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FLORIDA'S REVISED COMMERCIAL PAPER LAW: THE CONSUMER'S DILEMMA

by Linda F. Stamper*

INTRODUCTION

On January 1, 1993, Florida's revised Articles 3 and 4¹ became effective. The purported purpose of the revisions is to accommodate modern technologies and practices in payment systems.² Gone are the days where each check was closely examined by a bank employee to determine whether it was to be paid. Rather, we are now at the dawn of the age of Magnetic Ink Character Recognition (MICR) and completely computerized check processing and payment. Former Articles 3 and 4 were written for a paper-based system, and do not adequately address the issues of responsibility and liability as they relate to modern technologies and the current volume of checks processed.³

Relating to the issues of responsibility and liability, former Articles 3 and 4 provided little in the way of consumer protection, but instead provided a framework of sorts within which banks could profitably transact business. Unfortunately, revised Articles 3 and 4 provide even less consumer favorable provisions. The primary purpose of this Article is to familiarize the reader with a number of the recent revisions to Florida's version of the Code, particularly those which may be problematic for consumers.

Though the Uniform Commercial Code⁴ was drafted to govern commercial transactions, the average consumer, perhaps unknow-

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¹ Commercial Law, Negotiable Instruments—General Amendments, Fla. Sess. Law Serv., Chapter 92-82, C.S.S.B. 378 (codified as amended at FLA. STAT. Chapters 673 and 674). The sections cited herein are to the general code provisions. The corresponding statutory sections under Florida law are preceded by "67". For example, "673.101" is the corresponding Florida statute to U.C.C. § 3-101.

² Revised Article 3 Prefatory Note.

³ *Id.*

⁴ Hereinafter the "Code."

ingly, is subject to the provisions of the Code when writing or accepting a check or utilizing an automated teller machine (ATM). This Article, however, only addresses the effect of the revisions on consumer check writing.⁵

Further, this Article assumes a reader with a basic comprehension of the Code, having access to a copy of both the pre-revision Articles 3 and 4, as well as the revised sections. For convenience of the reader, the primary sections discussed herein are fully set out in footnotes.

I. POSTDATED CHECKS

Pre-Code Analysis

Prior to the adoption of the Code, banks were generally held liable under state common law for early payment of postdated checks. In *Montano v. Springfield Gardens National Bank*,⁶ a New York court found that a bank failed to use "ordinary care" to avoid premature payment of a postdated check, rejecting the bank's contract argument that Mr. Montano had "impliedly assented" to the bank's disclaimer policy by signing a signature card which made his account subject to certain rules printed in Montano's passbook. The court reasoned that it was questionable whether Montano was aware of the disclaimer, and even assuming that he was, the disclaimer was not sufficiently broad to relieve the bank of liability for its own mistake.⁷

Further, the court stated that if Montano had in fact assented to the disclaimer, it would be nearly impossible to conceive that the bank would pay such a check without being careless or negligent. Pursuant to this court's analysis, the bank would not have been able to disclaim liability at all, even under the most favorable of circumstances.⁸

⁵ Citations to sections of the Code prior to the amendments will be referred to within the footnotes as "P. #." Citations to sections as revised will be referred to as "R. #."

⁶ 140 N.Y.S.2d 63 (N.Y.App.Div. 1955).

⁷ *Id.* at 67. The language of the bank's attempted disclaimer was not reported in the case.

⁸ *Id.*

The *Montano* case, however, was decided long before the conversion by banks to an automated system of processing checks. Because of such automation, banks and bankers now assert that a more lenient standard of negligence should govern since very few checks are actually examined by bank employees.

The Emergence of the Uniform Commercial Code

With the states' enactment of the Uniform Commercial Code, several theories of liability for early payment of postdated checks originated. The majority of jurisdictions which confronted the issue of a postdated check concluded that it was not a "properly payable" item under prior § 4-104(1)(i).⁹ Thus, early payment of a postdated check by the payor bank violated § 4-401(1)¹⁰, which permitted the payor bank to charge against the customer's account only items which were otherwise properly payable, even though the charge created an overdraft.¹¹

In *Siegel v. New England Merchants National Bank*,¹² the Massachusetts Supreme Court found that a postdated check constituted an "unauthorized" charge to the drawer's account and was wrongful, therefore the drawer had a valid claim against the bank in the amount of the charge by virtue of the account itself.¹³ The court recognized, however, that the drawer may be unjustly enriched if allowed to recover the funds paid by the bank, and thus allowed the bank to be subrogated to the payee's rights pursuant to § 4-407.¹⁴

⁹ P. § 4-104(1)(i). "Properly payable" includes the availability of funds for payment at the time of decision to pay or dishonor. The section fails to provide a clear guideline as to exactly what is *not* properly payable, only that the availability of funds is one requirement.

¹⁰ P. § 4-401(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.

¹¹ P. §§ 4-104(1)(i) and 4-401(1), read together, seem to imply that whether the drawer's account has available funds or not, as long as the postdated check does not specifically violate another section of the Code, it is properly payable. Former § 3-114 provides further that the negotiability of an instrument is not affected by the fact that it is undated, antedated or postdated, which could be read to imply that the date is irrelevant.

¹² 437 N.E.2d 218 (Mass. 1982).

¹³ *Id.* at 221.

¹⁴ P. § 4-407. If a payor bank has paid an item over the stop payment order of the drawer or maker or otherwise under circumstances giving a basis for objection by the drawer or maker, to prevent unjust enrichment and only to the extent necessary to prevent loss to

Though that section governs improper payment over stop orders, and not postdated checks, the court found the section to be sufficiently analogous to be applicable.

At least one court has imposed liability on a bank for holding a postdated check beyond the bank's midnight deadline.¹⁵ In *Allied Color Corporation v. Manufacturers Hanover Trust Company*,¹⁶ the payee deposited two checks dated December 31, 1978 into its account on December 14, 1978. On December 18, the payor bank received the checks and stamped them "Paid." On December 28, the payor bank cancelled its "Paid" stamp and returned the checks unpaid.

The payee argued that the payor bank became accountable for the checks because it held them beyond its midnight deadline in violation of § 4-302(a).¹⁷ The court agreed, and reasoned that because "demand item" is not defined anywhere in the Code,¹⁸ the purported class of "demand items" in 4-302(a) could be broader than those items simply "payable on demand" and could include prematurely presented postdated checks.¹⁹ The court looked to §§ 3-114(2)²⁰

the bank by reason of its payment of the item, the payor bank shall be subrogated to the rights

- (a) of any holder in due course on the item against the drawer or maker; and
- (b) of the payee or any other holder of the item against the drawer or maker either on the item or under the transaction out of which the item arose; and
- (c) of the drawer or maker against the payee or any other holder of the item with respect to the transaction out of which the item arose.

¹⁵ "Midnight deadline" with respect to a bank is midnight on its next banking day following the banking day on which it receives the relevant item or notice, or from which the time for taking action commences to run, whichever is later. P. § 4-104(1)(h).

¹⁶ 484 F.Supp. 881 (S.D.N.Y. 1980).

¹⁷ P. § 4-302. In the absence of a valid defense such as breach of a presentment warranty (subsection (1) of Section 4-207), settlement effected or the like, if an item is presented on and received by a payor bank the bank is accountable for the amount of

- (a) a demand item other than a documentary draft whether properly payable or not if the bank, in any case where it is not also the depository bank, retains the item beyond midnight of the banking day of receipt without settling for it or, regardless of whether it is also the depository bank, does not pay or return the item or send notice of dishonor until after its midnight deadline. . .[.]

¹⁸ P. § 3-108 defines items "payable on demand." This section was not cited by the court.

¹⁹ *Allied Color Corporation*, 484 F.Supp. at 883.

and 3-122(1)(b)²¹ to support its characterization of a postdated check as a "demand item," and rationalized that there was no apparent reason why postdated checks should be treated differently for the purposes of the midnight deadline rule under § 4-302.²²

Under the *Allied* court's rationale, a payor bank which receives a postdated check must therefore act with respect to that check immediately, either by forwarding it to another bank, settling for it, paying it, returning it, or sending notice of dishonor. Otherwise, the bank is deemed to have accepted the check, and must pay.²³

Wrongful Dishonor of Subsequent Items

Another problem can arise when a bank improperly pays a postdated check. Under § 4-402,²⁴ the bank may theoretically incur liability for the wrongful dishonor of subsequent checks of the drawer that would have been paid had the postdated check not been prematurely paid. There are no reported cases which address precisely this issue, however, commentators suggest that this situation occurs frequently, without resolution satisfactory to the customer.²⁵

Damages for Wrongful Dishonor

Prior § 4-402²⁶ provides for payment of damages to a customer which are proximately caused by the bank's wrongful dishonor, but limits damages to actual damages proved when the dishonor occurs

²⁰ P. § 3-114(2). Where an instrument is antedated or postdated the time when it is payable is determined by the stated date if the instrument is payable on demand or at a fixed period after date.

²¹ P. § 3-122(1). A cause of action against a maker or an acceptor accrues . . . (b) in the case of a demand instrument upon its date or, if no date is stated, on the date of issue.

²² *Allied Color Corporation*, 484 F.Supp. at 883.

²³ *Id.*

²⁴ P. § 4-402. A payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item. When the dishonor occurs through mistake liability is limited to actual damages proved. If so proximately caused and proved damages may include damages for an arrest or prosecution of the customer or other consequential damages. Whether any consequential damages are proximately caused by the wrongful dishonor is a question of fact to be determined in each case.

²⁵ See 1991 Uniform Commercial Code Committee Report, A.B.A. Bus. Law. Sec., at 11.

²⁶ See *supra* note 24.

through the bank's mistake. It is reasonable to assume that premature payment of a postdated check by a payor bank usually occurs due to a mistake on the part of the bank. Therefore, in that instance, pursuant to § 4-402, only compensatory damages would be available to the customer.²⁷

However, an instance could conceivably arise where the payor bank prematurely pays a postdated check, not because of mistake, but intentionally, such as where the bank has ineffectively disclaimed liability for such payment.²⁸ The bank, under the impression it is protected, knowingly pays a postdated check prior to its stated date, causing subsequent checks to be returned because of non-sufficient funds. When the customer brings suit for wrongful dishonor, it is not clear whether the "mistake" defense would be available to the bank. If not, the bank will then be held liable for all damages "proximately caused" by such wrongful dishonor, including damages for lost credit rating and humiliation to the customer, loss of time at work, mental anguish and in some cases punitive damages.²⁹

Limitations On Bank Liability For Postdated Checks

It is against the foregoing background that banks must presently perform their daily operations. Because of banks' tremendous exposure to liability, there have been some affirmative measures employed by both banks and several state legislatures, including the Florida legislature, to alleviate the burden on banks regarding the processing of postdated checks.

²⁷ A minority of jurisdictions which still adhere to the pre-code common law "trader rule," which allowed the customer to recover damages for wrongful dishonor without proof of such damage. Under the trader rule, the customer was presumed to have been injured. See T. Quinn, *Uniform Commercial Code Commentary and Law Digest* § 4-402[A][5] (1989 Cum. Supp. No. 2). R. § 4-402 has been rewritten to preclude any inference that it still retains the trader rule. R. § 4-402, Comment 1.

²⁸ See *supra* note 6 and accompanying text; see *infra* note 32.

²⁹ See, e.g., *Twin City Bank v. Isaacs*, 672 S.W.2d 651 (Ark. 1984).

Specific Agreements

Contrary to New York's *Montano*³⁰ decision four years prior, the court in *Kalish v. Manufacturers Trust Company*,³¹ held that where there is an unambiguous contract expressly relieving the bank of liability for payment of postdated checks, the depositor was not entitled to reimbursement for the amount of a check prematurely paid.

Most banks now have a sufficiently specific disclaimer which appears in the contract signed by the customer, or, if appearing on a separate document, such as in a rule booklet, such booklet is incorporated into the signed contract by reference.³² This method appears for the most part to effectively deal with the postdated check situation.

State Statutes

A minority of state legislatures, which includes Florida,³³ have enacted statutes which require the customer to provide the bank with prior written notice of a postdated check,³⁴ otherwise the bank will not be liable for paying the check early.

In *Florida National Bank v. Dental*,³⁵ the court found that where a drawer of a postdated check failed to give notice of the check to the bank, the bank could not be held liable for paying the check early. Thus, this method appears to be reliable in relieving the bank of liability, unless a situation arises where the customer does provide written notice to the bank, but the bank pays the check any-

³⁰ See *supra* note 6 and accompanying text.

³¹ 191 N.Y.S.2d 61 (N.Y.Mun.Ct. 1959).

³² A typical disclaimer appearing in one bank's booklet setting forth account rules and regulations reads as follows:

You also agree not to issue postdated checks or other items. The bank is under no obligation to take notice of any date, time limits or special memoranda placed on a check or other item drawn by you and will not be liable for payment of any such item.

³³ Six states have such statutes in place: Kansas, Missouri, Nebraska, South Carolina, Utah and Florida. BRADY ON BANK CHECKS, § 16.16 (6th ed. Bailey 1987: 1990 Cum. Supp. No. 3).

³⁴ See, e.g., § 659.64, FLA. STAT.

³⁵ 210 So.2d 241 (Fla. 3d D.C.A. 1968).

way. This situation would be analogous to the bank's payment of a check over a valid stop order.³⁶

In the majority of states, however, the statutes are not so bank favorable. In spite of continuing efforts by the banks to improve their position as to liability by modifying contracts with their customers, banks are apparently still concerned with their level of exposure. The revisions to Articles 3 and 4 of the Code are drafted in response to greater need for bank protection in the age of advanced technology.

Revised Section 4-401(c) and Postdated Checks

Revised § 4-401(c)³⁷ has been added "because the automated check collection system cannot accommodate postdated checks."³⁸ Recall that under the pre-revision version of § 4-401, the bank could not pay a postdated check because it was not "properly payable."³⁹ Under revised § (c), a customer wishing to postdate a check must provide the bank with notice, either oral or written, in order to provide the bank with reasonable opportunity to act on it before the bank takes action under 4-303.^{40 41}

³⁶ Stop orders are addressed by P. § 4-403(1). A customer may by order to his bank stop payment of any item payable for his account but the order must be received at such time and in such manner as to afford the bank a reasonable opportunity to act on it prior to any action by the bank with respect to the item described in Section 4-303.

³⁷ R. § 4-401(c). A bank may charge against the account of a customer a check that is otherwise properly payable from the account, even though payment was made before the date of the check, unless the customer has given notice to the bank of the postdating describing the check with reasonable certainty. The notice is effective for the period stated in Section 4-403(b) for stop-payment orders, and must be received at such time and in such manner as to afford the bank a reasonable opportunity to act on it before the bank takes any action with respect to the check described in Section 4-303. If a bank charges against the account of a customer a check before the date stated in the notice of postdating, the bank is liable for damages for the loss resulting from its act. The loss may include damages for dishonor of subsequent items under Section 4-402.

³⁸ *Id.*, Comment 3.

³⁹ See *supra* note 9. The definition of "properly payable" in R. § 4-104(1)(i) has been completely deleted, though the term still appears elsewhere in the Code.

⁴⁰ R. § 4-303 deals with notice, stop-payment orders, legal process, setoff and the order in which items may be charged or certified to a customer's account (the "four legals").

⁴¹ The additional requirement of notice becomes largely academic in Florida due to the pre-existence of § 658.64, FLA. STAT., discussed *supra* at note 34 and in the accompa-

Subsection (c) shifts the burden to the customer with regard to responsibility for a postdated check. A major problem with this approach is that the requirement is not consistent with the customer's expectations, and further, is not consistent with past practice in the banking business. How will customers be given notice of the change? What protections will be afforded to the customers during the period of transition? One commentator suggested the addition of language to the subsection delaying its effective date for two years, unless the customer can be given an understandable disclosure of the bank's practice with regard to postdated checks at the time of opening an account, or prior to writing a check.⁴²

Interestingly, Comment 3 to the new § 4-101 notes that the changes to Article 4 may raise consumer problems which enacting jurisdictions may wish to address in individual legislation such as in their unfair and deceptive practices laws. The Comment further admits that drawers who postdate checks in the belief that the checks will not be immediately payable are in need of protection, but unfortunately, the Comment does not offer any further suggestions.⁴³

Pursuant to the revised Code,⁴⁴ notice to the bank is to be provided in accordance with § 4-403(b)⁴⁵ which governs stop-payment orders. The notice will remain effective for 6 months if given in writing, but if given orally, it lapses after 14 days.⁴⁶ It appears that prior caselaw regarding notice of stop-payment orders would be applicable here, though it can be argued that a court may legitimately take a stricter view of improper payment by a bank over a stop-payment order than over a postdated check notice; after all, a postdated check will *eventually* be payable, whereas a check which has been stopped will not.

nying text. However, the majority of states have no such statute. Therefore, the general importance of this section to consumers cannot be overly emphasized.

⁴² Hillebrand, *Revised Articles 3 and 4 of the Uniform Commercial Code: A Consumer Perspective*, 42 ALA.L.REV. 679 (1991).

⁴³ R. § 4-401, Comment 3.

⁴⁴ See *supra* note 37.

⁴⁵ R. § 4-403(b). A stop-payment order is effective for six months, but it lapses after 14 calendar days if the original order was oral and was not confirmed in writing within that period. A stop-payment order may be renewed for additional six-month periods by a writing given to the bank within a period during which the stop-payment order is effective.

⁴⁶ *Id.* Of course, a consumer is at greater risk by giving notice orally because of the difficulty in proving that such notice was received, and if so, when.

Additionally, subsection (a) to § 4-403 provides no clear guideline as to precisely how much time is necessary to afford the bank a reasonable opportunity to act. Comment 6 attempts to address this problem but only reveals that "a relatively short time is required to communicate to the [bank's] accounting department advice of one of [the four legals]."⁴⁷ There is no authoritative source cited in the comment, thus it appears that each jurisdiction is free to judicially determine how much time is reasonable.

Further, banks are not prohibited by new § 4-403 from charging customers a fee for honoring a postdated check notice. Fee regulation has been for the most part left to the courts. Though somewhat sparse, there is some caselaw on the subject. For instance, in *Perdue v. Crocker National Bank*,⁴⁸ a depositor challenged the validity of charges assessed by the bank for processing NSF (non-sufficient funds) checks. The California Supreme Court found that the bank's signature card was a contract authorizing the bank to impose charges upon depositor for NSF checks, but subject to the bank's duty of good faith and fair dealing. The court went on to find that the contract was one of adhesion because it was offered to the customer without negotiation.⁴⁹

In further determining that the \$6 charge by the bank for processing NSF checks was an unconscionable one, the *Perdue* court considered (1) whether the charge was excessive when the actual cost to the bank for processing was only \$.30, and (2) the price actually being paid by other similarly situated consumers in a similar transaction. In rejecting the bank's argument that a price equal to the market price cannot be held unconscionable, the court acknowledged that "the market price set by an oligopoly should not be immune from scrutiny."⁵⁰ The court concluded that the claim of unconscionability constituted a cause of action and remanded the case for further factual determination.

In an Oregon case regarding bank fees, *Best v. United States National Bank of Oregon*,⁵¹ the court found that the power of a bank under its deposit agreement to set a service charge for process-

⁴⁷ R. § 4-403, Comment 6. See *supra* note 40 regarding the "four legals".

⁴⁸ 702 P.2d 503 (Cal. 1985).

⁴⁹ *Id.*

⁵⁰ *Id.* at 512.

⁵¹ 714 P.2d 1049 (Or.App. 1986).

ing NSF checks was not unlimited. Rather, the power was subject to the covenant of good faith. A cause for recovery existed for breach of the covenant if there was evidence that the charge by the bank greatly exceeded costs in processing checks and that profit derived therefrom exceeded the bank's normal profit margin.⁵²

A different approach was taken by the state of Alabama with a similar result. The legislature passed a law which created a "ceiling" on fees which banks could charge for processing NSF checks. The Attorney General, in an opinion to a local District Attorney, indicated that under Alabama statutes, a court in a civil action would probably enjoin a bank from overcharging such fees, and would also probably require repayment of the excessive charge to the customer.⁵³

Similar to the approach taken by Alabama, one commentator argues that because of the lack of equal bargaining power in a bank-customer relationship, legislation should be utilized to ameliorate the effects on the consumer of the imbalance of bargaining power.⁵⁴ One way would be to add an unconscionability provision to Article 4, similar to that found in Article 2 governing the sale of goods.⁵⁵ Another way would be to promulgate legislation limiting waivers of consumers' rights.⁵⁶ At the very least, legislators could provide that any agreement or modification of an agreement which reduces the rights or increases the obligations of a consumer is ineffective unless the party seeking to enforce the agreement proves that the provision of the agreement sought to be enforced was clearly understood and intended by the consumer.⁵⁷

II. ACCORD AND SATISFACTION

"Accord" is an agreement whereby one of the parties involved in a dispute offers, and the other party accepts an amount different

⁵² *Id.* at 1056.

⁵³ Ala. 173 OAG 22 (1978). However, there are no reported cases addressing this issue. The statute has since been repealed.

⁵⁴ Hillebrand, *Revised Articles 3 and 4 of the Uniform Commercial Code: A consumer Perspective*, 42 ALA. L. REV. 679 (1991).

⁵⁵ *Id.*

⁵⁶ *Id.* at 709.

⁵⁷ *Id.*

than the original amount owed in full satisfaction of the dispute.⁵⁸ "Satisfaction" takes place when the accord is executed; hence the phrase, "accord and satisfaction."⁵⁹

The process of accord and satisfaction has traditionally been governed by state common law. In most jurisdictions, the Code has not disturbed the common law accord and satisfaction doctrine. The majority of courts agree that an accord and satisfaction results when a check is offered in full payment⁶⁰ of an existing dispute, and the person receiving such a check accepts and cashes the check. By cashing the check, the receiving person waives her right to the balance of the claim.⁶¹

A minority of courts, however, take the position that § 1-207⁶² allows a party to explicitly reserve her rights without prejudice. Therefore, if the offeree crosses out the language "payment in full" or writes "not accepted" on the check prior to negotiation, she has effectively barred the accord and satisfaction, without communicating the rejection to the offeror.

Revised § 1-207(1) is similar to the prior version, and is not intended to change current law regarding reservation of rights. Subsection (2), however, contains an express provision that subsection (1) does *not* apply to an accord and satisfaction. The new subsection (2) has been expressly added to resolve the conflict among various jurisdictions regarding its application to an accord and satisfaction.⁶³

The revised version of the Code now includes a section which specifically governs accord and satisfaction by use of a negotiable

⁵⁸ R. § 3-311, Comment 1.

⁵⁹ *Id.*

⁶⁰ Generally, the phrase "payment in full" written on the check is sufficient notice to the creditor that the check is meant in settlement of a dispute. *Id.*, subsection (b); Comment 4.

⁶¹ See, e.g., *Ditch Witch Trenching Company of Kentucky, Inc., v. C & S Carpentry Services, Inc.*, 812 S.W.2d 171 (Ky. Ct. App. 1991); *Complete Messenger & Trucking Corp. v. Merrill Lynch Money Markets, Inc.*, 169 A.D.2d 609 (N.Y.App.Div. 1991); *Potter v. Pacific Coast Lumber Co. of California*, 234 P.2d 16 (Cal. 1951).

⁶² P. § 1-207. A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as "without prejudice," "under protest" or the like are sufficient.

⁶³ *Id.* Comment 3 [emphasis added].

instrument. The new section, § 3-311,⁶⁴ imposes numerous burdens and limitations upon a debtor's use of accord and satisfaction in settlement of a debt, purportedly because of the inability of automated equipment to read restrictions on checks.⁶⁵ The addition of § 3-311 is a significant change, and because it is technically complex, this section merits a detailed analysis.

Subsection (a) of R. § 3-311 is the threshold provision, which places the initial burden of proof on the debtor. If the debtor is able to successfully prove that she tendered the instrument in good faith and in full settlement of the claim, the amount of the claim was unliquidated or subject to a bona fide dispute, and the creditor obtained payment of the instrument, then the remaining subsections will apply.

⁶⁴ R. § 3-311

(a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.

(b) Unless subsection (c) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

(c) Subject to subsection (d), a claim is not discharged under subsection (b) if either of the following applies:

(1) The claimant, if an organization, proves that (i) within a reasonable time before the tender, the claimant sent a conspicuous statement to the person against whom the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place, and (ii) the instrument or accompanying communication was not received by that designated person, office, or place.

(2) The claimant, whether or not an organization, proves that within 90 days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted. This paragraph does not apply if the claimant is an organization that sent a statement complying with paragraph 1(i).

(d) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.

⁶⁵ See, Revised Article 3 Prefatory Note; R. § 3-311, Comment 3.

Subsection (b) basically codifies the common law rule which requires the debtor to conspicuously⁶⁶ indicate on the instrument or an accompanying written communication that the instrument was tendered as full satisfaction of the claim. If the debtor can satisfy the burden of proof under subsections (a) and (b), the claim will be discharged, unless subsection (c) applies. Subsection (c) will prevent a claim from being discharged under (b) if either (c)(1) or (c)(2) applies, but subsection (c) is subject to subsection (d). Subsection (c)(1) shifts the burden to the creditor if it is an organization, as opposed to a natural person, which is usually the case. The creditor/organization can prevent discharge under (b) if it can show that within a reasonable time before the tender by debtor, it sent a conspicuous statement to the debtor that communications concerning disputed debts, including "full-payment" checks, are to be sent to a particular office, person or place, and the instrument or accompanying communication was not received by that designated office, person or place.

Subsection (c)(2) applies whether or not the creditor is an organization, but does *not* apply if creditor is an organization that sent a statement complying with (c)(1).⁶⁷ If the creditor can show that within 90 days after payment of the instrument, it returned the payment to the debtor, the debt will not be discharged.

Subsection (d) provides an additional, but difficult, savings mechanism for the debtor. If the debtor can prove that within a reasonable time before collection of the instrument was initiated, the creditor, or its agent in charge of the dispute, had *actual* knowledge that the instrument was tendered in full satisfaction of the claim,⁶⁸ the claim will be discharged.

The addition of § 3-311 places some obstacles in the way of a consumer's use of accord and satisfaction, and changes the law under the majority view. The debtor who sends a "full-payment"

⁶⁶ "Conspicuous" is defined in § 1-201(10). The statement is conspicuous if "it is so written that a reasonable person against whom it is to operate ought to have noticed it." If the claimant can reasonably be expected to examine the check, almost any statement on the check should be noticed and is therefore conspicuous. R. § 3-311, Comment 4.

⁶⁷ The effect of the language in R. § 3-311(c) would be that a creditor which is an *organization* may satisfy *either* (c)(1) or (c)(2) to effectively bar a discharge of the debt, but an *individual* has no choice and must satisfy (c)(2) to bar a discharge.

⁶⁸ R. § 3-311, Comment 7. *See also*, R. § 1-201(25), (26) and (27) for the Code definitions of "actual knowledge."

check to the wrong address, which may even be the regular payment address, will not receive a discharge if the creditor has previously sent the debtor a notice of a "designated office."⁶⁹ Also, under subsection (c), a creditor may now effectively bar the discharge of a debt by simply returning the payment to the debtor.⁷⁰

III. ORDER OF POSTING: CHECKS VS. DEPOSITS

Under the pre-revision Code, there was no provision governing the order in which a payor bank applied checks and deposits to a customer's account. Revised § 4-402(c)⁷¹ now provides that a payor bank may determine a customer's account balance at any time between the time an item is received by the bank and the time that the bank returns the item, and no more than one determination need be made. Subsection (c) then expressly eliminates a bank's uncertainty as to the necessity of making a second determination before the bank returns an item on the day following presentment. Under the new § 4-402(c), such a failure does not constitute a wrongful dishonor, even if new credits were added to the account following the first balance determination which would be sufficient to cover the amount of the check.⁷²

⁶⁹ For instance, a creditor may protect itself by advising customers by a conspicuous statement that communications regarding disputed debts must be sent to a particular person, office, or place. The statement must be given to the customer within a reasonable time before the tender is made. These requirements could be satisfied by a notice on the billing statement sent to the customer. R. § 3-311, Comment 5. If the full satisfaction check is sent to the designated destination and the check is paid, the claim is discharged. If, however, the creditor proves that the check was not received at the designated destination, the claim is not discharged unless subsection (d) applies.

⁷⁰ The revised Code provisions with regard to accord and satisfaction may admittedly have equal or greater impact on commercial transactions than on consumer transactions, merely due to the frequency of their respective occurrences. However, the new section is certain to impact on many consumer transactions as well.

⁷¹ R. § 4-402(c). A payor bank's determination of the customer's account balance on which a decision to dishonor for insufficiency of available funds is based may be made at any time between the time the item is received by the payor bank and the time that the payor bank returns the item or gives notice in lieu of return, and no more than one determination need be made. If, at the election of the payor bank, a subsequent balance determination is made for the purpose of reevaluating the bank's decision to dishonor the item, the account balance at that time is determinative of whether a dishonor for insufficiency of available funds is wrongful.

⁷² R. § 4-403, Comment 4.

The addition of this subsection in effect may increase the frequency of dishonor of checks by banks, and the subsequent imposition of fees on customers for "bounced" checks. One commentator suggests that any uncertainty should be resolved in favor of consumers, not banks, and further, this revised section is inconsistent with the average consumer's expectation that if he makes a deposit on the day an item is presented to the bank, the deposit will cover that item.⁷³

IV. LOST OR STOLEN INSTRUMENTS

Under the pre-revision Code, a person who claimed to be the owner of a lost, destroyed or stolen instrument was not a "holder" since she was not in possession of the paper.⁷⁴ As a result, she did not have a holder's prima facie right to recover under prior § 3-307 on production of the instrument and establishment of the signatures. In a suit on the instrument under prior § 3-804, she had to establish the terms of the instrument and her ownership and also account for the absence of the instrument. The court, in turn, could require security indemnifying the defendant in the event the instrument later came to light.⁷⁵

The comparable provision of the revised Code is contained in the new § 3-309.⁷⁶ This section now embodies rights of "a person entitled to enforce the instrument at the time of loss" rather than those of an "owner" in the former sections. Thus the establishment of "ownership" is no longer necessary under the new section.

In a suit on a lost or stolen instrument under the former sections of the Code, the court was empowered, in its discretion, to

⁷³ Hillebrand, *supra* note 42, at 685.

⁷⁴ P. § 1-201(20). "Holder" means a person who is in possession of a document of title or an instrument or an investment security drawn, issued or indorsed to him or to his order or to his bearer or in blank.

⁷⁵ T. Quinn, *supra* note 27, § 3-804[A].

⁷⁶ R. § 3-309(a). A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

“require security indemnifying the defendant against loss.”⁷⁷ Section 3-309(b) now imposes a mandatory rule that the court provide “adequate protection” by any “reasonable means.” Thus, protection for a defendant is now mandatory and not discretionary, though the formulation of an objective standard in the revised section allows the court to devise protection based upon the facts of a case as proven only by a preponderance of the evidence. There remains a possibility that the protection provided to a defendant based upon the facts found pursuant to the ‘preponderance’ standard may not be adequate. Time will determine whether the new § 3-309(b) actually accomplishes the level of debtor protection which it attempts.

V. CUSTOMER’S DUTY TO DISCOVER ALTERATIONS

Revised § 4-406,⁷⁸ as well as the former § 4-406, sets forth the duty of the customer to examine her bank statement and items to discover any unauthorized signature or any alteration on an item, and the duty to promptly notify the bank of either. Revised § 4-406 was drafted to accommodate the increasing use of check truncation, or storage, by banks and requires that the bank “return or make available to the customer the items paid, or furnish the customer a statement containing sufficient information to allow the customer reasonably to identify the items paid.”⁷⁹ Because the subsection may be satisfied by the bank providing a statement containing only the item number, amount, and date of payment, the customer is left with little means by which to determine whether there has been an unauthorized signature or alteration.⁸⁰ Revised § 4-406(d)(2) also

⁷⁷ P. § 3-804.

⁷⁸ R. § 4-406(c). If a bank sends or makes available a statement of account or items pursuant to subsection (a), the customer must exercise reasonable promptness in examining the statement or the items to determine whether any payment was not authorized because of an alteration of an item or because a purported signature by or on behalf of the customer was not authorized. If, based on the statement or items provided, the customer should reasonably have discovered the unauthorized payment, the customer must promptly notify the bank of the relevant facts.

⁷⁹ R. § 4-406(a) [emphasis added].

⁸⁰ The Comments to R. § 4-406 point out that whether the bank returns to the customer the items paid is a matter for bank-customer agreement. R. § 4-406, Comment 1. Read together with R. § 4-103, such an agreement could vary the provisions of this section, so long as the standards by which the bank’s responsibility is to be measured are not unrea-

provides that the time for examination has been extended to 30 days, from 14 days under the prior section.⁸¹

The former section placed liability for payment of an altered item on the bank if it failed to exercise ordinary care in paying the item.⁸² The revised § 4-406 poses a modified comparative negligence test for determining liability for payment of an altered item. Subsection (e) preconditions bank liability on proof that the bank's failure to use ordinary care in paying an altered item and that the failure "substantially contributed" to a loss. The loss is then allocated between the customer and the bank according to what degree each contributed to the loss.⁸³

Comment 4 to the new § 4-406 points out that the revised definition of "ordinary care" appearing in revised § 3-103(a)(7) and made applicable to Article 4 by revised § 4-104(c), was drafted to reconcile a split of authority regarding whether sight examination by a bank is negligent. The new definition rejects those authorities that hold, in effect, that failure to use sight examination is negligence as a matter of law.⁸⁴

The overall effect of the revisions in this area is to place a much greater risk of loss on the customer, while reducing the risk of loss on the bank. The primary goal seems to be a less costly automated collection system, which favors those customers that keep detailed records.⁸⁵ Strange though it may seem, a customer receives more information on her statement of account from a credit card company than on her bank statement.⁸⁶ The drafters of the revisions were apparently aware that this section left something to be desired, as Comment 1 suggests that with the development of technological

sonable. *See*, R. § 4-103 and Comments thereto. It appears then that a bank is left with wide discretion and much power in drafting these agreements.

⁸¹ Comment 3, however, makes clear that the 30 day time limit only applies when a loss results from the bank's payment of additional items under subsection (d). Otherwise, a "reasonable" period of time will apply. A reasonable period of time may then be interpreted to be even less than the original 14 day period allowed under the prior section, as determined by the particular circumstances.

⁸² P. § 4-406(3).

⁸³ *Id.*

⁸⁴ R. § 4-406, Comment 4.

⁸⁵ R. § 4-406, Comment 1.

⁸⁶ *See generally*, Consumer Credit Protection Act, 15 U.S.C.A. § 1637 (1980; Uniform Consumer Credit Code, § 74 U.D.A. § 3.203-3.206 (1974).

advances, it may become possible for banks to provide more information to the customer in a manner that is fully compatible with automation or truncation systems, and acknowledges that at that time further amendment of the section may be necessary.⁸⁷

VI. LIABILITY OF COLLECTING BANKS

Revised § 4-202 governs the liability of a collecting bank, as did prior § 4-202. Subsection (c) was added to correct a split of authority regarding the liability of the initial collecting bank for the action of subsequent banks in the collection chain, and expressly provides that a collecting bank is *not* liable for such action.⁸⁸ At common law, the “New York collection rule” subjected the initial collecting bank to such liability, and the less harsh “Massachusetts collection rule” made the initial collecting bank, subject to the duty of selecting proper intermediaries, liable only for its own negligence.⁸⁹ This section abolishes the more stringent rule of New York, and thus lessens the risk to a collecting bank.

VII. COLLECTING BANK'S RIGHT OF CHARGE-BACK OR REFUND

Under prior § 4-212, a collecting bank making provisional settlement for an item only had the right of charge-back to a customer's account as long as it had not received settlement that already is, or becomes through the passage of time, final.⁹⁰ Late charge-back was not permitted under the former section. Revised § 4-214, the successor to prior § 4-212, extends the time for charge-back beyond the bank's midnight deadline if final settlement has not been received. Under the revised section, the right of charge-back may be exercised after the bank's midnight deadline,

⁸⁷ R. § 4-409, Comment 1.

⁸⁸ See R. § 4-202(c) [emphasis added].

⁸⁹ R. § 4-202, Comment 4.

⁹⁰ “Final Settlement” is governed by P. § 4-211(3) and § 4-213(2) and (3).

but promptly after the bank "learns the facts."⁹¹ The right exists whether or not the bank is able to return the item, and if the midnight deadline is not met, a collecting bank loses its rights only to the extent of damages for any loss resulting from any delay beyond a "reasonable time."⁹² This section adopts the bank-favorable rule which emerged out of *Appliance Buyers Credit Corp. v. Prospect National Bank*,⁹³ rather than the less favorable rule that a late charge-back is an ineffective charge-back.

VIII. STATUTE OF LIMITATIONS

Revised §§ 3-118(g) and 4-111 provide that an action under Articles 3 or 4 must be brought within three years after the cause of action accrues. This statute is shorter than most state-law contract statutes of limitation. This change obviously cuts in favor of banks. Neither the Comments to either section nor the commentators shed any light as to why three years was the chosen time limit.

IX. CHARGES IMPOSED ON A CUSTOMER BY OTHER ENTITIES

Commercial entities can recoup their charges for returned checks by charging the responsible individual an additional fee which fee is generally not proportionate, but instead greater than, against the commercial entity's account. This practice is not addressed in the Code,⁹⁴ but is now a widespread practice by supermarkets and other retail stores. An individual consumer has no such remedy available. Instead, the individual who writes a check which is returned for non-sufficient funds is exposed to two charges, one by his bank and the other by the entity to whom he wrote the check.

⁹¹ R. § 4-214, Comment 3. Neither the section nor the comment provide a clear guideline as to precisely how much time is allowable following the bank's midnight deadline within which the bank may act.

⁹² R. § 4-214(a).

⁹³ 708 F.2d 290 (7th Cir. 1983).

⁹⁴ This practice may be justified using a theory of "implied consent." The retail establishment generally posts a notice regarding the charge on returned checks. When the consumer writes a check to the establishment, she has "impliedly consented" to the charge.

The ultimate burden falls upon on the individual consumer, who is least suited to bear such burden. Though the consumer is the party who committed error, the error is most often not willful. The effect is that the innocent consumers are penalized for the wrongdoing of the abusers of their check-writing privilege. There is an obvious need here for some type of equitable legislation governing or limiting this practice by retail industries.

X. CONCLUSION AND RECOMMENDATIONS

Florida's revised Commercial Paper law in most instances will prove disadvantageous for the average consumer. Most of the revisions provide additional protection to the banks, while reducing the slight protection which was afforded consumers under the prior version of the Code. Consumers are *not* commercial entities. Query then, why should consumer transactions with banks be governed by the Uniform Commercial Code? Following are several alternative suggestions.

First, the federal banking regulations could be amended to encompass consumer transactions with banks. Protective measures could be required regarding disclosure and fees. Consumers are generally not as sophisticated as a commercial entity. The average consumer who tries to read the Code will most probably find that it is virtually impossible to comprehend and extremely boring. To facilitate effectiveness, the laws and regulations governing consumer transactions should be written in such a way that an average consumer can access and understand them.

Another suggestion would be to draft a Uniform Law, such as the Uniform Consumer Credit Code, which deals only with *consumer* banking. There are separate laws governing consumers in sales transactions, leasing transactions and credit transactions, why not banking transactions?

Another solution, but somewhat less practical, would be for each state, in adopting the revised Articles 3 and 4, to additionally amend Articles 3 and 4 to adequately protect consumers. This would create a substantial risk, however, of destroying uniformity among the states.

Lastly, as suggested in the prefatory remarks to Article 3, each state may elect to update its consumer protection laws to specifically address consumer banking, particularly charges and fees, and further address disclosure by banks regarding consumer accounts in a way that the average consumer can understand.