Nova Law Review

Volume 4, *Issue* 1 1980 *Article* 13

Forged Restrictive Endorsements: Does the Drawer of a Check Have a cause of Action Against the Depository Bank? Underpinning and Foundation Constructors, Inc. v. The Chase Manhatten Bank and The Bank of new York.

Forged Restrictive Endorsements: Does the Drawer of a Check Have a cause of Action Against the Depository Bank? Underpinning and Foundation Constructors, Inc. v. The Chase Manhatten Bank and The Bank of new York.

Abstract

Underpinning and Foundation Constructors, Inc.' employed in its accounting department an employee by the name of Walker.

KEYWORDS: forged, check, bank

Forged Restrictive Endorsements: Does the Drawer of a Check Have a Cause of Action Against the Depository Bank? Underpinning and Foundation Constructors, Inc. v. The Chase Manhatten Bank and The Bank of New York.

Underpinning and Foundation Constructors, Inc.[1] employed in its accounting department an employee by the name of Walker. Among other things, Walker's primary duties placed him in charge of the corporation's books. As such he was responsible for the rectification and examination of any invoices or bills received by Underpinning for payment. Upon receipt of any such bill, Walker would prepare the checks[2]

1. Underpinning and Foundation Constructors, Inc. is the appellee in the case brought before the New York Court of Appeals. The Bank of New York is the appellant. The Chase Manhattan Bank did not appeal the order of the Appellate Division. *See* Underpinning and Foundation Constructors, Inc. v. The Chase Manhatten Bank and The Bank of New York, 46 N.Y.2d 459, 414 N.Y.S.2d 298, 386 N.E. 2d 1319 (1979).

2. In reference to the checks in question, Underpinning and Foundation Constructors, Inc. is the "drawer." The Uniform Commercial Code (U.C.C. or Code) neglects to specifically define "drawer." However, a leading authority describes the "drawer" as the "signer in the lower right hand corner on a check or other draft." *See* J. WHITE AND R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE at 398 (1972).

A "draft" is defined as a negotiable instrument that is an order to pay and "a check is a draft drawn on a bank and payable on demand." U. C. C. §3-104(1)(b) and §3-104(2)(a) and (b).

A writing which is a negotiable instrument within Article 3 of the U. C. C. is defined in U. C. C. §3-104(1)(a),(b),(c) and (d). See U.C.C. §3-104.

An order is "a direction to pay and must be more than an an authorization or request. It must identify the person to pay with reasonable certainty. It may be addressed to one or more such persons jointly or in the alternative but not in succession." U.C.C. §3-102(b).

The drawee bank pays to the party designated as payee only upon the order issued by the drawer. Drawee bank is synonymous with "Payor bank."

"Payor bank" is defined as "a bank by which an item is payable as drawn or accepted." U.C.C. §4-105(b).

by filling in the pertinent information and presenting the checks to the authorized officers or personnel for signature.[3] After the necessary signatures were obtained, the signed checks were then sent to the designated payees.

For approximately one year, either alone or in concert with others, Walker embezzled over a million dollars from his employer, Underpinning.[4] This was achieved by falsifying invoices purportedly received from suppliers with whom plaintiff had, in the past, done substantial business. Walker, as his duties normally required, wrote the checks to pay these false invoices and obtained the necessary signatures from Underpinning's authorized officers. Instead of forwarding the checks to the parties designated as the named payees who, of course, had no interest in them anyway,[5] Walker and his cohorts forged the payees' indorsements and indorsed[6] the checks with signature stamps

---

Item is defined as "any instrument for the payment of money even though it is not negotiable but does not include money." U.C.C. §4-104(g).

The payee is defined as "the individual who is intended by the drawer to be the recipient of the money." Schweitzer v. Bank of America, N. T. and S. A., 109 P.2d 441 (Cal. App. 2nd 1941). U. C. C. §3-413(2) sets out the statutory contract of the drawer.

U.C.C. §3-413 provides: "The drawer engages upon that dishonor of the draft and any necessary notice of dishonor or protest he will pay the amount of the draft to the holder or any indorser who takes it up. The drawer may disclaim this liability by drawing without recourse."

3. Signature is defined in U. C. C. §3-401. U.C.C. §3-401(2) provides: "A signature is made by use of any name, including any trade or assumed name, upon an instrument, or by any word or mark used in lieu of a written signature."

4. 414 N.Y.S. 2d 298.

5. The named payees of the checks were viewed as having no valuable interest because the invoices were false and did not represent a valid debt.

6. " 'Indorsement' is a formal act which passes title to the indorser's transferee and obligates the indorsee on the contract set forth in U.C.C. §3-414. U.C.C. §3-414 provides: 'Unless the indorsement otherwise specifies (as by such words as "without recourse") every indorser engages that upon dishonor and any necessary notice of dishonor and protest he will pay the instrument according to its tenor at the time of his indorsement to the holder or to any subsequent indorser who takes it up, even though the indorser who takes it up was not obligated to do so.' All indorsements fall into two broad categories, special and blank. A special indorsement (pay to the order of Joe Jones, John Peterson) makes the instrument into an 'order instrument' if it is not already one. A blank indorsement (Joe Jones) makes an instrument into a 'bearer instrument.' Thus, §3-204(1),(2) and (3) provide:

(1) A special indorsement specifies the person to whom or to whose order it

thought to be similar to those used by the designated payees.[7] These checks were indorsed "For Deposit Only," a type of restrictive indorsement[8] often used in the check collection process.[9] Such an indorsement

---

makes the instrument payable. Any instrument especially indorsed becomes payable to the order of the special indorsee and may be further negotiated only by his indorsement.

(2) An indorsement in blank specifies no particular indorsee and may consist of a mere signature. An instrument payable to order and indorsed in blank becomes payable to bearer and may be negotiated by delivery alone until specially indorsed.

(3) The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement. Note that a blank or special indorsement may also be a restrictive indorsement."

J. WHITE and R. SUMMERS, *supra* note 2, at 413.

7. 414 N.Y.S.2d at 299.

8. U.C.C. §3-205 states:

An indorsement is restrictive which either

(a) is conditional; or

(b) purports to prohibit further transfer of the instrument;

(c) includes the words "for collection," "for deposit," "pay any bank," or like terms signifying a purpose of deposit or collection; or

(d) otherwise states that it is for the benefit or use of the indorser or of another person.

9. A synopsis of the usual chain of events involved in check collection follows:

1. Payee deposits the check in the bank.

2. That bank of first deposit gives its depositing customer provisional credit pending payment of the check by the payor bank.

3. The bank of first deposit prepares the check for machine processing by encoding in magnetic ink the dollar amount of the check. The other information needed for machine processing—coded identifications of payor bank and drawer—has already been preprinted in magnetic ink on the check.

4. The bank sorts the checks. If a check is drawn upon an account maintained in the same bank where it has been deposited, it is considered by the bank as an on-us check, and internal processing completes the transfer of the check amount from the drawer's to the payee's account. But if the check is drawn on another bank, the funds must be collected from that bank by the bank of the first deposit.

In some cases, as for local items drawn on a bank of first deposit and being sent to a clearing house, the checks are fine sorted as to individual banks. For most out of town (transit) items, however, the sort pattern is much broader, i.e., all items to one Federal Reserve Bank might be sorted into only two general groups: immediate and deferred credit items.

5. The bank prepares cash letters—the deposit tickets or computer printed lists—for each sort category, showing the total dollar amount of the checks accompanying the

strictly requires that value given or received for the check be deposited[10] in the indorser's account.[11]

---

letter.

6. The bank sends the checks to the appropriate collection intermediary, i.e., clearing organization, Federal Reserve Bank, or correspondent bank or directly to the payor bank.

7. One of the above intermediaries presents the check directly or indirectly (through another intermediary) to the payor bank. This is the formal demand for payment.

8. The payor bank reviews the check:

(a) If for some reason, such as insufficient funds in the drawer's account to cover the check amount, or a stop-payment order posted to the account, the payor bank does not pay the check, it must return it to the presenting bank within a specified period of time.

(b) If the bank discovers no reason to reject or dishonor the check and refuse payment, it posts the check to the drawer's account and files it for subsequent mailing to him; and the payor bank must pay to the presenting bank for the amount of the check.

9. Each bank in the collection chain settles for the check with the previous bank until the bank of first deposit has been paid. The credit that the bank had extended provisionally to its depositing customer is now final. (In the case of a returned check, all the credits that had been granted provisionally for the check as it passed through the collection system must be reversed.).

For a more complete description *see* J. J. CLARKE, H. J. BAILEY, III, AND R. YOUNG, JR., BANK DEPOSITS AND COLLECTIONS, 2(1972).

10. U.C.C. §3-206 states:

(1) No restrictive indorsement prevents further transfer or negotiation of the instrument.

(2) An intermediary bank, or a payor bank which is not a depositary bank, is neither given notice or otherwise affected by a restrictive indorsement of any person except the bank's immediate transferor of the person presenting for payment.

(3) Except for an intermediary bank, any transferee under an indorsement which is conditional or includes the words "for collection," "for deposit," "pay any bank," or like terms [subparagraphs (a) and (c) of Section 3-205] must pay or apply any value given by him for or on the security of the instrument consistently with the indorsement and to the extent that he does so he becomes a holder for value. In addition such transferee is a holder in due course if he otherwise complies with the requirements of Section 3-302 on which constitutes a holder in due course.

(4) The first taker under an indorsement for the benefit of the indorser or another person [subparagraph (d) of Section 3-205] must pay or apply any value given by him for or on the security of the instrument consistently with the indorsement and to the extent that he does so he becomes a holder for value. In addition such taker is a holder in due course if he otherwise complies with the requirements of Section 3-302 on what constitutes a holder in due course. A later holder for value is neither given notice nor otherwise affected by such restrictive indorsement unless he has

Walker and his confederates either cashed or deposited the checks at several banks in accounts[12] with names different from the names of the payee indorsers.[13] Each bank took the checks for collection, totally disregarding the restrictive indorsements, and presented[14] them for payment by the payor bank, which honored and paid them and accordingly charged[15] Underpinning's account.[16]

---

knowledge that a fiduciary or other person has negotiated the instrument in any transaction for his own benefit or otherwise in breach of duty.

[subsection (2) of section 3-304].

11. 414 N.Y.S. 2d at 299.

12. U.C.C. §4-104(1)(a) defines account as "any account with a bank and includes a checking, time, interest, or savings account."

13. 414 N.Y.S. 2d at 299.

14. U.C.C. §3-504 explains how presentment is made. U.C.C. §3-504 provides:

(1) Presentment is a demand for acceptance or payment made upon the maker, acceptor, drawee, or other payor by or on behalf of the holder.

(2) Presentment may be made

(a) by mail, in which event the time of presentment is determined by the time of receipt of the mail; or

(b) through a clearing house; or

(c) at the place of acceptance or payment specified in the instrument or if there be none at the place of business or residence of the party to accept or pay. If neither the party to accept or pay nor anyone authorized to act for him is present or accessible at such place presentment is excused.

(3) It may be made

(a) to any one of two or more makers, acceptors, drawees, or other payors; or

(b) to any person who has authority to make or refuse the acceptance or payment.

(4) A draft accepted or a note made payable at a bank in the United States must be presented at such bank.

(5) In the cases described in Section 4-210 presentment may be made in the manner and with the result stated in that section.

15. *See* U.C.C. §4-401 *infra* note 31. U.C.C. §4-401 defines when the bank may charge a customer's account and states that "as against its customer, a bank may charge against his account any item which is otherwise properly payable from the account even though the charge creates an overdraft." What does properly payable include? U.C.C. §4-104(1)(i) states that "properly payable includes the availability of funds for payment at the time of decision to pay or dishonor." While the payor bank may pay all properly payable items, in the case of an unauthorized payment, the drawer can insist that the payor bank credit his account with the amount of the payment. *See* J.J. CLARKE, H.J. BAILEY III, AND R. YOUNG, JR., *supra* note 8, at 104. A check bearing a forged indorsement is not properly payable since the person receiving

When Underpinning finally realized that it had been embezzled, it instituted suit against all of the depositary[17] banks involved in the transactions for paying the checks with the restrictive indorsements.[18] One of the named defendants, The Bank of New York,[19] had paid ten such checks for a total amount of $452,979.27. Instead of serving an answer, The Bank of New York argued that the drawer of the check could not sue the depositary bank and moved to dismiss the complaint, claiming the drawer was limited to whatever claims it had against the drawee.[20] This motion was denied by the Supreme Court and the Appellate Division sustained the lower court's determination.[21] The order of the Appellate Division was then appealed by The Bank of New York. This brings us to the case at hand.[22]

According to the Uniform Commercial Code,[23] the governing body of law[24] in check forgery cases,[25] an unauthorized signature or

---

payment will not have title to the item. Jerman v. Bank of America National Trust and Savings Association, 87 Cal.Rptr. 88, 7 Cal.App.3d 882 (1970). *See also* text accompanying note 31, *infra.*

16. 414 N.Y.S. 2d at 299.

17. "In Article 4 unless the context otherwise requires 'depositary bank' means the first bank to which an item is transferred for collection even though it is also the payor bank." See U.C.C. §4-105(a). A "depositary bank" may be a "collecting bank." " 'Collecting bank' means any bank handling the item for collection except the payor bank." U.C.C. §4-105(d).

18. *See* U.C.C. §3-206(3), *supra* note 10.

19. The Bank of New York was the depositary bank. *See* U.C.C. §4-105(a) *supra* note 17.

20. A payor or drawee bank will be liable to its customer (the drawer) for payment of a check bearing a forged indorsement absent some defense. *See* notes 38 and 39 *infra* and accompanying text.

21. *See* Underpinning and Foundations Constructors, Inc. v. The Chase Manhattan Bank and The Bank of New York, 61 A.D. 2d 628, 403 N.Y.S. 2d 501 (1978).

22. 414 N.Y.S. 2d at 298.

23. The Uniform Commercial Code may be abbreviated as U.C.C. or Code. The 1972 Official Text of the Uniform Commercial Code should be referred to for any Code citations.

24. The Uniform Commercial Code, specifically Articles 3 and 4, is the governing body of law covering check forgery cases. The Code has been enacted in all states except Louisiana, however, Articles 3 and 4 have been enacted in all fifty states. Of all the Uniform Commercial Code these two sections probably depart least from prior substantive law. R. BRAUCHER AND R. RIEGERT, INTRODUCTION TO COMMERCIAL TRANSACTIONS, at xxxvii (1977).

25. The bank collection provisions originally appeared as part of Article 3 on

indorsement is "one made without actual, implied, or apparent authority and includes a forgery."[26] This applies not only to the unauthorized signature of the payee, but also to the unauthorized signature of the drawer. When the payee's signature is forged it is considered a forged indorsement, and when the drawer's signature is forged it is considered a forged check. Ordinarily, when items are "properly payable,"[27] the customer's[28] account may be charged by the bank.[29] However, since no person is liable on an instrument unless his signature appears thereon,[30] a check bearing an unauthorized signature does not transfer title[31] and cannot be considered "properly payable." Thus the customer's account cannot be charged by the bank.[32]

Commercial Paper. Eventually, however, as separate questions were raised peculiar to the subject of bank collections, Article 4 was written. J. J. CLARKE, H. J. BAILEY III, AND R. YOUNG, Jr., *supra* note 9, at 18.

26. U.C.C. §1-201 (43).

27. "Whether an item is properly payable is the crunch question in a variety of conflicts between customer and bank. Translated into practical terms, if a court finds that an item is properly payable, the bank will be entitled to charge the depositor's account; conversly, if the Court finds that an item is not properly payable, the bank may not charge the customer's account, and if it has done so, it must recredit the account." *See* J. WHITE AND R. SUMMERS, *supra* note 2, at 558.

28. U.C.C. §4-104(e) states that "Customer means any person having an account with a bank or for whom a bank has agreed to collect items and includes a bank carrying an account with another bank."

29. U.C.C. §4-401 is as follows:

(1) As against its customer, a bank may charge against his account any item which is otherwise properly payable from that account even though the charge creates an overdraft.

(2) A bank which in good faith makes payment to a holder may charge the indicated account of its customer according to:

(a) The original tenor of his altered item; or

(b) The tenor of his completed item, even though the bank knows the item has been completed unless the bank has notice that the completion was improper.

30. U.C.C. §3-401 is as follows:

(1) No person is liable on an instrument unless his signature appears thereon.

(2) A signature is made by use of any name, including any trade or assumed name, upon an instrument, or by any word or mark used in lieu of a written signature.

31. 87 Cal. Rptr. 88, 7 Cal.App.3d882 (1970).

32. Since §4-401 (1) states that a bank may charge its customer's account for any item properly payable, then it may be assumed that it may not charge its cus-

Accordingly, it has been held[33] that when the drawer's signature is forged on a check, absent a defense,[34] the drawee bank is liable to the drawer whose name is forged for the amount paid on the check. Similarly, when the payee's indorsement is forged, the drawee bank is liable to its customer for the amount paid on the check.[35] The major difference between forged checks and forged indorsements is that with the latter, indemnification may be sought by the drawee bank from the depositary bank, whereas in the former such an indemnification is not allowed.

This liability of the depositary bank to the drawee bank for payment of a check bearing a forged indorsement is founded upon principles of warranty embodied in U.C.C. § 4-207(1)(a).[36] As the check passes from party to party on its way to final payment, its prior indorsements are guaranteed by each customer or collecting bank. For this reason, the drawee bank may "recredit the customer's account and then sue as far up the collection stream as is feasible"[37] to recover any loss.

The general rule is that the drawee bank will be liable to its customer, the drawer, for payment of a check bearing a forged signature or indorsement. However, liability can be avoided if an exception to the general rule exists. Of the available exceptions or defenses, the

---

tomer's account for a check paid which bore a forged signature or indorsement. Such a check can not be considered properly payable.

33. Stone and Webster Engineering Corp. v. The First National Bank & Trust Co. of Greenfield, 345 Mass. 1, 184 N.E. 2d 358 (1962).

34. *See* notes 38 and 39 *infra* and accompanying text.

35. *See* Philadelphia Title Insurance Co. v. Fidelity-Philadelphia Trust Co., 419 Pa. 78, 212 A.2d 222 (1965).

36. U.C.C. §4-207(1)(a) is as follows:

> (1) Each customer or collecting bank who obtains payment or acceptance of an item and each prior customer and collecting bank warrants to the payor bank or other payor who in good faith pays or accepts the item that (a) he has good title to the item or is authorized to obtain payment or acceptance on behalf of one who has a good title.

The Official Comment 1 of U.C.C. §4-207 states that the warranties in §4-207 are more or less identical to the warranties in §3-417. For a more complete discussion of the slight differences in these two warranties *see* J. WHITE AND R. SUMMERS, *supra* note 2, at pp. 510-512, notes 39 and 40.

37. J. WHITE AND R. SUMMERS, *supra* note 2, at 513.

U.C.C. sets forth five explicitly[38] and permits others by reference to the common law.[39] Of these exceptions, two deal with negligence and can be found in U.C.C. §3-406 and §4-406. U.C.C.§3-406 provides as follows:

> Any person who by his negligence substantially contributes to a material alteration of the instrument or to the making of an unauthorized signature is precluded from asserting the alteration or lack of authority against a holder in due course or against a drawee or other payor who pays the instrument in good faith and in accordance with reasonable commercial standards of the drawee or payor's business.

The Code does not attempt to define what constitutes "negligence" as expressed in this section. However, Comment 7 of the Official Comments of U.C.C.§3-406 states that the most obvious case is that of a "drawer who makes use of a signature stamp or other automatic signing device and is negligent in looking after it."[40]

Code §4-406,[41] the other negligence defense, requires the customer

38. The five available statutory defenses are embodied in the following Code Sections: §3-406; §4-406; §3-404; §4-103; and §3-405. This text will only discuss §3-406, §4-406 and §3-405. For more information *see* generally J. WHITE AND R. SUMMERS, *supra* note 2.

39. The common law exceptions to liability include receipt of payment by payee and election of remedies. The Uniform Commercial Code adopts the common law in U.C.C. §1-103. U.C.C. §1-103 provides: "Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions." These common law exceptions will not be discussed in this text. For more information *see* J. WHITE and R. SUMMER, *supra* note 2.

40. Official Comment 7 of U.C.C. §3-406 further states that "the section extends however to cases where the party has notice that forgeries of his signatures have occurred and is negligent in failing to prevent further forgeries by the same person" and "in the case where a check is negligently mailed to the wrong person having the same name as the payee."

41. U.C.C. Code §4-406 reads in full as follows:

> (1) When a bank sends to its customers a statement of account accompanied by items paid in good faith in support of the debit entries or holds the statement and items purusant to a request or instructions of its customer or otherwise in a reasonable manner makes the statement and items available to the customer, the customer must exercise reasonable care and promptness to examine the state-

to examine the statement and items sent to him by his bank and to promptly notify the bank of any unauthorized signatures. Upon failure to do so, the customer may be precluded from asserting against the bank that the signatures were unauthorized and may be held responsible for all losses occasioned by such forgery. It should be stressed, however, that §4-406(3)[42] permits the customer to assert contributory negligence as a counter defense when the bank itself has failed to exercise ordinary care.

Another defense that the drawee bank may assert against its cus-

---

ment and items to discover his unauthorized signature or any alteration on an item and must notify the bank promptly after discovery thereof.

(2) If the bank establishes that the customer failed with respect to an item to comply with the duties imposed on the customer by subsection (1) the customer is precluded from asserting against the bank

(a) his unauthorized signature or any alteration on the item if the bank also establishes that it suffered a loss by by reason of such failure; and

(b) an unauthorized signature or any alteration by the same wrongdoer on any other item paid in good faith by the bank after the first item and statement was available to the customer for a reasonable period not exceeding fourteen calendar days and before the bank receives notification from the customer of any such unauthorized signature or alteration.

(3) The preclusion under subsection (2) does not apply if the customer establishes lack of ordinary care on the part of the bank in paying the item(s).

(4) Without regard to care or lack of care of either the customer or the bank a customer who does not within one year from the time the statement and items are made available to the customer [subsection (1)] discover and report his unauthorized signature or any alteration on the face or back of the item or does not within 3 years from that time discover and report any unauthorized indorsement is precluded from asserting against the bank such unauthorized signature or indorsement or such alteration.

(5) If under this section a payor bank has a valid defense against a claim of a customer upon or resulting from payment of an item and waives or fails upon request to assert the defense the bank may not assert against any collecting bank or other prior party presenting or transferring the item a claim based upon the unauthorized signature or alteration giving rise to the customer's claim.

"Section 4-406 differs from Section 3-406 in that it deals with the customer's behavior after the fact, after the alteration or the forgery has already taken place. It is also a much narrower provision than 3-406 in that it deals only with the liability between the bank and its customer upon the customer's failure to examine and report 'his' unauthorized signature or any alteration." It may not be used as a defense by the collecting bank although the other defenses would still be available. *See* J. WHITE AND R. SUMMERS, *supra* note 2, at 539.

42. *See* note 41 *supra.*

tomer, the drawer, is that of U.C.C.§ 3-405. U.C.C.§3-405 has been viewed as similar to §3-406[43] and §4-406[44] "for it codifies the proposition that certain behavior is negligent and thus renders all signatures resulting from that behavior effective against the negligent party.[45] In other words, if §3-405 is considered applicable, the forgery will not be recognized and the signature will be deemed to have effectively passed title. U.C.C.§3-405 reads in full:

> (1) An indorsement by any person in the name of the named payee is effective if
>
> (a) an imposter by use of the mails or otherwise has induced the maker or drawer to issue the instrument to him or his confederate in the name of the payee; or
>
> (b) a person signing as or on behalf of a maker or drawer intends the payee to have no interest in the instrument; or
>
> (c) an agent or employee of the maker or drawer has supplied him with the name of the payee intending the latter to have no such interest.
>
> (2) Nothing in this section shall affect the criminal or civil liability of the person so indorsing.

Two common problem areas are expressly dealt with in this Code Section. U.C.C. §3-405(1)(a) covers the "imposter payee" with the "imposter rule"[46] and §3-405(1)(c) deals with the "padded payroll"[47] situation.

Under §3-405(1)(a) the prevailing view is that if a drawer draws a check payable to an imposter[48] who represents himself to be the payee,

---

43. *See* note 40 *supra* and accompanying text.
44. *See* notes 41 and 42 *supra* and accompanying text.
45. J. WHITE AND R. SUMMERS, *supra* note 2, at 542.
46. *See* U.C.C. §3-405(1)(a).
47. *See* U.C.C. §3-405 (1)(c).
48. " 'Imposter' refers to impersonation, and does not extend to a false representation that the party is the authorized agent of the payee." U.C.C. §3-405, Comment 2. "When the imposter falsely assumes the status of an agent and procures the issuance of a check payable to a purported principal, the indorsement of the principal's name by the imposter is a forgery, and the loss is shifted from the drawer of the check to the drawee bank and ultimately to the one who took the check from the imposter. The emphasis here is on the forgery instead of the method of fraud, the converse of the 'imposter rule.' The rationale is that the drawer of the check intends the check to be

any signature in the name of the payee will result in an effective indorsement. Therefore, liability for the loss will be placed on the drawer. The position taken here is that the loss, regardless of the type of fraud, whether it be face to face as opposed to imposture by mail, should fall upon the drawer.[49] In effect, the drawer, under §3-405(1)(a) is considered to be negligent for not determining the identity of the payee.[50]

The provision intended to cover the "padded payroll" cases, U.C.C. §3-405(1)(c),[51] also shifts liability to the drawer.

> The principle followed is that the loss should fall upon the employer as a risk of his business enterprise rather than upon the subsequent holder or drawee. The reasons are that the employer is normally in a better position to prevent such forgeries by reasonable care in the selection or supervision of his employees, or, if he is not, then he at least can cover the loss by fidelity insurance; and that the cost of such insurance is properly an expense of his business rather than of the business of the holder or drawee.[52]

Like Code §§3-405(1)(a) and 3-405(1)(c),[53] Code §3-405(1)(b) is

---

the property of, and indorsed by, the payee-principal named therein who is not being impersonated by anyone, rather than the property of the so-called agent whose fraud relates merely to status and not to identity." *See* L. M. Hudak and P. MacPherson, Jr., *Forged, Altered, or Fraudulently Obtained Checks*, 23 THE PRACTICAL LAWYER 73, 87 (No.3, 1977).

49. *See* U.C.C. §3-405, Comment 2.

50. J. WHITE AND R. SUMMERS, *supra* note 2, at 542.

51. *See* U.C.C. §3-405(1)(c).

52. U.C.C. §3-405, Comment 4. The Comment continues:

"The provision applies only to the agent or employee of the drawer, and only to the agent or employee who supplies him with the name of the payee. The following situations illustrate its application.

a. An employee of a corporation prepares a padded payroll for its treasurer which includes the name of P. P does not exist, and the employee knows it, but the treasurer does not. The treasurer draws the corporation's check payable to P.

b. The same facts as (a), except that P exists and the employee knows it but intends him to have no interest in the check. In both cases an indorsement by any person in the name of P is effective and the loss falls on the corporation.

53. *See* May Department Stores Co. v. Pittsburgh National Bank, 374 F.2d 109, (3rd Cir. 1967). In *May*, an employee forged the indorsements of fictitious payees on checks which were issued and prepared by his employer. The employer was supplied the names of the fictitious payees by the defrauding employee. The drawee bank

also a "bankers provision intended to narrow the liability of the banks and broaden the responsibility of their customers."[54] However, Code §3-405(1)(b), which adopts the fictitious payee doctrine[55] of the Uniform Negotiable Instruments Act[56] (N.I.L.) allows for a more liberal interpretation. Under §3-405(1)(b), an indorsement by any person in the name of the named payee is effective if a person signing as or on behalf of a maker or drawer intends the payee to have no interest in the instrument.[57] For example, if a dishonest corporate officer makes the corporation's check payable to a payee with the intention that the

---

charged the employer's account, and the employer brought an action to recover the amount paid on the forged indorsements raising §3-405(1)(c) as a defense. The court agreed and held that §3-405(1)(c) did indeed bar any liability on the part of the bank.

54. J. WHITE AND R. SUMMERS, *supra* note 2, at 549. For instance, in Twellman v. Lindell Trust Co., the court strictly construed the "in the name of the named payee" language and stated that "in order for §3-405(1)(c) to apply, the forged indorsement must be in the exact name of the named payee.

55. Subsection (1)(b) restates the substance of the original subsection 9(3) of the N.I.L. The test stated is not whether the named payee is 'fictitious' but whether the signer intends that he shall have no interest in the instrument. The following situations illustrate the application of the subsection.

(a) The drawer of a check, for his own reasons, makes it payable to P knowing that P does not exist.

(b) The drawer makes the check payable in the name of P. A person named P exists, but the drawer does not know it.

(c) The drawer makes the check payable to P, an existing person whom he knows, intending to receive the money himself and that P shall have no interest in the check.

(d) The treasurer of a corporation draws its check payable to P who to the knowledge of the treasurer does not exist.

(e) The treasurer of a corporation draws its check payable to P. P exists but the treasurer has frauduelntly added his name to the payroll intending that he shall not receive the check.

(f) The president and the treasurer of a corporation both sign its check payable to P. P does not exist. The tresurer knows it but the president does not.

(g) The same facts as (f), except that P exists and the treasurer knows it, but intends that P shall have no interest in the check.

U.C.C. §3-405, Comment 3.

56. The Uniform Negotiable Instruments Act (N.I.L.), a codification of the law covering negotiable instruments, was the forerunner of the U.C.C. For a general history of the N.I.L. *See* R. BRAUCHER AND R. RIEGERT, *supra* note 23 at 4-31.

57. U.C.C. §3-405(1)(b).

payee have no interest in it, forges the payee's indorsement, and receives payment on the check from a collecting bank which collects from the drawee bank, the corporate drawee cannot claim that the forged indorsement bars the bank from charging its account with the amount of the check.[58] The indorsement will be considered effective.

Absent a defense, the drawer may sue the drawee bank pursuant to U.C.C. §4-401[59] and the absolute contractual liability which exists. The drawee bank may then seek indemnification from the collecting or depositary bank pursuant to U.C.C. §4-207.[60] Whether the drawer of a check has a direct cause of action against the depositary bank which wrongfully pays the check, however, is a question which has long divided the courts.[61]

Under the N.I.L.,[62] the pre-Code cases which considered the liability of the depositary to the drawee have been far from unanimous in either result or rationale. Some courts permitted recovery by the drawer from the depositary bank on the theory of conversion[63] and warranty.[64] Others held that the drawer could only proceed against the drawee bank and that any action against the depositary or collecting bank would be barred.[65]

---

58. See First Pennsylvania Banking and Trust Co. v. Montgomery County Bank and Trust Co., 29 Pa. D & C 2d 596 (1962).

59. *See* note 29 *supra.*

60. *See* note 36 *supra* and accompanying text. Ordinarily the drawee bank may sue the collecting bank, however, such an action may be barred pursuant to U.C.C. §4-406(5). U.C.C. §4-406(5) provides:

> If under this section a payor bank has a valid defense against a claim of a customer upon or resulting from payment of an item and waives or fails upon request to assert the defense the bank may not assert against any collecting bank or other prior party presenting or transferring the item a claim based upon the unauthorized signature or alteration giving rise to the customer's claim.

61. 414 N.Y.S. 2d at 299.

62. This issue had not been addressed to a Court prior to the N.I.L. (Uniform Negotiable Instruments Act). For a brief history of Negotiable Instruments prior to the N.I.L. *see* Britton, William Everett, Handbook of the Law of Bills and Notes, 1943 p 1-22.

63. *See* Gustin-Bacon Mfg. Co. v. First National Bank, 306 Ill. 179, 137 N.E. 793 (1922).

64. *See* Farmers State Bank v. U. S., 62 F.2d 178 (5th Cir. 1932).

65. *See also* First National Bank of Bloomingdale v. North Jersey Trust Co., 18 N.J.Misc.449, 14 A.2d 765, (1940) and Lavanier v. Cosmopolitan Bank and Trust Co., 36 Ohio 285, 173 N.E. 216 (1929).

Case law under the Uniform Commercial Code is equally as unresolved and unsettled.[66] Since the Code neglects to make any specific reference to any action by the drawer against the depositary or collecting bank for payment of an item bearing a forged indorsement, one could argue that such an action could not be maintained under the Code.[67] For instance, in Massachusetts a drawer will under no circumstances be allowed to sue the depositary bank. The case standing for this proposition and considered to be the majority view is that of *Stone and Webster Engineering Corp. v. First NationalBank and Trust Co.*[68] In *Stone,* an employee stole checks from his employer, the drawer, and cashed the checks with forged instruments. Upon discovery of the forgeries, the drawer, Stone and Webster, demanded that the drawee recredit its account, but to no avail. An action was then brought by the drawer against the depositary bank for the full amount of the checks cashed with the forged indorsements, approximately $64,000.00, alleging that the depositary bank had not acted in accordance with reasonable commercial standards as required in §3-419(3).[69] The court held §3-

66. *See generally* H. J. BAILEY, BRADY ON BANK CHECKS, (4th Ed. Supp. 1979) at 409 n.76.

67. §3-406 is by its terms unavailable to depositary bank since a depositary bank is not a holder in due course as defined in §3-302.

The depositary bank is not a holder pursuant to §1-201 (20) since the endorsement is forged. Unavailability of this defense suggests that the code does not contemplate such a suit.

68. 345 Mass. 1, 184 N.E. 2d 358.

69. U.C.C. §3-419 is as follows:

(1) An instrument is converted when

(a) a drawee to whom it is delivered for acceptance refuses to return it on demand; or

(b) any person to whom it is delivered for payment refuses on demand either to pay or to return it; or

(c) it is paid on a forged indorsement.

(2) In an action against a drawee under subsection (1) the measure of the drawee's liability is the face amount of the instrument. In any other action under subsection (1) the measure of liability is presumed to be the face amount of the instrument.

(3) Subject to the provisions of this Act concerning restrictive indorsements a representative, including a depositary or collecting bank, who has in good faith and in accordance with reasonable commercial standards applicable to the business of such representative dealt with an instrument or its proceeds on behalf of one who was not the true owner is not liable in conversion or otherwise to the

419(3) inapplicable and ruled the drawer had no cause of action against the depositary bank. Relying on the pre-Code case law and on reasons of Code policy, the court gave both a "traditional and pragmatic"[70] rationale for its decision. The court held that the plaintiff-drawer had no "valuable rights" in the checks stating that, the drawer has no right to the proceeds of its own check to a third person, and not being a holder, the drawer cannot present the check to the drawer for payment.[71] The value of the checks was limited only to the physical paper on which the checks were written. The court admitted that by allowing direct suit, circuity of action might be avoided. However, the court feared that a direct suit by the drawer would circumvent defenses available to the drawee bank and indirectly available to the depositary bank in a suit by the drawee bank.[72] To avoid violation of the draftsmen's

---

true owner beyond the amount of any proceeds remaining in his hands.

(4) An intermediary bank or payor bank which is not a depositary bank is not liable in conversion solely by reason of the fact that proceeds of an item indorsed restrictively (Sections 3-205 and 3-206) are not paid or applied consistently with the restrictive indorsement other than its immediate transferor.

70. J. WHITE AND R. SUMMERS, *supra* note 2, at 500.

71. *Id.* The court in *Stone* further stated: Had the checks been delivered to the payee, the defendant might have been liable for conversion to the payee. The checks, if delivered, in the hands of the payee would have been valuable property which could have been transferred for value or presented for payment; and, had a check been dishonored, the payee would have had a right of recourse against the drawer on the instrument under §3-413(2). *See* §3-413(2). Here, the plaintiff drawer of the checks, which were never delivered to the payee *(see* Gallup v. Barton, 47 N.E. 2d 921 (1943)) had no valuable rights in them. Since it did not have the right of a payee or subsequent holder to present them to the drawee for payment, the value of the rights was limited to the physical paper on which they were written, and was not measured by their payable amounts. (Trojan Publishing Corp. v. Manufacturer's Trust Co., 83 N.E.2d 465 (1948).

72. R. Brot, *Forged Endorsements: Liability of Collecting and Drawer Banks,* from the ALI-ABA Course of Study, Bank Defense of Negotiable Instrument Cases, 73 (1976), at 79 and 83.

A direct cause of action asserted by the drawer against the collecting bank would probably reduce the effectiveness of at least two of the defenses that the collecting bank could assert against the drawee bank; laches under §4-207(4) and failure to assert the drawer's negligence under §4-406(5) . . . . "The problem of circuity of action which is often cited as a prime reason to allow a cause of action by the drawee against the collecting bank may be avoided to some extent by the use of §3-803." "The U.C.C. allows a payor bank that is sued for payment of a check bearing a forged indorsement to 'vouch in' a collecting bank by giving written notice of the claim and stating that the person notified may come

apparent intention to require the drawer to bring an action against the drawee, the court held that a suit by the drawer against the collecting bank could not be maintained.[73]

Nevertheless, at least one court has rejected the majority opinion of *Stone* and permitted a direct suit by the drawer against the depositary bank based on an interesting albeit complicated rationale. In *Allied Concord Financial Corporation v. Bank of America, National Trust and Savings Association,*[74] the drawer had not discovered the forged indorsements until the statute of limitations had run pursuant to §4-406(4)[75] so that any claim against the drawee bank was lost. The action was brought against the depositary bank, but the complaint was dismissed based on two Code sections. Under §§3-603(2)[76] and 4-207(1),[77] the warranties of title running to the depositary bank were said to run to the drawer on third party beneficiary principles. The court stated that "by allowing direct suit we reduce circuity of action and make litigation easier between parties located in different jurisdictions . . . . Settlement in one lawsuit of all aspects of a controversy involving commerical paper is clearly one of the prime objectives of the

---

in and defend, and that if the person notified does not do so he will in any action against him by the person giving the notice be bound by any determination of fact common to the two litigations. *See* U.C.C. 3-803. If the person notified fails to act seasonable after receipt of notice by so defending he will be bound in that manner. The Official Comment to 3-803 indicates that the notification is not effective until receipt. Substantial compliance with this procedure was found in Bagby v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 491 F.2d 192 (8th Cir. 1974).

73. *See* V. COUNTRYMAN AND A. KAUFMAN, COMMERICAL LAW, CASES AND MATERIALS, at 141 (1971).

The defect in the court's opinion is that it may be contrary to the language of Section 3-419(3) (which does not expressly exclude actions by drawers) and that it ignores the Code policy of placing on the bank any loss which results in part from the bank's failure to use ordinary care, even though the other party may also have been at fault.

This policy is indicated in §§3-406, 3-419(3), and 4-406(3).

74. 80 Cal. Rptr.622, 275 Cal. App. 2d 1 (1969).

75. *See* U.C.C. §4-406(4) *supra* note 41.

76. U.C.C. §3-603(2) states: "Payment or satisfaction may be made with the consent of the holder by any person including a stranger to the instrument. Surrender of the instrument to such a person gives him the right of a transferee." (Section 3-201).

77. *See* U.C.C. §4-207(1) and *supra* note 36.

Code."[78] The court ruled, however, that the drawee's defenses under U.C.C.§4-406(4)[79] would be available to the depositary bank in any action against it by the drawer. It was the availability of one of these defenses, the statute of limitations, which saved the depositary bank. The action was dismissed.[80]

The conclusion reached in *Stone and Webster*[81] that the drawer could in no situation sue the depositary bank has also been avoided by finding that a drawer may become the assignee of a cause of action against the depositary bank. In *National Bank and Trust Co. of Central Pennsylvania v. Commonwealth of Pennsylvania,*[82] an action was brought against the collecting bank to recover on checks honored on forged indorsements of the payees. The court in its analysis reviewed the possible theories of recovery[83] but decided that "legal assignment made it unnecessary to rely on any one."[84] The court stated:

> Assignments are not prohibited by the Code and appellant here advances no compelling argument which obviates their significance. The assignments here related only to the legal rights of the drawee as against the collecting bank. They do not affect the rights of defenses that may be asserted by the drawer under §§3-406[85] and 4-406[86] of the Code.[87]

The often litigated drawer versus depositary bank issue obviously con-

---

78. 80 Cal.Rptr. at 624. *See* U.C.C. §3-419(3) *supra* note 69. *See also* U.C.C. §4-406 *supra* note 41; §3-803 and §3-417 Comment 8. The court also felt §3-419(3) fortified its conclusion. "Code §3-419 by implication permits direct suit by the true owner of a forged check against a representative, including a depositary or collecting bank, to the extent of any proceeds remaining in the hands of the representative." *Id.*

79. *See* U.C.C. §4-406(4) *supra* note 40.

80. 80 Cal.Rptr. at 626. *Cf.* Prudential Insurance Co. v. Marine National Exchange Bank, 315 F.Supp.520 (E.D. Wis.1970), in which the drawer was allowed to sue the collecting bank under a similar analysis.

81. 184 N.E. 2d 358.

82. 9 Pa. Cmwlth. 358, 305 A.2d 769 (1973).

83. The various forms of recovery available to the drawer of a check against the collecting bank include actions in both contract for moneys had and received and in tort, for conversion and for negligence by the defendant in cashing checks with the forged indorsements.

84. 305 A.2d at 773.

85. U.C.C. 3-406 *supra* note 39 and accompanying text.

86. U.C.C. 3-406 *supra* note 40.

87. 305 A.2d at 773.

fronts problems not solved by the Code and unfortunately, for the concept of uniformity, this split of authority continues to exist.[88]

Much can be said for not allowing the depositary bank to be sued by the drawer. If the drawer was negligent, a practical application of the Code would require him to bring an action against his own bank, the drawee bank. The drawee bank can more easily determine when the items and statement were sent to the drawer and when the forgeries were discovered and reported. The depositary bank, on the other hand, has no previous contact with the drawer and therefore is considerably disadvantaged.[89]

Another reason why a drawer should be barred from bringing an action against the depositary bank is that the depositary bank "is not deemed to have dealt with any valuable property of the drawer."[90] When the depositary bank pays over a forged indorsement, the indorsement, since it is ineffective, does not authorized any payment from the drawer's account. Absent such authority, no charge can be made on the drawer's account and any payment made will be deemed paid by the drawee.

On the other hand, much can also be said for allowing a direct cause of action by the drawer against the depositary bank. The depositary bank is usually located in the plaintiff's forum, is usually solvent, and often bears the ultimate loss anyway.[91] If the drawer were only permitted to sue the drawee, the drawee would then have to bring an action against the depositary bank, resulting in two or more lawsuits instead of one. If the indorsement is considered effective pursuant to §3-405, other considerations also arise. In such cases the check is not only a valid instruction to the drawee to honor the check and to charge the customer's account, but it is also a valuable instrument which results in the payment of funds from the drawer's account. When the depositary bank's failure to obey the restrictive indorsement results in the wrongful acquisition of the drawer's funds, then such a situation

88. *See* Life Insurance Co. of Virginia v. Snyder, 358 A.2d 859 (1976); International Industries, Inc. v. Island State Bank, 348 F.Supp. 886 (S.D. Tex. 1971); Insurance Co. of North America v. Atlas Supply Co., 172 S.E. 2d 632 (1970); Prudential Ins. Co. v. Mauni National Exchange Bank, 315 F.Supp. 520 (E.D. Wisc. 1970); and Jett v. Lewis State Bank, 277 So2d 37 (Fla. 1973).

89. J. WHITE AND R. SUMMERS, *supra* note 2, at 501.

90. 414 N.Y.S. 2d at 300.

91. J. WHITE AND R. SUMMERS, *supra* note 2, at 501.

could logically provide a basis for an action against the depositary by the drawer. It was this kind of situation which faced the court in *Underpinning.*

In a rather complicated opinion by Judge Gabrielli of the Court of Appeals for the State of New York, the court concluded that Underpinning had in fact stated a cause of action against The Bank of New York, the depositary bank, sufficient to withstand the bank's motion to dismiss for failure to state a cause of action. After discussion the "traditional"[92] reasons for not permitting the drawer to sue the depositary bank for paying a check with a forged indorsement, the court held that the forgeries involved in this case fell within the purview of §3-405(c) and therefore were to be considered effective. The court stated:

> Naturally, in such case, since the indorsement is effective no action would lie against a depositary bank for payment over the forged indorsement. Moreover, if the check was tainted in some other way which would put the drawee on notice, and which would make its payment unauthorized and subject it to suit, then the above rationale would not apply, since the payment would once again be from the drawee's funds rather than the drawer's account; and thus no action would lie against the depositary bank in favor of the drawer. Hence, it is only in those comparatively rare instances in which 1) the drawee has acted properly and 2) the depositary bank has acted wrongfully that the drawer will be able to proceed directly against the depositary bank.[93]

The court in *Underpinning* determined that the drawee had acted properly; the checks bearing effective indorsements did indeed authorize the drawer to charge its customer's account. It was also determined that the depositary bank could be liable to the drawer for the loss since it paid the checks in complete disregard of the restrictive indorsement, something for which the Code holds only the depositary bank responsible[94] pursuant to U.C.C. § 3-206.[95] U.C.C. §3-206 effectively places lia-

---

92. *See* notes 89-91 *supra* and accompanying text.

93. 414 N.Y.S. 2d at 301.

94. The Code holds the depositary bank responsible in such a situation pursuant to U.C.C. §§3-419(4) and 3-206(2). U.C.C. §3-419(4) states: "An intermediary bank or payor bank which is not a depositary bank is not liable in conversion solely by reason of the fact proceeds of an item indorsed restrictively (Sections 3-205 and 3-206) are not paid or applied consistently with the restrictive indorsement of an indorser other than its immediate transferor."

95. U.C.C. §3-206(2) provides: "An intermediary bank or a payor bank which is

bility solely upon the bank which first takes a check with the restrictive indorsement. Since The Bank of New York had not acted consistently with the restriction, it was responsible and could theoretically be liable for the losses resulting from payment made in violation thereof.[96] The court went on to distinguish the rationale in *Stone and Webster* and concluded:

> We note that one reason why several courts have been reluctant to allow the drawer to proceed directly against the depositary bank has been the belief that the drawee is normally in the best position as a practical matter to assert such defenses . . . . While this may be true, we do not deem it sufficient to shield a depositary from all liability in a situation such as this in which it would appear that the depositary bank is the only entity purposely not completely protected by the provisions of the Code from liability for paying in disregard of a restrictive indorsement.[97]

This determination, however, is not absolute. Since the depositary bank in *Underpinning* could have possibly asserted a valid defense, one which would have been impossible to evaluate due to the procedural posture of the case, the court decided that The Bank of New York could not be held liable as a matter of law and refused to rule on the specific question of liability stating:

> We have previously held that in an action for money had and received a depositary bank is entitled to any defenses which may be created by the drawer's failure to use due care in examining his bank statements and returned checks. *(Federal Ins. Co. v. Groveland State Bank,* 37 NY2d 252, 258-259). While it may be that the forgery could not have been discovered by the use of reasonable care or that in any case the deposi-

---

not the depositary bank is neither given notice nor otherwise affected by a restrictive indorsement of any person except the bank's immediate transferor or the person presenting for payment."

96. Under New York's common law, collecting as well as depositary banks presented with restrictive indorsements had a duty to inquire and their failure to do so subjected them to liability. In Soma v. Handrulis, 277 N.Y. 223, 14 N.E. 2d 46 (1938), it was observed that: "If inquiry would have disclosed the irregular transaction and would have shown the theft of the check then failure to make this inquiry establishes, in a legal sense and a commercial sense, bad faith on the part of the bank and makes it liable to the plaintiff."

97. 414 N.Y.S. 2d at 302.

tary bank's failure to use due care itself precludes such a defense, that question is not now before us.[98]

CONCLUSION

The Court's determination in *Underpinning* produced a result that is not only practicable but is also harmonious with the principles of equity and sound Code policy. The law of commercial paper ascertains that when one of two innocent parties suffers a loss, that loss should be borne by the party most able to prevent the same.[99]

In this case, had the forgery not carried the restrictive indorsement, then the loss would have fallen upon the drawer alone. However, the use of such indorsements in the *Underpinning* case resulted in a transfer of the potential liabilities and obligations pursuant to U.C.C. §§3-206 and 3-419.[100] These sections attempt to insure the continuous negotiability of an instrument restrictively indorsed. The result, however, is to offer no available remedy to the drawer against the drawee for payment on instruments nogotiated in violation of the restrictive indorsement.[101] When the unusual case such as *Underpinning* occurs, the drawer then finds himself not only precluded from suing the drawee on the restrictive indorsements, but also precluded from suing for payment over the forged, yet effective, indorsements pursuant to U.C.C.§3-405.[102] Such a situation results in the drawer's loss of all available actions.

The drafters of the U.C.C. in §3-206(1) and (2)[103] meticulously exempted intermediary[104] banks and payor banks from liability for negotiation of instruments containing restrictive indorsements. Similarly, they provided for a special liability on the grounds of conversion when a depositary bank does not pay or apply a check pursuant to the re-

98. *Id.* at 302.

99. *Id.*

100. 61 A.D. 2d at 633. See also U.C.C. §§3-206 at *supra* note 10 and 3-419(3) and (4) at *supra* note 69.

101. *Id.* at 632.

102. *See* note 49 *supra* and accompanying text.

103. *See* note 10 *supra.*

104. U.C.C. §4-105 defines "intermediary bank" as "any bank to which an item is transferred in the course of collection except the depositary or payor bank."

strictive indorsement as required in §3-419(3) and (4).[105] It would be difficult to understand the range and reason of the drafters of these provisions if their purposes were to prevent any relief to a drawer of a check who has a loss due to the depositary bank's failure to comply with the restrictive indorsement. When the Code permits recovery by the payee who has a loss resulting from the depositary bank's failure to obey the tenet of a restrictive indorsement, then simple wisdom should also permit recovery by the drawer. To prohibit such recovery by the drawer from a depositary bank which inadvertently, yet inexcusably, cashes a check with any restrictive indorsement, but especially the restrictive indorsement "For Deposit Only," would not only violate the intentions of the Code drafters but would also do violence to logic and common sense.

Georgene Gore

105. *See* note 69 *supra.*