) provided:

> A bank or other financial institution authorized to accept deposits, upon being served with a writ of garnishment, shall report in its answer and retain, subject to the provisions of s. 77.19 and subject to disposition as provided in this chapter, any deposit, account or tangible or intangible personal property in the possession or control of such garnishee, if the deposit or ownership records of such bank or other financial institution relating to such deposit or property reflect that any defendant named in the writ has or appears to have an ownership interest therein, whether solely or with another or others not named in the writ; but the answer shall state the name or names and address if known to the garnishee of the defendant and any such other or others having or appearing to have an ownership interest therein as shown on said records, and the plaintiff shall, within 5 days of the service of the answer on him, serve by delivery or by mail on the defendant and each such other person notice of the writ and the garnishee's answer and shall file in the proceeding a certificate of such service at the address of the defendant as shown on the records of the bank.

Non-bank garnishees were not under these statutory duties. Chapter 85-272, *Laws of Florida*, repealed that statute, and by doing so, eliminated all distinctions between bank garnishees and non-bank garnishees. The repeal evidences the intent of the Legislature to impose on all garnishees the same duties, regardless of their status. The Court should decline AME's invitation to reinstate any distinctions between bank and non-bank garnishees in the absence of legislative action.

Contrary to AME's assertion, current Florida law imposing stop-payment duties on all garnishees is completely consistent with Florida's version of the UCC. As noted above, drawers of checks have an absolute right under §674.403 to stop payment on them. A holder of a check is on notice that the check may be dishonored for lack of funds, stop payment instructions, and other reasons. *See*

§§674.2131 and .303, *Fla. Stat.* Ordinarily, if a check is dishonored due to a stop payment order, the holder (including a holder in due course) would have a remedy against the drawer. The statutory immunity provided by §77.06, however, cuts off any liability of a garnishee who stops payment in response to a garnishment writ, and §77.16 permits the holder of the check to directly assert its claim to the funds in the garnishment action. In other words, the holder of the check (in this case, the judgment debtor, Preclude) must resolve any dispute with the garnishor over entitlement to the funds in the court that issues the garnishment writ. So long as the garnishee issues stop payment instructions, notifies the court that issued the writ that it holds funds of the judgment debtor, and disposes of the funds in accordance with the court's instructions at the conclusion of the garnishment proceeding, its liability to all persons is cut off. That statutory scheme creates no dichotomy or conflict with the UCC, as AME would have the Court believe.

E. Attorney's Trust Account Checks Do Not Have Special Status Under the Law and Are Not Akin to Cashier's Checks

As succinctly stated in *Williams Management Enterprises, Inc. v. Buonauro*:

> A bank checking account is a bank checking account . . . without regard to the character or capacity of the depositor . . . As to funds held in a trust account, an attorney or anyone else may have a fiduciary relationship to the person for whom the funds are held, or to the true equitable owner, but the trust nature of the funds in the account does not establish a trust relationship between the holder and everyone else in the world.

489 So. 2d 160, 167 (Fla. 5th DCA 1986) (holding that garnishment or attachment, not replevin, is the proper method to seize a judgment debtor's money held in an attorney's trust account or in any other bank account).

Nowhere in the garnishment statute are **any** exceptions to the general rules created for client funds in attorneys' trust accounts. Nowhere in **any** statute are trust funds held by an attorney exempt from legal process. Indeed, AME does not (and cannot) dispute that funds held in an attorney's trust are subject to garnishment. *Robert C. Malt & Co. v. Colvin*, 419 So. 2d 745 (Fla. 4th DCA 1982). Instead, AME argues that the mere act of delivering a check drawn on trust funds creates a "fiduciary duty" (nonexistent the moment before delivery of the check) that cannot be impinged by obedience to a valid garnishment writ, and that obedience to a court's writ immediately after delivery of the check undermines the attorney-client relationship in a way that obedience to the writ one moment earlier does not. The only Florida authority cited by AME for these propositions is *Florida Bar Ethics Opinion* 60-34 (1960), which instructs attorneys to maintain client confidentiality by not telling a client's creditors that the attorney holds client funds. That opinion offers no support for the propositions for which AME cites it.

AME concedes that under the Rules Regulating the Florida Bar, there may be circumstances when an attorney may refuse to surrender trust funds to a client based on a duty imposed by law to protect a creditor's claims. AME curiously

argues that the duty was not present in this case. AME is simply wrong. In this case, AME was served with the Second Writ, issued by a Circuit Court, while the judgment debtor's funds were in its trust account. One can scarcely imagine a higher duty imposed by law to protect a creditor's claims than a court order directing the client's funds restrained.

AME answered the Second Writ within minutes of its service, and denied possession or control of any of the judgment debtor's funds. That response was completely inaccurate. The funds were in AME's trust account at the time of service of the Second Writ and at the time of the answer, and the funds remained in the trust account for several more days. AME asks this Court to excuse its disobedience of the Second Writ by granting all attorneys special privileges to disobey garnishment writs and garnishment statutes that apply uniformly to all garnishees. AME does so in order that it might avoid the consequences of its own disobedience of the Circuit Court's garnishment writ. If the Court determines in this case that AME was under no duty to obey the Circuit Court's garnishment writ, then there can never be a duty on any attorney to protect a creditor's claims by refusing to surrender trust account funds to its client. That proposition is directly contrary to this Court's directives, as set forth in its commentary to *R. Regulating Fla. Bar* 5-1.1. The Rule expressly directs attorneys that they may have duties to protect third parties who justly claim an interest in client funds in the

lawyer's custody. The Court instructs attorneys "not to unilaterally arbitrate these disputes" (by, e.g., delivering the funds to the client), but in appropriate cases to deliver the funds into the applicable court registry so that the matter may be adjudicated. *Amendment to the Rules Regulating the Florida Bar,* 875 So. 2d 448, 534 (Fla. 2004). AME now asks this Court to ignore its own directive. This Court should decline AME's invitation.

AME also argues that an attorney's trust account check is "virtually equivalent" to a cashier's check. AME is simply wrong. Attorneys' escrow account checks do not carry any of the characteristics of cashier's checks. They are drawn on a bank account, rather than on the attorney-issuer. They are not paid until they are presented to the drawee bank and the bank finally pays them. The issuer can issue a stop payment instruction. *Hudgins v. Florida Federal Savings and Loan Association*, 399 So. 2d 990 (Fla. 5th DCA 1981). In that case, the court determined that payment made by a personal check or an attorney's trust account check is **not** equivalent to payment by certified check or cash. The court stated:

> Tender of a personal check is not the equivalent of cash or a certified check. The delivery of a personal check is at best 'conditional' payment because **whether or not it is drawn on a trust account or escrow account,** it is not 'finally paid' until the conclusion of the 'settlement' process and in the interim, the account may fluctuate in amount, it may be garnished, set off by the Bank, **or the drawer may stop payment on the check.**
> *Id*. (emphasis added).

If the garnishee does not stop payment of outstanding checks – even escrow

account checks - after service of a writ of garnishment, the garnishee is liable to the garnishor for the amount of such payments. *Kipnis v. Taub*, *supra*.; *Gelco Corporation v. United National Bank, supra*.; *Michael Acri Boxing Promotions, supra*. As noted above, the rule of strict liability for payments made in violation of garnishment writs has unanimously been applied to attorneys in Florida. In fact, consistent with the Florida Supreme Court's amendment to the Rules Regulating the Florida Bar quoted above, attorneys are held to an even higher standard of care in garnishment matters than non-attorneys. *Robert C. Malt & Co. v. Colvin*, *supra*.

F. The Rules Regulating The Florida Bar Do Not Exempt Attorneys From Compliance with Valid Garnishment Writs.

R. Regulating Fla. Bar 5-1.1 requires attorneys to establish trust accounts to segregate client funds, and generally regulates those accounts. That Rule does not grant any special legal status to attorney trust account checks. Instead, subsection (j) of the Rule permits attorneys to disburse certain funds from trust accounts prior to receiving confirmation that the funds are collected. If an attorney makes such a disbursement, he generally will not be subject to discipline for violating the "commingling" prohibitions found elsewhere in the Rule. One circumstance in which a lawyer may disburse prior to collection is when the funds are represented by a "certified check or cashier's check." In such circumstances, there is no requirement that attorneys investigate the likelihood of clearance of funds – certified checks and cashier's checks are treated like cash.

Under subsection (j), attorneys can also draw on uncollected funds represented by a check from another attorney's trust account. **But they can do so only if they have "a reasonable and prudent belief that the instrument will clear and the funds will constitute collected funds in the lawyer's trust account within a reasonable period of time."** In other words, even under *R. Regulating Fla. Bar* 5-1.1, not only are trust account checks and cashier's checks not analogous – they are not even closely related. Under the Rule, attorneys may not draw uncollected funds represented by a trust account check until they investigate the likelihood of clearance and satisfy themselves that clearance is likely. No such requirement applies to cashier's or certified checks.

The Bar Rules govern only attorney conduct and discipline. They do not regulate or purport to regulate matters of bank deposit and collection. They do not purport to provide attorneys with special immunity from statutory garnishment procedures or supplant the *Florida Statutes*. No support can be found in Rule 5-1.1 (or any other Bar rule) for the proposition that funds in an attorney's trust account should not be subject to a writ of garnishment, or that the attorney loses "possession and control" over those funds when he or she writes a check against them (as opposed to when the check is finally paid by the attorney's bank).

There is no support anywhere in Florida law for AME's propositions that an attorney does not have the same duties with respect to garnishment writs as every

other Floridian, that an attorney loses "possession and control" over trust account funds when he or she delivers a check written against them (as opposed to when the check is finally paid by the attorney's bank), that trust account checks are the same as cashier's checks, or that requiring attorneys to comply with the garnishment statute by stopping payment on outstanding checks somehow violates a fiduciary duty to a client or undermines the attorney-client relationship.

AME argues that funds deposited in an attorney's trust account belong to the client. First American does not dispute that proposition. AME also argues that because *R. Regulating Fla. Bar* 5-1.1 permits attorneys to disburse money against uncollected trust account checks received from other attorneys without disciplinary consequences, trust account checks are "virtually equivalent" to certified checks. As noted above, there is no support in Florida law for this proposition, and it is directly contrary to *Hudgins*, *supra*. Like all rules regulating the Bar, Rule 5-1.1 is simply a rule that governs attorney conduct and provides discipline for misconduct. It does not regulate bank deposits and collections by "equating" trust account checks with certified or cashier's checks, nor does it change the garnishment statute by providing attorneys with authority to violate it.

Nevertheless, from these propositions, AME argues that (i) because its trust account check is "virtually equivalent" to a certified check, AME was obligated to assume it would be immediately presented for payment and, therefore, AME could

not stop payment; (ii) for AME to stop payment on check no. 13450 would undermine the attorney-client relationship and would somehow "violate" AME's fiduciary duty to its client; and (iii) AME could not stop payment without committing some sort of ethical breach. None of these arguments has any merit at all.

In the first place, although AME (or any law firm) might be required to "assume" that a trust account check will be immediately presented for payment, AME cannot rely on that assumption to ignore reality. In reality, Preclude's check was **not** immediately presented to the Bank for payment, and AME could have learned that fact with a simple telephone call to the Bank or an on-line check of AME's trust account balance. Instead of complying with the most rudimentary duty of making a phone call to the Bank to inquire whether Preclude's check had cleared or whether AME still had the funds in its trust account, AME chose to "assume" that the check was already paid. AME filed its answer to the Second Writ denying possession of any funds belonging to Preclude. That denial was clearly false. Preclude's money was still in AME's bank account. The Bank did not disburse funds to Preclude until three days after AME's Answer. It was so easy for AME to discover the true state of affairs that it can fairly be said that AME filed its Answer to the Second Writ with reckless disregard of its truth or falsity. AME – **a law firm** – had a statutory duty to the Court and to First

American to determine whether it still possessed Preclude's funds before filing a pleading with the court denying such possession. AME failed to comply with that duty.

According to the Bank, AME could have stopped payment on check no 13450. *See*, §674.403, *Fla. Stat.* (2005) and *Warren Finance, Inc. v. Barnett Bank of Jacksonville, N.A.*, *supra*. Nothing in the Bar Rules prohibits an attorney from stopping payment on a trust account check. Indeed, there are undoubtedly occasions when it is essential that an attorney do so. For example, if a client loses a trust account check, the attorney has a duty to stop payment on the lost check and replace it. If a writ of garnishment is served on the attorney, the attorney – like every other garnishee in Florida – must stop payment on any outstanding checks payable to the judgment debtor. Nothing absolves attorneys from the duty to stop payment on outstanding checks when served with a writ of garnishment, and nothing prohibits them doing so.

G. Compliance by an Attorney With the Garnishment Statute Does not "Undermine" the Attorney-Client Relationship, Violate a Fiduciary Duty, or Create an Ethical Violation.

AME also argues that to require it to stop payment on check no. 13450 (i.e., to require AME's compliance with the garnishment law) would somehow undermine the attorney-client relationship or cause AME to violate its fiduciary duty to its client. On its face, the argument is absurd. In essence, AME argues that

obeying the Second Writ and following the Florida Supreme Court's directives would "undermine" the attorney-client relationship or violate a fiduciary duty. In its commentary to *R. Regulating Fla. Bar* 5-1.1, the Florida Supreme Court expressly directs attorneys that they may have duties to protect third parties who justly claim an interest in client funds in the lawyer's custody. The Court instructs attorneys "not to unilaterally arbitrate these disputes" (by, e.g., delivering the funds to the client), but in appropriate cases to deliver the funds into the applicable court registry so that the matter may be adjudicated. AME, however, chose to unilaterally arbitrate the garnishment action, by denying possession of any of Preclude's funds, by failing to stop payment on check no. 13450, and finally, by allowing the Bank to pay the funds to Preclude in derogation of the Second Writ.

A decision by AME to comply with the Second Writ would not have "undermined" the attorney-client relationship in any way, nor would it have violated any fiduciary relationship. It also would not have subjected AME to any ethical violation. Such violations do not exist. Rather, the penalty for AME's noncompliance with the Second Writ is a statutory one - §77.06(1) makes AME primarily liable to the First American for the amount of the check that was subsequently paid to Prclude. *Robert C. Malt & Co. v. Colvin*, *supra*. ("… neither a strict adherence to the letter of the writ's command nor the attorney's duty to his client will permit [the attorney] to ignore with impunity what he knew the writ

clearly and obviously intended to command.").

First American recognizes that in many ways, the attorney-client relationship is a special one under Florida law. Clients have a nearly absolute privilege to prevent attorneys from testifying about client confidences. Attorneys have a privilege to withhold their work product from discovery. No special privileges, however, extend to financial transactions between the attorney and the client. *Ashcraft v. Harvey*, 315 So. 2d 530 (Fla. 4th DCA 1975); *State v. Investigation*, 802 So. 2d 1141 (Fla. 2nd DCA 2001); *Robert C. Malt & Co. v. Colvin*, *supra*. Those transactions are always subject to discovery and to other legal process, such as garnishment.

"A bank checking account is a bank checking account . . . without regard to the capacity of the depositor." *Williams Enterprises Management, Inc. v. Buonaro*, *supra*. The mere act of delivering a check to a client does not immunize the attorney for disobedience of a valid garnishment writ. Mere delivery of a check is not delivery of the funds represented by the check until the check is finally paid. Upon service of the Second Writ, AME was under a legal duty to stop payment on its trust account check, and to notify the Circuit Court and First American of the status of the funds in its trust account and of any claims to those funds, including the claims of its judgment debtor client, Preclude. AME failed to perform that duty, and must bear the consequences of that failure.

II. THE SECOND DISTRICT CORRECTLY RULED THAT UNDER FLORIDA LAW, AME HAD POSSESSION AND CONTROL OF PRECLUDE'S FUNDS AT THE TIME OF SERVICE OF THE SECOND WRIT, AND THAT AME WAS REQUIRED TO STOP PAYMENT ON THE UNPAID CHECK PREVIOUSLY DELIVERED TO PRECLUDE.

The Florida garnishment statute and case law clearly delineate AME's obligations with regard to the Second Writ. AME, however, argues that the Florida cases are all wrong, that the Florida garnishment statute does not and should not apply to its trust account, and that the Court should adopt the rulings of other states that do not impose a stop payment obligation on a garnishee. Once again, THE Court should decline AME's invitation.

The case of *Hiatt v. Edwards*, 182 S.E. 634 (Ga. Ct. App. 1935), cited by AME and relied on by the trial court, is directly contrary to the long-established legislative policies behind the garnishment statute, all Florida case law construing that statute, and the Florida Supreme Court's directives to attorneys regarding third party claims to trust account funds. It should not be followed by this Court. In that case, the Georgia appellate court held that funds in an attorney's trust account were not subject to garnishment for the client's debt if the attorney had delivered to his client a check drawn against the funds. The court went on to state that this was especially true in cases where, prior to service of the writ of garnishment, the client had negotiated the check to a third party. *Id*. The court reasoned that trust account funds were not a "debt due" to the client, but instead, were property owned by the

client. Because the attorney was not the owner of the funds, the Georgia court held that, under the Georgia garnishment law as it existed at that time, the funds could not be garnished.

Hiatt is directly contrary to Florida law, in that the Georgia court ruled that under Georgia law, a garnishment writ served on an attorney did not reach his client's property. The writ could only reach a debt due to the client. The Florida garnishment statute, on the other hand, permits garnishment of **any** intangible property of the judgment debtor in the "possession or control" of a third person. The *Hiatt* court ruled that because no debt was due to the client, the writ did not require the attorney-issuer of a check to his judgment debtor client to stop payment on the check when served with the writ of garnishment. No exemption for attorney trust accounts is provided in the Florida garnishment statute, and no exemption should be judicially created. AME's reliance on *Hiatt* is misplaced.[1]

AME's reliance on *First National Bank of Boston v. New England Sales, Inc.*, 629 A. 2d 1230 (Me. 1993) is similarly misplaced. In that case, a bank sought to enforce a "trustee process" (a prejudgment writ of attachment) against a law firm that had delivered an escrow check against the proceeds in its escrow account.

---

1 *Hiatt* has been cited in Florida only one time – for the proposition that the drawer of a check is not subject to garnishment by the payee's creditor **where the check has been endorsed and delivered to a third person by the payee before service of the garnishment writ on the drawer**. *Universal C.I.T. Credit Corporation v. Broward National Bank of Ft. Lauderdale*, 144 So. 2d 844 (Fla. 2d DCA 1962). That is not the case here, as Preclude never endorsed the check to a third party.

The Maine Supreme Court held that the law firm had no duty to stop payment on the check. Under the applicable statute, 14 *M.R.S.A.* §2602(1), the funds represented by the check were not subject to "trustee process." That statute provides "no person shall be adjudged trustee by reason of any negotiable bill, draft, note or other security drawn, accepted, made or indorsed by him . . ." In other words, the writing of the check (i.e., a draft) made the attorneys expressly not subject to trustee process under Maine law. The Maine trustee process law is simply not analogous to the Florida garnishment statute.[2]

Another Georgia case cited by AME, *Russ Togs, Inc. v. Gordon*, 127 Ga.App. 520, 194 S.E. 2d 280 (Ga. 1972) also does not help AME's cause. In that case, the Georgia Court of Appeals held only that "once a check has been properly mailed and delivered to the payee, the debt represented by the check is not subject to garnishment," citing *Parker-Fain Grocery Co. v. Orr*, 1 Ga.App. 628, 57 S.E. 1074 (Ga. 1907). *Parker-Fain* holds that a garnishee need not stop payment on a delivered check because of the risk of double liability. *Watt-Harley-Homes Hardware Co. v. Day*, 1 Ga. App. 646, 57 S.E. 1033 (Ga. 1907) held that prior to mailing, a check could be garnished, but again cautioned that under Georgia law, once the check was mailed, it could not be stopped by the drawer without a risk of

2 In fact, the trustee process statute is not even analogous to the Maine garnishment statute, which uses the same "possession and control" language as Florida's. *See*, 14 *M.R.S.A.* §3127-A.

double liability. As demonstrated above, there is no such risk in Florida.

Giere's Truck and Trailer, Inc. v. Ward, 2002 WL 31719476 (Ohio App. 2002), is likewise unavailing. In that unreported case, the Ohio appellate court held that requiring a garnishee to stop payment on an outstanding check would place an undue burden on the garnishee by requiring him to pay the stop payment charges. The Florida garnishment statute resolves that concern by requiring the garnishor to deposit a statutory fee with the Clerk at the time of issuance of the writ, for payment to the garnishee. See, §§ 77.17 and 77.28, *Fla. Stat.*

The Pennsylvania cases cited by AME also are inapplicable. In *Lundy Lumber v. Deem*, 34 Pa. D. & C. 3d 78 (Pa.Com.Pl. 1984) the Pennsylvania trial court held that because, under Pennsylvania law, delivery of a check to a payee constitutes an assignment of the funds represented by the check, there could be no duty to stop payment in favor of a subsequent garnishee. The case is inapposite precisely because Florida law provides that delivery of a check is not an assignment of the funds. *Hudgins, supra*. *Guaranty Trust & Safe Deposit Co. of Mt. Carmel v. Tye,* 196 A. 618 (Pa. Super. 1938) dealt with an assignment of stock certificates that defeated a garnishment on the issuer, because the assignment was delivered to the purchaser, though not the issuer, at the time of the garnishment.

A decision to reverse the Second District will completely gut the garnishment statute. By creating a new exemption from garnishment for funds in

an attorney's trust account, the Court will create a new method of defeating all judgment collection efforts. If funds in an escrow account are exempt from garnishment, an attorney can (must?) help a client escape all liability for a judgment simply by having the client deposit all of his money into the attorney's trust account. So long as the attorney delivers a check to the client, and so long as the client does not cash the check, the funds can never be garnished and the judgment creditor can never collect what is rightfully due. This is clearly contrary to the policies behind the garnishment statute, as repeatedly articulated by the courts of this state in the cases cited above, and clearly contrary to the policies articulated by the Florida Supreme Court in the commentary to *R. Regulating the Fla. Bar* 5-1.1.

In summary, Preclude's funds were in AME's escrow account at the time of service of the Second Writ. When served with the Second Writ, AME chose not to stop payment on the check that it had delivered to Cameron and Preclude, though it could have done so. If AME had stopped payment on that check and complied with the Second Writ, AME would have been entitled to statutory immunity from all claims. As contemplated by the garnishment statute, the trial court would then have had the opportunity to decide whether the judgment creditor, First American, or the judgment debtor, Preclude, was entitled to the money. Instead of stopping payment and complying with the statute, AME issued a simple denial that it

possessed any funds belonging to Preclude, and AME did nothing further. By its acts and omissions, AME allowed the Bank to pay the funds from AME's account to Preclude three days later. By its acts and omissions, AME deprived First American of the funds that should have been garnished. By its acts and omissions, AME thereby became liable to First American for the amount of $23,736.24.

CONCLUSION

The Second Distrct properly construed the "possession and control" requirement of Florida's garnishment statute, in accordance with Florida law. The compliant garnishee is under a minimal burden to stop payment on uncleared checks. The compliant garnishee who stops payment and retains all funds in its possession and control avoids all liability to the garnishor and all third parties, including the judgment debtor. The compliant garnishee is entitled to have its costs and fees paid, and thereby can avoid any financial burden associated with compliance. The compliant garnishee need only properly report to the court the funds in its possession and control, and the identity of all parties that it believes may claim an interest in the garnished funds. The compliant garnishee need only retain the funds, subject to further order of the court. All of these provisions are enacted to ease any real or imagined burdens on garnishees because Florida policy strongly favors compliance. The non-compliant garnishee, on the other hand, is primarily liable to the judgment creditor for all amounts that it did not properly

report and retain.

Under Florida law, AME was in possession and control of $23,263.76 at the time the Second Writ was served. AME did not properly report those funds to the Circuit Court and did not retain them. It was obligated to do so, under applicable Florida law.

Based on the foregoing, the Second District's decision should be affirmed.

Respectfully submitted,

GEOFFREY TODD HODGES, ESQUIRE
G. T. Hodges, P.A.
Florida Bar Number: 379964
905 Shaded Water Way
Lutz, Florida 33549
Telephone: (813) 933-6571 Ext. 1001
Facsimile: (813) 935-8234
Counsel for First American

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by regular U.S. Mail to John Bales, Esq., A Bales Professional Association, 9700 Dr. Martin Luther King, Jr. St. N, Suite 400, St. Petersburg, FL 33702, to Barbara Eagan, Esq., Broussard Cullen, DeGailler & Eagan, 445 W. Colonial Drive, Orlando, FL 32814, and to Michael Clark Cameron, 2147 Osprey Avenue, Orlando, FL 32814 this 28th day of August, 2007.

_____
Attorney

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the font requirements of *Fla. R. App. P.* 9.210(a)(2).

_____
Attorney