

# Verdicts

DECEMBER 5, 2001

## & Settlements

**At Issue**

## Dead Hand

**Bank of America prevails over a woman who claims someone forged checks worth nearly half-a-million dollars from her deceased brother's account.**

BY CHRISTINA LANDERS

**S**ylvia Wagner and her brother Barney fought for years over money that they inherited from their father. And the battle continued after Barney died of liver disease in March 1997.

After Barney's death, Sylvia decided to sue Bank of America, where her brother held checking and savings accounts since 1996, to try to gain control of some of these contested funds. She claimed that three checks that Barney allegedly signed before his death were forged and that, as his next of kin, she should be reimbursed the amount written on those checks, totaling nearly \$500,000.

"It came down to three checks and the plaintiff's burden of proof, which simply became too heavy to bear," Timothy A. Lambirth, counsel for the bank, says.

Judge Morris Jones agreed. In a short bench trial, Jones handed Lambirth of Los Angeles' Ivanjack & Lambirth a defense victory. *Warner v. Bank of America Nat'l Trust and Sav. Ass'n*, BC186307 (L.A. Super. Ct., verdict Aug. 30, 2001).

Burt McCullough, attorney for the plaintiff, says that he was surprised that the judge considered it Sylvia's responsibility to prove that the signatures were forged. He asserts that the bank should have had to prove whether the signatures were authentic. He plans to refile the case by the end of the month.

"I hope to convince the judge that he applied the wrong burden of proof, and if that burden changes, I believe we'll prevail," McCullough says.

### **A Long History of Long-Distance Disagreement**

Barney, who lived in Los Angeles, was the only sibling of Sylvia, a Lake Elsinore resident. When their father died, he left them a 22-unit



Photo by Hugh Williams

**Using the sad-but-true argument that Barney Wagner's illness was so advanced, he could barely hold a pen, Timothy A. Lambirth successfully defended Bank of America in an alleged forgery suit.**

West Hollywood apartment house, for which Barney had collected rent for several years.

After their father's death, Sylvia came to Los Angeles and took over rent collection. But she did not split the net income with Barney, according to Lambirth.

"Barney basically got to where he couldn't make ends meet," Lambirth says. "He never had a bank account. He lived off that rent money."

Barney became ill soon after, Lambirth says.

"Barney's good friend, Jerry Beran, was taking care of him after he was diagnosed with liver disease," Lambirth says.

In 1994, Sylvia filed a lawsuit against her brother over the rights to their father's property. Attorney David Castenholz of Huntington Beach defended Barney and secured a restraining order for him against Sylvia. Soon after, Sylvia began

## SIDEBAR

**Cite:** *Warner v. Bank of America National Trust and Savings Association*, BC186307 (L.A. Super. Ct., verdict Aug. 30, 2001)

**Type:** Payment on forged endorsement

**Result:** Defense verdict

**Attorneys:** Plaintiff — Burton McCullough of La Cañada-Flintridge's Law Offices of Burton McCullough  
Defendant — Timothy A. Lambirth of Los Angeles' Ivanjack & Lambirth

**Judge:** Morris Jones

splitting the net income from the apartment complex with Barney, but brother and sister remained estranged.

By 1996, Barney was hospitalized with advanced liver disease at Harbor UCLA Medical Center, and he knew that he did not have long to live. He had settled his case with Sylvia and received more than half a million dollars from their father's estate, which he put into an account with Bank of America.

According to Castenholz, Barney told the hospital not to notify his sister if he died but to tell only Beran. In the last year of his life, Barney wrote three checks to the David Castenholz Trust Account. Barney gave the checks to Beran and instructed him to have Castenholz cash the checks, since Beran did not have a bank account, Lambirth says. The checks totaled \$480,000, nearly all the money that Barney received from his father's estate.

When Beran notified Castenholz that Barney was close to death, Castenholz rushed the checks to the hospital with Barney's will, which required his signature. Because Barney suffered from water retention as a side effect of his liver disease, his extremities, including his fingers, were so swollen that he could barely sign his name.

His will bears a scrawled "X" where his signature should be, Lambirth says.

In the spring of 1997, in his mid-40s, Barney died, and his sister didn't discover his death for several months. Sylvia claimed she was the sole heir to Barney's estate, and she demanded the funds that Barney had written the checks on, through Castenholz, to Beran.

Beran had since moved home to his native land, the Czech Republic, and taken the money with him.

When Sylvia found out that Beran and the money were gone, she filed a lawsuit against Bank of America, claiming that the checks, totaling \$480,000, never were signed by Barney and were forgeries. She asserted that the bank owed her that money plus other funds that had been transferred by telephone and via automatic teller machine transactions.

"If she proved that the signatures were forged," Lambirth says, "Sylvia stood to make half a million from the checks the bank honored in good faith."

Lambirth says that his client had a lot hanging in the balance on this case.

"Since the money was gone and Beran was gone, Bank of America would have to pay Sylvia \$480,000 plus interest, but only if she could prove the checks were forged," he says.

### A Hard-Fought Case

Bank of America's in-house lawyers originally were handling Wagner's case, but as a result of the bank's merger with Nations Bank, the case landed on Lambirth's desk in March 1999.

Lambirth specializes in bank defense and says that he was pitted as a stand-in against a worthy opponent.

"[McCullough's] one of one or two pre-eminent plaintiffs' counsels who sue banks in Southern California," Lambirth says.

McCullough is a former Bank of America at-

**'Since the money was gone and Beran was gone, Bank of America would have to pay Sylvia \$480,000 plus interest, but only if she could prove the checks were forged'**

— Timothy A. Lambirth

torney who opened his own law firm in 1986, La Canada-Flintridge's Law Offices of Burton McCullough, and he specializes in suing banks.

"McCullough is a formidable adversary," Lambirth says. "He is very well-thought-of in banking law circles and has exceptional knowledge of uniform commercial code of banking issues."

McCullough, Lambirth says, put on a good show at the trial. He brought in a large movie screen, on which he projected enlarged copies of the signatures on the three checks in question. The plaintiff also hired expert witness David Crisp, a documents examiner, to verify that the three checks were forged.

Sylvia Wagner brought in only a few handwriting samples of the hundreds that she had of Barney's from the years when he co-signed on rent checks that they collected, Lambirth says.

Testifying for the plaintiff, Crisp examined the samples and deemed the checks forged, but he could not say who had forged them. Lambirth countered Crisp's assessment by arguing that Crisp was not made aware of Barney's condition, including his swollen limbs, and there-

fore Crisp could not reasonably disprove the signatures' validity.

On cross examination, Sylvia admitted that she hadn't seen Barney sign anything for the last several years of his life, so Lambirth discredited her testimony, he says.

"Crisp had good qualifications as an expert, but I was able to prove that he wasn't provided with current signatures, and none from the time period under question," Lambirth says. "And he was unaware of Barney's edema."

McCullough disputes Lambirth's claim that Crisp didn't have good handwriting samples, and says that Crisp believed that the signatures were not written by a sick person.

"Those signatures had well-formed letters, written smoothly and not by someone who could hardly hold a pen," McCullough says.

Lambirth's expert witness, document examiner Howard Rile, surprised the attorney when he looked at the three questioned signatures and said that he could not say whether they were forged because of Barney's fluctuating health status.

"And the judge pretty much agreed with Rile," Lambirth says. "That wasn't much help to [my client]."

Jones did not agree, however, to admit Beran's deposition, which disappointed Lambirth, who flew to Prague to obtain it.

"The judge said we failed to comply with the code of civil procedure in getting Beran's deposition," he says. "But, luckily, we didn't need it."

In the end, the judge ruled in Bank of America's favor on Aug. 30, 2001.

### Checks Already Scrutinized by Bank

Lambirth also brought in a Bank of America employee to testify about how many millions of checks are processed every day at the bank. The employee, who asked not to be named, testified that the three checks in question had been pulled out for personal review by bank experts because of their large dollar amount (two of the checks totaled \$200,000 or more).

The employee testified that the bank's experts, during their own review, believed that Barney's signatures were good on all three checks.

While Bank of America, whom Lambirth has defended in three jury trials in the past 14 months, often faces forged-signature cases, this case was unique in how strictly the judge ruled on permitting evidence and, in the end, overruled consideration of "he said, she said" claims.

"The plaintiff failed to show that the checks were forged, and so her brother, with whom she had not been close for years, was able to give his money to a friend who cared for him until he passed away," Lambirth says.

According to Lambirth, it's a luxury to be on the emotionally satisfying side of a case when defending a large commercial bank.

"It was a case of whether the wicked sister got a half a million dollars back or whether Barney could leave his money to his friend and companion," he says. "And ultimately, he got his wish."

LOS ANGELES

# Daily Journal

— SINCE 1888 —

## Sleuthing Lawyer Wins Vanishing-Medallion Suit

By Christina Landers  
Daily Journal Staff Writer

The case had all the makings of a movie plot: missing jewelry, possibly forged appraisals, Iranian royalty and jewelers who seemed to vanish into thin air.

But after some gumshoeing by attorney Timothy A. Lambirth, the trial lasted only one day before Bank of America won a defense judgment against a former customer who claimed that the bank's Westwood branch lost his "valuable" gold medallion. *Alexander V. Javaheri v Bank of America*, SC064158 (L.A. Super. Ct.).

"At the end of the day, the judge ruled for Bank of America that the plaintiff failed to meet his burden of proof," Lambirth said. "The plaintiff took nothing."

The plaintiff's attorneys, Derek I. Tabone, a Van Nuys sole practitioner, and Cameron Y. Brock of Sherman Oaks' Burg & Brock did not respond to requests for comment.

Lambirth said he undercut the plaintiff's credibility on the appraisals to torpedo the entire case.

"I suggested that having submitted apparently fabricated appraisals to the court, the larger claim was probably fabricated as well," Lambirth said. He drove the point home in court by focusing on the plaintiff's failure of proof.

"The plaintiffs did not produce any live appraisers who had ever actually seen the item, and I demonstrated that there had

never been appraisers by those names in those buildings," Lambirth said. "This left the plaintiff with a big hole in his case. They'd have a hard time showing that the missing item was actually the valuable pendant they said it was."

According to Lambirth, Alexander Javaheri had a safe deposit box at Bank of America's Westwood branch for 10 years when, in the summer of 1997, he stopped paying rent for it, according to court documents. He received notices from the bank first that his payments were overdue and that his box would be re-rented.

On May 20, 2000, bank employees forced entry into the box, inventoried its contents and placed them in a vault.

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## Lawyer Pounds the Pavement to Win Case of Vanishing Medallion

Continued from Page 1

On June 3, Javaheri came to the bank with his brother and parents to reclaim his property. At that time, Nina Thomas, the branch manager, provided him with six envelopes containing the contents of the safe deposit box. She spent more than four hours with him and his relatives, reviewing every item.

At the meeting's conclusion, one item was missing, which had been described by the bank's employees as "a cardboard with a yellow token attached," according to court documents, Lambirth said.

Javaheri claimed that yellow token was in fact "the Iranian equivalent of the Hope diamond," a one-ounce rectangular bar of 24-karat Italian gold with an 1860 United States \$20 Pike's Peak coin attached, all of which was surrounded by 36 diamonds, Lambirth said.

Javaheri claimed it had been given to his father by the sister of the Shah of Iran, the defense attorney said.

Javaheri filed suit against the bank for the loss of his medallion on Nov. 29, 2000. As evidence, he produced two appraisals for the piece, from 1993 and 1996.

"I was looking at these appraisals, thinking these were just too good to be true," Lambirth said.

So he left his downtown Los Angeles office and hit the street, heading for the Jewelry District.

After asking around, Lambirth found a store that sells blank appraisal forms.

"I was surprised that anyone could buy

one," he said. "I noticed they were almost identical to those used for the plaintiff's appraisals."

That discovery led him to seek out the jewelers listed on the appraisals.

He could not find either one, though their addresses were mere blocks from his own office.

"I spoke with the building managers at each building and, in both instances, the managers said there was no jeweler by that name, nor had there ever been, as a tenant there, and there was no such suite number in the building," Lambirth said.

Upon returning to his office, Lambirth checked the civil index for plaintiff claims filings and found that Javaheri and his brother had another suit involving an insurance carrier in a Northridge earthquake claim.

"I was of the opinion there was some type of modus operandi there — that perhaps [in this case] they had fabricated a document to support a fraudulent claim," Lambirth said.

During last Wednesday's trial before Judge John H. Reid, Lambirth surprised the plaintiff when he brought in one of the managers from the building where jewelers allegedly appraised the now-missing medallion.

"As it became apparent who she was, it became obvious that we were on to them, and we created the impression that they were putting forth fraudulent appraisals," he said.

After the short trial, the judge ruled in



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Attorney Tim Lambirth went to the Jewelry District, hunting for jewelers who allegedly had appraised a gold pendant that his client, Bank of America, had lost. "I spoke with the building managers at each building and, in both instances, the managers said there was no jeweler by that name, nor had there ever been, as a tenant there, and there was no such suite number in the building," Lambirth said.

favor of the bank, who will pay nothing to the plaintiff. The Javaheris were visibly upset, Lambirth said.

"I think they were very disappointed," he said.

It remains a mystery where that gold medallion with alleged royal ties is today.

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