IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

ARNOLD, MATHENY & EAGAN, P.A.,

Petitioner,

vs.

CASE NO.: SC07-1136
LOWER TRIBUNAL NO: 2D06-317

FIRST AMERICAN HOLDINGS, ET AL.,

Respondent.
_____/

ON A CERTIFIED QUESTION FROM
THE SECOND DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Petitioner refers to Arnold, Matheny, & Eagan, P.A. as "AME."

Petitioner refers to First American Holdings, Inc. as "FAH."

Petitioner refers to Preclude, Inc. as "Preclude."

ARGUMENT

ATTORNEY GARNISHEE DOES NOT HAVE A DUTY TO ISSUE A STOP PAYMENT ORDER ON HIS OR HER TRUST ACCOUNT CHECK THAT HAS BEEN DELIVERED TO THE PAYEE PRIOR TO THE RECEIPT OF A WRIT OF GARNISHMENT - EVEN IF THE SERVICE OF THAT WRIT OCCURS PRIOR TO THE PRESENTMENT OF THAT CHECK FOR PAYMENT TO THE ATTORNEY'S BANK.

The Supreme Court, respectfully, should not impose a duty upon an attorney garnishee to issue a stop payment order on a check issued on his or her trust account check that has been delivered to the payee prior to the receipt of a writ of garnishment. To impose such duty would negatively impact the attorney/client relationship, the practice of law, and the management of a law office, as well as impinge the dignity of the legal profession.

Respondent, First American Holdings ("FAH"), presents arguments that do not shed light on, or fully address, the issue at hand, as follows.

A. Respondent, FAH's Analysis Of Attorney Trust Account Checks And Garnishment Is Incomplete and Fails To Address The Concept That Attorney Trust Account Checks Delivered To The Client Are Not Subject To Garnishment

FAH continually asserts the position that AME "believes" attorney trust accounts should be exempt from the requirements of garnishment law. This position misstates AME's position. AME has repeatedly stated that FAH had the right to obtain a writ of garnishment for "any intangible property of defendant (Preclude) in the garnishee's possession or control." §77.06, Fla. Stat. (2007).

Further, AME has repeatedly stated that f AME received FAH's writs of garnishment before AME issued the check to Preclude, the funds in the trust account could be garnished, under the circumstances of this case. However, AME's continued position is that when an attorney delivers a trust account check to a client the funds are no longer in the attorney's "possession or control," therefore not subject to garnishment.

FAH relies heavily upon *In re Amendment to the Rules Regulating the Florida Bar,* 875 So. 2d 448, 534 (Fla. 2004) for the proposition that:

> 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 the matter may be adjudicated.

FAH asserts that AME "unilaterally arbitrated" the matter by not ordering a stop payment on the issued trust account check. FAH's analysis simply failed to

discuss the fact that the funds represented by an attorney trust account check delivered to a client are no longer in the attorney's "custody."

FAH promotes the belief that AME cannot rely on an assumption that the check in question was immediately presented for payment. However, AME did not rely on an assumption -- it relied on the Rules Regulating The Florida Bar. Analysis of the Rules Regulating The Florida Bar show AME is required to assume an attorney trust check will be immediately presented for payment.

In sum, a client has a right to control and ultimately possess funds owed to them. R. Regulating Fla. Bar 5-1.1; *In re Amendment to the Rules Regulating the Fla. Bar* 875 So. 2d at 534-535. This right imposes a mandatory duty upon attorneys to promptly distribute to the client any portion of money received from a third party that is not subject to dispute over legal fees. R. Regulating Fla. Bar 5-1.1; *In re Amendment to the Rules Regulating the Fla. Bar* 875 So. 2d at 534-535. Additionally, upon prompt distribution to the client,

> [a]n attorney must assume that the recipients of checks drawn upon his trust account will present such checks for payment immediately at the drawee bank.

In re Amendment to the Integration Rule, 647 So. 2d 704, 704 n* (Fla. 1985).

As a result, an attorney is required to immediately debit the client's account for the amount of the check delivered to the payee. The attorney must deem the funds represented by the check are no longer subject to the attorney's control.

Once the check is delivered, the attorney no longer has control over the subsequent events with respect to the check (i.e. whether the check has been presented for payment or endorsed by the payee to a third party). Therefore, AME did not "unilaterally arbitrate" the matter, because the funds were not in AME's "possession or control" to deposit in the court registry.

Respondent, FAH further contends that the Rules Regulating The Florida Bar do not grant any special legal status to attorney trust account checks. Additionally, FAH declares that the Rules Regulating The Florida Bar govern only attorney discipline and do not regulate or purport to regulate matters of bank deposit and collection. This argument is not grounded. A quick glance at Rule Regulating Fla. Bar 5-1 shows the extensive regulation bestowed upon attorney trust accounts.

Rule Regulating The Florida Bar 5-1 plainly shows the special status conferred upon attorney trust account checks. Lawyers are permitted to accept another attorney's trust account check before the funds are finally settled and credited to the lawyer's trust account. *Id*; R. Regulating Fla. Bar 5-1.1(i) (2002) (The Rule Regulating The Florida Bar 5-1.1(i) is cited as it appeared in June 2002, the pertinent time frame in the case at bar). However, Rule Regulating The Florida Bar 5-1.1(i) now appears as 5-1.1(j).) and specifically provides:

> when the deposit is made by a check drawn on the trust account of a lawyer licensed to practice in the state of Florida or on the escrow or

> trust account of a real estate broker licensed under applicable Florida law when the lawyer has a reasonable and prudent belief that the deposit will clear and constitute collected funds in the lawyer's trust account within a reasonable period of time…

This rule provides an exception to the general principal that trust account checks cannot be disbursed unless the funds are deposited, finally settled, and credited to the lawyer's trust account. *Id*. This clearly evidences that Attorney trust account checks are given a special status and degree of certainty under the law, similar to "certified checks" or "cashier's checks." Further, as presented in the Initial Brief, the Uniform Commercial Code, as adopted in Florida, clearly defines a "cashiers check" and a "check" §673.1041, Fla. Stat. (2007). However, the Uniform Commercial Code is silent in regards to the definition of an attorney trust account check, because attorney trust account checks are defined and regulated through the Rules Regulating the Florida Bar. *See* R. Regulating Fla. Bar 5-1.1.

Under the Uniform Commercial Code, cashier's checks are recognized as a cash substitute; parties use cashier's checks in place of ordinary checks because a cashier's check stands on its own as a primary obligation of the bank. *Warren Finance v. Barnett Bank of Jacksonville N.A.*, 552 So. 2d 194, 195-196 (Fla. 1989). A bank cannot be required to stop payment on a cashier's check. *Behavioral Health and Wellness, Inc. v. FDIC*, 802 So. 2d 374, 376 (Fla. 3d DCA 2001); *Crosby v. Lewis*, 523 So. 2d 1154, 1156 (Fla. 5th DCA 1988). The Rules Regulating The Florida Bar impart a status upon an attorney trust account check

that is decidedly similar to a cashier's check. In essence, an attorney is "guarantying" a trust account check: just as a bank is "guarantying" a cashier's check. Consequently, it would be illogical and contrary to Florida ethics principles to require an attorney to stop payment on an attorney trust account check delivered to a client.

FAH, makes an unsuccessful attempt to explain why a requirement for a "stop payment" on an attorney's trust account check delivered to a client would not undermine the attorney/client relationship or diminish the fiduciary duty an attorney owes a client. Once again, FAH relies on the argument that Rule Regulating Florida Bar 5-1.1 states attorneys may have a duty to protect third parties who justly claim an interest in client's funds in the lawyer's custody. As maintained above, however, a more well-reasoned approach results in the conclusion that when an attorney delivers a trust account check to a client the funds are no longer in the attorney's "possession or control," therefore not subject to garnishment. This is the position Petitioner AME espouses.

Additionally, FAH relies upon *Ashcroft v. Harvey*, 315 So. 2d 530 (Fla. 4th DCA 1975) and *State v. Investigation*, 802 So. 2d 1141 (Fla. 2d DCA 2001) for its position that no special privileges extend to financial transactions between the attorney and the client. While this may be correct regarding discovery and the assertion of the attorney/client privilege, it simply has nothing to do with the

attorney/client relationship and the fiduciary duty an attorney owes a client. The issues at hand in both the *Ashcroft* and *Investigation* cases, *supra*, simply involve the discovery of attorney trust account documents and the assertion of the attorney/client privilege. These decisions are devoid of discussion regarding stop payment orders on attorney trust account checks and concurrent infringement upon the attorney/client relationship. As has been stated:

> It is improper for an attorney to advise his client's creditor's that he holds funds due to the client so that such creditor may proceed against them, nor is it proper for the lawyer to interplead such funds. It is the lawyer's duty to represent his client with undivided fidelity and to preserve his confidences.

Fla. Bar, *Ethics Opinion* 60-34 (March 28, 1961). The Second District's decision, and FAH's position, will require an attorney to breach their "undivided fidelity" to the client and disclose clients' confidences.

Of import here, the legal community, the bench and bar as a whole, is engaged in an everyday battle to enhance and uphold the integrity of the profession and present the profession favorably to the public. From a policy perspective, a stop payment order on a check carries a weighty, negative connotation. Such should be reserved for extreme circumstances (such as, fraud, mistake). Additionally, clients and the public rely on attorney trust accounts as a sound source for transacting business. To require an attorney to request a stop payment on issued and delivered attorney trust account checks would not only undermine the attorney/client relationship; such would also carry the negative connotations

associated with the stop payment of a check over into the public perception of the legal community. This would not enhance efforts toward buttressing public perception.

B. FAH's Analysis Of The Majority Rule Is Incomplete And Fatally Flawed

According to the majority of jurisdictions a non-bank garnishee, such as AME, which delivers a check to a judgment debtor before being served with a writ of garnishment, has no duty to stop payment on the delivered check. *Cent. Sec. Alarm Co. v. Mehler*, 963 P.2d 515, 519 (N.M. Ct. App. 1988). In its answer, FAH emphasizes subsection 77.06(3), Florida Statutes, in its attack on the majority rule. FAH believes that Florida does not need to follow the majority rule, because subsection 77.06(3), Fla. Stat. provides "complete statutory immunity" to a garnishee that complies with the garnishment writ in good faith and stops payment on the issued check. Additionally, FAH submits that the majority rule is a majority rule only because it addresses a problem that can never arise in Florida due to subsection 77.06(3).

FAH's analysis of the majority is flawed in the following manner. First, FAH fails to address the rational behind the majority rule. FAH simply notes subsection 77.06(3) provides protection to a garnishee, therefore, the garnishee must order stop payment on issued checks. No additional analysis is provided to support FAH's position that Florida should follow the minority rule. FAH

disregards the majority rule acknowledgement that the only control a non-bank garnishee retains [once the check leaves its possession], is over "the ultimate payment of a check through the stop payment mechanism." *Mehler* 963 P. 2d at 519. Additionally, a non-bank garnishee that exercises "the stop payment mechanism" does not know whether the payee cashed the check or negotiated the check to another person, who may be a holder in due course. *Id* at 519-520. If the non-bank garnishee stops payment it is possible disputes will ensue between the garnishee and holders in due course. *Id*. Non-bank garnishees are different from bank garnishees, because a bank garnishee has direct control over the funds and immediate access to information regarding the judgment debtor's account. *Id*. FAH is unable to undermine the logical rational behind the majority rule, in its attempt to support a minority rule.

Second, FAH completely neglects to address the multiple jurisdictions, discussed in Initial Brief, which follow the majority rule; while (like Florida), providing statutory protection to a garnishee that acts with diligence and/or good faith. FAH simply ignores and fails to distinguish the circumstances that multiple jurisdictions provide two-fold protection to a non-bank garnishee. These jurisdictions deem it important that non-bank garnishees have no duty to stop payment on an issued check upon the receipt of a writ of garnishment, despite the protections installed for garnishees. *Id*; *Watt-Harley-Holmes Hardware Co. v.*

Day, 57 S.E. 1033, 1034 (Ga. App. 1907); *Togs v. Gordon*, 194 S.E. 2d 280 (Ga. App. 1972); *Frickleton v. Fulton*, 626 S.W. 2d 402 (Mo. Ct. App. 1981); *Lundy Lumber v. Deem*, 34 Pa. D. & C.3d 78, 81 (Pa.Com.Pl. 1984); *Guar. Trust & Safe Deposit Co. of Mt. Carmel v. Tye*, 196 A. 618, 620 (Pa.Super 1938). Even where a jurisdiction provides a garnishee with statutory protection from third party claims when the garnishee acts with good faith and/or diligence, it remains a majority jurisdiction. N.M. Stat. §35-12-3 (2007); Ga. Code §18-4-92.1 (2007); Mo. Ann. Stat. §525.040 (Vernon 2007); Pa. R. Civ. P. No. 3143 (2007). FAH simply does not provide a reasonable argument against the ability of these two rules of law to co-exist without undermining garnishment law.

C. FAH Failed To Address That Under Statutory Construction Rules The Garnishment Statute Does Not Conflict With Delivered Attorney Trust Account Checks Not Being Subject To Garnishment

FAH completely fails to address AME's statutory construction analysis. The Second District Court of Appeal stated "…the issue we must resolve is whether funds held in the attorney's trust account are still considered to be in the 'possession or control' (citing §77.04, Fla. Stat.) of the attorney at the time the attorney receives the writ of garnishment if the attorney has previously drawn a check on those funds and has personally delivered it to his client but the client has not yet presented the check for payment." *First American Holdings, Inc. v Preclude Inc.*, 955 So. 2d 1231 (Fla. 2d DCA 2007). The Second District opined

that "possession and control" are unclear and ambiguous terms in section 77.04, Florida Statutes, as to delivered attorney trust account checks.

Under rules of statutory construction, the Legislature is presumed to be acquainted with judicial decisions implicating that which it subsequently enacts as law. *Williams v. Jones*, 326 So. 2d 425, 435 (Fla. 1975); *Ford v. Wainwright*, 451 So. 2d 471, 475 (Fla. 1984); *City of Ormond Beach v. City of Daytona*, 794 So. 2d 660, 664 (Fla. 4th DCA 2001). Additionally, courts should consider administrative usage prior, and subsequent, to the act. *P.A.C. v. State*, 391 So. 2d 364, (Fla. 1st DCA 1980).

The Florida Legislature has made amendments to and reenacted sections 77.01, 77.04, and 77.06, on multiple occasions (section 77.01 amended in 2001 and 2000; section 77.04 amended in 2005 and 1995; section 77.06 amended in 2000 and 1995). §77.01, Fla. Stat. (2007); §77.04, Fla. Stat. (2007); §77.06, Fla. Stat. (2007). It is presumed that the Legislature was aware of Florida case law stating that neither a bank nor a purchaser of a cashier's check has the authority to issue a stop payment order on a cashier's check. *Crosby v. Lewis*, 523 So. 2d at 1156. Under this presumption, the Court must interpret Florida Garnishment Law pursuant to sections 77.01, 77.04, 77.06. No stop payment shall issue on a cashier's check drawn on an account and delivered to the payee prior to the receipt

of a writ of garnishment if the writ occurs prior to the presentment of that check for payment to the bank.

As previously discussed, Rule Regulating Florida Bar 5-1.1 treats an attorney trust account check in a similar vein with a cashier's check. Therefore, it should not be an attorney's duty to issue a stop payment order for a check drawn on his or her trust account and delivered to the payee prior to the receipt of a writ of garnishment – even if the writ occurs prior to the presentment of that check for payment to the attorney's bank.

D. FAH Failed To Acknowledge That Under The Florida Constitution, The Florida Supreme Court Has Exclusive Jurisdiction To Regulate Attorney Trust Accounts

FAH also failed to address AME's analysis that the Second District's interpretation of section 77.04, Florida Statute. allows the Florida Legislature to regulate attorney trust accounts. The Florida Constitution provides, "the Supreme Court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted." Art. V, §15, Fla. Const. The Florida Supreme Court adopted the Rules Regulating The Florida Bar for application to attorneys and the practice of law. The attorney trust account rules provide definitions, guidelines, and procedures in detail for the maintenance of an attorney trust account. R. Regulating Fla. Bar. 5-1.1.

The Second District's construction of section 77.04 has a direct effect on the Rules Regulating The Florida Bar, specifically Rule Regulating Florida Bar 5-1. The ruling will directly affect the status of attorney trust account checks and mandates changes to the Rules Regulating The Florida Bar. This is a usurpation of power from the judicial branch by the legislative branch. The legislative branch will now be regulating Florida attorneys and their management of trust accounts.

CONCLUSION

For the reasons stated, Petitioner, Arnold, Matheny, Eagan, P.A., respectfully submits that the Second District Court of Appeal erred in holding an attorney garnishee has a duty to issue a stop payment order for a check drawn on his or her trust account, and delivered to the payee prior to the receipt of a writ of garnishment, if the service of that writ occurs prior to the presentment of that check for payment to the attorney's bank. The Second District's decision, if affirmed, will have a negative impact on the attorney/client relationship, the practice of law, and the management of a legal practice. Additionally, the ruling will directly affect and change Rules Regulating The Florida Bar, specifically as related to attorney trust accounts. Respectfully, this Court should answer the certified question in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following on September 20th , 2007:

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the Times New Roman 14-point font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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