

2001

# Valley Bank and Trust Company v. First Security Bank of Utah NA : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc2](https://digitalcommons.law.byu.edu/byu_sc2)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Don B Allen; James W Gilson; Ray, Quinney and Nebeker; Attorneys for Respondent.

Irving H Biele; Biele, Haslam and Hatch; Attorneys for Appellant .

---

## Recommended Citation

Brief of Respondent, *Valley Bank and Trust Company v. First Security Bank of Utah*, No. 13852.00 (Utah Supreme Court, 2001).  
[https://digitalcommons.law.byu.edu/byu\\_sc2/1023](https://digitalcommons.law.byu.edu/byu_sc2/1023)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

IN  
CLERK  
U  
9

UTAH SUPREME COURT

BRIEF

CKET NO.

**13852 R**

RECEIVED  
LAW LIBRARY

OF THE

STATE OF UTAH

FEB 1976

BRIGHAM YOUNG UNIVERSITY  
VALLEY BANK AND TRUST COMPANY, a Utah corporation,  
*Plaintiff and Appellant,*  
vs.  
FIRST SECURITY BANK OF  
UTAH, N.A.,  
*Defendant and Respondent.*

Reuben Clark Law School  
Case No.  
13852

RESPONDENT'S BRIEF

Appeal from the Judgment of the Third District Court  
for Salt Lake County, Hon. Stewart M. Hanson, Sr.

Don B. Allen, Esq. and  
James W. Gilson, Esq. of  
RAY, QUINNEY & NEBEKER  
400 Deseret Building  
Salt Lake City, Utah 84111  
*Attorneys for Respondent*

Irving H. Biele, Esq.  
BIELE, HASLAM & HATCH  
80 West Broadway, Suite 300  
Salt Lake City, Utah 84101

FILED  
APR 28 1975

## TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE .....	1
DISPOSITION IN LOWER COURT .....	1
RELIEF SOUGHT ON APPEAL .....	2
STATEMENT OF FACTS .....	2
ARGUMENT	
THE UTAH UNIFORM COMMERCIAL CODE EXPRESSLY ALLOWS A COLLECT- ING BANK TO GIVE ORAL NOTICE OF DISHONOR .....	3
CONCLUSION .....	11

### AUTHORITIES CITED

#### CASES

Hansen v. Bd. of Educ., 101 Utah 15, 116 P. 2d 936 (1941) .....	10
Lawrence v. Bamberger Railroad Co., 3 Utah 2d 247, 282 P. 2d 335 (1955) .....	5
Rio Grande Motor Way, Inc. v. Public Service Com- mission, 21 Utah 2d 377, 445 P. 2d 990 (1965) ....	10
Rummell v. Bailey, 7 Utah 2d 137, 320 P. 2d 653 (1958) .....	5

#### STATUTES

Utah Code Annotated Section 70A-1-201 .....	9
Utah Code Annotated Section 70A-3-508 .....	4
Utah Code Annotated Section 70A-4-103 .....	10
Utah Code Annotated Section 70A-4-104 .....	4

## TABLE OF CONTENTS—Continued

	Page
Utah Code Annotated Section 70A-4-202 .....	4
Utah Code Annotated Section 70A-4-210 .....	9
Utah Code Annotated Section 70A-4-211 .....	5
Utah Code Annotated Section 70A-4-212 .....	6, 7
Utah Code Annotated Section 70A-4-301 .....	7
Utah Code Annotated Section 70A-4-302 .....	9

### TEXT

Uniform Laws Annotated, Section 4-212(2), Com- ment 4 .....	8
--	---

IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

---

VALLEY BANK AND TRUST  
COMPANY, a Utah corporation,

*Plaintiff and Appellant,*

vs.

FIRST SECURITY BANK OF  
UTAH, N.A.,

*Defendant and Respondent.*

Case No.

13852

---

RESPONDENT'S BRIEF

---

STATEMENT OF THE CASE

This is a case arising under the Uniform Commercial Code contesting the validity of a charge back made by an intermediary bank on the account of a depositing bank after oral notice of dishonor.

DISPOSITION IN LOWER COURT

After trial before the Court, the District Judge,

The Honorable Stewart M. Hanson, Sr., entered Findings of Fact, Conclusions of Law and Judgment for the defendant. The Court found that the plaintiff received oral notice of dishonor and that oral notice was sufficient notification under Utah Code Annotated, § 70A-4-212 (1968).

### RELIEF SOUGHT ON APPEAL

Respondent prays that the judgments and orders of the low court be affirmed.

### STATEMENT OF FACTS

On or about August 18, 1970, Bernard M. Tanner and Kent Lundquist executed a check in the amount of Four Thousand Five Hundred Dollars (\$4,500.00) payable to DataCap International, Inc. and drawn on the Guarantee Bank and Trust Company of Chicago.

The check was endorsed by Tanner for DataCap and deposited in the DataCap account in Valley Bank and Trust Company (hereinafter "Valley Bank"). Valley Bank thus became the depository bank within the meaning of Section 70A-4-105(a). Valley Bank credited the \$4,500.00 to the account of DataCap on August 18, 1970.

Valley Bank then forwarded the check to First Security Bank of Utah, N.A. (hereinafter "First Security") for collection. First Security thus became an intermediary bank within the meaning of Section 70A-4-105(b).

First Security made a provisional credit on the account of Valley Bank and Trust Company and forwarded the check for collection to Guarantee Bank and Trust Company, which thus became the payor bank within the meaning of Section 70A-4-105(d).

The payor bank returned the item to First Security on or about August 27, 1970, because the check required another signature. Valley Bank thereafter received the original and contacted its customers. After obtaining the necessary signature, the item was redeposited in DataCap's account at Valley Bank on August 27, 1970, and the item was forwarded through First Security to the payor bank in Chicago.

First Security was notified on September 8, 1970 that the item was being returned for insufficient funds. The item was mailed by the Chicago bank to First Security, but the item was lost in the mails and was never returned to First Security or Valley Bank.

On September 9, 1970, First Security gave oral notice of dishonor to Valley Bank. First Security thereupon reversed the provisional credit given Valley Bank.

## ARGUMENT

THE UTAH UNIFORM COMMERCIAL CODE EXPRESSLY ALLOWS A COLLECTING BANK TO GIVE ORAL NOTICE OF DISHONOR.

First Security, acting as a collecting bank, assumes several statutory obligations. Utah Code Annotated § 70A-4-202 (1968) provides:

“A collecting bank must use reasonable care in (a) presenting an item or sending in for presentment; and (b) sending notice of dishonor . . .”

Section 70A-3-508 of the Code defines notice of dishonor:

“(1) Notice of dishonor may be given to any person who may be liable on the instrument . . . (3) notice may be given in any reasonable manner. *It may be oral or written, and in any terms which identify the instrument and state that it has been dishonored.* A misdescription which does not mislead the party notified does not vitiate the notice. Sending the instrument bearing a stamp, ticket or writing stating that acceptance or payment has been refused or sending a notice of debit with respect to the instrument is sufficient.” [Emphasis added]

By virtue of Section 70A-4-104(3), Section 70A-3-508 is expressly made applicable to the provisions of Article IV:

“(3) The following definitions in other chapters apply to this chapter:

\* \* \*

## Notice of Dishonor — Section 70A-3-508”

\* \* \*

Therefore, the Codes makes it clear that a collecting bank satisfies its obligation of reasonable care if it gives oral notice of dishonor to a depository bank. The Code further provides that if the collecting bank has given such notice that it is not liable to prior parties. Section 70A-4-211(2) provides:

“If before its midnight deadline, the collecting bank properly dishonors a remittance check or authorization . . . the collecting bank is not liable. . .”

The trial court in this case found that First Security gave oral notice of dishonor to Valley Bank on September 9, 1970, well within its midnight deadline. (R. 17) It is well recognized by this Court that findings of fact will not be disturbed on appeal unless they are clearly erroneous. *Lawrence v. Bamberger Railroad Co.*, 3 Utah 2d 247, 282 P.2d 355 (1955). *Rummell v. Bailey*, 7 Utah 2d 137, 320 P.2d 653 (1958). Valley Bank has not demonstrated or even argued that the findings of fact in this case are erroneous; and, consequently, the trial court’s finding must be sustained.

Once oral notice of dishonor is given, First Security is not liable to Valley Bank in the event of dishonor, and it has the right to “charge back” or reverse Valley Bank’s provisional credit. Section 70A-4-212 of the Code provides the right to charge back:

“Right of charge-back or refund. — (1) If a collecting bank has made provisional settlement . . . and itself fails . . . to receive settlement for the item . . . the bank may revoke the settlement given by it, charge back the amount of any credit given for the item . . . whether or not it is able to return the items if by its midnight deadline or within a longer reasonable time after it learns the facts it returns the item *or sends notification of the facts . . .*” (Emphasis added).

The “fact” in this case requiring notification is that the item was dishonored by the payor bank for insufficient funds. In other words, First Security must “send” Valley Bank “notice of dishonor” before midnight of the next business day following the receipt of notice from the payor. This requirement was strictly complied with. Section 3-508, expressly made applicable to Article IV, provides that such notice may be either oral or written. Since oral notice was given by First Security, it has the right at any time thereafter to charge back the provisional credit given to Valley Bank. The fact that the original was never returned became irrelevant, because Valley Bank had the right, upon receipt of oral notice from First Security, to enter a charge back against the account of its customer, DataCap.

The facts contained in the record amply support the court’s findings concerning notice and also comply with the statutory requirements outlined above. The clerk for First Security, Carla Manning, testified that

notice was given by telephone to a clerk at Valley Bank (R. 47). Her testimony was supported by the memorandum of such calls maintained by First Security in its course of business (Exhibit 6-D). Witnesses for Valley Bank could not deny receipt of such oral notice. Consequently, Valley Bank was clearly placed on notice by such call that the check had been dishonored and that it must take appropriate steps to deal with its customer, DataCap, for collection or charge back.

Valley Bank argues that no right of charge back exists because First Security did not properly dishonor the item and submits that written notice is required. In support of that argument, Valley Bank relies on Section 70A-4-212(2) which provides:

“(2) Within the time and manner prescribed in this Section and § 70A-4-301, an intermediary . . . bank . . . may return an unpaid item directly to the depository bank . . .

Valley Bank then refers to Section 70A-4-301 which provides that:

“. . . the payor bank may revoke the settlement and recover any payment, if before it has made final payment and before its midnight deadline it (a) returns the item or (b) *sends written notice of dishonor* for non-payment if the item . . . is otherwise unavailable for return . . .” (Emphasis added).

Valley Bank’s reliance on the written requirement

of Section 4-301 is misplaced. Section 4-301 provides for the collection of items by *payor banks*. It has no application to collecting banks except through Section 4-212(2). Section 4-212(2) is merely an election that may be exercised to return an unpaid item directly to the depository bank and is utilized to avoid the unnecessary handling by intermediary banks. Comment 4 of the Official Comments notes the purpose of the election provided by Section 4-212(2):

4. "Subsection (2) is an affirmative provision for so-called "direct returns." This is a new practice that is currently in the process of developing in a few sections of the country. Its purpose is to speed up the return of unpaid items by avoiding handling by one or more intermediate banks. The subsection is bracketed because the practice is not yet well established and some bankers and bank lawyers would prefer to let the practice develop by agreement. The contention is made that substantive rights between banks may be affected, e.g. available set offs, but proponents contend advantages of direct returns outweigh possible detriments. However, if the subsection were omitted, the *election* to use direct returns would be on the depository bank and it would probably be necessary for that bank to specifically authorize direct returns with each outgoing letter." (Emphasis Added).

It is clear in this case that there was no attempt to return the dishonored check directly to the depository

bank (Valley Bank). Consequently, there was no exercise of the election. Section 4-212 is, therefore, not applicable to this case and cannot be used to create a duty imposed on *payor banks* to send written notice of dishonor in direct returns. The provisions applicable to collecting banks make it clear that written or oral notice is sufficient notice of dishonor. See Sections 70A-4-202, 70A-3-508, 70A-4-212.

Valley Bank has further argued that the Code contemplates written notice of dishonor through the Code's definition of "send" found in Section 70A-1-201 (38). However, the preface of Section 201 provides that those definitions are:

"subject to additional definitions contained in the subsequent chapters of this act which are applicable to specific chapters or parts thereof."

Further, that section specifically notes that the definitions "are applicable unless the context otherwise requires."

In this case, the specific Article IV sections, as well as the context of those provisions, make it clear that oral notice of dishonor may be sent. When written notice is necessary, the Code expressly provides. Section 4-301 (1) (b) describes when a payor bank "sends *written* notice of dishonor," while Section 4-210 (1) indicates when a collecting bank must send "*written* notice that the bank holds the item for acceptance or payment." However,

in all other situations, oral notice is sufficient. Section 4-212 provides that a collecting bank may "charge back" if it, among other things, "sends notification of the facts." Similarly, Section 4-301(2) and Section 4-302 refer to situations where the payor bank "sends notice of dishonor." Section 4-503 discusses when a bank must "notify its transferor of the dishonor."

Valley Bank urges this court to imply written notice where the Code has failed to do so. Article IV of the Code has indicated in which specific circumstances written notice is required. It is a well-recognized principal of statutory construction that the use of specific words connotes an intent to exclude that which is not specifically mentioned. *Rio Grande Motor Way, Inc. v. Public Service Commisison*, 21 Utah 2d 377, 455 P.2d 990 (1968); *Hansen v. Board of Education*, 101 Utah 15, 116 P.2d 936 (1941). Since the Code in this case has indicated when written notice is required, the absence of any requirement for written notice in other situations must be considered as an indication that the Code draftsmen and the Utah Legislature did not intend to require written notice in those situations.

Even if the Code did require written notice, the Code recognizes that such requirements may be modified by agreement. Section 70A-4-103(1) provides:

"(1) The effect of the provisions of this chapter may be varied by agreement except that no agreement can disclaim a bank's responsibility for its own lack of good faith or failure

to exercise ordinary care or can limit the measure of damages for such lack of failure; but the parties may by agreement determine the standards by which such responsibility is to be measured if such standards are not manifestly unreasonable."

Section 4-103 makes it clear that even if written notice were required in the Code, the parties by agreement could establish a contrary practice or custom if not manifestly unreasonable. In the present case, it is the custom or practice of the banking community to give oral notice of dishonor on items over \$1,000.00. (R. 17) It must be emphasized that Valley Bank has not required or even requested a deviation from that policy, either before the initiation of this lawsuit or subsequent to it. That practice must, therefore, constitute tacit agreement by Valley Bank that oral notification is sufficient.


## CONCLUSION

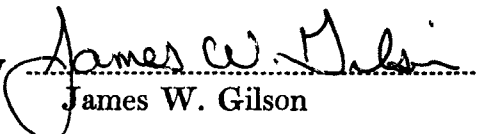
The Code has clearly and expressly indicated that oral notice is sufficient "notification of dishonor" for collecting banks. It has further indicated those specific circumstances when written notice is required. First Security received its notice of dishonor on September 8, 1970. Pursuant to the standards of reasonable care and the statutory authority conferred by Section 70A-3-508, First Security gave oral notice of dishonor to Valley Bank on September 9, 1970. Valley Bank received this notice and, consequently, First Security had the right to charge back the provisional credit given

Valley Bank. The trial court properly ruled on the basis of substantial evidence that First Security had the right to make such a charge back, and that determination should be upheld. Respondent, therefore, requests that this court affirm the lower court's judgment.

Respectfully submitted,

RAY, QUINNEY & NEBEKER

By   
Don B. Allen

By   
James W. Gilson  
*Attorneys for Respondent*