

INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL  
FIDELITY AND SURETY COMMITTEE NEWSLETTER

**Mark VII, Inc. v. Lumbermens Mutual Casualty Company**  
**Case No. 99-2612 (W.D. Tenn. November 17, 2000)**

The United District Court for the Western District of Tennessee, in an unpublished opinion, recently granted the fidelity insurers' Motions for Summary Judgment in a lawsuit brought by the insured asserting coverage under commercial crime policies. Specifically, the court addressed the definition of "Covered Instruments" under the forgery or alteration coverage form of the policy.

**I. Facts**

Mark VII, Inc. and Mark VII Transportation Co., Inc. (collectively "Mark VII") is a commercial transportation company which operates primarily through independent agents and vendors. The agents solicit shipping services on behalf of Mark VII and arrange for shipment by an independent vendor. The agent receives a fee for originating shipping business and the vendor receives payment for the shipping services. One of the Mark VII's agents was Thomas Torcomian ("Torcomian") who also owned and operated Global Transportation Management, LLC ("GTM"), a vendor who provided shipping services on behalf of Mark VII. Torcomian primarily contracted with GTM on behalf of Mark VII.

A certain limited number of vendors were approved for expedited payment for services. GTM would receive payment the week following the date when services were performed. The agents, including Torcomian, were required to submit customer invoices and carrier payment information into the Multi-Modal Billing System ("MBS") which transmitted the information to Mark VII. For those vendors approved for expedited payment, including GTM, information was obtained from the MBS without further confirmation that the services were performed and payment was issued to GTM and Torcomian for their respective commission and fees. This expedited pay system was referred to as the Quick Pay System and involved a second computer program which obtained information transmitted through the MBS and processed the information creating a report of amounts payable to the agent (Torcomian) and the vendor (GTM). Based upon the information in the report, a check was issued in the amount payable to the Quick Pay vendor. In the case of GTM, the check was cancelled and a wire transfer order was prepared transmitting the funds to GTM.

Torcomian entered shipping information for shipments which never actually occurred ("phantom loads"). Therefore, Mark VII paid GTM for services which were never performed and paid Torcomian commissions for shipping business which was never provided. In order to perpetuate the scheme, Torcomian subsequently performed valid shipments, did not enter the information for the valid shipments into the MBS, altered the prior customer invoices for phantom loads, and billed the customers for the actual shipments. Mark VII's records reflected that the payments received from customers were in payment of the prior accounts relating to phantom load information submitted by Torcomian. Ultimately

the scheme was discovered when Torcomian could not continue to provide valid shipments to cover phantom load invoices and Mark VII began collection efforts against its customers. Mark VII incurred a loss in excess of \$1,000,000 as a result of Torcomian's scheme.

## II. Analysis

Coverage was asserted by Mark VII under two commercial crime insurance policies covering the two policy periods in which Torcomian wrongful conduct occurred. The policy issued by Lumbermens Mutual Casualty Company ("Lumbermens") provided coverage, in relevant part, as follows:

We will pay for Loss involving Covered Instruments resulting directly from the Covered Causes of Loss.

**1. Covered Instruments:** Checks, drafts, promissory notes or similar written promises, orders or directions to pay a sum certain in "money" that are:

- a. Made or drawn by or drawn upon you;
- b. Made or draw by one acting as you agent;

or that are purported to have been so made or drawn.

**2. Covered Causes of Loss:** Forgery or alteration of, on or in any Covered Instrument.

St. Paul Fire and Marine Insurance Company's ("St. Paul") policy provided coverage, in relevant part, as follows:

We will pay for loss resulting directly from forgery or alteration of a check, draft, promissory note, or similar written promises or directions to pay money that our:

made or drawn by you;  
drawn upon you;  
made or drawn by someone acting as your agent; or  
claims to have been so made or drawn.

At issue was whether the information submitted by Torcomian through the MBS system constituted a "Covered Instrument" under Lumbermen's policy and a "check, draft, promissory note, or similar written promise or direction to pay money" under St. Paul's policy.

Mark VII argued first that the information transmitted through the MBS and processed through the Quick Pay System onto a written report was an order or direction to pay a sum certain to GTM and/or Torcomian. Alternatively, Mark VII argued that the check or wire transfer was, in fact, a

Covered Instrument and all the documents leading to the issuance of the check and the wire transfer should be viewed as one transaction and one instrument.

The court first acknowledged that the purported forgery alteration did not occur on or in any check, draft, or promissory note. Therefore, the issue became whether there was a forgery alteration on or in any “similar written promise or direction to pay money.” The court applied the doctrine of *ejusdem generic* which provides that a list of specific words followed by general words limits the application of the general words to items similar to the items specifically listed. Therefore, the court found that the common factor in checks, drafts, and promissory notes is that they are “all unconditional promises or orders to pay money, either on demand or at a time certain.” The court held that the information submitted through the MBS and processed through the Quick Pay System did not constitute an order, a direction, or promise to pay which is similar to a check, draft, or promissory note. The court noted that the Quick Pay System was an expedited invoice system where the agent sends Mark VII the information that would normally be on an invoice that requests payment. The fact that a check was drawn and a wire transfer ultimately resulted in payment to GTM and Torcomian is independent of the submission of fraudulent information and, therefore, there was no forgery or alteration of a check, draft, promissory note or similar written promise or direction to pay.<sup>1</sup>

### **III. Conclusion**

This opinion is significant in that no court has issued a published opinion on the definition of covered instrument or discussing the items which are covered under the forgery or alteration section of a commercial crime insurance policy. This opinion should provide support for the insurer’s defense of claims advancing a broad application of the covered instrument definition or attempting to assert coverage arising from forgery in a non-covered.

Jeffrey S. Price  
John M. Gillum  
Manier & Herod, P.C.  
Nashville, Tennessee

---

<sup>1</sup> The court did find that, under Tennessee law, Torcomian's actions did constitute forgery of records of Mark VII as it caused false information to be entered into the records of Mark VII.